

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF DAR ES SALAAM  
AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 128 OF 2023**

*(Original Criminal Case No. 295/2020 of the District Court of  
Kinondoni before Hon. Lyamuya A. M., PRM)*

**JOANA NGAIZA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*2/11/2023 & 19/12/2023*

**DING'OHI. J;**

**Joana Ngaiza**, the appellant herein, and two others who are not parties to this appeal were charged with the offence of Malicious damage to property contrary to section 326 (1) of the Penal Code, [Cap 16 R: E 2019]. It was alleged in particulars of the offence, and as stated in the charge sheet, that on the 4<sup>th</sup> and 11<sup>th</sup> day of March 2020, at Mikocheni "A" area within Kinondoni District in Dar es Salaam, the appellant and two others, as said, who are not parties to this appeal, willfully and unlawfully damaged the wall valued at Tshs. 5,000,000/= the property of **Agnes Ng'anga**.



The background of this appeal, as per the trial court records, is to the effect that the appellant and one Agnes Ng'anga, who testified as PW1 at the trial, agreed orally to commence a partnership business of establishing a supermarket at Mikochen area in Dar es Salaam. For the purposes thereof, they jointly rented a plot of land in Mikocheni area from one Akwilina Mbaza (PW4). It is alleged that their agreement showed that as joint tenants, they would pay the lessor an annual rent of Tshs. 12,000,000/=. The agreement between the partners and PW4 was reduced into writing and witnessed at the 'Serikali ya Mtaa'. The rented land was an open space, where the appellant and her business partner managed to build some shops for rent.

Later, the misunderstanding between the appellant and PW1 erupted over the rented area and their business. Following that state of affairs, the PW1 wanted to take 50% of the rented area. The appellant refused that idea, and instead, proposed to refund PW1 50% of the construction costs. The PW1 refused to accept the proposal by the appellant by the reason that that was outside of their earlier agreement. Under the circumstances, the appellant held his stance of separating the supermarket building into two parts. On the other hand, the PW1 lost interest in working with the



appellant any more. It is when, it is alleged, that the PW1 decided to build a wall separating their supermarket building when the appellant insisted to the PW1 that she would demolish the wall separating them. It is alleged, thereafter, from 4/3/2020 evening hours to 11/3/2020 the wall built by PW1 was demolished by other persons, who were charged with the appellant, under the supervision of the appellant.

After a full trial, the appellant was convicted as charged. He was accordingly sentenced to serve nine months' imprisonment.

Dissatisfied with both the conviction and sentence the appellant made the present appeal armed with twelve grounds. The grounds of appeal by the appellant may be reduced into the following; **First**, the trial court failed to evaluate the strong evidence of the Appellant as there was no partnership \deed between the Appellant and PW1. **Second**, the trial court erred for being confused about whether Akwilina Mbaza (PW4) owns plot No. 477 Regent Estate or Plot 303 Senga Road Mikocheni. **Third**, the trial court erred on the issue of whether Plot No. 477 is a plot of land where the supermarket which from the pivot of this case was erected. supermarket which was erected. **Fourth**, the trial court erred by relying on the evidence of PW1 who failed to establish both ownership and value of the wall. **Fifth**,



Exhibits tendered by PW1 especially PE3 were in contradictory with other exhibits, particularly on the date. **Sixth**, a trial court used a wrong principle of law in arriving at an unjust decision. **Seventh**, the learned Trial magistrate erred in law and facts for being biased by arriving at the wrong judgment while falling short of evidence against DW1 supervising DW2 and DW3 to demolish a wall. **Eighth**, the trial court reached a wrong decision by using a wrong principle of law on the existence of DW1's malicious mind. **Ninth**, the trial magistrate failed to consider that there was a conflict of ownership of Land, which has to be decided by land courts and not a criminal court. **Tenth**, the trial court relied on ambiguous Exhibits I;e PE1, PE2, PE3, and PE4 while ignoring the fact that Exhibits PE 1,2,3 were inconsistent with an affidavit brought by PW1. **Eleventh**, the trial court erred by referring to 3<sup>rd</sup> day of March as a date where the accused started demolition of the wall, while the mentioned date is contrary to the date found in a charge sheet; and **Twelfth**, the prosecution evidence has many shadows of doubts as non-existence of plot No 477 as a place where the criminal act took place.



