

TANZANIA / JUDGMENT

constantine willium mwaja vs mohamed omari mbilikila 2024 tzhc 167 9 february 2024

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9 February 2024

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA DODOMA SUB REGISTRY AT
DODOMA DC CRIMINAL APPEAL NO. 83 OF 2023 (Arising from the Judgment of District Court of
Dodoma at Dodoma in Criminai Case No. 89 of 2022)

1. CONSTANTINE WILLIUM MWAJA..... 1st APPELLANT
2. MOHAMED OMARI MBILIKILA.....2nd APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 04/12/2023 Date of Judgment: 09/02/2024 LONGOPA, J: The Appellants, Constantine Willium Mwaja and Mohamed Omari Mbilikila were charged and convicted of the offence of malicious destruction of properties c/s 326(1) of the Penal Code, Cap 16 R.E. 2022. Each of the appellants was sentenced to serve a four years' imprisonment. It is averred that on 28/10/2021, at Veyula within Dodoma District in Dodoma Region, the appellants destroyed one television make Sony, five 1 | Page motorvehicle tyres make Zeetex, Linglon and Black lion, one cupboard, three thermos and one electric bulb all valued at TZS 1,595,000/=, properties of Hassanali Rashid Kimaro. Being dissatisfied with conviction and sentence, both appellants preferred an appeal to this Court on the following grounds:

1. That, the trial Court erred in law and in fact in not considering all defence witnesses'evidence and proceeded to determine the matter basing in prosecution witness which also failed to prove the charge of malicious damage to property against the appellants beyond reasonable doubt.
2. That, the Hon learned magistrate of the trial court erred in law and fact for failure to evaluate properly evidence in satisfying itself rather than taking into account weak, shark and cooked evidence in relation to this matter henceforth reached into biased decision which is unmaintainable in the eyes of the law.

3. That, the trial court erred in law and in fact by delivering decision based on the contradictory evidence adduced by the prosecution's witnesses during the hearing the case at hand hence reached into unfair decision. 2 | Page
4. That the trial /earned Magistrate erred in law and in fact when failed to consider one of ingredients of the offence which the appellants charged with which is proof of ownership of the damaged property, before a person is convicted it is important to establish that the property alleged to have been damaged belongs to the person who alleges damage to the property. However, in the present case the trial magistrate did not address the question of ownership for instance there were not receipts tendered in court proving that the alleged property belonged to the Complainant.
5. That, the trial /earned magistrate if could think in deeply she could discover that the case against the appellant was planted by the complainant so as to implicate the appellants basing on ground that to avoid liability of knocking the 2nd appellant with his motor vehicle.
6. That, the trial court erred in law and in fact when failed to consider the need of chain of custody of the alleged items to be maliciously damaged by the person alleged to damage those items from the place where it was collected until when they were brought to court.
7. That, the trial magistrate Court grossly erred in law and fact when acted on evidence of prosecution side which was 3 I Page vicious and calculated this is because how a person can manage to communicate with other person through caller phone while in situation of being assaulted with another person and this was corroborated by trial magistrate when refused to work on the evidence of doctor (PW 5) on that ground that the said iron bar was not explained which part of the body was directed by the victim.
8. That, the trial magistrate grossly erred in law and in fact as the decision of the trial court was based on unfounded allegations, a mere word, frivolous, sheer lies, weak unfounded evidence, cooked and speculative claims which have no truth in reality. On 7th December 2023 the parties appeared before me for hearing of the appeal. The appellants appear in person while the respondent was represented by Ms. Patricia Mkina, learned State Attorney. The appellants adopted all the grounds of appeal as set forth in the petition of appeal and submitted as follows in support of the appeal, jointly for some grounds while others were argued independently. It was submitted by the appellants that all alleged damaged properties presented in trial court were handed over to the Exhibits Keeper on 31/10/2021 which was three days after the alleged incident thus remained at Namanga Veyula without police security. As such, appellant 4 | Page argued that it is possible that such damage was done later by the complainant to pin down the appellants. They prayed for expunging of these exhibits for being a nullity. Further, it was argued that prosecution through PW 3 who was the victim failed to bring to court evidence of receipts on ownership of all properties alleged to have been maliciously damaged. Failure by the Prosecution to tender the receipts makes the evidence of PW 3 a nullity. It deserves to be discarded. Also, it was submitted that the prosecution failed to bring necessary witnesses to court who were alleged by PW 3 to

