

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI**

PC CRIMINAL APPEAL NO. 21 OF 2023

(Arising from Criminal Case No. 9/2023 of the Kiteto District Court at Kibaya, Originating from Criminal Case No. 317/2022 of Kiteto Primary Court at Kibaya)

**NYANGE BAKARI MUYA.....1st APPELLANT
BARAKA GERALD2nd APPELLANT
TUI JOHN.....3rd APPELLANT
CHIPANA NDAHANI.....4TH APPELLANT**

VERSUS

PARKEPU TANG'IDI..... RESPONDENT

JUDGMENT

13th February & 9th May, 2024

Kahyoza, J.:

Nyange Bakari Muya (the Appellant), Baraka Gerald, Tui John and **Chipana Ndahani** were charged before the Primary Court of Kiteto District at Kibaya (the trial court) with the offence of felling trees for farm preparation without permit, contrary to Regulation 15(1), (2) (b) of **the Forest (Sustainable Utilization of Logs, Timber, Withies, Poles or Charcoal) Regulations, 2019**. They pleaded not guilty to the charge against them.

The trial court convicted **the appellant** and his fellows on the said count and sentenced each of them to pay a fine of 50,000/= or to serve a

custodial sentence of three months (in lieu of fine). Aggrieved by both, conviction and sentence, **Nyange Bakari Muya, Baraka Gerald, Tui John** and **Chipana Ndahani**, appealed to the Kiteto District Court (the district court (the first appellate court) and the appeal was terminated in favour of **Parkepu Tang'idi** who happened to be the complainant at the trial court (the respondent in this appeal).

Again, the appellant, single handedly appealed to this court, raising four grounds of complaint, however, during hearing of the appeal the advocate for the appellant abandoned the fourth ground of appeal and remained with three, namely: -

1. That, the honourable learned trial magistrate's judgment is bad in law for shifting the burden of proof.
2. That, the honourable trial magistrate erred in for turning the criminal case into land court and giving orders which the trial court did not have jurisdiction.
3. That, the honourable learned trial magistrate failed to analyze evidence.

This appeal was disposed by way of oral submissions. And in this judgment, parties' submissions will be referred where necessary. Mr. Pastor Florence Kong'oke, Advocate, appeared for the appellant and Mr. Christopher, State Attorney, appeared on behalf of the Respondent.

The back ground of this matter is that, it was alleged that on the 25th day of October, 2022 at Lesoit village within Kiteto District in Manyara Region, **Nyange Bakari Muya, Baraka Gerald, Tui John** and **Chipana Ndahani**, with intent to make farm preparation, they jointly did fell trees in an area measuring 63.9 acres without permit from the District Forest Manager after approval of the District Forest Produce Harvesting Committee.

It was alleged by **Parkepu Tang'idi, PW1**, a chairman of Lesoit village, that on the 25th day of October, 2022 in a farm that is within Lesoit village, he saw **Baraka Gerald, Tui John** and **Chipana Ndahani** degrading the environment by felling and burning down trees without having a permit. They organised police officers, and they arrested them and took them to the police station, where they admitted to have been labourers. Later on, **Nyange Bakari Muya** appeared and claimed to be the lawful owner of the said farm. The village land certificate and the village map, were collectively admitted without objection and marked as exhibit "**LS1**".

G. 4654 D/CPL EMMANUEL, PW2, testified that, on the material date and in the presence of his fellow police officer one Vasieri and PW1, they arrested three people who were found cutting the felled trees into pieces. When interrogated, they claimed to have been deployed by the

appellant as labourers. Upon being interrogated, the appellant admitted to have hired them as his labourers to fell trees. The appellant was arrested and joined course with three others. On the 27th day of October, 2022, as an investigator of the case, he sent **Hassan Kivinga, PW3**, a Forestry officer from TFS - Kiteto, to the scene of crime for damage valuation. PW3 testified that in the said farm he witnessed a number of fell trees and others burned down. He measured the farm at 63.9 acres, and that the damage was valued at 11,200,000/= according to GN No. 59 of 2022. Valuation report was admitted and marked as exhibit "**LS2**".

