IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.138 OF 2020

NASIBU BAKARI @ BUSHIRI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the District Court of Bagamoyo at Msoga)

(Masua- Esq, RM)

Dated 22nd March, 2019

in

Criminal Case No. 92 of 2018

JUDGEMENT

9th April & 2nd July 2021

Rwizile, J

Before the district court of Bagamoyo, appellant was arraigned for the offence of arson contrary to section 319 (a) of the Penal code, [Cap 20 R.E 2019]. It was alleged that, on 30th March, 2018 around 0100hrs, the appellant Nasibu Bakari set fire to three houses, by which one among them was the house of one Ramadhan Yusuph. After a full trial, appellant was convicted and sentenced to life imprisonment. This decision did not please him, he therefore appealed before this court on the following grounds;

1. *That, the learned trial magistrate grossly erred in convicting the appellant based on the alleged Kasuku Match (Exh P1) where its movement and storage (chain of custody) was not established.*
2. *That, the learned trial magistrate grossly erred in holding that the cause of fire was a result of match of Kasuku (Exh. P1) where no forensic evidence was led to establish the same.*
3. *That the learned trial magistrate grossly erred by failing to draw an inference for the prosecution for failure to call material witnesses, the Village Executive Officer (VEO) and the villagers alleged to be acquainted of the offence.*
4. *That the learned trial magistrate grossly erred in holding exh P1, where Pw4 who arrested the appellant and acquainted of the same was not led to identify in court for verification.*
5. *That the learned trial magistrate grossly erred in law and facts by not assessing the veracity of PW2, PW3 and PW4 as regards how PW2 got information of the alleged crime.*
6. *That, the learned trial magistrate grossly erred by holding the appellant conviction where prosecution failed to tender as exhibit the alleged valuation report and photograph of the burnt house as exemplified by PW6.*
7. *That the trial magistrate erred where he did not appraise objectively the credibility of the prosecution evidence before relying on it as basis for appellant conviction.*
8. *That the learned trial magistrate erred in law and fact by convicting the appellant relying on single evidence of visual identification made by PW4 at the scene of crime without considering the circumstances surrounding the scene.*

9. *That the trial magistrate erred in holding that prosecution proved its case without considering irreconcilable, inconsistence and contradiction in the evidence led by the prosecution witness.*

He therefore prayed for this court to allow the appeal, quash the conviction and set aside the sentence.

At the hearing, appellant appeared in person via video link from Ukonga prison where he is remanded. For the Republic was Ms Nchala learned State Attorney. It has to be noted that, when the parties were called to argue the appeal, appellant had nothing to say, he just prayed for the court to consider the grounds of appeal submitted. As for the Republic, Ms Nchala prayed for adjournment in order to prepare and argue the same. Her prayer was however rejected, because the record showed, the respondent was well aware of the case since 17th July 2020 when the same was called for hearing. It had been subjected to at least 9 months on adjournments.

I therefore decided to deal with the case exparte. The respondents conduct, reminded me the decision in the case of **VIP Engineering and Marketing Ltd vs CitiBank Tanzania Ltd,** Civil Application No. 24 of 2019 when the court of appeal had this to say,

> "*… anyone contemplating to appear in this Court, and indeed in any court of law, must prepare himself adequately in all respects*"….

From the state of affairs, since the appellant is a layman and could not submit on any of the grounds, I then scrutinized all grounds advanced in his appeal. Here I propose, upon considering the grounds, the same can be grouped in two. That is to say, ground 1 and 4 can be couched to

answer the issue whether the chain of custody of a box of matches allegedly found in possession of the accused was proved. The remaining grounds of appeal, are referring to whether the prosecution proved the case without leaving any doubt.

For the absence of arguments from the both sides, a careful consideration has to been directed to the records of the trial court.

Starting with chain of custody, in the said grounds, the appellant stated that the movement and storage of exhibit P1 was not established. It is on record that, appellant was found in possession of a kasuku box of matches. It was alleged to be used in setting fire to the victim's house. The same was seized by Pw4 who handed it to Pw6. After the said transaction no information was adduced as to where the same was stored, and under whose custody. The chain of custody is as important as it has been stated in loads of cases. It is now a settled rule that, chain of custody can be proved by documentation or oral evidence, as it was categorically stated in the case of **Paulo Maduka and 4 others vs Republic,** Criminal Appeal No. 110 of 2007. The Court of Appeal held as hereunder;

> *"…Chain of custody is to mean a chronological documentation and / or paper trail, showing the seizure, custody, control transfer analysis and disposition of evidence be it physical or electronic…"*

It was further stated that;

