IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

CRIMINAL APPEAL NO. 10 OF 2020

SAIMON S/O MADUHU @ BUHALO
RASHID S/O RAMADHANI @ KALUNGWA .....**APPELLANTS**
SAIMON S/O RABAN @ MALONGO
MATHIAS S/O MARTINE @ SINDANO
NEHEMIA S/O YACOB

VERSUS

THE REPUBLIC .....**RESPONDENT**

(Appeal from the decision of the District Court of Mpanda at Mpanda in Criminal Case No.200/2018)

JUDGEMENT

9th July – 17th August, 2020

MRANGO, J.

This appeal was filed by five appellants namely, Saimon s/o Maduhu @ Buhalo, Rashid s/o Ramadhani @ Kalungwa, Saimon s/o Raban @ Malongo, Mathias s/o Martine @ Sindano, and Nehemia s/o Yacob who were first charged and convicted by the District Court of Mpanda at Mpanda in Criminal case No. 200 of 2018 for the two counts: one, for Arson **Contrary to Section 319 of the Penal Code, Cap 16, RE 2002**

and, two, **for Malicious damage to property contrary to section 326 of the Penal Code, Cap, 16, RE 2002**.

They were each sentenced to one year imprisonment for the first count and, each one year imprisonment for the second count as well each to compensate the victim of crime.

At the trial court it was alleged on the first count that on the 18th day of December 2018 at Katobo area within Tanganyika District in Katavi Region the appellants did unlawfully set fire to four buildings of Zuhura d/o Andrew with the properties therein valued at Tanzania Shillings Fourteen Million Nine Hundred thousand and sixty four Thousand (Tsh. 14, 964, 000/=.

With regard the second count it was alleged that on the 18th day of December 2018 at Katobo area within Tanganyika District in Katavi Region did unlawfully damage one iron sheet house by demolishing 15 goats, 28 hen and 30 pigeons by throwing them into the fire, all properties valued at Tshs. Six Million and thirty six thousand (Tshs. 6,036,000/= the property of Zuhura d/o Andrew.

To prove the case, prosecution successfully called three witnesses whereas the appellants defended themselves along with three witnesses to support their defence.

After full trial, the trial court found the appellants guilty of the two offences and proceeded to convict, and accordingly sentenced them as aforesaid. Aggrieved by both conviction and sentence of the trial court appellants preferred this appeal, each lodging his petition of appeal containing five grounds of appeal.

During the hearing of this appeal, the appellants were represented by Mr. Deogratius Sanga, Learned advocate; whereas Ms. Safi Kashindi, the learned state attorney appeared for the republic to argue the appeal. Mr. Deogratius Sanga prayed to argue the appeal by way of written submission whereas Ms. Safi Kashindi conceded. Each counsel filed their respective submission as scheduled and ordered by the court.

In supporting the appeal, Mr. Deogratius Sanga, learned advocate for the appellants submitting with regard to the 1st ground of appeal, he was of the strict view that the trial court's decision is wrong and unjust following convicting the appellants on basis of the incredible, inconsistence, insufficient and contradictory evidence of prosecution.

Mr. Sanga submitted that it is a trite law that, discrepancies in the various account of the story by the prosecution witnesses give rise to some reasonable doubts about the guiltiness of the accused person, which should be resolved in favour of the accused. To elaborate his stance he cited the case of **JEREMIA SHEMWETA Versus REPUBLIC [1985] TLR 228** at page 235 where the court held that he quoted:

> *"Be it as may, the discrepancies under quarry on the prosecution own side raise some reasonable doubts..... I resolve these doubts for the benefits of the appellant as required by law"*

In this case at hand, Mr. Sanga further submitted that there is a number of discrepancies and gross contradiction in various account of story by the prosecution witnesses to some material issues to be specific: firstly the date of occurrence and reporting of alleged incidence of fire and secondly identification of the accused persons (the appellants herein) thirdly number of houses which alleged to have been burnt. In their testimonies PW1 and PW2 who alleged to be together at the fateful date of the incidence of the alleged fire and who purported to report the same to PW3 while under oath, he said their testimonies contradicted each other,

PW1 (ZUHURA ANDREA) alleged the incident of fire to have been occurred on 18/12/2019 said to have reported the same to their hamlet leader PW3 on 20/12/2019 and PW2 (ASHA BONA) also alleges the incidence to have occurred on 18/12/2019 and that her together with PW1 they reported the same to PW3 on the followed day, that means on 19/12/2019 and all together alleged to have mentioned inter alia all the five accused persons before the hamlet leader to wit: PW3, (see page 17 and 19 of the trial court's proceedings).

