

TANZANIA / JUDGMENT

EMMANUEL KISAU

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF TANZANIA AT MANYARA CRIMINAL
APPEAL NO. 000006233 OF 2024 (Originating from conviction and sentence in Criminal Case No.
16 of 2023 Kiteto District Court) EMANUEL K1SAU..... COMPLAINANT /
APPELLANT / APPLICANT VERSUS
REPUBLIC..... RESPONDENT /
DEFENDANT

JUDGMENT

3rd & 10th June. 2024 D. C. KAMUZORA, J. The Appellants were charged before the district court of Kiteto (hereinafter referred to as the trial court) for the offence of malicious damage to property contrary to section 326 (1) of the penal code [CAP 16 RE 2022]. It was alleged by the prosecution that on 30th and 31st January 2023. the Appellants wilfully and unlawfully destroyed 75 acres of maize and sunflowers crops valued at TZS 52.226.000/= the property of one Mussa Haruna. The Appellants pleaded not guilty to the charge hence, full trial and in attempt to substantiate its case the prosecution paraded a total of five witnesses and tendered one documentary evidence. On the other hand, the defence had four witnesses. A brief background leading to the arraignment of the Appellants before the trial court as could be gathered from the record is that. PW1 rented a farm measuring about 75 acres from PW3 and planted maize and sunflowers. On 30/1/2023 PW1 got information from PW2 who was looking after the farm that cows were grazed in his farm. PW1 reported the matter to the police and they visited the scene and found that maize and sunflowers plants were damaged. PW I further testified that on the following day on 31/1/2023 he went again to the farm and found cows owned by Mzee Lengalu being grazed in the farm by about 10 people but he was able to identify the Appellants amongst the herdsmen. PW I narrated that there were many cows about 2000. The evidence of PW1 was supported by PW2 who was looking after PW1's farm. He testified that on 30/1/2023 while at the farm, he saw cows being grazed in the farm by about 7 herdsmen. That, PW2 tried to stop the cows from entering the farm but he was threatened by the herdsmen who told him to choose either to let the cows eat Paae 1 Hnn DfVOTHA KAMUZORA the maize or get beaten up. PW2 claimed that he was able to identify the Appellants herein among the herdsmen who were grazing cattle in the farm owned by PW1. PW4, is the agricultural officer who conducted damage assessment of the farm owned by PW1. He testified that the crops in whole farm measured about 75.8 acres were totally destroyed and few crops were half damaged. I ie assessed the total loss for

the maize as TZS 49,131.000/= and sunflower as TZS 375.000/= making total loss was TZS 52,226.000/=. In their defence, the Appellants denied to have committed the offence. After a full trial, the trial court was satisfied that the case against the Appellants was proved hence, it convicted and sentenced them to three years imprisonment. Being aggrieved with the conviction and sentence meted out against them, the Appellants have preferred this appeal. Initially, the Appellants filed three grounds of appeal as follows;

1. That, the trial magistrate erred in law and facts by convicting the Appellants herein while the prosecution failed to prove the case beyond reasonable doubt.
2. That, the trial magistrate failed to evaluate the evidence on record, hence arrived unjustifiable and problematic judgment against the Appellants herein.
3. That, the trial magistrate erred in law and facts by composing judgment without considering the Appellant's defence. Later on, they filed additional grounds of appeal as follows;
 1. That, the learned trial magistrate erred in law and facts by considering the evidence of PW1 which was hearsay.
 2. That, the learned trial magistrate erred in law and in fact for considering uncorroborated evidence of PW1 and PW2 in material particulars.
 3. That, the trial magistrate erred in law and fact by considering the evidence of PW4 who is not qualified as a valuer according to the law. When the appeal was called for hearing, Mr. Nikolaus Senteu, learned advocate represented the Appellants while Ms. Rhoida Kissinga, learned State Attorney represented the Respondent. The appeal was disposed of orally. In his submission in support of appeal Mr. Senteu abandoned the 2nd ground of appeal in the original petition and he consolidated the 1st and 3rd grounds in the petition of appeal. As to the additional grounds of appeal, he consolidated the 1st and 2nd grounds while he argued separately the 3rd ground. Submitting on the 1st and 3rd grounds, Mr. Senteu faulted the trial court in convicting the Appellants while the case was not proved beyond reasonable doubt and the trial court failed to consider the evidence of the Appellants. He argued that, as per the charge, the Appellants were charged with malicious damage to property and the offence is alleged to have been committed on 30th January 2023, but there were a lot of issues that were not resolved in court. Pao? 7 linn DFOVOTHA KAMII7ORA He pointed out that, there are two dates on which the offence is allegedly committed. That, while at page 6 of the proceedings PW1 claimed that he reported to the police station and the police went at the scene, on the same date PW2 who is a key witness testified at page 10 of the typed proceedings that he was at the farm alone and when the cows entered the farm, he informed PW1 who later informed PW3. That, later at 15:00hrs, PW3 went to the farm and did not find anyone or the cows. He added that, there was a gap in the evidence of PW2 and PW1 because PW2 who was in the farm never mentioned if PW1 went to the farm. To him, on 30th January 2023, there is no witness who recognised the Appellants in the farm as it was also testified by PW3 that, he never found anyone at the farm. That, even PW2 never told the trial court if he recognised the Appellants although he later at page 10 of the typed proceedings, claimed

