

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB REGISTRY OF MANYARA**  
**AT BABATI**  
**CRIMINAL APPEAL NO. 66 OF 2023**

*(Originating from Criminal Case No. 66 of 2022 in the District Court of Kiteto at Kibaya)*

**JAMES S/O MKALE.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

*13<sup>th</sup> December, 2023 & 7<sup>th</sup> March, 2024*

***Kahyoza, J.:***

The appellant, **James Mkare** was prosecuted in the District of Kiteto at Kibaya (the trial court/the District Court) on offence of Malicious Damage to Property contrary to section 326 (1) of **the Penal Code**, [Cap 16 R.E.2019].

It was alleged that on 2<sup>nd</sup> day of April, 2022 at Ngaboro village within Kiteto district in Manyara region, did destroy by grazing the cattle in farm measuring 30 acres having varieties of crops, namely; pigeon pie, maize and sunflower valued at 3, 746, 000/= the property of Bernard s/o Mashaka.

Having heard the case on merit, the learned trial court found the appellant guilty, convicted and sentenced him to pay a fine of 300,000/= in lieu of imprisonment of three years in jail and an order to pay compensation of Tzs. 3,500,000/- to Bernard s/o Mashaka.

Aggrieved with the conviction and the sentence meted out by the trial court, the appellant preferred this appeal, marshalled with three grounds of appeal, namely: -

*"1. That, the learned trial Magistrate of the trial court misdirected himself convicting and sentencing the appellant while the offence against him was not proved on the standards required in as far as criminal cases are concerned;*

*2. That, the learned magistrate of the trial court, erred in fact and law as he failed to analyse and evaluate properly the evidence of the parties, as a result he wrongly convicted and sentenced the appellant.*

*3. That, the learned magistrate of the trial court, misdirected himself in ordering the appellant to compensate the complainant (PW1) one Bernard Mashaka Tshs. 3,500,000/= while the said amount was never prayed and proved by the prosecution."*

The background is, that Bernard Mashaka (PW1), testified that he owns a farm measuring 100 acres at Ngaboro village, where he cultivates Corn, beans and sunflower and that on 02/06/2022 he was informed by Idd

Nkombi (PW2) that a herd of cattle (30 cows) entered his farm and destroyed his crops. The same evidence, that was never challenged under cross-examination by the respondent, was corroborated by the testimony of PW2, who testified further, that he witnessed the said herd of cattle in PW1's farm eating crops. The said 30 cows were taken by police officers.

E.820 SGT Haji (PW3) testified that on 02/06/2022 in a company of his fellow police officers they found the said cows inside the farm and they handed them to the village authorities and left. Later the same were handed to the Ndaleta's village chairman, to whom, on 02/06/2022 the same were given to the appellant, who claimed to be the owner of the 30 cows, and he was arrested.

Abdulkarim Ismail, (PW4) added that on 02/06/2022 he was requested by PW1 to go to police station and report the incident and he obliged. On the same day he went to the farm and found the said 30 cows being surrounded by security guards at the farm and that the said cows had several marks including "V" on the right-hand leg.

Ijumaa Bakari, (PW5), the village chairman of Ndaleta testified that, on 03/06/2022 he received 30 cows from police officers, as reflected in exhibit PE1, alleged to have been grazing at Bernad Mashaka's farm. He later

handed over the said cows to the appellant, as depicted in exhibit PE2 and later when he was arrested, he handed over the same to his relative via exhibit PE3.

Godfrey Kingu, (PW6), Agricultural officer at Njoro Ward, testified to have witnessed the destruction of crops, namely maize, pigeon pies and sunflower at Bernard Mashaka's farm. He prepared a report that evaluated the damages at a tune of Tzs. 3,746, 000/= and the same was admitted as exhibit PE4.

G. 2260 D/CPL Moshi, (PW7), testified that on 05/06/2022 he was instructed to investigate this case, he went to the scene of crime and found that the damage was real, maize, sunflower and pigeon were destroyed.