Mr. Sanga added that PW3 while under oath gave his testimony to the effect that the incident was reported to him on 22/12/2020 to have been occurred on the day before which simply means 21/12/2019 and that at the time of reporting PW1 and PW2 mentioned only 1st, 2nd and 3rd accused persons to be their invaders, he testified further that 4th and 5th accused persons were not mentioned to him as among the invaders.

On top of that Mr. Sanga argued that while the charge sheet provides that the houses which were burnt are four, testimony of PW1 and PW2 were at variance with what was stated in the charge sheet wherefore in whole of their testimonies they testified to the effect that the burnt houses were only two.

Mr. Sanga was of the view that by taking into concern the material discrepancies on the stories by the prosecution witnesses pointed out herein which in essence it shows substantively that the prosecution failed absolutely to prove the case against the accused persons herein, he humbly invited this court to find it proper to resolve the doubts on favor of the appellants and accordingly allow their appeal upon finding merit in their first ground of appeal.

In respect with 2nd and 3rd grounds of appeal Mr. Sanga argued them jointly, that it is his legal view that the offence of arson which the appellants were charged and convicted with before the trial court and the ordered to be paid to the victims was not sufficiently proved.

Mr. Sanga insisted that it is a trite law that he who alleges must prove the allegations. In criminal cases, the onus of proving is vested on the prosecution side, that is, the spirit of **Section 110 (1) and (2) of The Evidence Act, 1967** therefore the burden of proof lies with prosecution. He said the principle has been held in many cases including the case of **JONAS NKINZE V REPUBLIC**. Prosecution machinery has to prove the case **beyond reasonable doubt**.

The prosecution in supporting their case before the trial court arraigned three (3) witnesses in which he said none of them gave sufficient evidence to neither proving the incidence of fire nor the value of losses the victim alleged to have suffered. The whole of the prosecution evidence was naked stories without any justifiable proof of the same. No any witness was called from fire and rescue forces the organ which is vested with powers and trained personnel over all the incidences of fire whose would corroborate with the PW1 and PW2 who in fact had interest to serve as they are wives of the owner of the alleged house one HAMIS RAMADHANI bearing in mind the principle that the evidence of person with interest must be corroborated by independent evidence this was principle emanated from the case of **ABRAHAM SAIGURAN versus R.[1981] TLR 265 HC**, failure of the prosecution to arraign before the trial court a witness from fire and rescue forces left a gross doubt in the case and renders their case specifically on the issue of occurrence of the alleged fire absolutely not proved beyond reasonable doubt.

Apart from corroborating the fire and rescue force is vested with powers to investigate and produce scientific report as to the cause and loss

suffered by fire incidence hence proving occurrence of fire incidence to have occurred, Mr. Sanga wished to invite this court to enjoy **The Forces Act, Cap 42' Act No. 14 of 2007** which support the effect of his averment. For clarity and easy reference, he re-produced the same as hereunder:

> "5-(1) – NIL
>
> (2) Without prejudice to the provision of subsection (1), the functions of the force shall be to-
>
> (a) – NIL
>
> (b) – NIL
>
> © - NIL conduct fire inspection and investigation for the purposes of obtaining information relating to the causes of fire and loss inflicted by fire
>
> (d) to conduct studies on investigation of arson and accidental fires

Mr. Sanga submitted that taking into concern the position in the cited provisions herein in line with the circumstances of this case, he humbly prayed for this court to join hand with his view that, all the testimonies by the prosecution before the trial court was merely spoken words without any evidential value. Northing was given as evidence by the prosecution witness to prove arson and the losses alleged to have suffered, In his view to prove the alleged arson and malicious damage to property in this case at hand the prosecution so as to add water to the mere spoken words of the PW1, PW2 was duty bound to arraign before the trial court a witness from fire and rescue forces whom would have conducted investigation and prepared a report concerning the alleged fire incidence, on the cause and loss suffered.

