THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA
(IRINGA SUB-REGISTRY)
AT IRINGA

DC CRIMINAL APPEAL NO. 72 OF 2023

VESTINA EUGENE KIDAKULE .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the District Court of Mufindi at Mafinga)

(Hon. S.E. Kyungu - RM)

dated the 25th day of July, 2023

in

Criminal Case No. 47 of 2022

JUDGMENT

Date of Last Order: 13/05/2024 &
Date of Judgment: 31/05/2024.

S. M. Kalunde, J.:

The appellant, Vestina Eugene Kidakule (Dw2) and Mika Nyongole (Dw1) were, on the 25th day of July, 2023, convicted for malicious damage to property contrary to section 326(1) of **the Penal Code [Cap. 16 R.E. 2022]**. The first accused, Mika Nyongole was acquitted. The appellant on the other hand was convicted and sentenced to serve a four year prison term. The particulars of the offence were that, on or about the 12th day of July, 2022, at Ibwanzi Village, Ihanu Ward, Ifwagi Division within Mufindi District in Iringa Region, she willfully and unlawfully destroyed pine trees worth TZS. 13,700,000.00, the property of Edmund Murashani.

The brief factual background to the present case is that: believing that a farm at Ibwanzi village, containing the destroyed trees was a property of her husband, in 2022, the appellant entered into an agreement with Mika Nyongole for the sale and purchase of the said farm. The agreement was executed on the 03rd day of July, 2022. Upon conclusion of the agreement, Mika Nyongole transferred TZS. 1,200,000.00, to the appellant. Believing that the trees were his, Dw1 proceeded to harvest the said trees. In the process of harvesting the trees, the owner, one Edmund Murashani, was informed of the incident. The matter was reported to the village authority and then to the police station. The appellant and her co accused were arrested and prosecuted as outlined earlier.

The appellant is aggrieved by the decision of the trial court, hence the present appeal. Her memorandum of appeal outlines three grounds of appeal as follows:

> "1. *That, the honourable learned trial Magistrate erred in finding that the prosecution case was proved beyond reasonable doubts;*
>
> 2. *That, the sentence of four (4) years imprisonment on the appellant was excessive based on the circumstances of the case;*
>
> 3. *That, the honourable learned trial Magistrate erred in failing to consider the mitigation factors in sentencing the appellant.*

To prosecute the appeal, the appellant enjoyed the legal representation of Ms. Joyce Francis, learned Advocate, whereas

Mr. Daniel Lyatuu, learned State Attorney appeared for the respondent Republic. Ahead of submissions of the parties, Mr. Lyatuu informed the court that the prosecution was supporting the appeal.

Upon taking the floor, Mr. Lyatuu argued that on the strength of the first ground of appeal that the charge against the appellant was not proved beyond reasonable doubt. In amplifying his point, the learned state attorney argued that the appellant was charged with one count of malicious destruction of property contrary to section 326(1) of the Penal Code. However, the evidence presented in court during trial did not support the respective charge because it was not established in evidence that the appellant willfully and unlawfully destroyed or damaged the property as described in the charge sheet. The learned state attorney argued that for the offence under the respective section to be sustained there must be an intention to cause harm to the property, and that for the destruction to be unlawfully it must be in a manner that is not permitted or allowed by law.

The learned counsel added that the appellant reasonably believed that the farm belonged to her husband and thus she sold it to Dw1. He added that Dw1 harvested the said trees believing that he had purchased the same from the appellant. In the opinion of the learned state attorney, none of the accused persons at the trial court had the intention to destroy the farm. Mr. Lyatuu added that charging and convicting the appellant for malicious damage to property was not appropriate since her

intention was not to cause harm or damage to property. The counsel stated further that, the harvesting of the trees was not unlawful, it was a lawful act and therefore it did not amount to destruction of property. In his opinion, the prosecution failed to establish the ***mens rea*** requisite to prove the charge of malicious prosecution.

Mr. Lyatuu added that, the major issue at the trial court was whether the appellant had a right to the property she purported to sale to the second accused person. In his view, that aspect was civil in nature and not criminal. For this he referred to the case of **Dodo Tekway vs The Republic** (Criminal Appeal 20 of 2021) [2021] TZHC 9497 (10 December 2021) TANZLII.

In light of the above submissions, Mr. Lyatuu submitted that the prosecution ought to have prosecuted the appellant for impersonation or obtaining money by false pretences and not malicious damage to property.

This being a first appeal, this court is charged with a duty to re-evaluate and re-analyze the evidence tendered before the trial court so as to arrive at its own findings and conclusions, on both points of law and facts. Admittedly, the appellant together with her co-accused were charged for malicious damage to property contrary to section 326(1) of the Penal Code. The respective section reads:

> *"326. - (1) Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years."*

For a person to be convicted of the offence under the above quoted section the prosecution must establish, and the court must be satisfied that, **first**, some property was destroyed; **second**, that the accused person destroyed the property; **third**, that the destruction was willful and therefore there must be proof of intent on the accused part; and **fourth**, the court must also be satisfied that the destruction was unlawful.

The appellant and her accomplice were charged with malicious damage to property. As pointed out above, for the prosecution to sustain such charge it must prove that some property belonging to another person was damaged and that the damage was willful and unlawful. Looking at the circumstances in the present case there is no cogent evidence that the appellant damaged the complainants' property, or that she did so maliciously.