> *"…the chain of custody requires that from the moment of the evidence is collected, its every transfer from one person to another must be*

documented and that it be provable that nobody else could have accessed it…"

As in Paulo Maduka's case, chain of custody can be proved by documentation. While, in the case of **Marceline Koivogui v. R**, Criminal Appeal No. 469 of 2017 the Court of Appeal had this to say;

> *In the present case we thus cannot fault the trial court in having relied on the credible oral account of the prosecution witnesses which was not impeached considering that:* ***One,*** *documentation is not the only requirement in dealing with exhibits and it will not fail the test merely because there was no documentation and* ***two****, other factors have to be looked at depending on the prevailing circumstances in every particular case.*

From the foregoing I agree with the appellant that, prosecution, did not establish and prove chain of custody of exh. P1. This means the same brings doubt as to whether the said exhibit was real found with the appellant. Even assuming for the sake of argument that the appellant was indeed found with it, does that prove that it is the appellant who committed the offence. In actual fact, arson is a criminal charge that can only be prove with evidence beyond reasonable doubt.

This leads me, to the second issue, as to whether in the circumstances of this case, has the case been proved. It is on record that, prosecution called six witnesses to prove the case. Among them was one eye witness Pw4. It is settled that a case can be proved by direct or indirect/circumstantial evidence. The Evidence Act provides under section 62 of [Cap 6, R.E 2019] that;

62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say–

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(2) If oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

It is on record that, at the trial Pw1, Pw2, Pw3, Pw5 and Pw6 testified, they did not see the appellant setting fire to the house of one Ramadhani. It is Pw4 who said he saw and arrested the appellant.

But what I find strange is that, when the appellant was arrested by Pw4 who said was assisted by his 7 dogs. The victim was not aware of that, despite the whole scenery alleged happened at the victim's house. Pw4 testified so, at page 14 of the typed proceeding of the trial court that;

> *"...from there I started to make alarm and said accused was on that side, I managed to arrest accused person in assistance with my seven dogs..."*

When cross examined by the appellant, he said;

> *"We met at the scene of incidence to the house of Ramadhani Yusuph. I ordered you to stop but you were about to run away…I arrested you at the time you were setting fire to the house of Ramadhan Yusuph…"*

Despite all of that, Pw1 said he heard his children crying when he woke up. He saw his house on fire but he never saw the appellant at the scene. He said he was told about the appellant by the hamlet chairman. Did the dogs assist him arrest the appellant silently or is it possible that 7 dogs which assisted him did not bark at the appellant when helping arresting him? But Pw1 is silent on this. This brings doubt, if at all the appellant was arrested at the scene of the crime, or was just a random arrest done by Pw4.

Another suspicious, is the fact that, appellant was said to set fire to three different houses on the same day at the same time by mid night i.e at 0100hrs. The distance between the houses was not known, and the question of how a person can set fire to three different houses at exactly the same time, cannot be easily answered. Pw5 testified, at page 16 of a typed proceeding that;

"I went to the village office I found accused person was there with allegation of setting fire of the house of said Hamis, on material day three houses were set on fire, one of Mohamed and that of Ramadhan.

It is my considered view that, proving the case beyond any doubt means adducing all important and reasonable evidences to satisfy the court that, the offence was truly committed.

I agree with the appellant that, prosecution ought to have brought at the trial some other evidence which Pw6 testified to have. The same in my view could have proved that the victim's house was truly set on fire and the same was set by the appellant.

Also, prosecution failed to call hamlet chairman one Seleman Bigo who was the first person called at the crime scene. I consider this person could be important witness since he was the leader of the said village, but also, he was the one who ordered for the appellant to be searched. It is my view that, he could have been a perfect witness to verify that it was indeed true that, the appellant was found at the scene with a box of matches, that was perhaps used to set fire on the house. In the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 133 the court held that;

Where for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests.

It is from the foregoing that I consider, if this leader was called to testify, he might have testified against the interest of the prosecution.

As I said before, Pw4 was the only eye witness, it is clear that his testimony was not corroborated by any evidence of other witnesses. Since the rest of the witnesses said they were told that the appellant was the one who set fire on the houses at their village and since dogs cannot speak. This reminds me, of an African saying, that, a person planning to tell lies, will always say, "*I was with my dog*". In my considered view, circumstances leading to this case, and the time it is alleged happened would demand for more direct evidence than what the prosecution procured. For that reason, it is very hard to believe in the respondent's case. For the foregoing reasons, I hold that, the case was not proved to the standard required. I therefore quash the conviction and set aside the sentence. I further order the immediate release of the appellant unless held for some other lawful cause.

AK. Rwizile
Judge
02.07. 2021

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY