

TANZANIA / JUDGMENT

NGALAYO TAYEI 222 Eduted

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4 November 2024

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF TANZANIA AT MANYARA CRIMINAL
APPEAL NO. 000013124 OF 2024 NGALAYO TAYEYI..... COMPLAINANT I
APPELLANT I APPLICANT VERSUS REPUBLIC..... RESPONDENT / DEFENDANT

JUDGMENT

D. C. KAMUZORA, J 23th September & 04th November, 2024 The appellants were aligned before Kiteto District Court charged with two counts of malicious damage to property contrary to section 326(1) of the Penal Code [Cap 16 R.E 2022]. It was alleged that, on 01/02/2023 at Uburungeni area, Kimana village within Kiteto district, the appellants did willfully and unlawfully destroy crops namely; maize, sunflower and peas valued at TZS. 84,068,000/- by grazing cattle in 120 acres' farm, the property of Wilbethi Mangura. That, the appellants also destroyed maize by grazing cattle to the farm measuring 50 acres valued at TZS. 29,169,000/= the property of Joshua Jonas. The appellants pleaded not guilty to both counts and in attempt to substantiate its case against the appellants, the prosecution paraded six witnesses and tendered three exhibits. On the other hand, the defence had 14 witnesses. After hearing evidence from the parties, the trial court was convinced with the prosecution evidence hence, convicted and sentenced the appellants to pay fine or serve jail term in default of fine. A brief factual background underlying the instant appeal, as could be gathered from the record is that, on 01/02/2023 PW1 received a phone call from his farm supervisor (PW2) about the presence of cows into his farm. PW1 reported the matter at Kibaya police station and he went to the scene accompanied by police officers. On arriving at his farm, PW1 saw more than 1000 cows in his farm being grazed by 12 Maasai boys. PW1 was able to identify three of the herds boys; the first, third and fifth appellants. That, everything in the farm was damaged thus, they shepherded the cows to the local government offices. That, on 02/02/2023 the owners of the cows among them the eighth appellant showed up and were handed back their cows. PW2 was the farm supervisor at PW1's farm and his evidence is similar to that of PW1. He was the one who notified PW1 after he found the cows being grazed into the farm by Maasai boys. He narrated that he was able to identify the first, fifth, sixth and ninth appellants. PW3 testified that on 01/02/2023 he received a phone call from PW2 that cows were being grazed into his farm. He reported the matter at police station and went to the scene where he found more than 1000 cows being grazed into his farm by 12 Maasai boys who run away after seeing police officers. PW3 was able to identify the second, fourth and sixth appellants. PW4 conducted damage assessment on the two farms owned by PW1

and PW3 and tendered reports; exhibits PEI Page. 1 Hon.. DEVOTHA KAMUZORA and PE2 respectively. PW5 had the task of handing over the seized cows back to their owners and he tendered exhibit PE3 as handing over document. PW6 was the investigator of the case, he visited the scene together with PW4 and found that the crops were damaged. He narrated that PW4 conducted damage assessment and 9 people were arrested in connection with such damage. In their respective defence, the appellants flatly denied to have committed the offences they were charged with. They maintained that they never grazed cows in the farms owned by PW1 and PW3 rather grazed their cows at Amei. After hearing the matter, the trial court was convinced that the case against the appellants was proved to the standard required hence, it convicted and sentenced the appellants to pay fine at the sum of TZS 100,000/= or serve three years in prison. However, for the second appellant who was considered a minor, his parent was ordered to pay fine at the sum of TZS 50,000/= or the second appellant serve one 1 year in remand home in default of payment of fine. The appellants were displeased with the conviction and sentence meted out against them and being represented by Mr. Jeremia Mjema, learned advocate, they preferred the instant appeal with 12 grounds of appeal. However, in his submission in support of the appeal, Mr. Mjema consolidated the second, third, and fifth grounds, the fourth and ninth grounds but the sixth and eighth grounds of appeal were argued separately while he abandoned the first, seventh, tenth, eleventh and twelfth grounds of appeal. In determining this appeal, I will only list and renumber the grounds of appeal which were argued on merit by the counsel for the appellants as follows;

1. That, the charge sheet prepared and laid at the appellants' door was defective.
2. That, the charge sheet was amended without addressing the appellants on it.
3. That, there was variance between the prosecution evidence and charge sheet.
4. That, the third appellant was improperly prosecuted for he was a minor.
5. That, the appellants were not properly identified at the crime scene.
6. That, the prosecution did not prove the case against the appellants to the standard required.
7. That, there were contradictions and inconsistencies in the prosecution evidence. From the above grounds there are three issues for determination; the first issue whether the trial was vitiated by charging the second and third appellants who were minors alongside with other appellants who were adults, the second issue is whether there was variation between the charge and the evidence and lastly whether the offence against the appellants was proved. In his submission on the charge sheet, Mr. Mjema submitted that the charge which was laid against the appellants shows that they were jointly charged for malicious damage to property under section 326(1) of the Penal Code. That, the third appellant was a minor below 14 years but he was charged with adults. He added that the 2nd appellant was equally a minor. That, the amended charge sheet indicated that the third appellant was 24 years old. That, the appellants' advocate raised a concern regarding the third appellant's age and the trial court ordered the charge to be amended but no amendment was done. He argued that

the third appellant was required to be prosecuted in accordance with the Law of Child Act [Cap 13 R.E 2009], (hereinafter referred to as the LCA). That, since the trial court was not designated as Juvenile court, it lacked jurisdiction to try the matter. To buttress his arguments, the learned advocate referred the decision of this court in the case of Ramadhani Juma Mpalupalu vs Republic Criminal Appeal No. 109 of 2020 (unreported). He also referred the case of Ibrahim Hashim Salumu @ Abuu vs Republic Criminal Appeal No. 2637 of 2024 on the effect of failure to amend the charge sheet. He was of the view that the sentence passed against the second and third appellants were illegal. The learned advocate also submitted that, the appellants were charged for damaging properties belonging to Joshua Page. 2 Hon.. DEVOTHA KAMUZORA Jonas and Wilbeth Mangula. That, the properties allegedly damaged as per the charge were maize, sunflower and peas but in his evidence, PW1 claimed that he cultivated maize and sunflower and when he was cross examined, he claimed that there were no pigeon peas. That, when testifying PW2 clearly narrated that he cultivated maize, sunflower and pigeon peas but when he was cross examined, he stated that he cultivated maize and there was no sunflower. That, PW4 claimed that the farm had maize and when he was cross examined, he stated that he saw damaged maize and there was no sunflower. That, PW6 claimed not to have seen pigeon peas. That, the valuation report referred damaged maize and not sunflower. The appellants' counsel further submitted that there was variation in the location of the scene. That, while PW1 stated that farming activities were carried at Nabilikunya the fact which was supported by PW4, the charge sheet indicated that the offence was committed at Uburungeni area Kimana village. Based on that evidence, the appellants' counsel insisted that there was variance between the charge and evidence adduced rendering the offence against the appellants not proved for the prosecution did not amend the charge in accordance with section 234 (1) of the Criminal Procedure Act [Cap 20 R.E 2022], (hereinafter referred to as the CPA). To buttress his argument, he referred the case of Iman Paul Kavishe @ Maximilan vs Republic Criminal Appeal No. 677 of 2020 Court of Appeal of Tanzania at Moshi (unreported). In his submission regarding the identification of the appellants at the scene, the counsel for the appellants submitted that while PW1 testified that he saw 12 Maasai and he was able to identify the first, third and fifth appellants but when under cross examination, PW1 admitted that he did not tell how they dressed because they run away. That, PW2 claimed to have seen the ninth, sixth, fifth and first appellants while PW3 claimed to have seen the second, third, and fourth appellants but while under cross examination, PW3 he did say how they were dressed. He argued that, while both witnesses claimed to have identified the appellants no one could not describe the appellants' attire. That, PW2 who was at the crime scene did not mention to PW1 or PW3 the names of the appellants. The counsel for the appellants further submitted that, there was unexplained delay in arresting the appellants which raises doubt on the credibility of the witnesses as to whether there was correct identification. He referred the case of Mugambo Saanane & another vs Republic Criminal Appeal No. 255 of 2021 Court of Appeal of Tanzania at Bukoba (unreported) on the delay in arresting the culprit. As regard to the proof of the case, the counsel for the appellants submitted that the prosecution failed to prove two major ingredients. Referring page 9 of the