Through the testimony of Michael Simon Mlewa **(Pw1)**, Edmund Murashani **(Pw2)**, Cliff Beatus Lusungu **(Pw3)** and Richard Said Wissa **(Pw4)** the prosecution presented evidence that the trees were cut by Mika Nyongole. However, the valuation report (**Exh. P4**) tendered by David Yosia Sembeye (Pw6) show that the trees were not destroyed, instead they were harvested by Mika Nyongole (Dw1). The title to the said report read as follows:

> *"UTATHIMINI KWA AJILI YA MITI ILIYOVUNWA KATIKA SHAMBA LA NDUGU EDMUND FRANCIS MURASHANI LILIPO KIJIJI CHA IBWANZI MALMASHAURI YA WILAYA YA MUFINDI"*

That is "*A valuation report on the harvested trees on the farm situated at Ibwanzi Village which is the property of Edmund Francis Murashani*". From the title to the report and its content it is clear that the trees were harvested and not destroyed as testified by prosecution witnesses. For his part, Mika Nyongole (Dw1), testified that he harvested the trees after purchasing the farm from the appellant. Given that, Dw1 had purchased the farm from the appellant he had every reason to believe that he had the right to harvest the trees. What he did was not destruction of the property of another but rather harvesting of one's own farm produce.

The ***actus reus*** of the offence under section 326(1) is destruction of property. However, from the above re-evaluation of evidence, it is clear that there was no destruction of property within the meaning ascribed to section 326(1). In the instant case, Dw1 harvested the trees believing that they were his own property. There was no evidence that the pine trees were destroyed. It looks to me that the said pine trees were just harvested by another person who had legitimate grounds to believe that they were his. It is also evident from the records that the appellant did not harvest the said trees. Instead, it was the first appellant, (Dw1) who harvested the said trees. The first and second elements of the offence were therefore not established.

The two remaining elements of the offence, that is "Willfully and Unlawfully", represents the ***mens rea*** of the offence under section 326(1). Thus, for the offence to be brought home under the respective section, the destruction to the property must, not

only, be willful but it should also be illegal or unlawful. The two elements bring into the offence the characteristic of "malicious".

In law, a person is deemed to have acted maliciously if he does an act which he knows will injure either the person, property or reputation of another person without any lawful justification. For an action to be malicious it must be unlawful and the person doing the action must be deliberatively, intentionally or with a knowledge that the act will cause injury to the property of another. If the destruction is caused by some accident or some form of inadvertence, then that act cannot be said to be willfully.

In discussing whether an action is "Willfully and Unlawfully" for purposes of malicious prosecution, the High Court of Kenya, in the case of **Kahuhu Wang'ang'a v. Republi**c, 2002 SCC OnLine Ken 237, had the following to say:

> *"The key words in an offence of malicious damage to property are that the damage must have been done "willfully" and "unlawfully". That willful and unlawful act carries with it the intention and cannot therefore be complete unless mens rea is proved.* ***Above all, the said act must be attributed to the person charged "directly".*** *I emphasize the word "directly" because, in the offence of this nature, unlike in a civil jurisdiction vicarious liability cannot attach. This is because malice, by its own nature is a conception of the mind which cannot be assigned. And so, in the instant case, the prosecution was duty bound to prove beyond any reasonable doubt that the appellant did willfully and unlawfully damage the alleged properties."*

What I sieve from the above persuasive wisdom is that for an act to be deemed malicious, it must be directly attributable to the person charged. A person cannot be made liable for malicious

damage to property by mere inference through some actions of another person. In the case under scrutiny, the appellant cannot be said to have maliciously damaged the complainants pine trees by mere inference to the actions of the Mika Nyongole (Dw1). If anything, it was him who destroyed the property and not the appellant. But even for Dw1, he did so under an honest but mistaken belief that he was harvesting his own farm.

Appreciating that Mika Nyongole (Dw1) was acting on an honest but mistaken belief that the pine trees were his own property, the act of harvesting the pine trees was itself not an unlawful action. Such action cannot amount to damaging the complainant's property. For this reason, I am prepared to hold that, in light of the above discussion, the trees were not destroyed in the strict sense required under section 326(1) of the Penal Code.

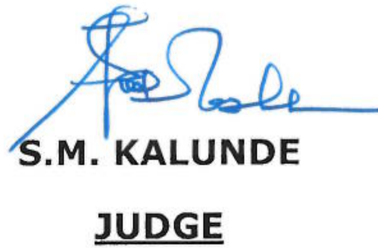
For the foregoing reasons, I am satisfied that the prosecution failed to prove that the destruction of the pine trees was willful and unlawful. I am convinced that, had the learned trial magistrate considered the above circumstances she would have resolved, as I have, that there were, clear and reasonable, doubts in the prosecution case. Those doubts were to be interpreted for the benefit of the appellant.

That said and for the foregoing reasons, I find merit in the appeal, which I allow. The appellant conviction on the offence of malicious damage to property is hereby quashed and the resultant sentence is set aside. Consequently, I order her

immediate release from prison, unless she is otherwise lawfully held.

It is so ordered.

DATED at **IRINGA** this **31st** day of **MAY, 2024**.



S.M. KALUNDE

JUDGE