

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 32 OF 2019

(Arising from criminal case No. 215/2018 of Muleba District Court)

PONSIAN ISAYA-----1ST APPELLANT
REVOCATUS SALVATORY-----2ND APPELLANT
FERESIAN PETRO-----3RD APPELLANT
GOZBART RWAKALEMELA-----4TH APPELLANT
JACKSON RUKIZA-----5TH APPELLANT
WINFRIDA REVOCATUS-----6TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order 17/01/2020

Date of Judgment 24/01/2020

N. N. Kilekamajenga, J.

The appellants were arraigned before the District Court of Muleba for two counts namely, conspiracy contrary to **section 384 of the Penal Code, Cap. 16 RE 2002** and arson contrary to **section 319(a) of the Penal Code, Cap. 16 RE 2002**. All the appellants entered plea of not guilty prompting the prosecution to summon seven witnesses to prove the case to the required standard. PW1 (Novatus Pancras), who is the owner of the torched house, informed the court that he knew the appellants before the incident. On 18th July 2018, while seated

at his house with his wife Restituta, he saw the appellants and was able to identify them. The appellants demolished his house using trees, they torched it and cut down banana plants. During cross examination, PW1 told the court that the incident occurred '*during the evening/day time*'; other villagers never responded to the incident. When further cross examined by the 3rd accused, he said, the incident occurred 'during day-time.' Upon re-examination, PW1 told the court that the incident occurred for almost an hour and he was 50 footsteps away from the scene.

PW2 (Restituta Novatus) testified before the trial Court that she knew the appellants as their fellow villagers. On 18th July 2018, she saw the appellants torching their dwelling house and destroying their banana field. The event happened '*during day time at about evening hours*'. She was 10 footsteps away from the incident and was able to identify the appellants. Upon cross-examination by the 1st accused person, he told the court that the 1st accused person went to the scene with other villagers. The cross examination further revealed that the 4th accused went to incident as one of their neighbours.

PW3 (Elida Novart), who is the daughter of PW1 and PW2, testified that on 18th July 2018, the appellants torched the dwelling house of her parents and destroyed their banana field. PW3 saw the appellants at a distance of 15 foot steps away. She further hinted that the incident occurred after a meeting.

PW4, the Ward Executive Officer, testified that he was informed about the incident and went to the scene and found the house torched and banana field destroyed. PW5, the Village Executive Officer testified that, he was informed of the incident; he also informed the police. He later went to scene and found the house burnt and banana field destroyed. PW6 (E5219) was the police officer who was informed about the incident that occurred at Bisheke Ward. He went to the scene and found the house destroyed. He arrested the perpetrators who were later charged in court. The last prosecution witness was PW7 (the police officer) who drew the sketch map of the scene.

During the defence, all the appellants did not raise any serious defence than denying the allegation. The appellants said, they do not know the allegation and that, this was a framed case.

Finally, the trial court was convinced that the prosecution proved its case beyond reasonable doubt on the second count. Hence, the appellants were convicted and sentenced to life imprisonment. However, the trial court found out that the first count was not proved to the required standard. The appellants were aggrieved by the trial court's decision hence this appeal. They moved this Honourable Court with seven grounds of appeal which I take the discretion not to reproduce them in this judgment because they are framed around one ground that the prosecution did not prove the case to the required standard.

When the appeal came for hearing, the appellants appeared under the legal representation of two learned advocates, Messrs. Anexius Stewart and Mswadick while the learned State Attorney, Mr. Nehemia John appeared for the respondent, the republic. During oral submission, the counsel for the appellants, Mr. Stewart dropped the other grounds of appeal and argued the sixth and seventh ground. On the sixth ground, Mr. Stewart contended that the prosecution did not prove the case to the required standard. He argued that there is no specific time stated to show when the incident happened than the fact that the incident occurred '*during day time/evening hours*'. He referred the court to the Oxford Advanced Learner's Dictionary where the word 'day time' is defined. Though the trial magistrate considered the case of **Amani Waziri v. R [1980] TLR 250** but its ingredients were not met in this case as there was no proper identification of the accused persons. The counsel argued further that there is contradiction on the evidence of key witnesses in this case namely, PW1, PW2 and PW3 on the distance where they positioned themselves to where the appellants were during the incident.

The other counsel for the appellants, Mr. Mswadick confined his oral submission on the seventh ground arguing that the instant case does not provide any background why the house was torched and banana field destroyed. Lack of information on the cause of the incident creates doubt that must be decided in favour of the appellants. He further insisted that, to sustain a conviction, any

criminal case must be proved beyond reasonable doubt. To cement the argument, the counsel referred the Court to the case of **Jonas Nkize v. R [1992] TLR 213**. He further contended that as the first count was not proved, the second count was also not proved and the offence of arson could not stand.

In response, the learned State Attorney argued that lack of motive in criminal cases is immaterial as per **section 10 of the Penal Code, Cap. 16 RE 2002**.

On the issue of time of commission of the offense, Mr. Nehemia insisted that the offence was committed at day time; PW1, PW2 and PW3 were therefore able to identify the appellants. In Bukoba, it is possible to identify a person even at late evening. Also, the issue of distance between the appellants and PW1, PW2 and PW3 depends on each individual person because it is based on estimation. Hence, there was no contradiction that faulted the prosecution case.

When responding to the issue of failure to prove the first count, the learned State Attorney argued that failure to prove the offence of conspiracy does not, in any way, affect the offence of arson. Furthermore, during the defence, the appellants raised the defence of alibi but they failed to inform the trial court where they were. They also failed to properly cross-examine the prosecution witnesses. On the credibility of the prosecution witnesses, at page 9 of the judgment, the trial court found the witnesses to be credible, reliable and trustworthy. Therefore, the prosecution proved its case to the required standard.

When rejoining, Mr. Stewart insisted that the appellants were not properly identified and that the State Attorney failed to state the time when the offence was committed. Again, if the incident happened for almost 1:30 hours the other villagers could be witnesses in this case. On the appellant's defence, it is the onus of the prosecution to prove the case to the required standard and not the defence. He finally urged the Court to quash the conviction and set aside the sentence imposed against the appellants. In the rejoinder by Mr. Mswadick, he insisted that, in this case, motive was pertinent and that the prosecution was supposed to prove the case to the required standard. As the prosecution failed to prove the case beyond reasonable doubt, this Court should quash the conviction and sentence imposed against the appellants.

Having gone through and considered the arguments for the counsels for the appellants and that of the learned State Attorney, it is apposite at this point to determine whether the grounds of appeal argued have any merit. On the ground whether the prosecution proved the case beyond reasonable doubt, I wish to reiterate that it is an established principle of law that the prosecution has an onus of proving the case beyond reasonable doubt.

As sated earlier, the prosecution summoned seven witnesses but the only eye witnesses were PW1, PW2 and PW3. I have carefully scrutinized their testimonies, if at all, were able to satisfy the requirement of the law of proving a

case beyond reasonable doubt. Before I analyse their evidence, let me hint one crucial thing in this case. The appellants were charged with the offences of conspiracy and arson. It is alleged that the house of PW1 was torched during '*day time/evening hours*'. Despite lack of clear information concerning what prompted the torching of the house; it seems the house was located at the centre of the village. Both in the proceedings and judgment, there is dearth of relevant information showing how and why the appellants torched the house of PW1. However, PW3 hinted that the house was set on fire after a meeting. It is not stated in the Court file what was the meeting about. Was the meeting convened by the villagers or appellants? In fact no body knows.

During the hearing of the appeal, I invited the learned State Attorney and the counsels for the appellants to address me on the cause of fire and any background to the incident. To my surprise, no body seemed to know why the house was set on fire.

Furthermore, both in the proceedings and the judgment, it is not stated whether villagers responded to the incident. The offence of arson, especially at the centre of the village, could have attracted the multitude of villagers. But no villager responded to the incident leaving the prosecution to rely on only three witnesses who are all family members; PW1 (father), PW2 (mother), PW3 (daughter). Of course, I am aware; being a relative does not affect the evidence if a witness is

credible, trustworthy and reliable. In the case of **Bahati Makeja v. Republic, Criminal Appeal No. 118 of 2006**, CAT at Mwanza (unreported), the Court observed that:

*“It is generally agreed that I assessing the credibility of a witness, the Court has to adopt a careful and dispassionate approach and critically evaluate the evidence in order to find out whether it is cogent, persuasive and credible. **Relationship is not a factor to affect the credibility of a witness** (emphasis mine)”.*

However, I find blatant contradictions on the evidence of PW1, PW2 and PW3. While PW1 testified that villagers never attended the incident, PW2 stated that the 1st accused person went to the incident with other villagers. This contradiction ought to be decided in favour of the accused persons/appellants.

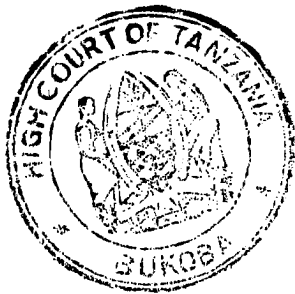
On the other limb of argument, there is no specific time stated to show when the offence was committed. The only available information shows that the offence was committed during ‘*day time/evening hours*’. What amounts to evening hours is debatable and possibly one of the reasons which moved the counsel for the appellants to define the term “day time” using Oxford Advanced Learner’s Dictionary. However, the issue of time is pertinent in establishing whether the key witnesses were able to identify the accused persons during the evening.

In addition, the counsel for the appellants, Mr. Swadick raised another issue which I wish to address. He argued that so long as the offence of conspiracy was not proved, then the offence of arson could not stand. With respect, the two offences are distinctive and bear different elements to be proved. Neither do the two offences depend on each other or run concurrently. As correctly addressed by the learned State Attorney, failure to prove the offence of conspiracy cannot affect the offence of arson.

In conclusion, this case presents contradiction on the evidence of key witnesses. Also, there is no clear background information which led to the commission of the offence. It is not stated whether the house was torched by villagers or the appellants. The absence of villagers in this serious offence that was committed at the centre of the village during "day time/evening hours" raises a lot of questions than answers. Furthermore, it is not clear how a nine month pregnant woman together with her husband were involved in torching the house and destroying banana plants. Currently, one of the appellants, Winfrida Revocatus, is raising a one year and six months child in prison. As the incident occurred on 18th July 2018, she was nine months pregnant when the incident occurred. No wonder all the appellants had only one defence that, they know nothing about the event and that it is one of the cooked cases. The instant case seriously raises doubt; the victims (PW1, PW2, PW3) or any body else might have torched the house then family members coined the evidence against the appellants. In my view, the

prosecution case was not proved beyond reasonable doubt. I therefore quash the conviction and set aside the sentence of life imprisonment imposed against the appellants namely, Ponsian Isaya, Revocatus Salvatory, Feresian Petro, Gozbert Rwakalemela, Jackson Rukiza and Winfrida Revocatus. The appellants should immediately be set free unless held for other lawful reasons. Order accordingly.

Dated at Bukoba this 27th January, 2020.




N. N. Kilekamajenga

JUDGE

27/01/2020

Court:

Judgment delivered this 27th January 2020 in the presence of Mr. Nehemia John (State Attorney) for the respondent and Mr. Mswadick (advocate) for the appellants.




N. N. Kilekamajenga

JUDGE

27/01/2020