In addition, he said PW3 did not even testify to have witnessed the fire incidence during or after occurrence likewise the investigating police, did neither draw nor tender a sketch map of the scene of the crime hence all created reasonable doubt as to whether or not the fire incidence ever happened.

Mr. Sanga was of the view that even if a report from fire and rescue force could be impossible to obtain in the circumstance, at least they could

produce receipts in proving the loss, failure of the prosecution to bring a witness of such nature and or even to bring a report from Fire and rescue forces or and at least receipts to ascertain the value of the alleged destroyed properties left grave doubt in their case which shall be resolved on favour of the appellants.

Be it as it may, Mr. Sanga argued that even if it could be true that, the fire incident occurred as alleged still in absence of report which it tells the source and the alleged losses if any attract a thought to a reasonable person that, may be the said fire could have been emanated from an accident or may be not caused by the appellants as alleged and the allegation are manufactured by the victims for their own malicious accord and intent to cover or justify their alleged loss or way of enriching themselves from the alleged fire incidence.

One could take an adverse inference following the malicious words of the victims (PW1) and (PW2) while being cross-examined in their testimonies at Pg 18 and 20 respectively. He quoted;

PW1 at page 18

"You are my neighbors but you didn't assist me."

PW2 at page 20

"Some neighbors arrived at the scene of the crime but they did not assist us"

He therefore argued that on other view this might be a revenge for neighbor failure to show support to the victim during alleged fire incidence if at all it happened.

Without prejudice to what he has submitted herein, Mr. Sanga submitted, the allegations was manufactured by the victims together with some other peoples unknown to them, if a reasonable person could look to the judgment which imposed a sentence against the appellants herein will come to the reasoning that, the allegations against the appellants was manufactured with target of compensation gain any way through criminal case this is said to be so on the basis that the said judgment was made with a magistrate who is competent and aware of the position of the law and the sentence in respect to the offence the appellants were charged with.

Mr. Sanga argued that despite of his awareness of the law and in consideration of the truth over the circumstance, the trial magistrate

convicted the appellants and sentenced them to serve one year imprisonment, he said that drew an inference that with conscious cried out that the appellants were not guilt since there is no other way of procuring compensation on favor of the victim the trial magistrate forced at least to convict the appellants to one year imprisonment though the offence was not proved.

Considering the position of the law above, he prayed for the court to find merit on the 2nd and 3rd grounds of appeal.

Regarding to the 4th ground of appeal, Mr. Sanga invited this court to find a grave doubt to prosecution case on their failure on undisclosed reasonable grounds to call the material witness one KHAMIS RAMADHAN whom in essence was the owner of all the alleged demolished properties subject matter of the case before the trial court and could at least give good evidence in the circumstance.

Advocate Sanga argued that it is a trite general principle of law, that the prosecution are under prima facie duty to call witness who, from their connection with the transaction in question, are able to testify on material facts and if such witnesses are within reach but are not called without sufficient reason being shown the court may draw an inference adverse to

the prosecution. This was the position in the case of **AZIZ ABDALLAH Versus REPUBLIC [1991] TLR 71 (CA)**

In this case at hand, Mr. Sanga submitted that such failure by the prosecution to call witness Khamis Ramadhan raises a grave to effect that may be the alleged properties were not even demolished and that could he be called he could have testified to that effect contrary to prosecution case. He prayed for the court to find merit in the 4th ground of appeal

In respect to the 5th ground of appeal, it is Mr. Sanga's submission that the appellants were sentenced without being legally convicted as required by law. He argued that it is a trite law that when an accused is charged with more than one count, the court shall convict him separately in respect of each count it has found guilty. Convicting the accused jointly in respect of more than one count amount to omnibus conviction, which is fatal and renders the judgment a nullity. The position was held in the case of SEME MKONDYA versus REPUBLIC DC Criminal Appeal No. 16 of 2019, unreported, where it was observed that;

> *"from the above extract, it is clear that the appellant's convictions in respect of all the counts were put together. It is not stated which amongst the offences the appellant*

was convicted. To may view that was wrong. It is proper for the District Court to convict the appellant separately in respect of each count, which he has found guilty. In law that amount to omnibus conviction which is improper and inacceptable"

[he emphasized by Italic and underline]

Before the trial court, Mr. Sanga said the appellants were charged with two offences to wit: arson and malicious damage to property c/s 319 and 326 (1) of the Penal Code, Cap.16 R.E. 2002 respectively, though as seen at page 9 where the appellants were sentenced separately for both counts, again at last paragraph of page 8 of its judgment the trial court convicted the appellant in respect of both the counts together. He quoted for reference;

"I have the considered opinion that prosecution has proved charge against the accused persons beyond any reasonable doubt as the standard set by law in criminal cases hence rounding the conviction of all five accused person contrary to section 319 and 326 (1) of the Penal Code, Cap.16 R.E.2002."