James Mkale, (DW1), testified that on 03/06/2022 he was informed that his herds of cattle was lost on 01/06/2022 and that 22 cows were found, but 30 of them were in vain. Later on, the said 30 cows were handed to him on writing, then he was taken to police station. They tried to settle the dispute as suggested by "bwanashamba", but it didn't reach to fruition.

Leksong Silunga, (DW2), testified that, as one of the elders, he tried to advise on the amicable settlement but they failed.

Lazaro Lailetei, (DW3), testified that he is a neighbour to DW1 and in the presence of DW2 and PW1 they did not see any damage to the farm.

The hearing of this appeal was by way of oral submissions.

Mr. Abdallah Kilobwa, Advocate for the appellant, submitted on the first ground of appeal that; the charge against the appellant was not proved beyond reasonable doubt. The complainant deposed that he was informed that the accused allowed his cattle to enter into the complainant's farm, as of fact he did not see the appellant (the then accused person). Argued that this amounts to hearsay evidence. All witnesses who testified deposed that they saw cows in the farm but did not see the appellant.

There was a manifestation of conflicting dates, to which the offence was alleged to have occurred, the impugned judgment leads to the fact that the offence occurred on 02/04/2022 while the same mentions that the same occurred on 02/06/2022. This occasioned doubt as to whether the offence was committed or otherwise.

Also, on the evaluation report, it was alleged that the same was conducted on 10/06/2022, that is 8 days lapsed after the alleged commission



of the offence, showing that anything may have happened in between, thus the magistrate erred to rely to the evaluation report.

It was his contention that the prosecution's side was duty bound to prove malice, as one of the elements of the offence. Since no witness testified to have seen the accused at the scene of crime, it was by no means that malice could have been established.

On the second ground of appeal, he submitted that the trial magistrate did not analyze the evidence of both parties. The impugned judgment features the summary of evidence but not the analysis. There was a settlement between the appellant and the Complainant. The trial court erred to rely on the same to find the appellant guilty.

As to the third ground of appeal, the trial court erred to order 3,500,000/= as compensation, as the same was neither pleaded nor proved. He neither mentioned nor prayed for compensation. It was the evidence of the valuation officer which established the alleged amount. The same was also not realistic, since it is not likely that what was planted could have been harvested.

He invited this court to allow the appeal, the judgment and orders be set aside.

Ms. Rhoida Kisinga, State Attorney, for the Respondent submitted on the first ground of appeal, that the case was proved beyond reasonable doubt. She conceded that there was no any witness who testified to have seen the appellant grazing the cattle in the complainant's farm, however it was proved that the appellant's herds of cattle damaged the complainant's crops. And that the Village Executive Officer testified to have handed the herds of cattle to the appellant, and he admitted that the herds of cattle belonged to him.

In his defence, the appellant deposed that he was the owner of the herds of cattle and that he grazed in the complainant's farm and that there was no one grazing cows. After the police being informed, the appellant immerged and claimed the cows. He deposed that his herd of cattle went 01/06/2022. The accused failed to bring persons, and this justified the court to draw adverse inference, that it was the appellant who let his cattle graze on the complainant's farm.

The incident took place on 02/06/2022, PW2, the eye witness deposed to have seen herds of cattle grazing into PW1's farm on 02/06/2022 and on

the 04/06/2022 herds of cattle were handed to the appellant; thus, the appellant knew very well what happened on 04/06/2022. If at all his cows disappeared on 01/06/2022 he could have reported the incident to the police station.

That the variation of the date in which the incident happened was due to slip of a pen, because the evidence is clear that the incident happened on 02/06/2022, and the irregularity in the judgement is curable under section 388 of **the Criminal Procedure Act**, Cap 20 R.E 2022.

As to the valuation date, the lapse of days from 02/06/2022 did not have any negative impact to the evaluation report, since the damage was there and the evaluation officer saw it. Thus, the offence was proved beyond reasonable doubt.

On the second ground of appeal, she submitted that evidence of both sides was considered, as featured from page 6 of the impugned judgment.

The trial court made a reference to an attempt to settle the matter out of court, however it did not rely on it to convict the appellant.



