IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

CRIMINAL APPEAL NO. 70 OF 2021

(Arising from Criminal Case No. 173 of 2019 of Same District Court)

MABILANGA VASHETE ..... 1ST APPELLANT

MICHAEL KIMBE..... 2ND APPELLANT

JOSHUA VASHETE..... 3RD APPELLANT

JAKOBO MICHAEL KONYA ..... 4TH APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

15/9/2022 & 19/10/2022

SIMFUKWE, J.

The Appellants herein were charged before the District Court of Same (The trial court) with the offence of Malicious Damage to property contrary to **section 326(1) of the Penal Code Cap 16 R. E 2002 (now R.E 2019)**. It was alleged that on 06.09.2019 at Ruvu Mferejini area, within Same District in Kilimanjaro Region, the appellants herein maliciously damaged water infrastructures to wit 180 pipes of water valued at Tsh 8,424,000/=, maize and onion seedlings valued at Tsh 3,920,000/= by grazing cattle in the farm of one Peter s/o Kilometa and caused damage of the said properties totally valued Tshs 12,344,000/=.

Briefly, the facts of the case as captured from the record are set out as follows: the appellants herein were charged and convicted with the

offence of malicious damage to properties before the trial court. It was alleged that the appellants grazed their livestock in the farm which belonged to PW1 Peter Kilometa. As a result, the said livestock destroyed the water irrigation pipes, the fence was burnt and the animals fed the crops in the said farm. The trial court convicted the appellants and they were sentenced to pay a fine of Tshs 300,000/- each or serve twelve months imprisonment in default

The appellants herein were aggrieved, they lodged the instant appeal before this Court on the following grounds:

1. *That, the learned trial Magistrate erred in law and in fact by finding the appellants guilty by relying on inconsistence and contradictory testimony of the prosecution witness (sic).*
2. *That the learned magistrate erred in law and in fact in holding that the prosecution did prove it is case beyond considering that there was no sufficient and material tendered before the court. (sic)*
3. *That, the learned trial magistrate erred in law and fact by considering the evidence of PW4 which is hearsay.*
4. *That, there was no corroboration of the evidence of PW2 and PW3 in material particulars.*
5. *That, the learned trial magistrate erred in law and fact by considering the evidence of prosecution which does not tells who has destroyed or burn the pipes. (sic)*
6. *That, the learned trial magistrate erred in law and fact by considering the evidence of PW6 who is not a valuer and*

conduct evaluation in different date and did not inform the court who did that destruction.

7. *That the learned trial magistrate erred in law and fact by considering electronic evidence without adhering to the rules of admissibility of electronic evidence.*

During the hearing the appellants were represented by Mr. Nicholaus Senteu learned counsel, while the respondent/Republic was represented by Ms Mary Lucas, the learned State Attorney. When the matter came for hearing, the learned advocate for the appellants was not feeling well, it was prayed and ordered that the appeal be argued by way of written submissions.

Before submitting in respect of the grounds of appeal, the learned counsel for the appellant consolidated some of the grounds of appeal as follows:

1. *That the 1st ground is that the Learned trial magistrate erred in law and fact by finding the appellants guilty by relying on inconsistent and contradictory testimony of prosecution witnesses.*
2. *That the 2nd and 5th grounds are that the learned magistrate erred in law and fact in holding that the prosecution did prove the case beyond the reasonable doubt and considering the incredible evidence from the prosecution.*
3. *That the 3rd and 4th grounds is that evidence of prosecution witnesses were hearsay evidence, and that testimonies of PW4, PW2 and PW3 were not corroborated in material*

particular.

4. *That the 6th ground is that trial magistrate erred in law and fact by considering evidence of PW6 who is not qualified as a valuer according to the law.*

The seventh ground was dropped. Supporting the first ground of appeal which concerns the inconsistence and contradiction of the prosecution evidence, Mr. Senteu submitted to the effect that, in his testimony, PW1 testified that they found many Maasai guys at the scene of crime but during cross examination he said that they found four Maasai guys only (page 14 of the typed proceedings). That, another discrepancy was that during examination in chief PW1 said that the water pipes were destroyed by the cattle but during cross examination he said that the same were destroyed by Maasai by using sime (machetes) (page 12 of the typed proceedings. Basing on the noted inconsistences, Mr. Senteu submitted that it is not certain whether at the scene PW1 found four (4) or many Maasai guys. Also, it is uncertain as to who destroyed the pipes.