that he recognised two people thus contradiction on what time did PW2 recognise the Appellants. The Appellants' counsel maintained that those contradictions create doubts. The learned advocate submitted further that, on the 31st January, PW1 claimed to have met 10 Maasai and recognised two of them who are the Appellants herein. He argued that PW1, did not state how he recognised two people among the 10 people. That. PW2 who is the key witness never recognised anyone. That. PW3 at page 15 of the typed proceedings claimed to recognise two people who are the Appellants but never described how he recognised them and when he was cross examined, he did not describe their clothing. Referring to section 3(1)

- (a) of the Evidence Act, [Cap 6 RE 2022], the learned advocate argued the prosecution is bound to prove its case beyond reasonable doubt. He was of the view that, there were a lot of doubts in prosecution evidence. To buttress his arguments, the learned advocate referred to the case of Maruzuku Hamisi Vs Republic. [1997] TLR I page 17 to 18. The learned advocate submitted further that, DW1 and DW2 (the Appellants herein), testified before the trial court that they were not at the scene of crime and their evidence was supported by DW3 and DW4 who also informed the court that the Appellants were grazing their cows at grazing land called Ami. That. DW3 tendered before the trial court Exhibit DEI which shows that the Appellants were granted permit to graze their cows in the said land and DW4 tendered exhibit DE2 which is a certificate of land for grazing. The learned advocate referring the case of Maruzuku (supra) and the proceedings insisted that the Appellants' evidence raised reasonable doubt and since the prosecution evidence had contradictions, the trial court erred in convicting the Appellants. In his submission in support of the 1st and 2nd additional grounds of appeal Mr. Senteu submitted that, the testimony of PW1 is purely hearsay as he narrated what he was told by PW2. That, since the evidence shows that, on 30th PW1 was not at the farm, his testimony was a lie. He pointed out that, PW1's evidence contradicted the evidence of PW2 who was at the farm and the latter informed the court that it was PW3 who went to the farm. To him. there was no corroboration of evidence between PW2 and PW1. Submitting on the 3rd additional ground of appeal, the learned advocate for the Appellants faulted the trial magistrate for relying on the evidence of PW4 as seen on page 7 of the judgment. He submitted that, section 3 of the Valuation and Valuers Registration Act No. 7 of 2016 (hereinafter referred to as the Act) defines a valuer. I le Pane 7 Hnn nFVOTHA KAMII7ORA argued that, PW4 was a diploma holder thus, does not meet the requirement of the law. That, the evidence by PW4 who is the agricultural officer also shows that he admitted that he is not a valuer. The learned counsel added that under section 10(1) and (4) of the Act, any full registered valuer may be appointed and be authorised valuer and the appointment must be published in the government Notice. He pointed out that, the testimony of PW4 does not show if he was appointed as valuer or gazetted. To buttress his arguments the learned advocate referred the case of Franck Onesmo Vs Republic, Criminal Appeal No. 147 of 2019, Tanzlii. He maintained that. PW4 was neither an expert nor did he possess sufficient skills to conduct valuation as he was not appointed and gazetted for that purpose. The learned advocate therefore urged this court to allow the appeal and the