Mr. Sanga submitted that the trial magistrate made an omnibus conviction against the appellants herein which is highly discouraged by this court and the court of appeal in various cases inter alia the above cited case for offending the material requirement of the law.

He humbly prayed for this court to find that, the trial court sentenced the appellants without first convicting them as required by law hence its entire judgment is a nullity thus be nullified.

Mr. Sanga argued that he is aware with the fact that, in the circumstance whether either conviction was not entered at all or was improperly entered before sentencing the accused, the remedy available is to remit the records to the lower court (Mpanda District Court) so that it should comply with the law by entering conviction and sentencing the accused. He is of the view that, this court should resort to such a remedy where the interest of justice so requires, when there is cogent evidence against the accused. He submitted that retrial will only be ordered where the interest of justice so requires, that is when the original trial was illegal or defective but not when the conviction is set aside because of insufficiency of evidence or to enable the prosecution to fill up gaps in its evidence in the first trial. The position was held in the case of FATAELI

MANJI Versus REPUBLIC [1966] EACA 341 and case of SEME MKONDYA Versus REPUBLIC whereas in both of the cases, the court while dealing with the situation similar to the case at hand resorted not to order retrial for lack of sufficient evidence to prosecution.

In this case at hand, Mr. Sanga reiterated that the prosecution miserably failed to prove their case, there is no sufficient evidence by prosecution brought before the trial court which would warrant conviction to the appellants. He is of the view that if this case will be remitted back to the trial court with an order to be tried afresh the same will prejudice the appellants and will afford the prosecution with chances to rectify their mischief which will let the cry of justice to the appellants.

With the plethora of relevant authorities pined in, he prayed for this appeal to be allowed, the judgment of the trial court be quashed and sentence together with all its subsequent orders be set aside and the appellants be released from prison.

On her part, Ms. Safi Kashindi, supported the grounds of appeal by submitting that it is trite law under **section 110 (1) of the Evidence Act, Cap 6 RE 2019** that whoever desires any court to give judgement as to legal right or liability dependent on the existence of facts which he

asserts must prove that those facts exists. She submitted that established principle has been held in the case of **Jonas versus Republic [1992] TLR 213** that the onus of proving the case beyond reasonable doubt is on the prosecution side.

Ms. Kashindi, further submitted that the prosecution to prove their case called a total of three witnesses who testified as follow;

PW1 one Zuhura d/o Andrea and PW2 Asha d/o Bona had a similar evidence as they testified that on the material date of 18 /12/ 2018 at about 15:00 hours they were together with their children at home when a group of more than thirty people arrived looking for their husband Kassim Ramadhan who was not at home by that time as they suspected him to have stolen some properties. Then those people entered into their house in which they took out two bicycles, they set fire on the two houses roofed with grasses and one iron sheet house was destroyed. However those people took cash money Tshs. 21, 000,000/=. PW1 and PW2 further testified that they managed to identify some of those people and that all the appellants were among those people and that they reported the incident to Tanganyika Police Station on 20/ 12/ 2018.

PW3 Yusuph s/ Iddi Milambo testified that he is the Chairman of Katobo and that on 22/ 12/ 2018 he was at his home then there came two women with their daughters came to inform him that they were invaded last day at around 15:00hrs at their home place at Katobo B by the people who were looking for their husband and they ended up to destroy their properties and set fire to the houses. PW3 further testified the following people were mentioned to him to have been identified on the material date at the scene of crime. These are Saimon s/o Maduhu, Malim, Rashid, Ramadhan, Lugisha, Mabeya, Kisiki, Laban, Malongo, Mabula, Sindani, Norbert, Yakobo and Martin. He testified to know the appellants as his people then escorted the victims to Tanganyika Police Station. Thereafter they visited the scene of crime where they found houses being burnt and others demolished. He identified the 1st, 2nd, 3rd appellants only in court.