Balheza Titi, PW4, a Land surveyor from Kiteto District Council testified that the 22nd day of December, 2022 he visited the said farm and he made a finding that the same farm is situated within Lesoit village land. A letter ascribed to PW4's report - dated the 22nd day of December, 2022 with its attachments were admitted collectively and without objection, as exhibit "**LS3**".

On the other hand, **Nyange Muya, DW1**, stated that he neither fell trees nor did he own a farm in Lesoit village. He owns a farm at Kijungu village, of which he cultivates varied crops, which was allocated to him in the year 2006, measuring 90 acres. He happened to have permits to that effect, of which several names of members of his family appear thereto, to wit; Amiri Nyange, Tatu Ramadhani Waziri, Mohamed Nyange, Mwajabu

Nyange and Hadija Nyange - his children; and his wife, one Mwekala. The same was corroborated by the testimonies of **Fatuma Ramadhani, DW5**.

The said eight permits titled "cheti cha Kibali cha haki miliki isiyo asili" were admitted collectively- as exhibit "**NB1**". Denied to know **Baraka Gerald, Tui John** and **Chipana Ndahani**. That there was a letter from the respective ministry to the Director which shows that the adduced village map was not valid, of which Kijungu, Lesoit and Lembapuli village were copied. The said letter was admitted and marked as exhibit "**NB2**". That PW4 did not specify as to who directed him to the farm and who accompanied him. That he was arrested on the 11th day of October, 2022 however, he changed his testimony when cross examined by Mr. Christopher, into that, he was arrested on the 21th day of October, 2022. That he had no permit from the director, DC or TFS. A judgment between the appellant and other people not subject to this appeal was admitted without objection and marked as exhibit "**NB3**". He also added that on one incident, he was assaulted by a group of people, to whom one of them was PW1's son. That the case against him is a cooked one.

Baraka Gerald, Tui John and Chipana Ndahani, DW2, DW3 and DW4, respectively, they testified that they were arrested on the 25th day of October, 2022 on their ways to Kijungu village, by Maasai boys and took them to Kijungu Police Post. They all denied to know DW1, save that they

met each other at the police station as suspects. They all claimed to be innocent.

This being the second appellate court, it is trite law as held in **Nurdin Nurdin Iddi Ndemule vrs. Republic** (Criminal Appeal 410 of 2018) [2021] TZCA 99 (6 April 2021)-

"...that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

To start with the first ground of appeal, the pertinent issue for determination is whether the trial court shifted the burden of proof to the accused person. Mr. Kong'oke submitted that the trial court shifted the burden of proof to the accused persons, referred this court to page 9 of the typed judgment of the trial court, that there was contradictory evidence – particularly on the place of arrest and that the court relied on the fact that DW5 knew Tui John to convict them, which was contrary to the rule in **Maziku Shija Kimumu vrs. R**, Criminal Appeal No. 382 of 2015, Court of Appeal of Tanzania at Bukoba (unreported). Mr.

Christopher, submitted that there was ample evidence to warrant conviction and that DW5 testified that accused persons knew each other.

I had a cursory review of entire judgment of the trial court and I found nothing to suggest that the cardinal principle of burden of proof in criminal trials to have been controverted. I wish to recite some relevant findings of the trial court magistrate, to wit, at page 7 the trial magistrate had this to say: -

"Jambo la kwanza ni uharibifu wenyewe ambapo upande wa mlalamikaji umeeleza kuwa waliwakamata washitakiwa No. 2, No. 3 na No. 4 wakikata, kufyeka na kuchoma miti bila kuwa na kibali au ruhusa halali ya kufanya hivyo. Hivyo basi hii inaonyesha kuwa ni kweli uharibifu umefanyika nani jukumu la washitakiwa kujitetea kwa hilo".

