

TANZANIA / JUDGMENT

director of public prosecutions vs dadi so mohamed chipehele 7 others 2023 tzhc 18944 30 june 2023

COURT
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IN THE HIGH COURT OF TANZANIA (MTWARA DISTRICT REGISTRY) AT MTWARA CRIMINAL APPEAL NO.1 OF 2023 (Originating from the District Court of Mtwara. at Mtwara in Criminal Case No. 117 of 2021) DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT VERSUS DADI S/O MOHAMED CHIPELEHE.....1st RESPONDENT HAMISI S/O AHAMAD MCHOMA.....2ND RESPONDENT IBRAHIMU S/O SELEMANI LIVEVE.....3rd RESPONDENT RAMADHANI S/O SELEMANI LIVEVE.....4th RESPONDENT HABIBA D/O RASIDI KACHELE.....5TH RESPONDENT SAUDA D/O HAMISI CHAPAPA.....6TH RESPONDENT RUKIA D/O SALUMU MAPULA...7TH RESPONDENT HAWA D/O HASSAN CHILOWE....8TH RESPONDENT

JUDGMENT

Sh and 3(7 June 2023 LALTAIKA, J, The DIRECTOR OF PUBLIC PROSECUTIONS (herein after the DPP) is aggrieved with the decision of the District Court of Mtwara (the trial court): in Criminal Case No. 117 of 2021 adjudged in favour of the respondents. In a Petition of Appeal lodge in this Cour on the 1st of January 2023, he DPP has fronted three grounds of appeal as reproduced hereunder: Page 1 of 17

1. That the Honourable trial magistrate erred in law and fact for holding that the evidence adduced by the prosecution on the offence of malicious damage to property varied with the particulars contained on the charge.
2. That the Honourable trial magistrate erred in law and fact for wrongly concluding that the word damages and destruction they (sic!) are not similar, and they mean two different things.
3. That the Honourable trial magistrate erred in law and fact to conclude that the prosecution did not prove the offence beyond reasonable doubt. When the appeal was called for hearing on the 5th of June 2023, the DPP appeared through Mr. Melchior Hurubano, learned State Attorney whereas the respondents appeared In person without legal representation. Before moving on to the revival submissions, I think it is important, at this stage, to provide a brief

factual (and contextual) backdrop to the appeal and the controversy in general as can be gleaned from the court records. The respondents are members of NJENGWA VILLAGE in NANYAMBA, Mtwara Region. Nanyamba is a part of Mtwara District with its own Council commonly referred to as Halmashauri ya Mji wa Nanyamba, In 2021 police officers from MTWARA drove to NJENGWA village with a piece of paper containing names of some villagers. After consultation with the village authorities who called each of the respondents to the village office, the police arrested the respondents and drove back to Mtwara. As can be seen from letters later written by their village chairman to support bail application, they are all peasants. They own nothing more than mud houses and small cashew farms On the 21st day of December 2021, the respondents were arraigned in the trial court) charged with three counts to wit: (i) Conspiracy to Commit an Offence c/s to 384 of the Penal Code Cap 16 RE 2019 (ii) Malicious Page 2 of 17 Damage to Property c/s 326(1) of the Penal Code [Cap 16 RE 2019] and (iii) Stealing c/s 258 and 265 of the Penal Code, now RE 2022. When the charges were read over and explained to the respondents (then accused) they pleaded not guilty. The trial court conducted a full trial that lasted for almost a year. On the 22nd day of November 2022 the court (Hon. LM Jang'andu, SRJM) delivered the impugned judgement in which all respondents were set free. It appears that the second respondent HAMISI S/O AHAMAD MCHOMA and a person called YUSUPH DADI who would later testify in the trial court as PW1 (the complainant) had a protracted land conflict. The conflict is rooted in the family as the complainant and respondents are all distant relatives. The second respondent asserted that the complainant was given a piece of land by his mother after she was divorced. However, he left the land he was given and invaded the second respondents in the pretext that it was God's land {Ardhi ni ya Mungu). On the 16th day August 2021, the complainant was attacked. His houses and property valued: at TZS 9,277,135.12 were destroyed. Fearing his life, the complainant, and his wife Awana Seleman Nandiwa run away. They went to the neighbouring village of Chiwindi where they were assisted to rush to Nanyamba Police Station where they reported the matter. It appears however that the OCS at Nanyamba doubted the complainant's story. As the complainant's wife would later testify as PW2, the Afande OCS thought the conflict was related to witchcraft practices and dismissed them, Page 3 of 17 The complainant was not ready to go back to Njengwa. He proceeded to Mtwara Central Police Station where he narrated the ordeal. The complainant was advised to open a police case and investigation was launched leading to the arrest of the respondents and their subsequent arraignment as alluded to above. Although the respondents were acquitted in November 2022, the DPP's mind is that such an acquittal was erroneous. He prays to this Court to set aside the acquittal order, thereby convict the respondents, and sentence them accordingly. Here are the arguments advanced by the learned State Attorney and counter arguments by the respondents. The learned State Attorney announced that he was inclined to argue only the first and third grounds of appeal. Arguing in support of the first ground of appeal, Mr. Hurubano, the learned State Attorney, averred that the learned trial magistrate had erred in law and fact by holding that the evidence presented by the prosecution witnesses regarding the offense of malicious damage to property differed from the particulars in the charge. He stated that upon examining the charge sheet and the