have been at the scene of crime on the material date including the wife and father of the victim resulted into weaknesses of the prosecution evidence. It creates reasonable doubt on whether such offence was committed at all. Additionally, it was argued that there was no cautioned statement at the police station related to the case. The appellants were of the view that there is nothing connecting the appellants with the offence they were convicted with. Furthermore, it was argued that there are contradictions on timing of arrest of the 2nd appellant. The evidence of PW 3 and PW 2 was a nullity for reasons that PW 2 informed the trial court that the 2nd appellant was arrested on 28/10/2021 while PW 3 stated that 2nd appellant was arrested after some days ranging from three to four days of the alleged incident. 5 | Page The court should consider that such evidence was contradictory, and it is not watertight to warrant conviction. According to the appellants, PW 3 testified that on 28/10/2021 at Namanga in Veyula he heard words restricting him that he will not pass. They wondered how a person driving a motorvehicle with fully closed windows could hear the words that he would not be permitted to pass. The whole evidence was nullity as it was not true. The appellants challenged the testimony PW 6 which revealed that PW 6 went to scene of crime to witness and sign a certificate of seizure note containing the damaged properties that are mentioned in exhibit as an independent witness. In cross-examination PW 6, stated that he does not know the date of incident nor the appellants. According to the appellants, PW 6's evidence is an indication that alleged incident of malicious damage to properties never happened. The appellants prayed to be set at liberty for the conviction and sentence was not supported by cogent evidence to prove its commission. The appellants adopted all grounds of appeal to form part of their submission in this Court. As a result, they urged this court should quash the conviction and set aside the sentence. In response, it was submitted by the respondent that in respect of Grounds 1, 2, 3, 4 and 8 the trial court considered the evidence of the defence seriously prior to reaching into a decision to convict. On page 15 of 6 | Page 4 the judgment, trial magistrate indicated that first appellant does not object to have been at the scene of crime on material time of the incident. It was the testimony of the first appellant that he went to the house of the victim to get medical first aid having been knocked by the victim's car. It is submitted that prosecution proved the offence of malicious damage to property as evidence proved existence of all ingredients of the offence of malicious damage to property. The ingredients/elements include the following: (i) That the property belonged to the victim; (ii) That property was damaged; (iii) That it was the accused person who caused the damage to the property; and (iv) That the damage was done maliciously without any justification. It was submitted that the evidence of the prosecution established that all the damaged properties belonged to the victim as per testimonies of PW 3 and PW 4. The trial court was informed that victim owns a supermarket at Namanga in Veyula which sells merchandise/items including those which were damaged by the appellants. Also, PW 4 informed the trial court that motorvehicle of the victim was parked at the supermarket on the fateful night. It was the evidence of PW 4 that he found the 2nd appellant damaging the said motorvehicle tyres. Thus, this element was proved. 7 | Page In respect of damage of the property element, it was submitted that PW 3 and PW 4 who were present at the scene of crime witnessing damage of the properties by the appellants

