IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC.CRIMINAL APPLICATION NO.53 OF 2019

(Arising from the High Court of Tanzania in Criminal Appeal No. 39 of 2019 originating from Bukoba District Court in Criminal Case No. 61 of 2018)

RESPICIUS FRANCIS .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

16/1/2020&30/1/2020

BAHATI,J.

The Appellant Respicius Francis was charged and convicted before the District Court of Bukoba for an offence of malicious injuries to property contrary to section 326(1) of the Penal Code, Cap. 16. He was sentenced to 7 years imprisonment. Aggrieved by the decision of the District Court he decided to lodge a petition of appeal and hence application for bail under the Certificate of Urgency. However the appellant abandoned the application for bail hence this appeal.

The appellant thus prayed the appeal to be allowed and consequently this Court to quash the trial court's conviction and the sentence be set aside thereby setting him free and releasing him from the prison.

Before discussing the grounds of appeal, the brief facts that led to the conviction and sentence of the accused mainly came from the evidence of PW1, PW2, PW3 and PW6 .The accused Respicius Francis on 7th day of April,2018 during night hours at Bushagara village within Bukoba District in Kagera Region did willfully and unlawfully destroy the goats shed and banana plants by cutting them down These properties belonged to one John S/o Sospeter.(PW1). Both PW1, John Sospeter and his wife PW2 (Rosemary) who live at Bushagara village, on 7th day of April,2018 at 10p.m heard something strange knocking, they opened the window and switched on the torch which had enough light. PW1 and PW2 pointed and succeeded to identify three persons, one was much known to him, in this case. The three were around the goats shed and some banana plants were cut down. They ran away, and then PW1 called a hamlet chairman through phone but with no response, and then proceeded to call a chairman from neighbourhood hamlet. PW2 (a wife to Sospeter) said that the accused was one among the three people seen on the material night. She added that he was in a white shirt and was holding a sword in his hand. PW3 (a neighbor) heard the screaming, quickly took the torch and rushed to the scene. It took him some few minutes to reach the victims' home. However, before he could arrive there, he found one Respicius Francis who was in companion of other two

carrying a sword running away. PW3 and PW6 who are also neighbors to Sospeter had a torch and there was enough moonlight and some electric which were lighting at the said area, they clearly saw the accused. The next morning, PW1 went to report the incident to the Ward Executive Officer (WEO) and was given a letter which assisted him to report the incident to the police station against accused.

PW4, an agricultural extension officer, while in office he received some minutes on number of banana plants which were damaged. PW4 had undertaken valuation of the damage causes and he prepared a report as exhibit No.P1. PW5, Rashid, who is an investigator working at the department of criminal investigation, he received a case file from OCCID on the allegation of malicious damage where he made prior investigation and later on went to the scene as part of his investigation. At the scene, he took a photo (Exhibit P2). Hence, the District Court convicted the accused and sentenced him to 7 years imprisonment.

In his defence before the trial court, the appellant herein had denied the allegation leveled against him. Hence this appeal.

At the hearing of the appeal, the appellant was represented by *Constantine Mutalemwa and Mathias Rweyemamu, learned counsel* while the Republic was led by the *learned State Attorneys, Kahigi Emmanuel and Juma Mahona*. The appellant requested the Court to go direct to the Petition of Appeal and leave the application for bail. The respondent had no objection

to proceed with the Memorandum of Appeal. The respondent Republic supported the appeal.

The appellant raised nine (9) grounds of appeal in his memorandum of appeal that;

1. *The visual identification evidence by Pw1, PW2 and PW3 upon which the trial court relied on to convict the appellant was not watertight.*
2. *Alternatively, the trial court erred grossly in law and fact to convict the appellant based on poor visual identification which was not watertight.*
3. *That while PW1 and PW2 did not identify the appellant and did not immediately mention him as a cause of malicious injuries /damages at possible opportunity at the scene of crime, it was very wrong to believe them to have proved the prosecution case beyond reasonable doubt.*
4. *That the case for the prosecution side was not proved beyond reasonable doubts as the Ward Executive Officer (WEO) to whom the appellant was allegedly first mentioned/named was not called to testify in court as a material witness.*
5. *That the trial court grossly erred in law and fact to believe the prosecution witnesses that they were credible despite full lies and contradictions testified in court by the testimonies by PW1, PW2, PW3 and PW4 which contradictions spoilt the whole evidence of the prosecution side.*

6. *That the trial court grossly erred in law and fact for importing extraneous matters or theories not canvassed in evidence of DW1, DW2 and DW3.*
7. *That the offence of destruction of property was not sufficiently proved by the testimony of PW5 as the photos /pictures/exhibit P2) were tendered in evidence in contravention of section 202(1) of the criminal procedure Act, Cap. 20.*
8. *Alternatively, the trial court erred in law in admitting four photos/pictures as exhibit P2 collectively.*
9. *That the trial court was not fairly conducted on account that the prosecution witness –PW4 Laurent John Buchakuchi was not listed amongst the prosecution witnesses nor was a prior court's leave sought and granted by the trial court to allow the said witness to testify.*

The Counsel for the appellant condensed ground no. 1, 2, 3 and 4 that;

1. *The visual identification evidence by Pw1, PW2 and PW3 upon which the trial court relied on to convict the appellant was not watertight.*

The appellant submitted that the trial magistrate erred in law when basing its conviction on weak recognition. He adduced that when PW1 said to know and identify the accused person, the visual identification was not supported by the evidence hence so it was not watertight. The

counsel for appellant referred the court to the judgment at pages 14-15 where it states,

> *"In this case the accused person and all the prosecution witnesses are the village members of Bushagara and further they are neighbor at the said locality. All the witnesses have told this court that, they knew the accused well as he is a co-village. The witnesses have told this court that they had a torch and the night was moonlight".*

Although the witness knew the accused person, PW1 was supposed to state the proximity of the area. Also it was submitted that PW1 and PW2 did not tell the court the time spent to observe the applicant, intensity of the light so as to clear all doubts. This has been provided in the case of **Elias Yobya Mkalagale v R Criminal Appeal No. 405 of 2015 (unreported)** at page.6 and in **Joseph Michael and Another V R Criminal Appeal Nos. 213 & 215 of 2014 (unreported)** where the Court stressed that,

> *"We wish to stress that even in recognition cases, clear evidence on source of light and its intensity is a paramount importance. As occasionally held, even when a witness is purporting to recognize someone whom he knows ,as was the case here, mistakes in recognition of close relatives and friends are often made."*

He further submitted that, though, the analysis of the case is not supported by the evidence; there is no any witness who showed a torch or intensity of the moonlight. The Counsel for the accused submitted that, the evidence

used to ground conviction on the appellant was on visual identification only but the ground of conviction is unsupported.

To fortify his argument, he referred the court to the judgment at page. 14 in the case of **Fadhili Gumbo Elias Malota and Three Others v Republic [2006] TLR 50(CAT)** where it was held that,

> *"Where the witnesses were close to allow to prove identification and they were not contradicting that they knew the appellant before the date of incident their identification by name cannot be faulted."*

The Counsel asserted that this case is not well supported because it does not touch on the aspect of sufficient light and at page.15 of the judgment, he insisted that the evidence adduced by PW1, PW2 and PW3 is not watertight for those anomalies mentioned.

The Counsel further asserted the proceedings at page 8, the PW1, could not name the suspect at the first instance. The earliest opportunity of naming the suspect concludes that the suspect was properly identified.

Also he submitted that Ward Executive Officer (WEO) who was a competent witness was not called upon to testify hence this could draw an inference on that matter. The Counsel further submitted that PW1 under oath did not mention PW3 if he went to the area of scene. This also leaves doubts on credibility on the witness. Hence, PW1, PW2 and PW3 cannot be credible witnesses.

Further to that, the Counsel for appellant asserted that at the proceedings, the circumstances was unfavorable for proper recognition of the second and third accused. They did not identify and not recognize them because of the distance.

2. *On the fifth ground, the trial court grossly erred in law and fact to believe the prosecution witnesses that they were credible despite full lies and contradictions testified in court by the testimonies by PW1, PW2, PW3 and PW4 which contradictions spoilt the whole evidence of the prosecution side.*

The Counsel for the accused asserted that there are contradictions which create doubts as adduced by PW1, PW2, PW3, PW4 and PW 6. These contradictions are very fundamental, and they should be resolved in favour of the appellant.