proceedings, specifically pages 13 to 46, it was clear that there was no difference between the testimonies of the witnesses and the charge sheet. The learned State Attorney further pointed out that the argument made by the trial magistrate on page 18 of the impugned judgment, regarding the variation in the value of the destroyed houses as stated by PW4 (Valuer), was without merit. Mr. Hurubano argued that even though the Director of Public Prosecutions (DPP) had acknowledged the variation as a R40f 17 clerical error, it did not remove the offense of malicious damage to property since the respondents were charged with that offense. Regarding the offense of malicious damage to property, Mr. Hurubano stated that it was not necessary to establish the value of the property. He argued that the offense was based on the willful and unlawful act of damaging property. He requested that the ground of appeal be accepted. Moving on to the third ground of appeal, Mr. Hurubano was of a strong view the trial magistrate had erred in fact by deciding that the prosecution had failed to prove the offense beyond reasonable doubt. He referred to Section 326(1) of the Penal Code, which outlined the elements required to prove the offense of malicious damage to property. He cited the case of SCOLASTICA PAUL V. REPUBLIC [1984] TLR 1.87, where it was stated that evidence of damage or destruction and ownership of the property were necessary to constitute the offense. He also mentioned the case of LAURENCE MATEO V. REPUBLIC [1996] TLR 118 HCT, which discussed the element of malice in the offense and stated that malice did not necessarily mean personal spite but rather the intention of wrongful damage to the property. Mr. Hurubano asserted that the evidence presented by PW1, PW2, PW3, and PW6 proved beyond reasonable doubt that the appellants had committed the offense of malicious damage to property. He highlighted the testimonies of PW1 and PW2, who claimed ownership of the damaged property and stated that they had seen the respondents approaching their Page 5 of 17 homes on the fateful day. He also mentioned PW3, a thirteen-year-old schoolboy and son of the complainant who had witnessed people destroying the property as he was leaving school and had identified the respondents as the culprits during cross-examination. Additionally, he referred to the testimony of PW6, who had found people demolishing the house and cutting down trees upon arrival at PW1 and PW2's place and had mentioned the respondents involved. Concluding his argument, Mr. Hurubano prayed that the court allow the appeal. The respondent, on their part, not being learned in law, had no legal arguments to advance. Nevertheless, each of them had the following to tell the court in general terms on the grounds of appeal and the allegations levelled against them. The 1st respondent stated that he did not have any knowledge of the offense and claimed not to have been involved. He asserted that they did not witness anything and were not present on the day in question. During the lower court proceedings, he claimed that he had been summoned by the Ward Executive Officer and were informed that some guests would arrive and were later called again at 2 pm. Subsequently, the police arrested them and detained them at Mtwara police station for ten days before they were taken to court. The 2nd respondent stated that he did not remember anything about the events in the village. He mentioned an incident where they were almost attacked with a machete by a person named Yusufu Dadi, who had invaded their farm and destroyed various items. He explained that he Page 6 of 17 was injured with a