testified. While PW 4 saw 2nd appellant damaging the victim's motor vehicle tyres, both PW 3 and PW 4 witnessed 1st appellant breaking/damaging victim's properties in the supermarket. These included the cupboard, TV and three thermos flasks. Also, PW 2, PW5, PW 6 and PW 7 when visited crime scene found all the damaged properties laying at that place. In respect of element of malicious damage by the appellants, it is submitted that PW 3 and PW 4 witnessed the damaging of the properties by the appellants. These witnesses were present at the scene of crime at the time of commission of the crime. Furthermore, the prosecution brought evidence that appellants had bad or ill intention to commit an offence of armed robbery which was not though established. On 5th ground that this case was a fabrication, it was submitted that it is not true as testimonies of the prosecution were corroborating each other to prove that the crime was committed. These are the testimonies of PW 3, PW 4, PW 2, PW 5, PW 6 na PW 7. Regarding the 6th ground of appeal, it was argued that chain of custody was well established, and the trial court considered the same. All exhibits were tendered by PW 1 who was Exhibit Keeper at the Central Police station in Dodoma. The narration on how the exhibits changed hands was availed as the same were collected by Insp Makanyaga. 8 | Page 4 Inspector Makanyaga entrusted them to PW 5 Inspector Nathan who handed them to the Exhibit Keeper (PW1). PW 1 upon receipt of the exhibits entered them in Exhibits Register and all of them was tendered, admitted, and marked as Exhibit P2 collectively. It is the Exhibits Keeper who tendered the exhibits demonstrating a clear demonstration of a proper chain of custody. According to the respondent, the 7th ground of appeal deserves a dismissal as it deals with an offence for which the appellants were not convicted with. It is the PW 3 and PW 4 testimonies that appellants are the ones who damaged the properties. The duo were the eyewitnesses of the commission of crime. It is thus evident that the appellants were the ones who damaged the properties. Furthermore, it was argued that the exhibits which were received on 31/12/2023 at the Central Police as they were seized on the same day and independent witness was called to witness seizure of the damaged properties. In respect of fact as to how could the victim hear something spoken from outside while his car windows were closed, it was submitted that this is clearly an afterthought. It was never asked at the trial court during hearing of the prosecution evidence thus it cannot arise at this stage. The aspect of treatment of the victim is not relevant to the offence of malicious damage to property. That would only be valid to prove a different crime as 9 | Page A it relates to the offence of armed robbery. The appellants were not convicted and sentenced for robbery but malicious damage to property. Regarding independent witness, it was submitted that PW 6 was called to witness the seizure of damaged properties only. He never went there to do anything else except to witness the status of the properties seized by the police who were dealing with investigation of the matter. The respondent stated that it is true that the damaged properties remained in custody of the victim prior to the same being seized by the police on 31/10/2021. They were at the right place under stewardship of the victim thus the same were in good hands. The properties were properly seized and handed over to the Exhibits Keeper at the Central Police station in Dodoma. On non-submission of the receipts of ownership of damaged properties, the respondent argued that it is true that there were no receipts.

However, PW 3 and PW 4 testimonies established that the owner of the property was the victim who was PW 3 during the hearing of the matter. Regarding failure by the prosecution to call some of the witnesses, it was vehemently argued that those witnesses could not have proved the malicious damage to property. They were only necessary in the offence of armed robbery that was not proved. Thus, respondent is of the view that 10 | Page those persons were not necessary and available evidence was adequate to support conviction of the appellants beyond all reasonable doubt. Moreover, it was argued that the prosecution evidence did not state anywhere that 2nd appellant was arrested on 28/10/2021. Page 15 of the proceedings indicates that 2nd appellant to have been arrested few days after the incident. It was prayed by the respondent that this appeal should be dismissed for lack of merits and the conviction and sentence against the appellant be upheld. Having heard the submissions of both sides, I have keenly perused the grounds of appeal and record of the trial court. This Court is enjoined to analyse available evidence of both sides to satisfy on the merits of the grounds of appeal and to determine whether the conviction of the appellants and sentence thereof were met properly. Section 326(1) of the Penal Code, Cap 16 R.E 2022 provides for the offence of malicious damage to property. It states that: 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. It appears that the ingredients of the offence are three mainly. First, there must be damage or destruction of a property. Second, that damage 11 | Page or destruction should be wilfully and unlawfully. Third, it is the accused who destroyed or damaged that property. In fact, under this provision unlawful damage to any property is what is required to establish the offence. The question of proof of ownership by production of receipts does not arise. What is important is to establish that a property was maliciously or unlawfully damaged. In the instant case, all these elements exist. First, there were damaged properties namely five motorvehicle tyres, three thermos, broken cupboard, and a broken Sony tv set. These were admitted in trial court as Exhibit PE 2 collectively and their value is TZS 1,595,000/=. Second, the damage was done with malice. There was no reasonable justification on part of the appellants to destroy the said properties. Third, it was established that the appellants are the ones who destroyed the said properties. Fourth, it was established that the properties belonged to the victim. PW 3 and PW 4 testified to have witnessed the 1st and 2nd appellant destroying the properties listed as Exhibit PE 2. It was PW 3 and PW 4 evidence that light was sufficient to identify the appellants who were known to the witnesses for about seven years. Given the evidence of PW 3 and PW 4 that they were present at the scene of crime when the offence was committed, testimonies of the duo is direct evidence. It tallies squarely with the provision of section 62(1) of the Evidence Act, Cap 6 R.E. 2022. It provides as follows: 12 | Page 62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say- (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; Further, it was the evidence of the DW 1 and DW 2 testified to have been at the scene of crime on that material date and time. Moreover, the 1st appellant was arrested at the scene of crime. All these testimonies cement the finding of the trial court against the appellants. This matter was stated in the case of Mohamed Haruna @ Mtupeni & Another vs Republic (Criminal

Appeal 259 of 2007) [2010] TZCA 141 (4 June 2010), the Court of Appeal observed that: It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence. But as the learned first appellate judge rightly observed in his judgment, "if the accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding on the question of his quit." It has been evidence of prosecution that 1st appellant was arrested at the scene of the crime while committing the offence of malicious damage to property. This evidence is heavier to eliminate any possibilities 13 | Page of mistaken identity or non-participation of the 1st appellant in commission of the crime. In fact, both appellants do not dispute being at scene of crime on that material date and time. Their testimonies are that the first appellant went to the victim's place to get treatment allegedly on being knocked by the victim's car. I am guided by the precedent of the Superior Court of the land in the case of Ibrahim Ally Mwadau vs Republic (Criminal Appeal 11 of

2018) [2020] TZCA 358 (23 July 2020), where the Court of Appeal, at page 11, observed that: The Court has on a number of times held that where an accused is arrested at the scene of crime his assertion that he was not sufficiently identified should be rejected. [See Bahati Robert Vs. Republic (supra) and Joseph Safari Massay Vs. Republic, Criminal Appeal No. 125 of 2012 (unreported)]. In the latter case, the case of Abdalla Bakari Vs. Republic, Criminal Appeal No. 268 of 2011 (unreported) was cited in which the appellant was overpowered and arrested at the scene of crime and his assertion on appeal that he was not sufficiently identified was rejected. The Court has also always considered the evidence of finding somebody red handed committing an offence to be conclusive. 14 | Page The 1st appellant was arrested within the scene of crime where some of the damaged properties were located. PW 3 and PW 4 testified to have seen the 1st appellant destroying a Sony tv set, cupboard and three thermoses at the victim's supermarket. Also, it was PW 4 evidence that he found the 2nd appellant destroying victim's motorvehicle tyres when he arrived at the scene of crime prior to 2nd appellant running away. According to PW 3 and PW 4, all the destroyed properties belonged to the victim. The damaged properties at the scene of crime are the one seized presence of PW 2, PW 5 and PW 6 on 31/10/2021 as demonstrated by Exhibit PE 3 which is a Seizure Certificate. Exhibit PE 1 which is a Police Register Book was admitted in trial court to establish the chain of custody of the properties as well as damaged properties as Exhibit PE 2 collectively. It is lucid that Exhibit PE 1, PE 2 collectively and PE 3 have effect of showing a clear chain of custody of the damaged properties from the scene of crime to the moment the same were tendered and admitted before the trial court. As rightly analysed by the trial court at pages 14 to 16 of the judgment, it was the appellants who destroyed the properties belonging to the victim. I find that the offence of malicious destruction to property c/s 326(1) of the Penal Code, Cap 16 R.E. 2022 was established all beyond reasonable doubts. The prosecution evidence was sufficient and clear to warrant conviction in the offence of malicious damage to properties. 15 | Page In respect of possibilities of contradiction of prosecution witnesses as advanced

