IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 14 OF 2012

(Appeal from the decision of the District Court of Sumbawanga in Original Criminal Case No. 121 of 2011)

AMOS KIPANTA ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

24th June & 15th August, 2013

JUDGMENT

MWAMBEGELE, J.:

The Appellant Amos Kipanta was charged with and convicted of arson c/s 219 (a) of the Penal Code, Cap. 16 of the Revised Edition, 2002 of the Laws of Tanzania. He was sentenced to serve a thirty years' term of imprisonment. Dissatisfied, he has appealed to this court against both conviction and sentence.

This appeal was argued before me on 24.06.2012 during which the Appellant appeared in person and unrepresented while Mr.

Mwandoloma, learned State Attorney, appeared for the Respondent Republic. The Appellant elected to stick to what he stated in the Memorandum of Appeal earlier filed. Mr. Mwandoloma, learned State Attorney, who argued the appeal for and on behalf of the Respondent Republic, refrained from supporting the Appellant's conviction and sentence. He argued that the evidence upon which the Appellant was convicted, hinged on previous threats and identification which were not sufficient to sustain a conviction. He argued that at law, previous threats, on their own, have no strength to justify an accused person's conviction. To bolster up his argument, Mr. Mwandoloma cited to me ***Republic Vs Mustapha Sandiri*** [1990] TLR 120 in which this court held that threats cannot be conclusive evidence to sustain a conviction unless there is tangible evidence other than the occurrence of the threatened act.

On identification, the learned State Attorney argued that the circumstances obtaining at the *locus in quo* were such that identification could not be easy. The offence was committed at night and during which identification was not facilitated by anything. To buttress this argument, he cited the decision of this court in ***Yassin Maulid Kipanta and others Vs Republic*** [1987] TLR 183 in which this court [Chipeta, J. (as he then was)] instructively stated that where the evidence against the accused is solely that of identification, such evidence must be absolutely watertight to justify a conviction.

I entirely agree with the lucid arguments by the learned State Attorney appearing and commend him for this good work well done. The learned State Attorney has ably argued the case as a true officer of the court. He did not support conviction of the Appellant and presented very valid arguments and substantiated them with case law. I, once again, commend him for this industry. In this regard, I wish to echo what was stated by this court (Werema, J.) on the duty of the organs of the state to combat crime while at the same time paying due regard to the guidelines of the law. His Lordship stated in ***Alex Byarugaba and another Vs R***, DC Criminal Appeal No. 10C/F11 OF 2007 (Iringa Unreported) as follows:

> "... all organs of the state should take a tough no-nonsense attitude towards crime. We should all of us combat crime strenuously. However, no matter how appealing the commitment to combat crime to the public it should be guided always by established principles of impartiality based on nothing but justice and the law"

As rightly put by the learned State Attorney, the Appellant was convicted on the strength of previous threats he allegedly uttered against Fidelis Kipanta PW1; his brother. It is in evidence that at a *pombe* drinking spree on 22.05.2011, the Appellant told one John Martin

who testified at the trial as PW2 to the effect that he was very much upset with what his brother PW1 did to him. It is said the Appellant was referring to what happened some five years back; in 2006 during which the Appellant was accused of stealing six goats the property of PW1 and he was made to compensate him after the matter was settled amicably by their family. PW2 passed the threat message to PW1 and indeed, quite in line with the Appellant's threat, that night, the dwelling house of PW1 was set on fire. A rightly submitted by Mr. Mwandoloma, learned State Attorney, the accused cannot be convicted basing on previous threats alone. The facts of the present case fall in all fours with the facts in the ***Mustapha Sandiri*** case (supra). Apart from the names of the victim and accused, the dates and places where the offences were allegedly committed, the facts of that case and the facts of the present case are identical. In the ***Mustapha Sandiri*** case, the accused Mustapha Sandiri was charged with arson c/s 319 (a) of the Penal Code. The basis of his prosecution was threats which he had uttered the day before the complainant's house was set on fire. No one saw the accused setting fire to the house, but Mustapha Sandiri was suspected and later arrested on the basis of the earlier threats. This court [Maina, J. (as he then was)] held:

> "Threats alone cannot be conclusive evidence that the person who uttered the threats has committed the offence. There must be something tangible other than the occurrence

> of the threatened act to indicate that the accused did carry out his threat".