Ms. Kashindi reminded the court that it is settled principle in case involving evidence of visual identification no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight. In such cases conditions favoring a correct identification are of utmost importance. Case laws have established necessary descriptions to be made

by the identifying witness such as the length of time he had with the accused under observation, the distance from which the witness had accused under observation, if there was any light then the source and intensity of such light, description of attire, whether he was tall or short and whether he knew him before or was his first time to see him and so forth. These principles were established by the Court of Appeal in various cases including the case of Waziri Amani versus Republic [1980] TLR 250 and Raymond versus Republic [1994] TLR 2.

Ms. Kashindi was of the view that base on the duty on the prosecution side to prove the case beyond reasonable doubt and the circumstances of this case it is obvious that the evidence of the PW1 and PW2 who were the eye witnesses failed to give clear evidence as to how they identified the appellants among the group of people who invaded their home as established in the case of Waziri Amani. They just pointed the appellants while testifying the evidence which is regarded to be a dock identification and is valueless as it is established in the case of Adolf Martin versus Republic, Criminal Appeal No. 249 of 2011, unreported. The evidence of PW1 and PW2 was of crucial value but was not sufficient to support the conviction of the appellants. She prayed for the appeal be

allowed and the appellants be set at liberty since the case against them was not proved beyond reasonable doubts.

In the course of composing this judgement, I discovered that the present appeal is not competent before me; the issue which was neither noted by this court nor the parties during the hearing of this appeal.

It is in the record of this appeal that the judgement which the appellants are appealing against was not composed and delivered by the trial court as per the charge sheet, but rather it was composed by the District Court of Mpanda as the title of the charge sheet which titled in the Court of Resident Magistrate of Katavi at Mpanda. The typed judgement and proceedings suggest that the case was tried at the District Court of Mpanda at Mpanda. Therefore, the appeal before me is incompetent for want of proper judgement and proceedings of the trial court that is, the Court of Resident Magistrate of Katavi at Mpanda.

The available judgement attached to the petition of appeal was not delivered in or by the trial court. To me the irregularity I discovered does alone suffice to dispose of the present appeal.

The law is clear under the provision of section **362(1) of the Criminal Procedure Act, Cap 20, RE 2019** I quote;

> *"Every appeal shall be made in the form of a petition in writing presented by the appellant or his advocate and every petition shall unless the High Court otherwise directs, be accompanied by a copy of the proceedings, judgement or order appealed against"*

The above cited provision requires that, for this court to entertain any appeal lodged before it; the petition of appeal filed to this court should be accompanied by a copy of proceedings, judgement or order appealed against. But it has been a practice that an aggrieved party attaches only judgement or order appealed against which to me it is not fatal.

The record of this appeal is clear that the charge sheet dated 08/ 05/ 2019 which initiated criminal charges against the appellants was headed **IN THE RESIDENT MAGISTRATE COURT OF KATAVI AT MPANDA** and the same was in fact filed and admitted in the Court of Resident Magistrate of Katavi after it was substituted, and it was where I suppose the proceedings against the appellants commenced to its finality. Unfortunately, both proceedings and the judgement were taken and

composed by the trial magistrate respectively as if he was sitting in the District Court of Mpanda, hence headed his judgement and proceedings, and I quote that

THE UNITED REPUBLIC OF TANZANIA

IN THE DITRICT COURT OF MPANDA

AT MPANDA

CRIMINAL CASE NO. 200 OF 2018

THE REPUBLIC

VERSUS

SAIMON S/O MADUHU @ BUHALO .....1st ACCUSED

RASHID S/O RAMADHAN @KALUNGWA.....2ND ACCUSED

SAIMON S/O RABAN @ MALONGO .....3RD ACCUSED

MATHIAS S/O MARTINE @ SINDANO.....4TH ACCUSED

NEHEMIA S/ YACOB.....5TH ACCUSED

The judgement and proceedings with the above quoted headed was the one which was accompanied with the petition of appeal with the trial of the appellants being took place in the District Court of Mpanda. It is my considered view that the judgement which the appellants ought to have attached to their petition of appeal was the one which was supposed to be

headed, composed and delivered by the Court of Resident Magistrate of Katavi because it was the trial court whose decision ought to be subject to this appeal.

