

IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: MWARIJA, J. A., MASHAKA, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 580 OF 2022

SOLEA MDADIJA 1ST APPELLANT

GADALA PAMBE 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
At Dar es Salaam)**

(Hon. Chaba, J.)

dated the 30th day of November, 2021

in

Criminal Appeal No. 103 of 2021

JUDGMENT OF THE COURT

9th May & 8th June, 2023

MAKUNGU, J.A:

The appellants, **SOLEA MDADIJA** and **GADALA PAMBE** were tried and convicted by the District Court of Ifakara in Criminal Case No. 64 of 2020. They were convicted on seven counts on the offences of malicious damage to property contrary to section 326 (1) of the Penal Code [Cap. 16 R. E. 2002] (P. C).

It is on record that the complainants' properties were destroyed by the herds of cattle owned by the appellants. It was alleged that on the

material date the herds of cattle entered into the complainants' farm, they were scattered all over the paddy field while the appellants were lively standing around watching them. Davis Undole decided to report the matter to the Village Executive Officer (VEO) and eventually the suburb chairman of Meela one Feruz Undole was asked to go the crime scene and witnessed the incident.

Upon arrival, the suburb chairman witnessed the destruction caused by the herds of cattle which were under supervision of the appellants. Thereafter, the assessment and valuation of the destruction was conducted.

In their defence, the appellants denied the allegations and contended that they did not own any herds of cattle. They further averred that on the material date they were arrested at their respective houses, the statement which was supported by DW3 Sauli Masham, the suburb chairman of Msindo.

On 27th May, 2021 the District Court convicted them on all counts and sentenced them to serve five years imprisonment on each count. The sentences were to run concurrently, in addition to pay compensation to the complainants.

On first appeal, the High Court (Chaba, J) dismissed their appeal. Aggrieved, the appellants preferred this second appeal advancing six

grounds of appeal. From the memorandum of appeal, the substance of their complaints are:

1. That, the charge was incurable defective.
2. That, there was no sufficient evidence to establish the commission of alleged offences against the appellants.
3. That, the prosecution failed to call the chairman to testify.
4. That, the evidence was not exhaustively assessed as to the credibility and contradictions in the prosecution witnesses.
5. That, the first appellate court failed to analyse the evidence adduced in court by the prosecution witnesses.
6. That, the charge was not proved to the required standard of the law.

Before us, the appellants appeared in person and unrepresented. Ms. Chivanenda Luwongo, learned Principal State Attorney who was being assisted by Ms. Aveline Ombock and, Ms. Mary Lundu, both learned State Attorneys, represented the respondent Republic.

The appellants adopted the grounds of appeal and informed the Court that they would prefer the respondent's learned State Attorneys to address first the grounds of their appeal.

On her part, Ms. Lundu started her submission by supporting the appellants' appeal. She submitted ground 6 of the appeal that the

charge was not proved to the required standard of the law. She submitted that the appellants were charged under section 326(1) of the P.C which requires the prosecution to prove two ingredients, that is, malice and damage. On the first issue of malice, she submitted that the prosecution failed to prove malice on the following; one, that the prosecution failed to link the appellants with the cattle, two, that the cattle were not tendered as evidence, and three, that there was no proof tendered to establish that the cattle were owned by the appellants.

On the issue of damage, the learned State Attorney submitted that, the prosecution called PW7 Philbert Maendeha, the Agriculture Officer who evaluated the said damages and prepared the evaluation report. Apart from his oral testimony, he tendered the report as exhibit P1 which was not read out after it was cleared and admitted as exhibit. She urged us that the evidence found in the exhibit P1 should be discounted and the exhibit P1 should be expunged from the record. She referred to us the case of **Thadeo John Bilunda and Other v. Republic**, Criminal Appeal No. 68 of 2020 (unreported). She pointed out that the oral testimony of PW7 was also problematic in that, **one**, what he testified before the trial court was contrary to what was written in the report, and **two**, the said valuation was done 34 days later after the incident. The incident alleged to happen on 25th July, 2019 and the

valuation was conducted on 29th August, 2019. She urged us to find that the report was not reliable and PW7 was not a credible witness and his evidence should be discounted. She then posed a question on whether after discounting the evidence in exhibit P1 and oral evidence of PW7 if there was any other evidence to support the evidence of six other witnesses of the prosecution. She submitted that the question should be answered in negative.

