

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL CASE NO. 38 OF 2010**

**REPUBLIC ..... APPELLANT**

**VERSUS**

**SIMON KIMARO ..... 1<sup>ST</sup> RESPONDENT**

**SALUSTIAN DANIEL MTENGA ..... 2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

**DYANSOBERA, J**

In the Resident Magistrate Court of Kisutu in Dar es Salaam the Respondents Simon Kimaro and Salustian Daniel Mtenga were charged with malicious damage to property c/s 326 of the **Penal Code**.

In its Judgment, the trial Court found the prosecution had not proved the case beyond reasonable doubt, thus they were acquitted under section **312(3) of the Criminal Procedure Act Cap 20 R.E 2002**.

Dissatisfied with the findings of the Trial Court, the Republic has preferred an appeal before this Court.

The memorandum of appeal by the Republic contains two grounds namely:-

1. The learned Magistrate erred in law and fact in disbelieving the evidence PW1 and PW2.

2. That the Trial Magistrate erred in law for holding that the case for the prosecution was not proved beyond reasonable doubt.

The salient fact giving rise to the charge of malicious damage to property and subsequent acquitted of the Respondents are follows:-

On 19<sup>th</sup> February, 2003 at about 18:00 hours at Tegeta Msichoke area within Kinondoni District in Dar es Salaam, the accused (respondents) did unlawfully destroy one house valued at Tshs. 13,000,000/= the property of one Godrlizen Shayo. They disputed the charge.

Before attempting to respond on the grounds for appeal the Court finds it pertinent to note that, this appeal has taken long time in court, having been filed in the year 2010 it appears the reason for its delay was due to failure of the respondents to appear in Court.

They were untraceable thus making it difficult for them to be issued with summons to appear in this Appeal. As a result it was ordered the respondents to be notified by way of substituted service.

Three orders of publication were made on different occasions but they proved unsuccessful as to date the respondents have never entered appearance in Court.

Following the absence of the Respondents despite of all efforts initiated to procure their attendance. This appeal had to be determined in their absence.

Although the Appellants memorandum of appeal contains two grounds, they both revolve on a single point that the prosecution did not prove the case beyond reasonable doubt.

It therefore follows that the main issue pending before this Court is whether the prosecution proved the case beyond reasonable doubt at the trial Court.

It is the Cardinal Principle of law in Criminal Case that the prosecution has the duty to prove the charge against the accused beyond all reasonable doubt see the case of **Christian s/o Benard Vs. R (1992) TLR 302 and the case of Aidan Mwakalinga Vs. Republic Criminal Appeal No. 207 of 2006 CAT at Dodoma (Unreported)**.

The record reflects, the evidence upon which the prosecution relied to vindicated the charge against the respondents in the trial court are that of PW1 (**Godlizen Emanuel Shayo**) PW2 (**Pascal Kukeyigwa**) PW3 (**Denis Kubingwa**) PW4 (**Florence a/o Moshi**) and PW5 (**D287 D/CPL Mshana**).

The sub issue before this Court here is, was the testimonies of the above witness sufficient to support the charge against the respondent?

In response to the above raised sub-issue, I find the testimonies from the prosecution witness with full of discrepancies which could not form the basis of the respondent's conviction.

For example PW1, Godlisten Emmanuel failed to provide evidence in Court to substantiate how he had built the house which he claimed was

damaged/distract by the Defends/Respondents on the other side PW2 Pascal Kukayingwa, the person who sold the plot where the alleged house was constructed declined the facts that PW1 had built the house on the plot.

Worthy note, the sale agreement between PW1 and PW2 which was executed on 1993 reveals it was witnessed by the ten cell leader who had died before it was executed. Those are few discrepancies noted but in short the prosecution evidence was tainted with discrepancies which could not establish the charge against the Respondents.

The Court finds that the Trial Magistrate rightly observed in its verdict that the prosecution did not prove the case beyond reasonable doubt.

As this is a first appeal, the Principles to be followed in dealing with the findings of facts and conclusion reached by the lower court is clearly set out in various decision of the Court of Appeal for East Africa.

The legal position is well established as clearly demonstrated in the following decisions, see **R.V Hassan bin Said (1942) 9 E.A.C and Peter Vs. Sunday Post 1958 EA 429.**

The decision of trial Court provides me with no cause to interfere. In the light of the authorities cited above, the court is satisfied that the evidence against the respondent is not sufficient to support the conviction I am therefore, on the evidence on record satisfied that the learned Magistrate was entitled to reach a finding that the case against the respondents was not proved beyond reasonable doubt.

In the event I find not merit in the appeal; the appeal is hereby dismissed in its entirety. It is so ordered.

**W.P. DYANSOBER**

**JUDGE**

**02/03/2018**

Delivered today in the presence of Ms. Neema Mbwana, learned State Attorney for the appellants but in the absence of the respondents.

**W.P. DYANSOBER**

**JUDGE**

**02/03/2018**