Therefore attaching to their petition of appeal the judgement of the court where the trial did not take place is wrong and improper. With that view, it is equal as if the petition of appeal was filed without accompanied with a copy of judgement, the appellants are appealing against as required by law.

My further scrutiny of the charge sheet also reveals that the said incidence alleged to have been committed by the appellants occurred at Katobo village within Tanganyika District in Katavi Region. Therefore, the geographical location of Katobo village is within the Tanganyika District of which even the District Court of Mpanda could have no jurisdiction to the trial of the case, save if there is formal consent for the same. I find it prudent to quote the charge sheet in full in order to appreciate above argument.

IN THE RESIDENT MAGISTRATE COURT OF KATAVI

AT MPANDA

CRIMINAL CASE NO. 200 OF 2019

VERSUS

SAIMON S/O MADUHU @ BUHALO .....1st ACCUSED

RASHID S/O RAMADHAN @KALUNGWA.....2ND ACCUSED

SAIMON S/O RABAN @ MALONGO .....3RD ACCUSED

MATHIAS S/O MARTINE @ SINDANO.....4TH ACCUSED

NEHEMIA S/ YACOB.....5TH ACCUSED

CHARGE

1st count

STATEMENT OF THE OFFENCE

ARSON: Contrary to section 319 of the Penal Code, Cap 16, RE 2002

PARTICULARS OF THE OFFENCE

SAIMON S/O MADUHU @BUHALO, RASHID S/O RAMADHAN @KASUNGWA, SAIMON S/O RABAN @MALONGO, MATHIAS S/O MARTINE@SINDANO and NEHEMIA S/O YACOB on the 18th day of December 2018 at Katobo area within Tanganyika District in Katavi Region did willfully and unlawfully set fire to four buildings of Zuhura d/o Andrea with the property therein valued Tanzania Shillings Fourteen Million Nine Hundred Thousand and Sixty Thousand (Tshs. 14, 964,000/=).

2nd count

STATEMENT OF OFFENCE

MALICIOUS DAMAGE TO PROPERTY: Contrary to section 326 of the Penal Code, Cap 16 RE 2002

PARTICULARS OF OFFENCE.

SAIMON S/O MADUHU@BUHALO, RASHID S/O RAMADHAN@KASUNGWA, SAIMON S/O RABAN@MALONGO, MATHIAS S/O MARTINE@SINDANO and NEHEMIA S/O YACOB on the 18th day of December 2018 at Katobo area within Tanganyika District in Katavi Region did willfully and unlawfully damage one iron sheet house by demolishing, 15 goats, 28 hens and 30 pigeons by throwing them into the fire valued Tanzanian Shillings Six Million and Thirty Six Thousand (Tshs. 6, 036,000/=the property of Zuhura d/o Andrea.

It is a principle of law that in any criminal proceedings it is a charge which lays a foundation of a trial. And again it is a principle of law that a charge must fulfill following requirements; **One**, the charge drawn and signed is in respect of an offence known to law; **Two**, it is an offence over which a court has jurisdiction; **Three**, must reflect the offence complained.

The principle has always been that an accused person must know the nature of the case he is facing. As such the charge must contain sufficient information to enable the appellant to understand the nature of the charge he faces and what defense to put up. See the case of **JUMA MAKOYE@**

JUMA versus The Republic, CAT, TABORA, Criminal Appeal No. 285 of 2016.

In the instant case, the charge sheet does not comply with aforesaid principle which is the spirit of the enactment of **section 135 of the Criminal Procedure Act, Cap. 20 RE 2002.** However, the copy of both judgement and the proceedings does not reflect the above quoted charge sheet as if the appellants have been charged/tried with a court which have no jurisdiction. The anomaly even touches to the case number of the case, there is variation of the case number. The copy of judgement and the proceedings is Criminal Number 200 of 2018 while the charge sheet is Criminal Number 200 of 2019.

In that view, renders the trial nullity and cannot be salvaged under **section 388 (1) of the Criminal Procedure Act, (supra)**, that definitely occasioned miscarriage of justice to the appellants. For the reason herein, I proceed to quash and set aside the entire proceedings and the judgement of the trial court.