A literal meaning to the extract is that the first thing that was pertinent for the trial court to determine was the issue of damage, and that the prosecution side managed to establish that the accused No. 2, 3 and 4 were caught felling trees and burning them down without a valid permit. And that the accused persons were obliged to fend for. In the circumstances, it was clear that the prosecution side successfully discharged their legal and evidential burden, and that it was upon the accused persons to raise a reasonable doubt (to punch holes) on the prosecution evidence, and by so doing the trial magistrate did not shift the

burden to the accused persons, neither did he impute the burden to them to prove their innocence.

It is also truism that, what the court observed at page 9 was warranted in law, for even the accused person can lie in a case, as a defence witness. The trial court did not say that its conviction was based on the fact that the accused lied. Thus, the first ground of appeal is dismissed.

As to the second and third grounds of appeal, I adopt the approach taken by Mr. Kongo'ke, as he submitted on them jointly. And the general issue for determination is whether the prosecution proved the charge against the appellant beyond reasonable doubt.

Regulation 15(1), (2)b of **the Forest (Sustainable Utilization of Logs, Timber, Withies, Poles or Charcoal) Regulations, 2019** reads:

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"15.-(1) Any person who intends to fell trees for farm preparation and or other land use purposes shall obtain a permit from the District Forest Manager after approval of the District Forest Produce Harvesting Committee.

(2) Any person who contravenes the provision of subregulation (1) commits an offence and upon conviction shall be liable-

(a) N/A;

(b) in case the of a farm above fifty acres, to a fine of not less than ten million shillings but not exceeding twelve million

shillings or to imprisonment for a term of not less than two years but not exceeding five years or to both such fine and imprisonment..”

From the foregoing provision of the law, for there to be a conviction on an offence of Felling trees for farm preparation without permit, the following elements ought to be established by the prosecution: -

1. That the accused person did fell trees in a farm measuring 63.9 acres.
2. That the accused person failed to produce a valid permit to that effect.

I had a thorough review of the proceedings, two judgments of the lower courts and respective parties' submissions, it is my settled finding that the prosecution managed to prove the charge against the appellant beyond reasonable doubt. As the records depicts, PW1, a village chairman and PW2, a police officer, were the eye witnesses to the fact that at the scene of crime they found **Baraka Gerald, Tui John and Chipana Ndahani** cutting down trees and burning them down, when probed they claimed to have been sent by the appellant for the undertaking, and they arrested them. Thereafter, the appellant appeared claiming to be the owner of the said farm. He was also arrested, and charged with the suspects found cutting trees. The trial court was justified to trust these two witnesses as credible witnesses, as there was no scintilla of evidence to suggest otherwise. The same was articulated in Athumani Hassani vs

Republic (Criminal Appeal No. 292 of 2017) [2021] TZCA 557 (1 October 2021) where the court observed that: -

*"It is a peremptory principle of law that every person, who is a competent witness in terms of the provisions of section 127 (1) of the TEA is entitled to be believed and hence, a credible and reliable witness, unless there are cogent reasons as to why he/she should not be believed. See, for example **Goodluck Kyando v. Republic**, [2006] TLR 363..."*

In addition, I find no reason to interfere with the concurrent findings on credibility of witnesses by the lower courts, save for minor qualifications that this court is about to address them in due course. I find refuge in the rule in Nurdin's case, where it was observed that: -

*"the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. This is so because being a second appellate court, we have not had the opportunity of seeing, hearing and assessing the demeanour of the witnesses - see **seif mohamed elabadan vs republic**, Criminal Appeal No. 320 of 2009 (unreported)."*

Mr. Kong'oke submitted that the appellant's conviction was not warranted as he was not charged with conspiracy. Under the principal and agent principal - as I borrow leaf in https://saylordotorg.github.io/text_business-law-and-the-legalenvironment-v1.0-a/s42-02-principal-s-tort-and-criminal-.html, where it was observed that; -