trial court's judgment to which the trial court concluded that there was no ownership dispute the counsel for the appellants submitted that, PW1 claimed that he owned 120 acres but when he was cross examined, he claimed that he rented the farm. That, PW2 claimed that the farm was owned by his uncle and he supervised PW1's farm. That, PW3 claimed that he owned 15 acres but on cross examination he claimed that he rented the farm from Ngalaboi. That, such evidence differs from the facts in the charge sheet which shows that PW1 and PW3 are owners hence, creating a contradiction between the charge sheet and the evidence. The appellants' counsel also submitted that, the prosecution failed to prove malice and there was no identification as whose cows damaged the crops. That, PW2 did not tell the marks of the cows and PW3 claimed that, the cows were returned to the owners but he did not know the owners. That, the prosecution did not prove the owners of the cows allegedly grazed in the farms owned by PW1 and PW3. He insisted that the ingredients of the offence as expounded in the case of Julius Malobo cited by the trial court were not proved and therefore urged this court to allow the appeal. Mr. Raphael Rwezahula, learned state attorney represented the respondent and strongly supported the conviction and sentence meted against the appellants save for sentence passed against the 2nd and 3rd appellants. In his reply Page. 3 Hon.. DEVOTHA KAMUZORA to the grounds of appeal, Mr. Rwezahula, commenced with the issue of proof and strongly submitted that the case against the appellants was proved to the standard required. He argued that in order to prove the offence the malicious damage to property, it must be established that; the complainants are the owners, the property must be damaged, the damage was caused by the accused and with malice. He considered the evidence by PW1 and PW3 to have proved that they cultivated the crops in those farms. That, such evidence was supported by other prosecution witnesses who testified that PW1 and PW3 were owning the farms and there was no issue regarding the ownership of the farms that was raised thus, renting the farm was not an issue. The learned state attorney further submitted that, all the prosecution witnesses were able to testify how the crops were damaged and PW4 conducted valuation which proved the damage caused and the value for the damaged crops. That, the evidence proved that the damage was caused by the appellants jointly. That, the evidence shows that the offence was committed in the morning hours at 10.00 hours. PW1 was able to identify the first, third and fifth appellants for he knew them as they reside in the same place. PW2 also identified the ninth, sixth, fifth and first appellants as they used to meet. PW3 was able to identify the second, fourth and sixth appellants at the scene as he knew them and they used to meet most of the time. He agreed that PW3 did not mention the attire but quickly pointed out that in considering that they testified after the lapse of three months, the witnesses could not remember the attire. The learned state attorney added that, failure to mention the attire does not go to the root of the case. He insisted that the damage was intentional because PW2 tried to stop them from grazing the cows but they threatened him and they grazed the cows for about 40 minutes. That, the appellants fled away after seeing the police thus, there was malice during and after the incident. He was of the view that, the marks on the cows were immaterial since there were many cows. As regard to the ownership of the cows, the learned state attorney submitted that, the same were owned by the people who were at the scene

and the appellants were identified at the scene by their faces and names. On the contradiction in evidence, the learned state attorney agreed that PW1 testified that he cultivated maize and sunflower and there were no pigeon peas while the charge sheet indicated maize, sunflower and pigeon peas. He however argued that PW2 mentioned all crops thus, the difference was cured by the evidence of PW2, PW3 and PW4. As regard to the variance between the evidence and the charge sheet, the learned state attorney submitted that PW1 claimed to reside at Nabilikunya but was doing farming activities at Burungeni thus no contradiction. On the charging of the 3rd appellant, the learned state attorney agreed that, the third appellant was below 18 years old and the prosecution did not amend the charge. He however argued that, where a child is charged jointly with adults, he will be charged in normal courts but the punishment will consider the sentence under the LCA. That, the argument that the third appellant should have been charged in the juvenile court is not correct and the authority referred by the learned advocate for the appellants is irrelevant since it refers the case where the child was charged alone before an ordinary court. He however agreed that, the sentence passed against the second and third appellants was illegal therefore, he urged this court to impose a proper sentence against them. In concluding, the learned state attorney prayed for this court to dismiss the appeal and sustain the conviction and sentence save for the sentence passed against the second and third appellants. In rejoinder, the learned advocate for the appellants essentially reiterated the submission in chief. Having gone through the parties' rival submissions and the record before me, I will begin my deliberation with the first issue in which the trial court is faulted for including the minor who was supposed to be charged before the juvenile court. It is true that the trial against the appellants were conducted before the ordinary court while the 3rd Page. 4 Hon.. DEVOTHA KAMUZORA appellant was a minor. The trial against a child is governed by the LCA which requires a child to be charged before a juvenile court. The said Act does not prescribe the procedures where a child is jointly charged with adults. However, section 100 (1), of the LCA gives exceptional circumstance under which hearing of a case against a child may be conducted in the same premise to which ordinary proceedings are conducted where the child is jointly charged with adults. This in my view, creates an exception where the child is charged jointly with adults and the circumstance does not accommodate separate charges. Since adults cannot be prosecuted before the juvenile court and the third appellant was charged jointly with adults, the trial was properly conducted before the ordinary court hence, the decision in the case of Ramadhani Juma Mpalupalu vs Republic (supra) is distinguishable with the circumstance of the matter at hand. As opposed to the circumstance in this case where a child is jointly charged with adults, the decision in Ramadhani Juma Mpalupalu (supra) referred the circumstance under which a child was not charged jointly with adults. In that regard, he was to be charged before the juvenile court but was wrongly charged before the ordinary court. The trial court proceedings at page 23 revealed that, the appellants' advocate raised a concern that the third appellant was a minor, a fact which was conceded to by the prosecution side. The record reflects that, the prosecution prayed to amend the charge but until the end of the trial, the charge was not amended. It is equally important to note that, after the concern was raised regarding the age