Mr. Senteu pointed out that the above noted inconsistencies applies to the testimony of PW2 as well. To cement the issue of inconsistence, the learned advocate referred to the case of **Abiola Mohamed @ Simba vs Republic, Criminal Appeal No. 291 of 2017** (unreported) which held that:

> *"It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

In short, Mr. Senteu submitted that the story of PW1 and PW2 had unresolved contradiction which renders the entire evidence that was

adduced by the prosecution witnesses unreliable and incapable of sustaining the conviction of the appellants.

In respect of the 2nd and 5th ground of appeal, Mr. Senteu faulted the trial magistrate for holding that the prosecution did prove the case beyond reasonable doubt and considering the incredible evidence from the prosecution. He submitted that PW1 said the destroyed pipes were 180 and they were destroyed by cattle by stepping on the pipes and the Maasai by using sime (machete) destroyed the three big pipes.

However, at page 3 of the judgment the pipes are said to be about 120 and were destroyed by the Maasai as they burnt them completely. Mr. Senteu was of the view that this also raise doubt as to who and what destroyed the pipes and how the destruction was done.

The learned counsel continued to fault the trial magistrate for failure to consider the defense of the appellants even after they proved that PW5 and PW6 were not at the scene but relied on evidence of witnesses who were couched to tell lies.

It was submitted further that PW2 said that DW1 was called through the phone and asked if he was aware of what happened and he admitted that he was the one who allowed them to do that.

Further to that it was stated that PW5 alleged that he called Ally Lesunguya (DWI) who responded that he was at the funeral. However, DW1 never admitted to have been called by PW5 and in court he proved that he was at the meeting as per **Exhibit DE1** which shows attendance of both PW5 and DW1.

It was the comment of Mr. Senteu that the trial magistrate ought to have not applied such evidence to convict the appellants. The learned advocate cited **section 3(2) of the Evidence Act** and the case of **Jonas Nkize vs Republic [1992] TLR 213** which requires the prosecution to prove the case beyond reasonable doubts.

The learned counsel also referred to the cases of **Marando Seleman Sarando vs Serikali ya Mapinduzi Zanzibar [1998] TLR** and **Maruzuku Hamis vs Republic [1997] TLR 1** which requires the defense side to raise reasonable doubts.

Mr. Senteu continued to state that as per exhibit DE1, PW5 and PW6 were at the meeting as they signed on the minutes. However, PW5 and PW6 told the trial court that they were at the scene of crime. He contended that it is impossible for two persons to be in two different places at the same time. That the village meeting begun at 09:00am till 16:45hrs evening hours and PW5, PW6 and DW1 attended and at the same time alleged that they were at the scene of crime at 15:30hrs to 16:00hrs as seen at page 43, 47 and 48 of the court proceedings.

Basing on the above noted discrepancy, it was the opinion of Mr. Senteu that the trial court ought to have resolved the discrepancies in favour of the appellants.

On the 3rd and 4th grounds of appeal, it was argued that evidence of prosecution witnesses was hearsay evidence and that PW4, PW2 and PW3's testimonies were not corroborated in material particular.

It was submitted further that the trial magistrate did not apply the

evidence to the issue and there is no any corroboration of evidence of PW2 and PW3 who gave different testimonies. The learned counsel cited the case of **Balole Simba vs Republic, Criminal Appeal No. 525 of 2017** (unreported) at page 10 which held that:

> *"The remaining evidence is that of PW3 which cannot ground the conviction because it is hearsay having narrated on what he was told by PW1 and PW2 adduced before the substitution of the charge and such evidence as earlier stated is of no evidential value, this renders PW3's account not corroborated and as such it is unsafe to rely on it to ground the conviction."*

The learned advocate emphasized that there is no corroboration in the prosecution evidence and even in the judgment the trial magistrate did not elaborate how the testimony of PW4 was corroborated with other evidence.