3. *On grounds 7 and 8 which are combined, that is, the offence of destruction of property was not sufficiently proved by the testimony of PW5 as the photos /pictures/exhibit P2) were tendered in evidence in contravention of section 202(1) of the Criminal Procedure Act, Cap. 20 and the trial court erred in law in admitting four photos/pictures as exhibit P2 collectively.*

The Counsel submitted that the trial magistrate did not analyze the evidence of PW5 (Police Officer) and also did not bother to check if he was authorized by the Attorney General in Criminal Case. The Counsel cited the case of

Fundisha Omary V R [Criminal Appeal No.592 of 2015 (Unreported)] where section 202(1) Criminal Procedure Act, Cap 20 stated that;

> *''in any inquiry, trial or other proceeding under this Act a certificate in the form in the Third Schedule to this Act, given under the hand of an officer appointed by order of Attorney General for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film together with any photographic prints, photographic enlargements and any other annexures referred to therein ,shall be evidence of all facts stated in the certificate.''*

Therefore, the learned counsel for appellant submitted that, there is no convincing ground for conviction as the Counsel for Republic also supports the appeal. Henceforth, he prays for this court to set aside the conviction, and its sentence of 7 years and the appellant be released.

In reply to those grounds, the learned State Attorneys for Republic were in support of the appeal. The learned State Attorneys supported combination of ground number 1,2,3, and 4 on the issue of visual identification .They further supported appeal by citing the case of **Waziri Amani v R [1980],** where it is now settled law that in a case depending on the evidence on visual identification such evidence must be absolutely water tight to justify a conviction. Also the case of **Yohanis Msigwa v. R [1990] and TLR 148 and Masudi Amlima v. R. [1989] TLR 25** support. The guidelines to be followed by the courts were stated with sufficient clarity by the court in **Waziri Amani v. R [1980] TLR 250.**

The State Attorney further submitted that, the evidence of PW1 and PW2 on visual identification and recognition was not water tight as there is a doubt if there was any light outside. The witnesses only mentioned they had torch and moonlight but did not go beyond that to explain what type of torch and the intensity of the light. This position was also supported by the applicants' counsel. Different torches produce light of different intensities. Therefore, there was an overriding need to describe the intensity of the light which would have enabled PW1 to correctly recognize only the appellant out of the three assailants. The Counsel for Republic submitted that this was not done hence it raises a lot of doubts on the bare assertion of PW1 that he recognized the appellant.

The State Attorney for the Republic submitted further that, the feeling that PW1 and PW2 might not have seen and recognized the appellants is reinforced by the fact that he never mentioned the accused's name during that very night but on the following day he did mention to the police when he reported the incident. The learned Counsel for Republic asserted further to that,

> *"the earliest naming confirmed that the person identified was proper, but failure to that leads to nullity".*

These two basic shortcomings render the identification evidence of PW1 highly suspicious and unreliable.

The learned Counsel for the Republic also submitted that, the case for the prosecution side was not proved beyond reasonable doubt as the Ward Executive Officer (WEO) to whom the appellant was allegedly first named was not called to testify in court as a significant witness.

The learned Counsel for Republic further submitted that on issue based on photo taking at the scene of crime, it is true that the certificate from the Attorney General is required however, there was nowhere in the proceedings where a certificate has been annexed to support the evidence in the court. To fortify his argument he referred the Court to Section 202(1) of the Criminal Procedure Act, Cap 20.

On the last ground of appeal, the learned State Attorney for Republic supported the Counsel for the applicant as stated following those contradictions testified in Court by testimonies by PW1, PW2, PW3, and PW4, spoilt the whole evidence of the prosecution side. Therefore, the learned Counsel for Republic prays to the court to set free the accused.