of the third appellant, the prosecution requested for the notification of social welfare officer. But at the time social welfare officer entered appearance three witnesses had already testified. Also, the record indicates that the social welfare officer entered appearance twice that is on 07/09/2023 when PW4 and PW5 testified and on 09/10/2023 when PW6 testified. This means that, there was no attendance of the social welfare officer at the commencement of the trial and throughout defence hearing. Although the LCA does not directly impose the requirement of the attendance of the social welfare officer as it is before the juvenile court under section 99 (1)(d) of the LCA, prudence and best interest of the child raises a need for attendance of the social welfare officer. It must be noted that the general principles governing best interest of the child imposes a requirement in ensuring that a child in conflict of the law receive proper treatment and that can be intensely observed by involving the social welfare officer who under the law, is bound to ensure that the child is protected by all means. For instance, in order to pass the appropriate sentence against the child there is a need for the recommendation from social welfare officer upon thorough investigating of the child's life style and community surrounding the child in conflict of the law. Based on the above discussion, I am of the considered view that the trial against the third appellant was vitiated for not amending the charge to indicate the correct age of the appellant and for non-attendance of the social welfare officer. Similarly, the sentence that was passed against the child without involving the social welfare officer, was illegal. In addition, this court observed that the trial court treated and punished the 2nd appellant as minor while the 3rd appellant was treated and punished as an adult. As opposed to the arguments by the learned counsel for the appellants that the second appellant was also a minor, the records are clear that the 2nd appellant Lais Nakeliya was an adult aged 31 years while the 3rd appellant was aged 17 years old at the time the offence was allegedly committed. Therefore, the sentence meted against both the 2nd and 3rd appellant was illegal. I therefore find merit in the first issue that the proceedings, judgment and sentence of trial court was vitiated by failure to comply with the law when dealing with the 3rd appellant and for passing illegal sentence against the 2nd and 3rd appellants. On the second issue regarding the variance between the charge sheet and evidence, two aspects were referred; first, the location on which the offence was committed (the crime scene) and second, the kind of crops allegedly Page. 5 Hon.. DEVOTHA KAMUZORA damaged. On the appellant's allegation that there was variance in the evidence of PW1 and PW4 as regard to the crime scene, I have revisited the evidence on the record and did not find any variance. In his evidence PW1 clearly stated that he lived at Nabilikunya and he was doing farming at Uburungeni. This supported the first count which shows that the crops were damaged at Uburungeni. PW4 claimed to have gone to Nabilikunya and was led to visit the farms but never mentioned the location of the farms. Therefore, there was no material variation on place on which the offence was committed as claimed by the learned advocate for the appellants. As regard to the variation on the crops alleged to have been damaged, it is on record that on the first count, maize, sunflower and peas were listed as crops damaged by the appellants. In his evidence PW1 stated that his farm had maize and sunflower. He never mentioned peas but PW2 testified that the farm had maize, sunflower and overgrown pigeon peas (maotea). While under cross examination