On the 6th ground of appeal, the learned advocate blamed the trial magistrate for considering evidence of PW7 who was not qualified as valuer according to the law. He said that **section 3 of the Valuation and Valuers Registration Act No. 7 of 2016** defines a valuer to mean:

> *"a person who hold at least a first degree in real estate or equivalent qualification with specialization in valuation."*

He also referred to **section 10(1) and (4)** of the same Act which provides that:

> *"For the better and effective carrying out his functions*

under this Act the chief Valuer may appoint any fully registered valuer to be an Authorized Valuer".

He also referred to the case of **Frank Onesmo vs Republic, Criminal Appeal No. 147 of 2019** (unreported) in which **Hon. Madeha J** defined an expert to mean:

"...people possessing special qualification in the field in which they are called to opine or testify. The expert opinion is obtained in the field and the witness is sufficiently skilled in the subject of an expert opinion."

Mr. Senteu also cited the case of **D.P.P vs Shida Manyama @ Seleman Mabuba, Criminal Appeal No. 285 of 2012** (unreported) which referred to the Indian case of **Romesh Chandra Aggaraval vs Regency Hotel Ltd (2009) 9SCC 709** which defined an expert.

The learned counsel argued further that PW7 did not provide sufficient data to enable the court to draw an inference that the value of the destroyed pipes was Tshs 8,000,000/-. That, PW7 did not show the court how he arrived at the conclusion as to the value of the pipes.

It was contended that since PW7 admitted at page 55 of the typed proceedings that he is a layman in the field of valuation then, his testimony and valuation report is unreliable, (incredible) and cannot be used by the court to incriminate the appellants rather his evidence ought to have been disregarded by the trial court.

Mr. Senteu prayed the court to allow the appeal and the judgment conviction order and sentence of the trial court be quashed, and the

appellants be set free.

Opposing the appeal, the learned State Attorney replied the first ground by quoting the provision of **section 127(1) of the Evidence Act, Cap 6 R.E 2019** which is to the effect that:

> *127.-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."*

Replying to the allegations that the prosecution failed to prove the case beyond reasonable doubts, it was stated that all prosecution evidence point the appellants as the one who committed the offence since the witnesses testified to have seen the appellants grazing herds of cattle, sheep and goats in the farm of PW1 during day time which caused destruction. Also, the witnesses identified the appellants in court as the persons they saw grazing their herds in PW1's farm. Thus, the trial magistrate was justified in convicting them as the testimonies given were credible and consistent enough to find the appellants guilty of the offence charged.

As far as the issue of contradiction is concerned, the learned State Attorney submitted that there is no any material contradiction to nullify the testimonies of witnesses. She argued that the manner on how to deal with contradictions was stated in the case of **Dikson Elia Nsamba Shapwata and Another vs Republic, Criminal Appeal No. 92 of**

2007 (Unreported). That in the instant matter there is no material contradictions, inconsistences or discrepancies to discredit the prosecution evidence as alleged by the appellants.

Responding to the 2nd ground of appeal, the learned State Attorney quoted page 32 of the proceedings where the trial magistrate admitted the certificate of seizure together with handing over document (Exhibit P1 and P2) which were used and provided for the type of herds, number of herds of cattle, goats, the machete and sticks seized by number and the person whom was handed over with the said cattle. Also, the handing over document provides for the same information. Thus, the same shows that there was documentary and physical exhibits tendered to prove that the offence was committed and such things were present upon the commission of the offence. Therefore, the ground that there was no sufficient evidence and material evidence tendered before the court has no merit.

Replying to the allegations that the trial magistrate relied upon hearsay evidence, The learned State Attorney referred to the evidence of PW4 who testified to the effect that:

> *"We left the WEO officer to the scene at Makumira, the area had a wooden fence which we found it (sic) on fire and inside the fence there were goats, cows, sheep and donkeys there were also four (4) people who (sic) the cowherds... there I saw pipes being destroyed, irrigation system in the farm was damaged, I also saw onion seedling being destroyed irrigation system in the farm was damaged*

I also saw onion seedling being destroyed too."

That, PW4 also testified to have issued the certificate of search and seizure and the handing over document after arresting the accused persons. From the above quotation it was stated that the same shows that evidence of PW4 was not hearsay since the evidence based on what he saw.

Responding to the 4th ground of appeal that the prosecution evidence was not corroborated, the learned State Attorney argued that the evidence was corroborated since PW2 testified to have seen the cattle inside the farm under the control of the appellants who allowed the cattle to graze on the crops hence destroyed the crops. PW2 also said that the appellants had weapons (sime) clubs and bush knives. That, evidence of PW3 was the same as seen at page 20 and 21 of the proceedings. PW3 identified the appellants before the trial court.