From the foregoing submissions, there is no doubt that the prosecution centers on the evidence of visual identification as grounds nos. 1, 2, 3 and 4 . After considering authorities on the matter before hand and the need to guard against all possibilities of mistaken identification. The trial magistrate was in no doubt that the accused was positively identified and there was no possibility of mistaken identity when he stated,

"at this juncture I must say that the identification of the accused person by the four prosecution witness was reliable as the accused was familiar to them, his village mates and that the moonlight and torches had facilitated hence reliable identification and the witnesses are credible."

It is trite law that no court should act on the evidence on the visual identification, unless all possibilities of mistakenly identity are eliminated and the court is satisfied that the evidence is watertight. See **Shaban Versus Republic, Criminal Appeal No.32 of 2011 (unreported), Waziri Amani V Republic [1980]** TLR.250.

In the present appeal the offence was committed at night hours and the witnesses were allegedly using torches. There is nowhere shown if the witnesses had ample time to observe and properly recognize the accused person, as they were using torch and outside there were moonlight, hence the prevailing conditions were not conducive enough for conclusive identification of the accused.

From those principles, I am of the settled mind that the accused was not properly identified at the scene of crime by considering the evidence that they identified the accused during the incident and they named the accused on the following day. The record shows that the incidence occurred on 7/4/2018 at 10p.m and the accused was named on 8/4/2018.

The learned Counsel for the Republic submitted that, the case for the prosecution side was not proved beyond reasonable doubt as the Ward

Executive Officer (WEO) to whom the appellant was allegedly first named was not called to testify in court as a significant witness. In my view that, Ward Executive Officer was an important witness who was not summoned to testify. Had the WEO been brought to testify, the trial magistrate would have arrived at a different conclusion. I am mindful that the prosecution is at liberty to call a witness they deem material. However, when a witness left out appears to be very important such as it appears to be in the case at hand, yet he is not summoned to testify without reasonable explanation; this court is entitled to draw adverse inference. I substantiate this stance with the case of **Aziza Abdallah V R [1991] TLR 71** where it was held thus;-

> *"The general and well known rule is that the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw adverse inference to the prosecution".*

This being the criminal case, the benefit of doubt goes to the appellant.

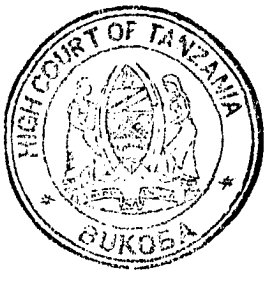
The learned State Attorney for the Republic further submitted that on issue based on photo taken at the scene of crime, Section 202(1) of the Criminal Procedure Act, Cap. 20, it is true that the certificate from the Attorney General is required. However, there was nowhere in the proceedings where a certificate has been annexed to support the evidence in the court. The case of **Monko V. Republic (Criminal Appeal No. 265 of 2015)(CAT unreported) 61;(08 April 2016)** held that;

"the ten photographs of the heads of cattle have no probative value because they were not accompanied with a certificate regarding their preparation by an officer appointed by order of the Attorney-General under section 202 of the Criminal Procedure Act,Cap.20."

I need not labour on last ground on the issue of those contradictions, although I'm not fully convinced with the alleged contradictions submitted by the counsels of both sides. All witnesses who testified in Court PW1, PW2, PW3, and PW4 clearly submitted their case beyond all contradictions. Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any way.

From the foregoing reasons, the appeal is therefore allowed. I further quash the conviction entered and set aside the sentence by the trial court. I also order immediate release of the appellant unless he is lawfully held.

It is so ordered.



A.A.BAHATI

JUDGE

30/1/2020

Coram: Hon. A.A.BAHATI

Appellant: Present in Person (Advocate-Mathias Rweyemamu)

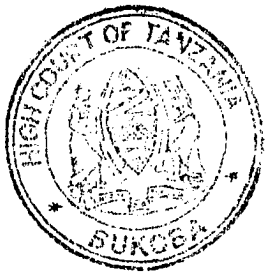
Respondent: State Attorney Emmanuel Kahigi

B/C: Gosbert Rugaika

State Attorney: Hon. Judge, the matter is for judgment. We are ready to receive it

Appellant: I am also ready

Court: The case is for judgment .The same is ready and is delivered in open court before the appellant and the State Attorney for Republic today 30/1/2020.



A.A BAHATI

JUDGE

30/1/2020