The learned State Attorney similarly urged us to allow the appeal due to the inconsistencies in the evidence. She pointed out three areas; **one**, that there was a variance between the charge and the prosecution evidence in respect of some names of the complainants, that in the 1st count the complainant is Wenslaus Kalumbalelo while in the evidence PW1 is Wenseslaus Daud Nyandeni. In the 2nd count the complainant is Madard Njahala while in the evidence, PW6 is Madad Paul Kalumbalelo. In the 3rd count the complainant is Davis Undole but he was not called to testify. This means that this count was not proved.

Two, that the prosecution's evidence relating to the number of acres was contradictory in material particulars in that in the 4th count the complainant Herman Lifumbuka has 14 acres while in his evidence at page 18 of the record of appeal testified to have 14.5 acres. In the 5th

count the complainant Zaituni Massaga has 5.7 acres while at page 17 of the record of appeal she testified to have only one acre.

Three, that the prosecution's evidence relating to the number of valuers was contradictory in material particulars in that, while PW2 and PW4 testified that the valuer was Mr. Hashimu; PW3 said the valuers were Mr. Hashimu Shemkanja and Mr. Filbert.

From the above variations and contradictions in the evidence of prosecution, the learned State Attorney argued that the prosecution failed to prove the alleged offence of malicious damage to property against the appellants, because the said variations and contradictions go to the root of the case.

On our part, we agree with the learned State Attorney that in the instant case, the valuation report (exhibit P1) was admitted in court but it was not read out after it was cleared and admitted as exhibit, hence it was improperly admitted in the trial court. We have looked at page 30 of the record of appeal which bears out the learned State Attorney's argument that indeed exhibit P1 was not read out in court. We agree with the learned State Attorney, that failure to read out exhibit P1 after its admission as evidence must result in the expunging from the record of documentary evidence. To that extent and in the authority of **Thadeo John Bilunda and Other vs. Republic** (supra) and

Robinson Mwanjisi and Others vs. Republic [2003] TLR 218, exhibit P1 is expunged from the record. For instance, in the case of **Thadeo John Bilunda** (supra), this Court said thus:

*"After dismissing the appellants' objections against the certificate's admission, the trial magistrate admitted the document as exhibit P3 and allowed PW1 to continue with his evidence without reading out the exhibit. We agree with the appellants and the learned State Attorney, **that failure to read out the certificate of seizure of the two pieces of elephant tusks (exhibit P3) and the trophy valuation (exhibit P4) after their admission as evidence must result in the expunging from the record of pieces of documentary evidence.**"*

[emphasis added]

We agree with Ms. Lundu that there is an oral evidence of PW7 that proved the amount and value of damage caused by the appellants but that witness was not a credible witness for the reasons given above, and therefore his evidence is hereby discounted.

Having expunged exhibit P1 and discounted the oral evidence of PW7 which could have proved the damages of the alleged properties can we say with certainty that there is another piece of evidence which proves the charged offences against the appellants? We, just like Ms.

Lundu, are of the opinion that there is none. This is because the testimonies of six other witnesses do not specifically prove the amount and value of damage alleged to have been done by the appellants' cattle.

We further agree with the learned State Attorney on contradictory evidence of the prosecution witnesses. 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 they go to the root of the matter. Looking closely 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.

In discharging our duty as second appellate court, we found this ground of appeal can move us to interfere with how the two courts below considered, weighed, and evaluated the prosecution and defence evidence.

All in all, we agree with the learned State Attorney that the offence of malicious damage to property was not proved against the appellants in all counts. For that reason, we are constrained to allow the appeal, quash the conviction in all the seven counts and set aside the sentence of five years imprisonment. We also quash the order of compensation

issued by the trial court. In the event, we order for the immediate release of the appellants from prison unless they are held for another lawful cause.

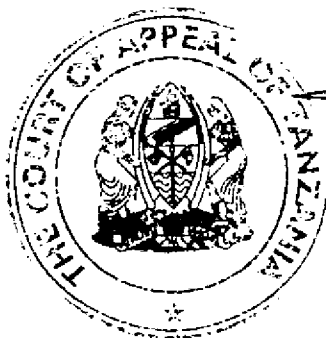
DATED at MOROGORO this 7th day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 8th day of June, 2023 in the presence of 1st & 2nd Appellants appeared in person via Video Link from High Court Morogoro and Mr. Simon Mpina, learned State Attorney via Video Link from High Court Morogoro for the Respondent / Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL