IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 108 OF 2008

(Original Criminal Appeal No. 525 of 2008 of the District Court of Dodoma District at Dodoma)

PHILIMON WAMI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

24/3/2010 & 03/6/2010.

KWARIKO, J:

The appellant was originally charged with the offence of Malicious Damage to Property contrary to section 311 (1) of the Penal Code Cap. 16 Vol. 1 of the Laws, Revised Edition 2002. It was alleged by the prosecution that on the 21st day of August, 2006 at about 06.00 hours at Makang'wa village within Chamwino District and Region of Dodoma the appellant had willfully and unlawfully damaged a half an acre of grape plants to wit by cutting down the plants thus causing a loss of Tshs. 2,050,000/= the property of WILLIAM MLONGA.

The appellant had denied the charge and at the end of the trial he was found guilty, convicted and accordingly discharged on condition that he commits no any offence for a period of twelve (12) months. The appellant was aggrieved with the trial Court's decision hence he filed this appeal.

The evidence against the appellant at the trial as revealed by the prosecution can be summarized as hereunder; On the early hours about 06.00 am of 21/8/2006 the complainant WILLIAM MLONGA, PW1 heard alarms from his grape vines farm which were raised by one ANDREW CHAHONZA, PW2. PW1 rushed to the farm where he found the appellant who was village mate cutting down grape vines. Other villagers also gathered and tried to apprehend the appellant but failed since he threw the machete he was using to cut the grape vines towards them, jumped the fence and run away. Among the people who gathered at the scene also included MANDEWA MANGWATWA, PW3.

The appellant was traced at his home but was not there and he absconded his village until he was arrested two months later. Report of the destruction was sent to the village office before THOMAS SAUSI, PW4 who was also the village chairman. After the report hat been sent to the Police an evaluation of the destruction was conducted by ANTONY MOSHI, PW5 who was an extension officer with Chamwino District and the report was admitted in Court as Exhibit P1. The appellant was a sub-village chairman and due to his disappearance someone else was appointed to act in his place.

In his defence the appellant denied the allegations and testified that he traveled to Nhinhi village to attend his cattle in the morning of 21/8/2006 and handed over his duties as a sub-village chairman to one STEVEN MLEWA, DW3 who was his assistant. He testified further that he had quarrels with PW2 and attacked the evidence of PW1 as being contradictory from his earlier statement at the Police when he stated that he did not see the alleged culprit at the scene but only followed footprints from there which disappeared in the road. This evidence was supported by DW2 DANIEL MALODA MDAWI; Village Executive Officer of Ilolo Mvumi DW3 AND DW4, VISENT CHILEWA.

The foregoing evidence satisfied the trial Court which found the appellant guilty and accordingly convicted him and sentenced him as earlier stated.

As indicated earlier, the appellant was aggrieved with the trial Court's decision hence this appeal. Through Mr Nyangarika learned Advocate who also advocated him at the trial the appellant filed three grounds of appeal namely;

1. That, the Hon. Trial Resident Magistrate erred in law and in fact in failing to properly evaluate the evidence on record, which evidence was in favour of the appellant.

2. That, the Hon. Resident Magistrate erred in law and in fact in not holding that the Prosecution had failed to prove its case

against the appellant at the standard required in law; and acquit the appellant.

3. That, the Hon. Trial Resident Magistrate erred in law and in fact in not holding that the appellant was not identified as the one who committed the alleged offence.

When the appeal came before the Court for hearing the Counsel for parties were granted an order to argue the same by way of written submissions which were duly filed according to the scheduled order.

In his written submission in support of the appeal Mr Nyangarika learned Advocate argued the grounds of appeal commulatively to the effect that the trial Court Magistrate erred in facts to believe the prosecution evidence when he convicted the appellant since the same did not prove beyond reasonable doubt that the appellant was identified at the scene of crime.

On the other hand the respondent Republic's submission was prepared by Ms Mdulugu learned State Attorney who did not support the appellant's conviction by the trial Court. The reasons for her assertion were similar to those advanced by the appellant's advocate.

This Court agrees with both parties that the Prosecution case against the appellant was not proved beyond reasonable doubt for the following reasons;

Firstly, the issue of visual identification of the appellant at the scene was not given the weight it deserved by the trial Court. While the trial Magistrate appreciated the definition of a term "**night**" under section 4 of the Penal Code to mean the period between seven O'clock in the evening and six o'clock in the morning, he did not go further to relate the same with the material time in this present case. PW2 testified that the material time when he spotted the appellant at the farm was 6.00 hours while PW3 said that it was 5.45 hours. If we go by the definition of the term night then during the material time the scene was still in darkness as properly testified by PW2. These witnesses together with PW1 did not state what source of light helped them to identify the person who was cutting grape vines in the farm who was said to be fifty (50) paces away. PW2 testified that there was enough light at the scene but he did not mention what was the source of the same so as it could be determined if it was really enough for any proper identification.

