IN THE HIGH COURT OF UNITED EREPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

HC CRIMINAL APPEAL NO 57 OF 2012

(From original crim. Case No. 213/2011 Tarime District Court)

SPRIANO OSENA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

6/8/ & 27/11/2012

SUMARI, J.

The appellant was charged, convicted and sentenced to three years imprisonment for committing an offence of Arson contrary to section 319 (c) of the Penal Code, Cap.16 R.E. 2002.

It is alleged that on 29. 10.2010 about 14.00 hrs the appellant who was accompanied by his fellow set fire on the homestead of one Joseph Odalo Ogege, which burnt the houses of the said Joseph Odalo.

Having been aggrieved by the conviction and sentence the appellant preferred this appeal. Appellant enjoyed legal services of Mr. Leonard, learned advocate and the respondent/republic was represented by Mr. Kidando, learned State Attorney.

The appellant's three (3) grounds of appeal which Mr. Leonard opted to adopt are:-

a. *That the learned trial Magistrate erred in law by discrediting the evidence of alibi contrary to Section 194(6) of the Criminal Procedure Act, Cap. 20 (R.E. 2002).*

b. *That the learned trial Magistrate erred in law in admitting the evidence of PW4 un-procedural contrary to section 34B (2) (d) and (e) of the Evidence Act, Cap. 6 (R.E 2002).*

c. *That the learned trial Magistrate erred in law and fact to admit the evidence of PW1 and PW2 as such to convict the accused without corroboration.*

Mr. Leonard submitted on ground one that, the learned trial Magistrate erred in law by discrediting the evidence of alibi raised by the appellant contrary to Section 194(6) of the Criminal Procedure Act, Cap. 20 (R.E. 2002). Mr. Leonard learned counsel vehemently contended that the trial Magistrate did not properly consider the provisions of the said section which entails about the defense of alibi. That the trial Magistrate did not comply with sub-section 6 which requires him to accord weight in the appellant's defense as it was held by the Court of Appeal in the case of **Charles Samson versus Rep. (1990) TLR 39,** which held inter-alia that (*i) The court is not exempt from the requirement to take into account the defence of alibi, where such defence has not been disclosed by an accused person before the prosecution closes its case*".

Mr. Leonard further argued that at page 3 of the judgment the trial Magistrate discredited the appellant's defense of alibi without

assigning reasons. In challenging the trial court's findings on this point, the learned counsel referred a case of **Mastaajabu Nyagabona versus Republic (unreported).**

Responding to the first ground of appeal, Mr. Kidando, learned State Attorney submitted that the trial Magistrate correctly rejected the defense of alibi raised by the appellant as he considered the weight of evidence adduced against the appellant and also assigned reasons in the same page 3 of his judgment.

He submitted further that the conviction and sentence of the appellant was fundamentally based on identification which was made by Pw1 and Pw2 respectively. He was of the view that the cases referred by the appellant's counsel would have weight if the trial Magistrate could not have taken into account the appellant's alibi defense.

I had ample time to read the judgement of the trial court very closely and carefully. At page 3 as correctly argued by Mr. Kidando, the trial magistrate discussed the issue of alibi in a very reasoned way contrary to what is been lamented by Mr. Leonard. In fact the trial magistrate in justifying his rejection of the alibi rose by the defense despite the same being strongly supported by Dw2 and Dw3, he went further citing a case of **Venant Mapunda and Another v Rep. Crim Appeal No. 16/2002 (unreported)** where CAT held that *"where the defense of alibi is raised and the prosecution witnesses identified the accused conclusively at the scene of the crime the defense of alibi is mutually exclusive"*. So it is not true as argued by Mr. Leonard that

the trial magistrate assigned no reasons on his rejection of alibi defense.

Now, on this ground the issue is whether the trial court was right to reject the said defense despite the water tight evidence advanced by the appellant to support that defense of alibi. In order to answer this issue one should first analyze the prosecution evidence available and most of it that of identification.

It is clear from the trial court's judgment that the magistrate was convinced by Pw1 and Pw2's evidence that they identified the appellant at the scene of crime, committing the offence. He however, failed to properly evaluate and consider the nature of evidence of these two witnesses who are witnesses of an interest to save and irrespective of the contradictions available in their evidence.

I shall start with the evidence of a witness of an interest to save. We are told that Pw1 and Pw2 are married couples. Pw1 has blatantly stated that he had grudges with the appellant over a land. These are facts which prove that the two are witnesses of an interest to save. The law on such witnesses' evidence requires corroboration. In other words such evidence is weak if there is no other corroborating evidence. In the case of **ASIA IDDI Vs REP. (1989) TLR N.174** it was held – inter-alia that:

> *(ii) Evidence of a person who has an interest to save also needs corroboration as it cannot be used to corroborate other evidence.*

In their testimonies Pw1 and Pw2 stated that they identify the appellant committing the alleged offence. Both are saying there were many people at the scene of crime and it was day time. But no other person who was at the scene of crime testified except the two who are actual victims with pain of their property destroyed.

But again Pw2 said she had prior the incident on the same day attended the village meeting convened at Kisana and in that meeting the main agenda was to burn all cattle thieves' houses. It means therefore that the meeting was attended by many people. Her evidence on that fact is not supported by any other witness who attended that meeting. Why no other villager testified in corroboration of what was stated by Pw2 is not known. In the absence of such evidence one cannot firmly argue that prosecution case was established to the required standard.

The only independent prosecution witness in this case is Pw3. This is a police officer who went at the scene of crime after Pw1 reported the on incident the same day. His evidence cannot in law corroborate Pw1 and Pw2's evidence because he did not witness the commission of the crime. As such we remain with uncorroborated evidence of Pw1 and Pw2, evidence which cannot be relied upon to convict.

Now let's see how contradictory the evidence of Pw1 and Pw2 were. Frankly speaking, Pw1 and Pw2's evidence is full of contradictions, just to mention few, when Pw1 is saying he had grudges with the appellant over a land dispute, while his wife, Pw2 is

firmly saying no grudges existed at all. This covers ground 3 of the appellant's appeal which is founded.

Turning now to the second ground of appeal, that the learned trial Magistrate erred in law in admitting the evidence of Pw4 un. procedurally contrary to section 34B (2) (d) and (e) of the Evidence Act, Cap 6 R.E 2002. Mr. Leonard submitted that the trial Magistrate erred in admitting the evidence of Pw4 Steven Gorge Okore contrary to section 34B (2) (d) and (e) of Cap. 6 (supra) as the appellant was not given notice before the evidence was tendered. That the conditions set in section 34B were not satisfied. He referred the case of **Republic Versus Hassan Jumamnne(1983) TLR 432** and **DPP Versus Ophant Manyancha(1985) TLR 127.**

Responding to this ground of appeal Mr. Kidando, learned State Attorney admitted that the requirement of section 34B (2) (d) was not complied with because the appellant was not given an opportunity to object the same.

Indeed, there is no need for this court to discuss much on this ground of appeal as it is undisputed fact that the trial Magistrate erred in admitting the evidence of Pw4 without taking into account all the conditions set under Section 34B (2) (d) of the Evidence Act, Cap.6 (R.E.2002). As correctly put by Mr. Leonard the two cited cases are good guidance on the issue. In the case of **Republic Versus Hassan Jumamnne (1983) TLR 432** it was inter-alia held:-