Responding to the 5th ground of appeal, the learned State Attorney referred to the evidence of PW2 at page 18 and 20 and the evidence of PW1 at page 12 and 14 of the typed proceedings and averred that it is the herds of animals which were brought by the appellants in PW1's farm which destroyed the irrigation system and crops. Also, the appellants did cut some other pipes of irrigation system. Thus, evidence shows and points out how the crops in the farm and irrigation system were destroyed.

In addition, the learned State Attorney blamed the trial magistrate for directing PW1 to institute civil proceedings for his destroyed crops and irrigation system. It was the opinion of the learned Sate Attorney that the trial magistrate having found the appellants guilty of malicious damage to property ought to have proceeded to order for compensation to the tune

which was adduced in evidence and not disputed by the appellants. The learned State Attorney implored this court being the first appellate court to order the compensation for destruction of crops and irrigation system which was proved during trial.

On the 6th ground of appeal, it was submitted that from page 47 of proceedings PW6 testifies that he was an agricultural officer with eight years' experience. He testified that they arrived at the scene of crime late evening and they couldn't deal with anything until next day after he received a letter from Same Police Station instructing him to conduct evaluation of the loss. That, he conducted the evaluation and prepared a report on the destroyed crops and forwarded the same to the OC-CID at Same police station.

The learned State Attorney while responding to the allegations that the valuation was conducted on different dates, she submitted that evidence of PW7 shows that on the material date they arrived late and he had not received a letter from the police instructing him to conduct valuation. Thus, he could not deal with anything under his own instruction that's why next date the evaluation was conducted.

In rejoinder the learned counsel for the appellants reiterated and emphasized what had been submitted in chief.

I have carefully considered the parties' submissions in relation to the trial court's records and grounds of appeal. The issue which covers all the grounds of appeal is ***whether evidence adduced by the prosecution before the trial court proves the offence charged beyond reasonable doubts***.

In scrutinizing this issue, I will determine all the raised grievances having in mind that this being the first appellate court, the court is obliged to re-evaluate evidence on the record in case the trial court did not evaluate evidence properly.

On the 1st ground of appeal, the appellants condemned the trial magistrate for relying on the prosecution evidence to convict the appellants while the same is coupled with contradictions. The noted contradictions are in respect of evidence of PW1 and PW2. That, while testifying, PW1 and PW2 said that they found many Maasai guys at the scene of crime but during cross examination they said that only four Maasai guys were found at the scene of crime. Replying the above noted discrepancies, the learned State Attorney submitted that there was no material discrepancy.

The precedents are very clear in so far as inconsistencies/ contradictions of evidence are concerned. There are material discrepancies and normal/ minor discrepancies. Material discrepancy is one which destroys prosecution evidence while normal discrepancy is the discrepancy which does not destroy the prosecution evidence. Recently, the Court of Appeal at Moshi in the case of **EX. G. 2434 PC. George vs Republic, Criminal Appeal No. 8 of 2018, [2022] TZCA 609** at page 11 had this to say in so far as contradiction of evidence is concerned:

> *"We shall therefore bear in mind that not every contradiction and inconsistencies are fatal to the case* ***[Dickson Elia Nsamba Shapwata & Another v. Republic, Criminal Appeal No. 92 of 2007*** *(unreported)]. And that minor contradictions are a healthy*

indication that the witnesses did not have a rehearsed script of what to testify in court. ***[Onesmo Laurent @ Saiikoki v. Republic, Criminal Appeal No. 458 of 2018*** *(unreported)]."*

Having established the position of law, my task is to see whether the noted contradiction exist and whether the same touches the root of the case.

I have examined evidence of PW1 from page 11 to page 15 of the typed proceedings. However, my careful look did not come across with the said contradictions. At page 11, PW1 said that at the scene he found Maasai guys with their animals. At page 12, PW1 elaborated that the Maasai guys were the accused persons before the court. At page 14, PW1 testified that only 4 Maasai were found at the scene and that others had disappeared as they did not find them at the scene. Also, at page 16 of the typed proceedings, PW2 identified the said Maasai people before the trial court who are the appellants herein. PW3 also told the court at page 21 of the typed proceedings that some of the Maasai guys escaped after they had seen the police and four were arrested.

Basing on the above noted evidence, I am of considered opinion that the said contradictions do not exist.

Another noted discrepancy by the learned counsel for the appellants was that it is not certain as to who destroyed the water pipes and the crops since PW1 testified that the water pipes were destroyed by the cattle while PW2 said that the cattle destroyed the water pipes and Maasai used sime to destroy the pipes. As established above, the evidence is clear that the destruction was done by the animals of the appellants. This is proved by

the evidence of the eye witness at page 17 of the typed proceedings who said that it is the herd of cattle which was let in by the appellants which destroyed the crops. Also, PW3 had the same story that the appellants let the animals in the farm which destroyed the crops and pipes by stepping on them. Basing on that evidence, I fail to see any material discrepancy.

On the 2nd ground of appeal, the learned counsel for the appellants faulted the trial magistrate for holding that the prosecution proved the case beyond reasonable doubt as PW1 said that 180 pipes were destroyed and the Maasai destroyed 3 big pipes. On the other hand, in the judgment, it was reported that about 120 pipes were destroyed by the Maasai. The learned State Attorney while replying this grievance said that all the prosecution evidence points fingers to the appellants.

It is a well-established principle of law that prosecution has a duty of proving the case beyond reasonable doubts and the defense has a duty to raise reasonable doubts. As per the raised claim, I find no merit on it since the appellants' counsel is trying to shake the credibility of the witness in comparison to what has been reported by the trial magistrate while composing the judgment. With due respect to Mr. Senteu, this is not the position of the law. In the case of **Shaban Daud v. The Republic, Criminal Appeal No. 28 of 2000 (unreported)** it was held that:

> *"... Credibility of a witness is the monopoly of the trial court only in so far as demeanor is concerned, the credibility of a witness can be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation*

with the evidence of other witnesses, including that of the accused person."

On the strength of above decision, I am of considered view that the raised grievance has no merit.

Mr. Senteu also blamed the trial magistrate for relying on the evidence of PW5 and PW6 who were not at the scene of crime since they signed the minutes sheet (Exhibit DE1). I have gone through the said meeting minutes; it is to the effect that PW5 was among the members who attended. However, the said meeting was closed at 17:07 hrs. in the evening while at page 44 of the typed proceedings during cross examination PW5 told the court that it was around 18:30 hrs. when they handled the cattle to one Jacob at the scene. Thus, it cannot be said that PW5 was not at the scene of crime. The same applies to PW6 who told the court that he was at the scene of crime and during cross examination at page 48 of the proceedings he said that he was not sure of the time.

On the 3rd and 4th grounds of appeal, it has been alleged that the trial magistrate relied upon hearsay to convict the appellants. That, evidence of PW2, PW3 and PW4 were not corroborated since PW2 and PW3 gave different stories.

The issue of contradiction of testimonies of prosecution witnesses has been resolved in the first ground of appeal that there was no any contradiction in so far as the evidence of PW2 and PW3 is concerned.

Regarding the claim that the prosecution evidence was hearsay, I don't support that assertion since PW2, PW3 and PW4 were eye witnesses and

there was no need of corroborating their evidence. It has been stated in the case of **Goodluck Kyando vs Republic [2006] TLR 26** that every witness is entitled to credence and must be believed unless there are reasonable reasons for not believing him/her.

On the sixth ground of appeal, the learned advocate for the appellants blamed the trial magistrate for relying on evidence of PW7 who was not a valuer. I keenly read the entire judgment. While convicting the appellants nowhere did the trial magistrates rely on evidence of PW7 rather, he relied on the evidence of PW2, PW3 and PW4 who were eye witnesses as seen at page 15 of the judgment.

The trial magistrate did not consider the valuation report that's why at the end of his judgment, he did not order compensation on the reason that the same was to be dealt with in another forum and that the victim was not barred to take any other legal actions.

From the foregoing analysis, I am satisfied that the case against the appellants was proved beyond reasonable doubts. I find the appeal wanting in merits and dismiss it entirely. Conviction and sentence of the trial court upheld.

It is so ordered.

Dated and delivered at Moshi this 19th day of October, 2022.

S. H. SIMFUKWE

JUDGE

19/10/2022