machete, resulting in a cut to his ear, which required stitches at Nanyamba Hospital, he maintained that they had already shared this information with the lower court and had nothing more to add. The 3rd respondent, a resident of Njengwa since 1979, who looked older than the rest in the group, stated that on the relevant day, he was at the market. He was called to the Ward Executive Officer's office, where he informed about the anticipated visit of visitors to the village. At 2 pm, police officers arrived and arrested them. They were subsequently remanded for ten days and later brought before the District Court. He claimed that during court proceedings, he consistently maintained his lack of knowledge about the events and were eventually set free. The 4th respondent, born in 1984 at Njengwa Village, claimed to have no knowledge of the matter under discussion. He explained that he happened to pass by the Ward Executive Officer's office on the day of their arrest, and upon being called inside, he was informed about a message from the regional office requesting their presence to meet visitors at 2 pm. They were subsequently interrogated by the police, despite being unfamiliar with the issues; He mentioned being one of the initial four respondents taken to the central police station and individually interrogated, consistently asserting his lack of knowledge. The 5th respondent a lady who looked rather tired and in despair, stated that she had nothing further to contribute. Nevertheless, she recalled being summoned to the Ward Executive Officer's office in October 2022, where she was asked to wait. Later, police officers arrived and Page 7 of 17 arrested her having asked if she was Habiba. She narrated further that they were then taken to the police station in Mtwara and subsequently charged. The 6th respondent, also a lady, mentioned being called to the Ward Executive Officer's office in October. She stated that after waiting, she encountered three other women and were subsequently arrested by the police, who took them to Mtwara and locked them up. The following morning, they were interrogated and accused of breaking into a house and stealing property. She stated that the same questions were asked during their court arraignment. Expressing her youthfulness and lack of knowledge of what the "elderly" were thinking about, she asserted her innocence. The 7th respondent, a not-so-young lady compared to the 6th respondent, stated that she was born in 1972 and claimed to have no knowledge about the matter and emphasized being taken away forcefully. She explained that she had been told to wait for visitors, and as the police arrived, they debated whether it was necessary to take the 7th respondent and her fellow women with them. Eventually, they decided to take the respondents, who numbered four in total (Habiba, Sauda, Rukia and Hawa). The 8th respondent's statement focused on being summoned by the Ward Executive Officer and visiting his office. She mentioned being born in 1985 and living in the same village throughout her life. She recounted being arrested and taken to the police in Mtwara, where she remained for Page 8 of 17 two days before being arraigned in court. During the court proceedings, she asserted her lack of knowledge about the events. I have dispassionately considered the grounds of appeal, the forceful submission by Mr. Hurubano in support of the same and the lower court records. I have also keenly observed the demeanor of the respondents as they offered their side of the story. The task ahead of me is to decide whether the appeal has merit. As alluded to earlier, the respondents were arraigned in court on three counts. Were they proved beyond reasonable court as required

by law? I will start with the first count: conspiracy contrary to section 384 of the Penal Code. First of all, the offence of conspiracy has three main ingredients, one, an agreement of more than one person to do an unlawful or a lawful act by unlawful means: See, MATTAKA & ANOTHER V R

[1971] E.A 495.Two, a willful agreement. Three, the intent to have a particular offence committed. In order to prove the offence of conspiracy all three ingredients must be proved. In the instant case no prosecution witness had adduced the evidence that the respondents agreed with intent to commit the offence of malicious damage to property and stealing. Furthermore, there in neither oral nor documentary nor electronic evidence that proves the offence of conspiracy. To this end, I am fortified that the prosecution had failed prove the offence of conspiracy beyond reasonable doubt. Page 9 of 17 Moving on to the second count of malicious damage to property the prosecution had a duty to prove three things as provided by section 326(1) of the Penal Code. First, that the accused/appellant herein acted willfully (with intent or malice). Second, there is damage or destruction of the disputed property. Third, proof of ownership of the damaged property. Section 326(1) of the Penal Code provides:- "Any person who willfully and unlawfully destroys or damages any property commits an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years". In the case of LAWRENCE MATEO VS R (Supra) the Court stated that:- "Before a person is convicted of that offence, malice, inter alia, must be admitted or proved. But the word malice here is not used in the sense understood by the layman; it is used in a technical sense. Here the word does not necessarily mean personal spite against the owner or possessor of the damaged property. It is enough if the accused intended wrongful damage to the property, because if that intention is admitted or demonstrated to have existed, the law will presume malice. The presumption is, of course, rebuttable!" See also the case of SCOLASTICA PAUL VS REPUBLIC (Supra) where the Court stated that:- "To constitute the offence of Malicious damage to property there must be evidence of damage or destruction of the property and the ownership of the property". Now, in the present case the evidence of damage or destruction of the property was adduced by PW1 (victim), PW2, PW3, PW4, PW6. However, Page 10 of 17 their evidence does not establish malice of the respondents to damage or destroy the properties. No prosecution witness testified as to why the respondents damaged the properties of the appellant. In other words, no mens rea or the criminal element was asserted. This may sound too theoretical, but I will come back to it later. The crux of the appellant's complaint is that the trial court acquitted the respondents on the ground that the evidence adduced by the prosecution witnesses on the offence of malicious damage to property varied with the particulars contained on the charge. In order to resolve this complaint, it is imperative to go through the particulars of the charge on the second count and the testimony of the prosecution witnesses particularly the key witnesses. The particulars of the second count provide that:- "...did willfully and unlawfully damage properties, to wit; two(2) Dwelling houses -worths Tsh 5,463, 2000/-,public toilet building worth Tsh 592,800/-,twenty-five (25) pineapple plants valued at Tsh 37,5000/-,eleven (11) soursop trees valued at Tsh.102,686.65,