During the hearing of this appeal, the appellant was represented by Mr. Aaron Allan Lesindamu, learned counsel. The respondent Republic had the services of Mr. Adolf Kisima, learned State Attorney.

Mr. Aaron Allan Lesindamu argued grounds No. 2, 3, 4, and 5 of the appeal together. It was the learned advocate's submissions that, the trial court erred in failing to know that the plot in dispute is No.303 Senga Road Mikocheni and not No. 477 Regent Estate as observed by the trial court. He referred me to page 1 of the trial court judgment where the trial magistrate referred the evidence of Akwilina (PW4) which showed that the disputed plot is No. 477 at Mikocheni – Regent Estate. According to the learned Advocate that is not true.

Additionally, Mr. Losindamu submitted that the prosecution side failed to prove its case beyond reasonable doubt as required by the law since exhibit PE3 clearly shows that the pictures were taken on **11/03/2021** while a certificate of authenticity of electronic evidence by **AGNES NG'ANGA** (PW 1) dated 24<sup>th</sup> August 2021 states that the picture tendered as Exhibit PE3 was captured on **11/03/2020**.

To bolster his arguments, the learned counsel cited the cases of **SELEMEN MAKUMBA vs. the REPUBLIC [2006] TLR 384**, and **NAZALOUS**



**MBILUNGI VS ALEXANDER THABIT MBILINYI**, PC CRIMINAL APPEAL

NO. 01 of 2021 (*Unreported*) where it was insisted the duty of the prosecution side to prove its case beyond reasonable doubt.

He prayed that this court be pleased to quash and set aside the conviction and sentence meted by the trial court.

On his side, Mr. Adolf Kisima learned State Attorney, for the respondent, supported the conviction and sentence made by the trial court.

He reminded this court that the appellant was charged with the offence of malicious damages to property. According to Mr. Kisima, as required by the law, the prosecution side proved three ingredients of the offence charged which are; **One**, that there was property damage. **Two**, the damaged property was owned by a person other than the accused; and **Three**, the accused is the one who damaged the property.

The learned state attorney further submitted that the prosecution side brought four witnesses (PW1, PW2, PW3, and PW4) who were credible and independent.

According to the learned State Attorney, the appellant instructed the second and third accused to demolish the wall. To substantiate his argument, he cited the case of **TABU SITA VS REPUBLIC**, CRIMINAL

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APPEAL 297 OF 2019 [2022] TZCA 702 on page 19 which quoted with approval of the case of **MOHAMED HARUNA MTUPENI AND ANOTHER V. REPUBLIC**, CRIMINAL APPEAL NO. 259 OF 2007 (*Unreported*) where it was observed *inter alia* that;

***"The very best of the witnesses in any criminal trial is an accused person who freely confesses his guilt."***

Submitting on the issue of the complained confusion over two properties (Plots No. 477 and No. 303), Mr. Kisima admitted that there was such confusion in naming the proper plot. However, he was of the view that this error is curable under **section 388** of the Criminal Procedure Act CAP 20 R.E. 2022. He contended that, in the alternative, this court may order the remittance of the case file to the trial court with the direction that it composes the proper judgment based on the adduced evidence.

The learned state attorney further added that the appellant did not dispute the competence of her cautioned statement and the evidence of PW1, PW2, and PW4.

According to the learned state Attorney, the case against the appellant was proved beyond reasonable doubt. He prayed that this appeal be dismissed.



In a brief rejoinder, Mr. Losindamu reiterated what he submitted in chief adding that the trial court did not evaluate the ingredients of the offence of malicious damage to property per the law. According to him, the trial court believed that the damaged wall was on **plot No. 477**, while the evidence of PW1 and the tendered exhibits, shows the damaged wall was on **Plot No.303** at Senga Road which is owned by a different person.

I have carefully considered the rival arguments by the counsels for the parties, the grounds of appeal, and the entire record of appeal. As argued by the trained legal minds, the relevant issue for my determination is whether the charge against the appellant at the trial court was proved beyond reasonable doubt.

It is a trite law, in criminal cases, that the prosecution side bears the burden of proving the charge against the accused. The standard of proof is beyond reasonable doubt unless the law provides otherwise. See, **HEMED V REPUBLIC [1987] TLR 117**. The law further states that the accused bears no duty to prove his innocence. He only has to raise reasonable doubts in the mind of the court. It is also a legal principle that, any reasonable doubts left by the prosecution evidence should be resolved in favor of the accused person.





I have reminded myself of the principle that in criminal trials the accused persons are only convicted on the strength of the prosecution case and not on the weakness of his defence. See **OMAR RASHID @KWANGIZWA V REPUBLIC**, CRIMINAL APPEAL NO. 405 OF 2021 [2023] TZCA 17.

In this case the conviction of the appellant based on the subject matter namely **plot No. 477** at Mikocheni – Regent Estate alleged to have been destroyed by the appellant. However, the trial court’s records, particularly Exhibit DE2 show that the supermarket with the building alleged to have been destroyed was erected at **Plot No. 303** Mikocheni, Kinondoni with the name of Akwilina William Mbaza and not **Plot No. 477. Even** the pictures of the suit plot tendered and admitted as Exhibit PE3 are in contradiction in that some of them show that they were taken on **11/03/2021** and others show that they were taken on **11/03/2020**. The certificate of authenticity on electronic evidence tendered and admitted as Exhibit PE4 also shows that the pictures were all taken on **11/03/2020**.

That is because, as I have observed herein above, there is a dispute and confusion as to the subject matter which is allegedly demolished between **plot No. 477** at Mikocheni – Regent Estate and **Plot No. 303** Mikocheni,



Kinondoni, and owners thereof. Those in my view would be resolved in civil litigation and not in criminal proceedings as in the case like this.

I am aware that Mr. Kisima, the learned State Attorney, attempted to give an alternative way to salvage that confusion. At his side, he was of the view that this court may nullify the whole proceedings and direct that the matter be heard *de novo*. I have considered that but, in my view and, under the circumstances of this case, that will not be a just decision as it may mean assisting the prosecution to fill a gap and may unnecessarily delay the justice, especially to the appellant who has served the substantive part of the prison sentence. In the case of **JOHN JULIUS MARTIN AND ANOTHER VS. THE REPUBLIC**, CRIMINAL APPEAL NO. 42 OF 2020 quoted with approval the case of **FATEHALI MANJI V. R** [1966] E.A 343 it was observed *inter alia* that;

***".....for the court to order a retrial, it should ensure that the prosecution is not going to utilize the opportunity of a rehearing to mount a better prosecution case by filling in the gaps, all to the detriment or prejudice of the appellant."***

It is my settled view therefore that the prosecution evidence at the trial court had shadows of doubts. That being the situation, it is the finding of




this court that the prosecution side had failed to prove its case to the required standard.

I, consequently, allow the appeal. The conviction and sentence imposed on the appellant are hereby quashed and set aside. The appellant is to be released from prison if he is still incarcerated unless otherwise lawfully held in connection with another cause.

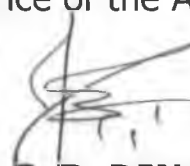
**Dated at DAR ES SALAAM** this 19<sup>th</sup> day of December 2023.



  
**S. R. DING'OHI**  
**JUDGE**  
**19/12/2023**

**COURT:** Judgment delivered this 19<sup>th</sup> day of December 2023 in the presence of Mr. Adolf Kisima, learned state attorney for the Republic/respondent, and in the absence of the Appellant.



  
**S. R. DING'OHI**  
**JUDGE**  
**19/12/2023**