

IN THE HIGH COURT OF TANZANIA

AT SONGEA

DC CRIMINAL APPEAL NO. 5 OF 2016

**(Originating from the decision of Namtumbo District Court in
Criminal Case No. 37 of 2015)**

ISSA SALUM.....1ST APPELLANT
HASSAN ADAM.....2ND APPELLANT
MOHAMED RASHIDI.....3RD APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 21st March, 2016

Date of Judgment: 29th March, 2016

CHIKOYO, J.

At the Namtumbo District Court, the appellants stood for the offences of conspiracy to commit an offence contrary to section 284 and arson contrary to section 319 (a) of the Penal Code [Cap. 16 R.E 2002]. At the end of the trial, all the appellants were only convicted for the offence of arson and were sentenced to serve three (3) years in jail. Following the

said conviction and sentence, the appellants were aggrieved, hence they preferred to appeal herein, and hence this is their appeal.

The appellants through the legal services of Mr. Ngilangwa Advocate have raised four (4) joint grounds of appeal, which in my view all of the said grounds of appeal fall in one fold that, the trial court erred in law and fact by convicting the appellants while the prosecution side failed to prove the alleged offence beyond reasonable doubts.

The facts leading to this appeal are as follows; on 26/8/2015 around 08:00-09:00 Hrs SAID ALLY (PW1) when he was at his home, he was informed by his young brother through mobile phone one HATIBU ISSA KITOPE (PW2) that, his three huts situated in his shamba had been burnt in Mchomolo Village. Then PW1 went at the scene of crime, and met PW2 who informed him that, there were four people ISSA SALUM MBENGILE, HASSA HOSSA, MOHAMED RASHIDI FUNDI and MBAGILE SALUM who were responsible for the alleged incident. Thus the incident was reported to the police station and the appellants were arrested and arraigned in the trial court, however at the trial all the appellants denied to have committed the alleged offence but at the end of the trial, the appellants were convicted and sentenced as stated above. Aggrieved by the said conviction

and sentence, the appellants have appealed herein, hence this is their appeal.

At the hearing of this appeal, Mr. Ngilangwa the learned Counsel appeared for the appellants while Ms. Juntwa, the Learned State Attorney appeared for the respondent, who also supported this appeal. Basically, Mr. Ngilangwa's submissions based on the fact that, the prosecution evidence is uncertain as on how the appellants were identified; the evidence of the prosecution is uncertain as to where the incident took place since in one point it was alleged to have been occurred at Masuguru Village while in the other point, it was alleged that the incident occurred at Mchomolo Village in Namtumbo District. Thus, he prayed this appeal to be allowed.

In supporting this appeal and what had been submitted by Mr. Ngilangwa, Ms. Juntwa submitted that, the prosecution side evidence is uncertain as to whether the incident took place at day or night time; the appellants were connected with the alleged incident since there was a land dispute between the appellants and PW1 and PW2, hence the evidence against the appellants is merely based on suspicion which cannot sustain the appellants' conviction.

As to me, the issue here is whether this appeal has merits or not. Upon my perusal of the court records and what have been submitted by both Counsels, I also full agree with them in their submissions, since the testimony of PW2 is uncertain as on how he managed to identify the appellants committing the alleged offence. According to the proceedings of the trial court, at pages 17 and 18 PW2 in examination in chief testified the following;

*'It was about 08:00hrs I saw the accused person setting fire to those huts. I was about 10 paces from the scene to the place I was able to identify them. Even before the incident **both the accused person** were very familiar to me as we farm together... [Emphasis is mine]*

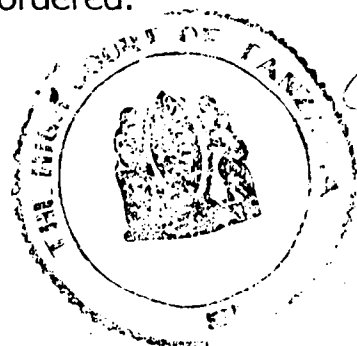
The above testimony suggests that, the accused persons were two and not otherwise because of the use of the word '**both**', and if that is the case, at page 15 of the said proceedings, PW2 when reporting the incident to PW1 indicated that, the appellants were four accused persons ISSA SALUM MBENGILE, HASSA HOSSA, MOHAMED RASHID FUNDI and MBAGILE SALUM, this is according to the testimony of PW1. Thus, in my view the above testimonies contradict to each other if really PW2 managed to

identify the appellants at the scene of crime. As if it is not enough, according to the testimonies of PW1 and PW2 the alleged incident occurred at Mchomolo Village within Namtumbo District, but this is contrary to what had been testified by F.8340 D/C YESAYA (PW3) whose evidence reveals that, the incident occurred at Masuguru Village. (see page 23 of the typed proceedings), definitely as correctly submitted by Mr. Ngilangwa, it is uncertain as to where the incident took place, otherwise I find the above stated contradictions go into the root of the case, and must be resolved in the appellants' favour. **See; Mohamed Said Matula Versus Republic [1995] T.L.R 3; Peter Sanga Versus Republic, Criminal Appeal No. 91 of 2008 (CAT-IR) (Unreported) and Awadhi Abrahamani Waziri Versus Republic, Criminal Appeal No. 303 of 2014 (CAT-AR) (Unreported).**

In line to the above, and as correctly submitted by Ms. Juntwa, the court records are very clear that, the appellants and PW1 had a land dispute for so long (see page16 of the typed proceedings), thus I agree with her that, it is highly probable that the appellants were linked in the said allegations due to that land dispute, having considering the fact that, the appellants were not properly identified at the scene of crime.

Having said so, I find this appeal has merits since the prosecution side at the trial court failed to prove the alleged offence beyond reasonable doubts as required by the law, thus this appeal must be allowed. For that reason, the conviction, sentences of three (3) years in jail and compensation order of Tshs. 800,000/= imposed by Namtumbo District Court in Criminal Case No. 37 of 2015 is hereby quashed and set aside, the appellants to be released from the custody unless lawfully held with another cause.

It is so ordered.

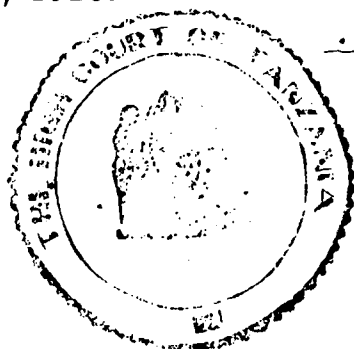



S.M. CHIKOYO

JUDGE

29/03/2016

Judgment delivered in chambers in the presence of Mr. Ngilangwa Advocate for the appellants who also were present in person, Mr. Mwegole State Attorney for the respondent and Mr. Komba Court Clerk, this 29th day of March, 2016.

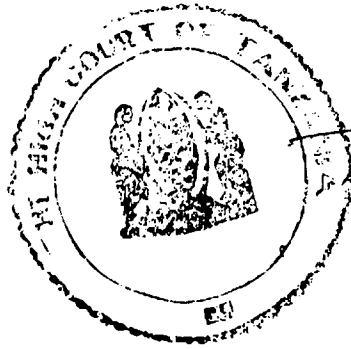



S.M. CHIKOYO

JUDGE

29/03/2016

COURT: Right of appeal explained.



[Handwritten signature]
S. M. CHIKOYO
JUDGE

30/03/2016