As rightly submitted by Mr Nyangarika learned Advocate a distance of fifty (50) paces is half a distance of a football pitch where in darkness it is hardly possible to identify a person. The evidence also reveals that the farm was enclosed by a fence measuring two paces wide and five feet tall fence. I do not think any one could be able to identify a person in that farm from 50 paces away considering the afore mentioned factors. Therefore, the conditions for proper identification were not favourable in this case and the same did not meet the criterion enunciated in the Court of Appeal case of ***WAZIRI AMANI VR [1980] TLR 250.***

Secondly, the prosecution evidence was contradictory in itself thus creating doubt as to whether the appellant was the one who was found committing the offence charged. The following points show the said doubts;

One; PW1 stated during cross-examination that soon after this incident had occurred many suspects were arrested including Noti Mganga, Ubelege Husi, Stephen Mlewa, Samwel Mganga, Wilson Mahinzo, Peter Wami and Masaga Kasuga. PW4 THOMAS SAUSI who was village chairman also testified in the effect. Now, if the appellant was identified at the scene then why these people were arrested as suspects? The answer to this question is that the culprit was not identified at the scene. Actually PW1's initial report at the Police (Exhibit D1) reveals that he was at home at 6.00 hours of the material day when one Ndimba Nhembo (who was not called to testify) came and informed him about the destruction at the farm. This shows that he did not at all see the appellant or any other person cutting down the grape vines. It is very surprising that when PW1 came to testify he completely changed his initial story and implicated the appellant.

Apparently, PW1 implicated the appellant since he had old grudges against him as clearly stated so in his statement. PW4 also confirmed that the two had old grudges.

Two; while PW1 testified that they traced the footprints of the culprit, PW2 completely denied that. And therefore, if the witnesses

followed footprints then it shows that no one was found at the scene committing the crime but whoever did that he/she had already long gone. If the culprit was found there the many people who answered the alarms could not have failed to apprehend him since he had thrown away the machete he was threatening the people with. Actually they did not say they even tried to chase the culprit.

Three; had the culprit who was said to have been identified to be the appellant thrown away the machete at the scene, the same must have been tendered in Court as exhibit; The absence of it proves that the prosecution evidence was only a fabrication against the appellant.

Lastly, the prosecution witnesses testified that the appellant absconded from the village for two months after he had committed the offence and they had to choose an acting sub-village chairman in his place. However, this assertion was not proved by evidence since the said acting sub-village chairman did not come to testify. Instead the assistant sub-village chairman STEVEN MLEWA, DW3 came to testify and he explained how PW1 reported to him about the destruction. That, the appellant had gone to Nhinhi village to see his cattle since there was famine during that time. His evidence is corroborated by PW1's statement at the Police that he reported the incident to DW3 since the appellant was away. Therefore, the appellant's absence from the village was not connected to his guilt conscious as the trial Court believed since the prosecution did not

prove that the sub-village elected another chairman after the appellant had disappeared.

In this case the trial court magistrate accorded the prosecution case an extra-ordinary weight which it did not deserve since I have highlighted herein above that the case against the appellant was tainted with obvious doubts. Had the trial magistrate highlighted and considered the various doubts which engulfed the prosecution case he could have found that the same did not deserve a conviction against the appellant. As rightly submitted by Mr Nyangarika learned Advocate the trial court did not give the defence case the consideration it deserved; apparently because it believed that the appellant was guilt since all the prosecution witnesses had pointed a finger onto-him.

Proof of a case does not depend on the amount of witnesses who testify on one particular issue but it depends on their credibility and coherence of their evidence. In this case the prosecution witnesses tried to implicate the appellant with the crime but they ended up contradicting themselves as herein above explained.

Finally, I find that the prosecution case against the appellant was not proved beyond reasonable doubts as amply shown above. The appeal is thus allowed, conviction quashed and the sentence is set aside.

It is so held.

(M. A. KWARIKO)

JUDGE

03/6/2010

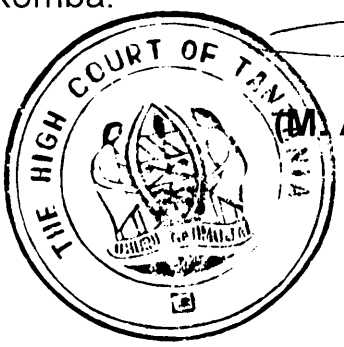
AT DODOMA

03/6/2010

Appellant: Present/Mr Nyangarika Advocate.

For Respondent: Absent.

C/c: Ms Komba.



(M. A. KWARIKO)

JUDGE

03/6/2010