judgment, conviction, sentence and orders passed by the trial court be quashed and set aside. In reply, Ms. Kisinga supported the conviction and sentence passed by the trial court. Arguing for the 1st and 3rd grounds of appeal, Ms. Kisinga submitted that the case against the Appellants was proved beyond reasonable doubt for the reasons in terms of section 326(1) of the Penal Code, and the case of Simon Markiadi Vs Emmanuel Markiad, PC Criminal Appel No 5 of 2023 [2023 TZHC 19669] page 4. That, the ingredients of the offence of malicious damage to property were proved; one, there was proof that the complainant owns the properties, two, it was proved that the said properties were damaged, three they were damaged by the accused persons (Appellants herein) and four, that the act of damage was be actuated by malice. She explained that, the evidence by PW1 and PW3 is clear that PW1 was the one cultivating the farm after he hired it from PW3 thus, at the time the damage was caused, the farm was in PW1 possession and he had planted maize and sunflowers. That, the evidence of PW1, PW2, PW3, PW4 and PW5 proves that the properties were damaged as they went to the farm and witnessed the damage to the maize and sunflowers caused by the cows and they also saw cow dung and prints proving that the cows entered into the farm and damaged the crops. That, there is evidence that the crops were damaged by the Appellants, as that was proved by the evidence of PW1. PW2 and PW3. That, the evidence reveals that PW1 received information from PW2 that his crops were damaged by cows and he went at the scene and did find 75 acres were grazed to the cows. That. PW2 informed PW1 that the people who grazed the cattle to his farm were Mkapa and Emmanuel (the Appellants herein). That, on the next day on 30/01/2023, PW2 witnessed the Appellants grazing cattle in the farm and on the same date PW3 also went to the farm after being phoned by PW1. That, PW2 identified the Appellants among the herdsmen and mentioned their names as Kisau and Mkapa as they were neighbours to the farm he was supervising. The learned State Attorney further explained that PW2 identified the cows with mark C and III as belonging to Lengaku Mkapa. Kisau and Kariakoo. That, on 31/01/2023 PW1 and PW3 witnessed the cows being grazed in the farm and they identified the Appellants among the herdsmen who were grazing the cows in the farm. To her, the crops were damaged by the cows grazed in the farm by the Appellants. She added that the Appellants had malice in grazing cows in the farm because the incident occurred consecutively for two days, on 30th and 31st January, 2023. That, on the first day on 30th January PW2 tried to stop the Appellants and their fellows but they Pane 4 Hnn DF.VOTHA KAMIJ7ORA threatened him thus, they had intention to graze cattle in the farm. She concluded that all elements of the offence were proved beyond reasonable doubt. Regarding the contradictions pointed out by the Appellant, the learned State Attorney agreed that PW2 claimed to have informed PW1 and then police but no evidence showing that the police went at the scene on 30th. She however insisted that the contradiction if any, was minor. On the argument that the trial court failed to consider the Appellants' evidence, the learned State Attorney argued that, the omission not to consider the accused's defence is not fatal. She urged this court to step into the shoes of the trial court and evaluate evidence to reach to a correct decision. To buttress her position, she referred the case of David Zablon @ Lusomo Vs Republic. Criminal Appeal No 241 of 2020, [TZCA 17748] page 12 and the case of Julius Josephat Vs Republic. Criminal

Appeal No 3 of 2017. [2020 TZCA 1729] page 12. The learned State Attorney added that, the Appellants did not prove their whereabouts on 30th and 31st as neither the Appellants nor their witnesses were able to state if they were at Kimana or another place on the alleged dates of incidents. She maintained that the Appellants were clearly identified as among people who were grazing cows in the farm belonging to PW1. On the 1st and 2nd additional grounds of appeal, the learned State Attorney submitted that the evidence of PW1 was not hearsay. She explained that. PW1 was informed of the incident by PW2. That, although PW1 did not see the Appellants on the first day on 30th, he witnessed the crops being damaged by cows when he visited the farm and saw the cows' foot prints and cows' dung. That, on the second day on 31st. PW1 personally witnessed the Appellants and others grazing the cows and since they were outnumbered, they could do nothing and instead they reported to the police station. She insisted that, the evidence by PW1 was corroborated by PW2 and PW3 as they both witnessed the cows being grazed in the farm and could not be considered as hearsay evidence. On the 3rd additional ground, the learned State Attorney submitted that PW4 was qualified to assess the damage caused in the farm because he is the agricultural officer responsible for assessment. She argued that, it is only the agricultural officer who can properly evaluate damage to crops. That, being the agricultural officer, PW4 was assigned to conduct assessment by his superior officer who is the Executive director of Kiteto District. She was of the view that, the provision of the law referred to by Mr. Senteu refers to real estate while in the matter at hand, is not about land issue rather damage to crops. That, the valuer within the meaning of that provision is not related to the valuer in agricultural activities. The learned State Attorney added that, at the time of hearing, the Appellants were well represented by the advocate thus, if there was legal issue regarding the capacity of PW4, they were bound to cross examine the witness on that fact. She referred to the principle that, a party who fails to cross examine a witness in a certain matter is deemed to have accepted the matter and will be estopped from asking the trial court to disbelieve what the witness said. Reference was made to the case of Chora Samson @ Kiberiti Vs Republic, Criminal Appeal Ni 516 of 2019 [2021 TZCA 628] page 12, the court reiterated the position in Nyerere Nyague Vs Republic. She concluded that, in malicious damage to property valuation is not necessary to convict the accused. She Papp 5 Hnn DfVOTHA KAMIJ7.ORA therefore urged the court to uphold the conviction because there is no sound ground to quash the trial court's conviction. In rejoinder. Mr. Senteu argued that, there is no single line in evidence showing that the ownership of the farm was proved and that was not even the issue before the trial court. He reiterated his stance that there was no correct evidence on identification of the Appellants and that, the defence evidence was not considered. Having gone through the parties' rival submissions, I will argue all grounds jointly as there are centred on evidence analysis save for the 3rd additional ground which refers to the capacity of PW4 as the witness who assessed the damage and prepared the valuation report. From those other evidence, three issues need to be looked into; one. whether the trial court's decision was based on contradictory, inconsistent and hearsay evidence, two, whether the Appellants evidence was considered by the trial court and three, whether the offence of malicious damage to property was proved beyond reasonable doubt. Starting with the issue on

whether there the trial court's finding was based on contradictory, inconsistent and hearsay evidence, this court undertook the duty of re-evaluating the evidence on record to see if there was any material contradiction or inconsistency that could vitiate the trial court's finding. From his evidence, PW1 categorically told the trial court how he received information from PW2 on 30/1/2023 and he also reported to the police. He explained that on that date he visited the farm but did not find the Appellants or the cows in the farm. I le however saw the crops damaged and PW2 mentioned to him the Appellants as among the people who were grazing cows in the farm. PW1 also claimed to have witnessed the cows being grazed in the farm on the next day 31/1/2023. He himself identified the Appellants among 10 people who were grazing the cows. The fact that PW1 was informed by PW2 that cows were grazed in the farm cannot be regarded as hearsay because, it was information from the source. PW1 also visited the farm and witnessed the damage caused although by that time the cows were already removed from the farm. Again, PW2 who was tasked with a duty of taking care of the farm by PW1 explained clearly that he was the only one who witnessed the cows being grazed in the farm on the first day on 30/1/2023. I le was able to identify the Appellants from the group of herdsmen and he informed the farm owner (PW1) and PW3. He also admitted that when PW1 arrived at the farm, he found the cows had already left but on the next day 31/1/2023 they both witnessed the cows being grazed in the farm again by Appellants and their fellows. Equally, PW3 witnessed the damage on the farm on 30/1/2023 and not act of grazing the cows by the Appellants but on 31/1/2023. he witnessed the grazing in the farm by the Appellants and their fellows. PW3 gave detailed evidence that he knew the Appellants for a long time and was able to identify the owners of the cows by their marks. That, he had conversation with the Appellants and did take photos of the cows. From the above assessed evidence, I did not find any material contradiction or inconsistency in the evidence of PW1, PW2 and PW3. It is clear that PW1, PW2 and PW3 were eye witnesses and accounted for what they saw on 30th and 31st January, 2023. Thus, I do not agree with the Appellants' argument that the decision of the trial court was based on hearsay evidence for the evidence of PW1 cannot be termed as hearsay for the reason Pane 6 Hnn DFVOTHA KAMII7ORA advanced above. It is for that reason. I find that, the trial court's decision was neither based on contradictory nor inconsistent evidence or hearsay evidence. Regarding the second issue on whether the Appellants' evidence was considered by the trial court. I have gone through the trial court's judgment and discovered that at page 7 to 8. the trial court duly considered the Appellants' defence in which they denied to have caused damage on the PWI's farm. The trial court analysed the evidence on record and came up with the conclusion that the Appellants were properly identified when grazing cattle in PWI's farm. I have also noted that, at page 9 of the typed proceedings, the Appellants' advocate informed the trial court that the Appellants intended to rely on the defence of alibi and that was after prosecution's case had commenced. However, at page 28 of the typed proceedings, the advocate for the Appellants prayed to withdraw their prayer to relied on defence of alibi and such prayer was granted. I have assessed the Appellant's defence and find that it does not establish any reasonable doubt to the prosecution evidence. All Appellants (DW1 and DW2) claimed in their defence that on the material date of incident they were grazing cattle