one (1) lemon tree valued at Tsh. 7,282.60/-, four (4) banana trees valued at Tshs 116,352.64, sixteen (16) orange trees valued at Tsh 776,809.92/- one (1) mango tree value at Tsh 45,516.21 and eleven (11) coconut trees valued at Tsh 2,134,987.11 being properties of YUSUPH S/O DADI ULA YA." Now let us move to the proceedings. On page 14-15 of the typed proceedings PW1 (victim) testified that:- "Two houses were completely destructed (sic!), cassava, no toilets with the value of Tshs. 1,500,000/= well worthily Tshs.1,500,000/=, 4000 bricks valued at Tsh. 1000,000/=, bambara groundnuts, pineapple tree, 18 coconut trees. They cut all down 20 orange trees, one mango tree, banana trees which were, many, three beds worth Tsh, Page 11 of 17 450,000/= 3 mattresses all valued at Tsh. 450,000/=, 3 tables valued at Tsh. 140,000/=, stool and bench valued at Tsh. 20,000/=, four chairs @ Tsh. 2000/=, total value at Tsh 80,000/=, three bags contain clothes, decoder and full TV 43 inches valued at Tsh. 1000,000/=, 10 goats @ Tsh. 50,000/--, 20 pieces of galvanizing iron sheet @ 16500/= all valued at 150,000/= two bicycles all valued 220,000/=, 2 mobile phones make itel black in colour valued Tsh. 150,000/= value, of shop goods destroyed are Tshs. 2000,000/=, solar system, sub-woofer." Additionally, PW2 who is the wife of WP1 was recorded on page 19 of the typed proceedings testifying thus "They destroyed our houses and cut [down] trees. Everything: was destroyed, bricks, utensils, 10 goats, 5 chickens, TV system now, Oryza, one bag, Bambara nuts 100kg. AH shop goods, three iron, beads, and their mattress, subwoofer big and small one. Two houses, toilet, well coconuts trees, orange trees, banana trees, decoder, galvanizing iron, wood chairs, 4 bench, three bicycles." A careful examination of the above reproduced texts leaves no doubt that indeed the evidence of PW1 and PW2 features properties damaged which do not appear in the particulars of the offence of malicious damage to property. In addition, the evidence of both prosecution witnesses made additional numbers of alleged maliciously damaged properties. Now doubt, this is what impelled the learned trial magistrate to arrive to the conclusion that there was variation between the charge sheet and the evidence adduced. He was right. Faced with a more or less similar situation, the Court of Appeal of Tanzania in ISSA MWANJIKU @ WHITE VS REPUBLIC, Criminal Appeal No. 175 of 2018 (unreported) held as follows: Page 12 of 17 "We note that, other items mentioned by PW1 to be among those stolen like, Ignition switches of tractor and Pajero were not indicated in the charge sheet. In the prevailing circumstances of this case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard." In the upshot, I am fortified that the prosecution evidence is incompatible with the particulars of the second count. To this end it does not take much effort to arrive to the same conclusion as the trial court that the prosecution had indeed failed to prove the offence of malicious damage to property beyond reasonable doubt. As for the offence of stealing, I have read the testimonies of the two key witnesses (PW1 and PW2). In their examination in chief none of them testified on the offence of stealing. However, during cross examination they replied that some of the respondents stole their properties. Furthermore, PW6 testified that he saw women collecting utensils outside the house and in cross examination he mentioned the sixth and eighth respondent were the one who took the utensils. Based on this evidence it is quite clear that the respondents who are men

never stole the utensils, but they were also charged. Generally, the contradictions pinpointed above are not minor. They go to the root of the offence. More importantly, the items listed in the charge sheet alleged to have been stolen are not attuned to the ones testified by the prosecution witnesses. To this end, I am convinced that the prosecution had failed to prove the third count of stealing at the requires standard namely beyond reasonable doubt. Page 13 of 17 As J windup on this, I am inclined to state albeit in passing that the police are often blamed for acting too late. Delayed investigation is cited in many studies as a pediment to fair trial. In the matter at hand, the opposite is true. The police probably acted too fast. As they say, justice hurried in justice buried. Twill explain. When the complainant and his wife went to Nanyamba Police Station the Afande OCS did not act immediately. I am not saying it was right for him to accuse act that slowly nor (allegedly) accuse the complainant of engaging in witchcraft. The OCS probably needed more time to investigate why a villager would be invaded by fellow villagers with whom he had spent most of his life and destroy his houses and other properties. As alluded to above, the complainant proceeded to Mtwara Central Police Station where he met Afandes who are much senior than the OCS at Nanyamba. Unlike their Nanyamba counterparts, the Afandes in Mtwara acted swiftly I would say. They proceeded to arrest the 8 appellants. It appears that the appellants were arrested on different time. The 1st to 4th appellant who are male (Dadi, Hamisi, Ibrahimu, and Ramadhani) allege that they spent ten days in the police cell before they were taken to court. The 5th to the 8th appellants who are female (Habiba, Sauda, Rukia and Hawa) were not confined that long but they believe that the office of the World Executive Officer (WEO) tricked them to attend a meeting only to be arrested and taken to Mtwara. Although the 8 members of NJENGWA VILLAGE have been arrested, spent several days in remand custody and incurred costs to attend court . Page 14 of 17 sessions for almost a year, almost nothing has come out of it. The police and this court are still in the dark on what exactly happened at NJENGWA VILLAGE on the fateful day. The evidence adduced in the trial court does not address the fundamental issues expected of a multifaced conflict like the present one. As a matter of fact, the entire prosecution process has led to more questions that answers. Justice has been buried in a hurry. Although I sympathize with the complainant and his family for the insecurity and so much fear experienced as the appellants allegedly stated that he no longer lives at Njengwa, I think this is yet another opportunity for a reminder that the criminal machinery is not always the best approach to resolve social conflicts. Since the conflict at hand has to do with land matter, it should have been taken to a land court. A land or civil court is in a better position to extract evidence that goes beyond the narrow confines of a criminal case. A valuable piece of advice to the appellant is to avoid the sunk cost fallacy. According to the Oxford Dictionary sunk-cost fallacy is "77?a phenomenon whereby a person is reluctant to abandon a strategy or cause of action because they have invested heavily in it, even when it is dear that abandonment would be more beneficial. In legal reasoning, avoiding the sunk cost fallacy is used to advice parties to move forward, be open to other options and avoid never ending litigation. There is no doubt that the respondent had incurred a lot of costs in the past three years. These are direct and indirect costs. Sometimes the indirect costs

(emotional, high expectations and time) are the strongest Page 15 of 17 reasons for resistance to abandon a strategy. Are the senior afandes at Mtwara ready to accept that the OCS of Nanyamba was right in assuming that the conflict was more inclined towards civil than criminal? If so, what about the sunk cost of sending officers from Mtwara to arrest the appellants and testify in court? In an article titled The Sunk-Cost Fallacy-Why More Discovery May Backfire published in the February 2018's edition of The Bar Bulletins publication of the King County Bar, Justice Kim Prochnau, a former Superior Court Judge shares the following advice which, I believe, applies not only to civil litigation but also criminal issues as the present appeal: "The sunk cost fallacy is a mistake in reasoning in which the sunk costs of an activity are considered when deciding whether to continue the activity...While a sunk cost can seem like a frustrating position to be in, it doesn't have to be a total waste. Using other tools such as mediation or early neutral, evaluation can make the most of a challenging situation." In the present case, in spite of the cost incurred, reaching the threshold required to prove a criminal case seems too far away. Since conviction must be based on the strength of the prosecution case and not the weakness of the defence case, I have no choice but to dismiss the appeal in its entirety. It is so ordered 30.06.2023 Page 16 of 17 Court Judgement delivered under my hand and the seal of this court this 30th day of June 2023 in the presence of Mr. Melchior Hurubano, learned State Attorney for the appellant and the respondents. The right to appeal to the Court of Appeal of Tanzania fully explained. 30.06.2023 Page 17 of 17

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