Notwithstanding the foregoing, even if I could have found the charge sheet is proper worse still there are contradictions with regard to the testimonies of the prosecution's witnesses. The testimonies of PW1, PW2

and PW3 contradicting each other as regard to the date of the occurrence of the incidence and the date where the incident was reported to the local leader as well the number of the appellants mentioned. PW1 testified that the incident occurred on 18/12/2019 and said to report the matter to a local leader (PW3) on 20/ 12/ 2019 while PW2 said the incident took place on 18/ 12/ 2019 and together with PW1 they reported the matter to PW3 on 19/ 12/ 2019 by mentioning all the five appellants herein.

However, PW3 testified that the matter was reported to him on 22/ 12/ 2019 while saying the incident took place on 21/ 12/ 2019. He said PW1 and PW2 mentioned to him only the 1st, 2nd and 3rd appellants to be the invaders, the 4th and 5th appellants being not mentioned to him.

Therefore, the testimonies of PW1, PW2 and PW3 are contradictory to each other and they are not consistent as a result cannot be relied upon. However, the court has a duty to resolve the inconsistences if they are minor and whether they go to the root of the matter as per the case of **Mohamed Said Matula versus Republic [1995] TLR 3** where the Court of Appeal held thus,

> "Where the testimonies by witnesses contain inconsistences and contradictions, the court has a duty to

address the inconsistences and try to resolve them where possible; else the court has to decide whether the inconsistences and contradictions are only minor or whether they go to the root of the matter."

The inconsistences and contradictions occurred in this case have an impact in assessing the credibility of the witnesses testified before the trial court. With the testimonies as testified by PW1, PW2 and PW3 I can say they were not credible witnesses to assist on the prosecution side. Therefore I subscribe the argument as submitted by the learned advocate for the appellants that the evidence of the prosecution witnesses had inconsistences and contradictions as hinted upon above.

Apart from the foregoing, there is an issue of identification of the appellants to the place where the incident took place. None of the prosecution witnesses particularly eye witnesses PW1 and PW2 has been able to give a detailed explanation as to how she identified the appellants. What the PW1 and PW2 did was to point the appellants while they were testifying at the trial court. The law requires that the identification evidence must be watertight to ground conviction. The position was articulated in

the case of **Republic versus Elia Sebwato [1960] E.A 174** where the court held that;

> "Identification evidence must be watertight in order to sustain conviction and exclude possibility of mistaken identity."

The position was clearly restated by the Court of Appeal in the case of **Waziri Amani versus Republic [1980] TLR 250** where the Court of Appeal gave guidelines with sufficient lucidly on the evidence of visual identification. The Court observed thus;

> "Evidence of visual identification is of 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 fully satisfied that the evidence before it is absolutely watertight."

From their testimonies PW1 and PW2 who are eye witnesses, none of them was able to provide a clear details/ explanation on how she came to know of each of the appellants. PW1 when cross examined by 5th appellant only explained to see him at katobo village as he was among the culprits

who attacked her. She did not give details of the remaining appellants. The same to PW2 who explained to see 4th appellant only at her village without give further details.

Thus, to say that their testimonies has eliminated all possibilities of mistaken identity for them to be relied upon to ground conviction to my view the identification is not watertight as per the tests in **Waziri Amani's** case above.

In the light of what I have stated herein above, I find still the evidence by the prosecution witnesses, PW1 and PW2 failed to clear doubt as regard to the identification of the appellants as being the ones who committed the offences they stood charged with.

In the premise, I may hold that the prosecution has failed to prove the case against the appellants beyond reasonable doubt as submitted also by the learned state attorney for the republic.

Therefore in the circumstances, I find the appeal before me has merit as not only the trial of which resulted to the conviction of the appellants has irregularity but the prosecution side failed to prove the case on the standard required by the law.

Henceforth, I order that the appellants to be set free unless lawfully held.

It is so ordered.

D.E. MRANGO

JUDGE

17. 08. 2020

Date	-	17.08.2020
Coram	-	Hon. W.M. Mutaki – DR.
1st Appellant		Absent
2nd Appellant		
3rd Appellant		
4th Appellant		
Respondent		Present in person
B/C	-	Mr. A.K. Sichilima – SRMA

COURT: Judgment is hereby delivered today the 17th day of August, 2020 in the presence of the Mr. Deogratius Sanga Learned Advocate for Appellants and Mr. Saraji Iboru – Senior State Attorney for the Respondent.

Right of appeal explained.

W.M. MUTAKI

DEPUTY REGISTRAR

17.08.2020