at Amei which is almost 20 kilometres from the farm allegedly damaged. They paraded two witnesses; DW3 who was the village chairman and DW4 their fellow pastoralist. The evidence from DW3 is to the effect that the Appellants were issued grazing pennit to graze their cattle at Amei village and the same was admitted as exhibit. He however did not corroborate their evidence if at all they were at Amei at all times on the material date of incident. DW4's evidence is to the effect that the Appellants were among the members of pastoralists allowed to graze their cattle within the designated grazing land at Amei. He tended a certificate for the land registered for grazing, a government notice for the designated grazing land and a sketch map for the grazing land. Those documents do not prove anything when it comes to entering and grazing cattle to another place. DW4 agreed in his evidence that the Appellants were permitted to graze their cattle at Amei village but they were residing at Kimana village. This is where the offence was allegedly committed thus, having permit to graze cattle at Amei in itself is not conclusive evidence that they never entered into the complainant's farm at Kimana. DW4 was unable to account for the Appellants' whereabouts on the material date of incident as he failed to state even the date to when the Appellants were arrested. In that regard. I find that the Appellant's' defence of alibi was not well supported to raise reasonable doubt on prosecution evidence. This would take me to the third issue on whether the offence was proved beyond reasonable doubt but before I go to that issue. I find it pertinent to first address the fourth issue on whether PW4 was a proper person to assess the damaged crops. The Appellants faulted the trial court for relying on the evidence of PW4 on ground that he was not a qualified valuer according to the law. With due respect. I do not agree with the Appellants' contention that the agricultural officer is not a qualified person in assessing damage caused to the farms and or crops. Exhibit PEI is prepared in form of assessment report and not a valuation report within the meaning of Section 10 of the Valuation and Valuers Registration Act No. 7 of 2016. In my view, being the agricultural officer at ward level, PW4 had powers to assess the damage caused in the farm within his jurisdiction. It does not need a full registered valuer to assess that cows were grazed in the farm and caused damage to the crops. Paw 7 Hnn HFVnTHA KA MI 170 kA It is on record that PW4 tendered the assessment report as exhibit PEI and the Appellants who were represented by an advocate neither objected its admission nor cross examined PW4 whether he was a qualified officer to assess the damage. Hence, in the light of the authority cited the learned State Attorney, failure to cross examine a witness on important fact amounts to admission of such fact. In addition. I agree with the argument by the learned State Attorney that, even in the absence of the report, the offence of malicious damage to property under section 326(1) of the penal code can still be proved if there is strong prosecution evidence to that effect. The valuation or assessment report is much intended to establish the value of the crops damaged and does not defeat the direct evidence from the witnesses who witnessed the damage. I therefore find the argument that PW4 was not a qualified officer to assess damage baseless. Turning to the third issue on whether the offence of malicious damage to property was proved. I am convinced with the argument by the learned State Attorney based on section 326(1) of the penal code and the case of Simon Markiadi Vs Emmanuel Markiad. (supra) on the ingredients of the offence of malicious

damage to property. I agree that the evidence on record clearly proved all the ingredients of malicious damage to property. It is not in dispute that PW1 rented the farm from PW3 and cultivated it by planting sunflowers and maize hence, the former was the owner of the crops at the time of damage. According to the evidence of PW1, PW2, PW3 and PW4 the said crops were damaged by the cows which were grazed in the farm. It is also in evidence that the Appellants and their fellows are the ones who drove the cattle into the farm as they were identified by PW1. PW2 and PW3. The evidence also proves that such damage was actuated by malice as the offence was committed in two days consecutively on 30th and 31st January, 2023. PW2 who was looking after the farm tried to stop the Appellants and their fellow herdsmen but he was threatened and told to choose between letting the cows feed on the crops or get beaten up. PW2 saw the Appellants for two days grazing the cows and identified them as neighbours. Likewise, PW3 identified the Appellants as neighbours and went further by identifying the owners of the cows. Therefore, I find the prosecution was able to prove the case against the Appellants beyond reasonable. In final analysis I find the appeal lacking merits and I proceed to dismiss it. The conviction and sentence meted out against the Appellants by the trial court are upheld. DATED at BABATI this 10th Day of June, 2024. D. C. KAMUZORA JUDGE Pane X Hnn DFVOTHA KAMUZORA Dated at THE HIGH COURT OF TANZANIA AT MANYARA this 10th of August 2024 . D. C KAMUZORA JUDGE OF THE HIGH COURT Paoe 9 Hnn DFVOTHA KAMUZORA

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