PW2 testified that the farm had only maize and sunflower. With such evidence I do not see variance in the evidence of PW1 and PW2 for it clearly shows that they planted maize and sunflower but pigeon peas just overgrew themselves. However, I have discovered the contradiction in the evidence of PW4, the agricultural officer who conducted damage assessment on PW1's farm and the evidence of PW6, a police investigator in this case. PW4 claimed that the farm had maize only and the valuation report he tendered (exhibit P1) reflected the assessment of the maize crops only. PW6 claimed that the farm had maize and sunflower but there were no pigeon peas. This contradicts the charge sheet and the evidence of PW1 and PW2 regarding the crops which were damaged in the farm owned by PW1 thus, not proving essential elements of the charge in the first count. With such contradiction, the trial court was supposed to assess if the prosecution proved the charge in the required standards. In simple words, there is doubt on the crops damaged in PW1's farm. As opposed to the argument by the learned State Attorney, such contradiction goes to the root of the matter for the nature of crops damaged is an essential element of the offence of malicious damage to property therefore, not curable. I therefore find merit in the second issue. On the third issue, there is general denial of the offence by all appellants who claimed that their cattle were being grazed at different area apart from the area mentioned by the prosecution witness. I will therefore assess the prosecution evidence in totality and see if the prosecution side managed to prove the offence in the required standards in criminal cases. For the first count, I reiterate my discussion on the second issue that, the contradiction in the evidence and the charge sheet was material and it eroded the prosecution's case in the first count. In addition, an issue was raised regarding the appellants' identification at the scene and the time spent before arresting the appellants. On the time spent before arresting the appellant, there is no clear information as to when the appellants were arrested and the circumstance which led to their arrest. PW6 was an investigator but he claimed to have found the appellants already in custody without explaining how, when and who arrested them. In fact, the investigator did not lead evidence to establish the basis of the appellants' arrest. On the identification issue, I do not agree with the counsel for the appellants that not identifying the culprits' attire entirely vitiates the identification. However, I was unable to find any evidence describing the circumstance which led to proper and unmistakable identification of the appellants. There is no doubt that the incident took place at daylight. PW2 was at the scene and claimed to have identified the 1st, 5th, 6th and 9th appellants for they used to go to him asking for water and he used to charge their phones. However, the evidence shows that two farms were damaged and the distance between the farm owned by Musa Mangula and the farm owned by Joshua Jonas was one acre. PW2 did not explain the culprits who were at Musa Mangula's farm and those at Joshua Jonas's farm. There is no precise description of the culprit and what made him to identify the appellants from other maasai boys. Page. 6 Hon.. DEVOTHA KAMUZORA who were at the scene. The fact that he knew them was in itself not enough in considering that there were other more than 12 maasai boys as he alleged. It must be noted that, being familiar with the culprit is not in itself a satisfactory ground to conclude that there was proper identification unless the witness explains the circumstances which could eliminate mistaken identification. In his evidence,

PW3 claimed to have received a phone call from PW2 and went with the police to the crime scene. He saw more than 1000 cows and more than 12 Maasai who fled after seeing the police. PW3 narrated that, he was able to identify the 2nd, 4th and 6th appellants in a distance of about 200 paces. Such distance in my view, is approximately two football grounds. He never gave the description of the 2nd, 4th and 6th appellants which made him to detach them from other 12 maasai boys whom he claimed were at the scene. I maintain that, the fact that PW3 was familiar with the 2nd, 4th and 6th appellants does not in itself a conclusion that he identified them without clearly stating the circumstance which could eliminate mistaken identification. It was expected for the witness to at least mention unique features of those identified in exclusion of the rest of maasai boys who were spotted at the scene and in considering the distance of 200 paces he mentioned. The same goes to PW1 who randomly mentioned that he identified some of the appellants without a clear description of such identification. Again, four handover documents were tendered and admitted as exhibit PE3 collectively to support the fact that the appellants were grazing cattle in the farms mentioned and they collected their cattle from the village office. Looking into the said exhibit, nothing links the appellants with grazing cattle in the alleged farms. The first document shows that Laisi Nekeleya handed his cattle to Long'ida Nekeleya, the second document shows that Ngayeni Osimanjiroi handed his cattle to Sebuka Lalashe, the third document shows that Ngurudada Nkolya handed his cattle to Kiloya Kimesero and the fourth document shows that Alupakwa Taiyai handed his cattle to Landei Teyai. All four documents were signed by the persons handing over the cattle and the persons to whom the cattle were handed to. Nothing shows that PW5 handed cattle to any of the appellants. In his evidence, PW5 claimed that he was the village secretary but the said handing over document shows that the handover was witnessed by the hamlet office and police Kiteto without indicating the witnessing officers. In that regard, nothing links the handing over documents with the alleged offence of malicious damage to properties. From the above analysis, the trial court's finding that the offence against the appellants was proved on the standard required was in my view, not supported by the evidence on record. The prosecution evidence was full of doubts which out to be resolved in favour of the accused persons (the appellants herein). In short, all counts were not proved against all the appellants in the required standards, that is, beyond reasonable doubt for the reasons well explained above. I therefore find merits in this appeal and I allow it. The conviction and sentence meted out against the appellants are hereby quashed and set aside. Dated at MANYARA ZONE this 5th of November 2024. D. C. KAMUZORA, J Page. 7 Hon.. DEVOTHA KAMUZORA JUDGE OF THE HIGH COURT Page. 8 Hon.. DEVOTHA KAMUZORA

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Prepared on 14 October 2026 · Esheria