by the appellants, I find the same in negative. Testimonies of PW 3 and PW 4 stated that 1st appellant was arrested at the scene of crime on 28/10/2021. PW 2 evidence revealed that 1st appellant was rearrested by the police on 28/10/2021 at the scene. PW 2 stated that the 2nd appellant was arrested sometimes later either on 29/10/2021 or 30/10/2021. PW 3 stated that the 2nd appellant was arrested few days after the event. There is no contradiction as the arrest is clearly stated to have been in two separate dates, the 1st accused was arrested at the scene of crime while the 2nd accused was arrested on a different day. Though the evidence of PW 2 is not specific on the date when 2nd appellant was arrested, I am of the view that it does not bring contradiction as the arrest was done after the incident of destruction of the victim's properties. In fact, evidence of PW 4 that after the incident 2nd appellant ran away is corroborated by PW 2 and PW 3 that 2nd appellant was arrested in a different date after the fateful incident. I cannot agree with the appellants' argument that there was contradiction on arrest of the 2nd appellant. In the case of Solea Mdadija & Another vs Republic (Criminal Appeal No.580 of 2022) [2023] TZCA 17312 (8 June 2023), Court of Appeal set a criterion when contradictions exist. It observed that: It is a rule that in evaluating discrepancies or contradictions the court has to decide whether that contradictions or discrepancies are only minor or if 16 | P a g e they go to the root of the matter. Looking c/ose/y on these contradictions, it is clear to us that they are not minor and also, they bring up question on credibility and reliability of those witnesses. In those circumstances, the contradictions go to the root of the case. As I have observed, there are no material discrepancies on testimonies of the prosecution regarding timing of arrest of the 2nd appellant. There is nothing to warrant discrediting evidence of the prosecution's witnesses in the circumstances of this case. Thus, second, third, fourth, fifth, sixth and seventh grounds of appeal lack an iota of merits. The evidence of PW 1, PW 2, PW 3, PW 4, PW 5, PW 6 and PW 7 point to the same direction that there were destructed /damaged properties, the properties belonged to the victim, the appellants are the ones who damaged the said properties, and that the destruction was actuated with malice as there was no justification whatsoever to justify their action to destroy such properties. My re-evaluation of the available evidence on record and analysis of evidence by the trial magistrate, I am of a settled view that available evidence is sufficient to prove the commission of the offence of malicious destruction of properties c/s 326(1) of the Penal Code, Cap 16 R.E. 2022. The trial court analysed evidence from both sides and reached into a valid 17 | P a g e conclusion that the prosecution managed to prove the offence against both accused persons thus it proceeded to convict them accordingly. I subscribe to the guidance of the Court of Appeal in the case of Gaudence Sangu vs Republic (Criminal Appeal 88 of 2020) [2022] TZCA 784 (7 December 2022). At pp 7-8, the Court of Appeal stated that: It is trite law that the first appellate court has a duty to re- evaluate the evidence on record which is more or less are hearing of the case except for the fact that, unlike the trial court, it does so through reading the transcript of proceedings without hearing witness as they testify which explains why the assessment of demeanour of witnesses is in the domain of a trial court. See: Shabani Daudi v. Republic, Criminal Appeal No. 28 of 2000 (unreported). In doing so, the first appellate court may concur with the finding of fact made by the trial court or come to its

own findings. Logically, the principle that a second appellate court should not readily interfere with concurrent findings of fact of the two courts, below is premised on the assumption that the first appellate court's concurrence with the trial court's finding of fact is a result of an independent re-evaluation and analysis of the evidence on record relied upon by the trial court in arriving at its findings. The Court has consistently held in many of its 18 | P a g e decisions that, analysis and evaluation of evidence entails an objective scrutiny of both the prosecution and defence evidence and not mere/y a summary or narration of it. My evaluation of the evidence on record reveals that the trial court analysed the evidence of both sides objectively, considered all ingredients of the offence and it was satisfied that prosecution managed to prove its case at the required standard of proof beyond all reasonable doubt. Totality of evidence leaves no reasonable doubts on the commission of the offence of malicious destruction of properties by the appellants. Once it is proved that the prosecution established its case beyond reasonable doubt, the appellate court is required to dismiss any appeal against conviction. This was the decision of the Court of Appeal in the case of Salum Said Matangwa @ Pangadufu vs Republic (Criminal Appeal 292 of 2018) [2020] TZCA 1814 (9 October 2020), where it stated that: The prosecution case was thus proved beyond reasonable doubt against the appellant. In the circumstances, for what we have shown herein concerning the evidence from both sides, we are settled in our mind that the appe/iant's conviction was properly reached as the appellant did not raise any reasonable doubt against the prosecution case. Consequently, the fifth ground of appeal is devoid of merit and stands dismissed. On the whole, we dismiss the appellant's appeal against conviction. 19 | P a g e On strengths of evidence on record, it is evident that the prosecution managed successfully to establish their case against the appellants within the required standard of proof beyond all reasonable doubt. The evidence of PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6 sufficiently established the prosecution case beyond all reasonable doubt. I find that first and eighth grounds of appeal are destitute of any merits. They deserve to be discarded for lack of merits. There are no cogent reasons to uphold any of these grounds. As a result, I find that the appeal lacks merits as the complaints against conviction and sentence are baseless. I shall proceed to dismiss all the grounds of appeal for being destitute of merits. In the final analysis, I concur fully with the findings of the trial court to convict both appellants and sentence them to imprisonment for the period of four years. The sentence was appropriate and consummate to the offence committed. I uphold both conviction and sentence in respect of offence of malicious destruction to properties c/s 326(1) of the Penal Code, Cap 16 R.E. 2022. The appeal stand dismissed in its entirety. It is so ordered. DATED at DODOMA this 9th day of February 2024. E.E. LON JUD 09/02/20247 20 | P a g e

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Prepared on 12 October 2026 · Esheria