Earlier, in ***Cornel Samson Vs R.*** [1972] HCD n. 184, this court [Mfalila, J. (as he then was)] stated:

> "... a threat is of the highest value when it corroborates some other evidence in order to link the accused with the offence charged. It is weakest when on its own, for it is then reduced to mere circumstantial evidence in the form of a disconnected chain".

In the present instance, apart from identification, there is no evidence which supports the accused person's previous threats being carried out. As was the case in the ***Cornel Samson*** and ***Mustapha Sandiri*** cases (supra), the fire could have been caused by numerous other causes besides the appellant; that is, the fire could have been caused by a flying spark, a malicious fellow who had heard the appellant utter the threats, *et cetera*. As will be clear shortly, even the evidence of identification cannot stand in the present case. It is already settled in this jurisdiction that in order to convict on the strength of evidence on identification, the same should be absolutely watertight to sustain a conviction. Let us see what transpired in the present case. The only

evidence on identification of the accused at the scene of crime is found in the testimony of PW1 and in a single sentence:

> "We saw the accused person running into the farm of maize".

Nothing more was stated to cement how the witness managed to identify the Appellant in the middle of the night. A landmark case in this jurisdiction which has uninterruptedly been followed by the courts is ***Waziri Amani Vs R*** [1980] TLR 250. This case provided guidelines with sufficient lucidity on the evidence of visual identification. Guided by the cases of ***R. Vs Eria Sebwato*** [1960] E.A 174, ***Lezjor Teper Vs the Queen*** [1952] A.C 480, ***Abdallah Bin Wondo and Another Vs R.*** (1953) 20 E.A.C.A 166, ***R Vs Kabogo wa Nagungu*** (1948) 23 K.L.R (1) 50 and ***Mugo Vs R.*** [1966] EA 124 (K), the Court of Appeal provided the following guidelines on visual identification:

> "Evidence of visual identification is of the weakest kind and most unreliable. No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is absolutely watertight".

The Court of Appeal in this landmark case instructively added:

"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record **a careful and considered analysis of all the surrounding circumstances of the crime being tried**. We would, for example, expect to find on record questions as the following posed and resolved by him; **the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.** These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity". (Emphasis supplied).

In the instant case, the circumstances obtaining at the *locus in quo* did not favour identification. Since the commission of the offence took place in the dead of the night, no evidence was led to show how the Appellant was indentified, the distance between the identifying witness and the culprit is also wanting in evidence, it cannot be said with certainty that the accused person was properly identified. The offence being committed deep in the night, I am satisfied that the material conditions prevailing at the time of the commission of the offence were so unfavourable to make any fair and correct identification of the culprit possible. This lack of certainty of identification of the accused person must be resolved in his favour.

I feel pressed to point out at this stage that in criminal proceedings like the present one, the duty of proving the charge against the accused lies squarely on the prosecution; it never shifts. I take note that the trial Resident Magistrate felt the appellant was guilty because he pretended not to know what happened to the house of his brother PW1. The learned trial Resident Magistrate stated:

> "... it is no doubt that the one who committed the crime is Amos Kipanta, the accused person because even in his defence, he tried to have known nothing that the house of Fideli Kipanta was burnt"

I have dispassionately read the court record, more especially the Appellant's testimony at the trial with a view to verifying the truth or otherwise of the foregoing quoted paragraph. Indeed, it is true that the Appellant, in his testimony at the trial, did not say anything about the house of PW1 being burnt. However, he did not testify to have known nothing on the house of his brother Fideli Kipanta being burnt like his on the same night. He just kept mum on this subject. His testimony concentrated on his house being set on fire on the night of 22.05.2011 and his seeking refuge together with his family to the house of his brother who lived in the neighbourhood. No mention at all was ever made over PW1's house being burnt as well. However, it seems to me, by convicting the Appellant for not stating anything respecting the house of PW1 being burnt as well, the trial magistrate erred and had the effect of shifting the burden of proof onto the accused person. This is illegal. The burden of proof rests on the prosecution throughout a criminal trial. I also wish to add that it is an elementary principle of criminal law that the accused is not supposed to prove his innocence; the onus is always on the prosecution to prove the ingredients of the charges against the accused person; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence - see ***Mohamed Said Matula Vs Republic*** [1995] TLR 3 (CAT).

In the final analysis, I allow this appeal. The conviction of the appellant which is not supported by the Respondent Republic is quashed and the sentence is set aside. The accused must be released from custody forthwith unless he is otherwise held for some other lawfully cause. It is so ordered.

DATED at SUMBAWANGA this 15th day of August, 2013.

J. C. M. MWAMBEGELE
JUDGE