"As a general proposition, a principal will not be held liable for an agent's unauthorized criminal acts if the crimes are those requiring specific intent. A principal will, however, be liable if the principal directed, approved, or participated in the crime"

Facts availed at trial do establish that the appellant admitted orally before PW1 and PW2 that he was the owner of the said farm and that he hired **Baraka Gerald, Tui John and Chipana Ndahani** as his labourers to cut the trees and burn them down. And that, **Baraka Gerald, Tui John and Chipana Ndahani** admitted to have been instructed by the appellant to cut down trees. The facts that were not disputed on cross-examination by the appellant, neither did he do so in his defence. Save for the evasive denial that he did not know the rest of the accused persons, which was again discredited by the testimony of DW5, his wife. The above findings also negate the defence that the appellant does not own a farm at Lesoit village.

In other words, the appellant was the principal, and all that was done by **Baraka Gerald, Tui John and Chipana Ndahani** (his agents) could not have been done but for the instructions and approval of the appellant. It was submitted by Mr. Kong'oke, that PW2 did not tender the statement as exhibit. I decline to support his contention, not all admissions in criminal cases are proved by written statements (confessional statements/ cautioned statement) This court is fully aware as to the rule in **Zabron**

Joseph vrs The Republic, Criminal Appeal No. 447 of 2018 (unreported)

that-

*"Therefore, what we take from the above decisions of the Court, as regards oral confessions, is that **one**, the reliability of the witnesses to whom the oral evidence was made should be considered, and **two**, that oral confessions must be received with great caution."*

Also, see the case of **Martin Manguku v. Republic**, Criminal Appeal No. 194 of 2004 (unreported), where the Court emphasized that "such an oral confession would only be valid if the suspect was a free agent when uttering the words attributed to him." From the cited authorities and the review of evidence on record, I find it settled that PW1 and PW2, to whom the appellant admitted orally, were reliable witnesses as their testimonies were coherent and sound.

And under the dictates of section 122 of **the Evidence Act**, Cap 6 R.E 2022, I profoundly make an inference that the cutting of the said tree was a manifestation of a specific intent, that is to fell trees for purposes allied to farm preparation and/or other land use.

PW3 and PW4 corroborated to the satisfaction of the law, that indeed the appellant did fell trees in a farm measuring 63.9 acres without valid permit. PW4 in his findings, as ascribed in exhibit LS3, which was admitted without objection, he cited the coordinates or points "nukta" that were

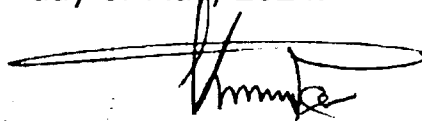
taken from the farm and when aligned with maps, exhibit LS1 he^{was} of the opinion that the said farm is within Lesoit village. The allegation that the maps were not approved is unfounded and a mere speculation. PW3 confirmed on the fell trees in the said farm and the valuation.

It goes without saying, that for all purposes of the first and the second element of the offence charged, the prosecution proved beyond reasonable doubt that indeed the appellant, without valid permit, did fell trees. The defence evidence failed to punch holes on the prosecution evidence. Thus, the second and the third grounds of appeal are dismissed on their entirety.

Finally, this appeal is dismissed for want of merit.

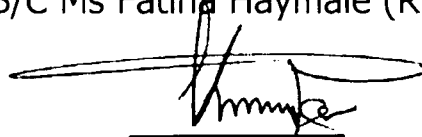
It is ordered accordingly.

Dated at Babati, this 9th day of May, 2024.



J.R. Kahyoza
JUDGE

Court: Judgment delivered in the absence of the parties who could not connect to the virtual. B/C Ms Fatina Haymale (RMA) present.



J.R. Kahyoza
JUDGE
9/05/2024