Submitting on the third ground of appeal, she deposed that the issues of compensation is subject to court's discretion, thus PW1 had no duty to plead and tender evidence the extent of damage.

In his short rejoinder, Mr. Kilobwa submitted reiterating that malice was not proved.

The first issue for determination is whether the prosecution proved the charge against the appellant beyond reasonable doubt.

It is settled that in the circumstances at hand, where this court sit as first appellate court, it is charged with a duty to undertake re-evaluation of evidence, the same is underscored in **Cheyunga Samson @ Nyambare vrs. R**, Criminal Appeal No. 510 of 2019 [2021] TZCA 607 (25 October 2021) to mention but a few.

Section 326(1) of **the Penal Code**, Cap 16 R.E 2019, (Now 2022) provides: -

*"326.-(1) Any person who wilfully 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. "*

From the cited provision of the law, for there to be a conviction for an offence of Malicious damage to Property, the following elements must be proved: -

1. That, there exist a property of a person.
2. That, the said property has been damaged.
3. That, the accused is responsible for the said damage.
4. That, the accused damaged the said property wilfully and unlawfully.

Now, when the testimonies of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 are gauged by the thresholds established in **Goodluck Kyando vrs. Republic** [2006] T.L.R 363, that:-

*"every witness is entitled to credence and his evidence believed unless there are cogent reasons to the contrary"*

It is without doubt that the availed evidence proves beyond doubt that Bernard Mashaka's farm was invaded by appellants herds of cattle (30 cows) on the 02/06/2022 and as a result a range of crops, namely; maize, sunflower and pigeon pie were destroyed, as testified by all prosecution's witnesses who testified to have witnessed the damaged crops and the fact that the said 30 cows were found in the farm and later on handed over to the appellant, who admitted to have received them in writing. Their

testimonies are coherent and plausible. I find to good reasons to fault their testimonies.

It was argued by Mr. Kilobwa that since PW1 testified that he was told that appellant's herds of cattle entered his farm, and never saw him, that was a hearsay evidence, with due respect, the said information was given to PW1 by PW2, and since PW2 was among the witnesses in a witness box, and the fact that PW2 confirmed the same, that he was the one who informed PW1 and that PW1 had a chance to cross examine PW2 if needed, then that negates the contention that what was testified by PW1 was a hearsay, for testimony to amount to a hearsay, it must be a statement that refers to a person who cannot be made available as a witness, see section 34 of **the Evidence Act**, Cap 6 R.E 202.

On the varied dates, the testimonies of PW1, PW2, PW3 and PW4 that the incident took place on 02/06/2022, while the charge reflects that the alleged offence occurred on 02/04/2022; it is my settled finding that the same is cured under section 388 of **the Criminal Procedure Act**, for, **One**, the date is not one of the elements of offence, and, **Two**, prosecution's witnesses were all categorical that the incident happened on 02/06/2022 and **Three**, the defect does not go to the root of the case.

As to the lapse of 8 days from the date of the incident to the day in which the valuation was conducted, as rightly pointed out by Ms. Kisinga, this was not fatal, as the evidence proved beyond reasonable doubt that damage was there and there is no any lead towards anything apart from the damage that was caused on the 02/06/2022.

Thus, the evidence proved beyond reasonable doubt on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> element(s).

As to the fourth element, I have laboured a great deal, trying to find the technical meaning of the phrase "Willfully and unlawfully" but it was in vain. However, going by literalism in inductive approach, for an act to be willful, it has to be done when a person does something "knowingly". Section 5 of **the Penal Code** defines knowingly to mean:-

*""knowingly" used in connection with any term denoting uttering or using, implies knowledge of the character of the thing uttered or used;"*

From the above definition, one thing that glitters, is the question of knowledge, that the accused must be aware or knowledgeable of the character of the act done or omitted. On the other side, the meaning of "unlawful" is not farfetched, as it connotes something "forbidden by law". In other words, the sufficient *mens rea* for an offence of malicious damage to

property has to be the doing of an act while being aware or having all reasons to believe that the said same thing is forbidden by law.

Back to the matter at hand, the prosecution's side was duty bound to prove beyond reasonable doubt that the damage that was done to crops in Bernard Mashaka's farm was actuated by the appellant while being aware that the same is forbidden by law or had all the reasons to believe that the same was forbidden by law. And this requirement is absolute under the demands of the said penal section and qualified by section 8 of **the Penal Code**.

I wish to add that according to the section 4 of the Interpretation of Laws Act, [Cap. 1 R.E. 2019] act when used with reference to an offence includes an omission to act. It provides that-

*""act" when used with reference **to an offence** or civil wrong, includes **an omission** and extends to a series of acts or omissions or a series of acts and omissions;"*

It is settled that a person may commit an offence by his omission to certain act. I am of the settled view that a person may cause damage to another person's property his omission to do certain act to prevent the damage to occur. I had I cursory review on the record and it is settled



Bernard Mashaka (**Pw1**)'s crops were destroyed by the appellant's untamed herds of cattle. Indisputably, there is no evidence depicting that the appellant led his herd of cattle to Bernard Mashaka (**Pw1**)'s farm. However, the appellant's omission to graze his cattle proves his intention to let his domestic animals go around and damage whatever was at their reach. The appellant deposed that his employees who were grazing his herd of cattle were invaded by elephants, to save their heads they ran away and left the cows untamed. The appellant did not summon his employees who were grazing his herds of cattle to testify hence his evidence was hearsay evidence. Hearsay evidence cannot raise doubt in the prosecution's case.

I am alive of the principle of law that an accused person has no duty to prove his innocence but to raise the reasonable doubt in the prosecution's case. I am of the firm view that hearsay evidence cannot raise a reasonable doubt. I, therefore find proved by circumstantial evidence that the appellant willfully omitted to tame his herds of cattle as a result they destroyed Benard. The trial court did properly convict the appellant.

### **Did the trial court misdirect itself to order compensation?**

The appellant's advocate complained that the learned magistrate misdirected himself to order compensation to the tune of Tzs. 3,500,000/=

which was not prayed and proved. To support his complaint, the appellant's advocate submitted that the trial court based the award on the evidence of the agricultural extension officer. He contended that the agricultural extension officer was a merely witness who was required to support the evidence of Bernard Mashaka (**Pw1**), the owner of the destroyed crops. He added that Bernard Mashaka (**Pw1**) did not give his evidence as to the value of his crops.

I do not share the appellant's advocate views that, to prove value, it was mandatory for Bernard Mashaka (**Pw1**), the owner of the damaged crops, to give evidence as to the value of the destroyed crops. In criminal law, witnesses have the same status. Thus, the evidence of Bernard Mashaka (**Pw1**) and Godfrey Kingu (**Pw6**) found credible had the same value in law. The prosecution summoned Bernard Mashaka (**Pw1**) and Godfrey Kingu (**Pw6**) to prove that the appellant committed the offence of malicious damage to property. In a criminal case, there is no a principal or leading witness among the prosecution's witnesses. I scrutinized the evidence of Godfrey Kingu (**Pw6**), the agricultural extension officer and exhibit PE4, and concluded that the damaged crops were valued. The trial court was correct to award compensation. The value of the damaged crops is based on

approximation, the actual value might be higher or lower than what Godfrey Kingu (**Pw6**) presented. For that reason, I reduce the compensation to Tzs. 1,500,000.00

In the end, I dismiss the appeal for want for merit. I uphold the conviction and the sentence, save for the compensation, which is reduced to Tzs. 1,500,000.00. Bernard Mashaka (**Pw1**) is at liberty to institute a civil suit to claim damages for his destroyed crops.

I order accordingly.

Dated at Babati this **7<sup>th</sup>** day of **March**, 2023.



A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', written over a horizontal line.

**J. R. Kahyoza**

**Judge**

**Court:** Judgment delivered in the presence of Ms. Bernadetha Mosha, the learned state attorney for the respondent and in the absence of the appellant and his advocate. Fatina Haymale (RMA) present.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', written over a horizontal line.

**J. R. Kahyoza**

**Judge**

**7/03/2024**