

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 84 OF 2021

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

1. MATHIAS DEUS CHIBUGA

2. AMOS MWANGA

3. MAYUMBU MANYASI BACHAI

4. SAMWEL FABIAN

5. MASABA MALIMA MAGESA

.....RESPONDENTS

JUDGMENT

19th August - 15th September 2021

TIGANGA, J.

In the District Court of Sengerema, at Sengerema, the respondents, Mathias Deus Chibuga, Amosi Mwanga, Mayumbu Manyasi @ Bachai, Samwel Fabian and Masaba Malima @ Magesa who throughout this judgment will be referred to as 1st, 2nd, 3rd, 4th and 5th respondents respectively, stood charged with one offence of Malicious Damage to

Property contrary to section 326 (1) of the Penal Code [Cap 16 R.E 2019]. The offence was alleged to have been committed on 24th day of October, 2020 at about 06:00 hours at Mbugani Village within Sengerema District, in Mwanza Region when and where the respondents willfully but unlawfully damaged and demolished two houses valued at Tshs 20,000,000/=, the property of one Masumbuko s/o Makubi.

Upon arraignment, the respondents pleaded not guilty to the charge. Consequent to that plea, the republic had a duty to prove the case as required by law. In an effort to prove the charge, the prosecution called four witnesses namely Masumbuko Makubi, who testified as PW1, James Turumanywa, who testified as PW2, Jesca Faustine, who testified as PW3 and F. 5639 DC Mathew, who testified as PW4. After full trial, the trial court found the respondent not guilty, and acquitted them.

In order to appreciate what led to the apprehension, arraignment and consequential acquittal of the respondents, I find it pertinent to state the background of the matter albeit briefly. What is gathered from the prosecution evidence is that, the matter at hand is predicated on what can be called mob justice whereby on the fateful day, some people from Ilyamchele Village who introduced themselves to be acting as the alarm

responder, commonly known in their area as "Mwano", they accused the victim one Masumbuko Makubi a resident of Mbugani hamlet to have stolen from them.

Following that accusation, according to the evidence of PW3, who happened to be a wife of the victim, they surrounded the house of the victim, asked PW3 to tell where the victim was and when they were told that he was not present; they entered inside the house, searched but did not find him.

Following that state of affairs, they instructed PW3 at a traditional weapons point, that she removes her all stuff from the two houses and immediately thereafter, they started to stone the two houses and demolished them to dusts.

However, before that illegal act was complete, PW2 who happened to be a militiaman of Mbugani hamlet arrived in response to the alarm raised. PW2 had opportunity of asking the leaders of the people who were stoning the house, who according to him, the leaders themselves and those they were leading were many, therefore he could not identify them all, but could only identify five people who were the leaders of the alarm.

According to him, in his presence, the five persons approached the house and started to interrogate the wife of the victim, that is PW3 and two of them entered inside the house conducted search, and came out and said to their fellow that the victim was not inside. PW2 said when he asked them, they told him that the victim had stolen from them and his fellow had already been killed.

He said those who were leaders instructed the people they came with, to stone down the houses and demolish them the act which they did, even after the said PW2 had asked them to stop.

Unfortunately PW2 did not mention in his evidence any person whom in particular he identified, either from the persons who were stoning the houses or from the group of the leaders. But on cross examination by the 2nd accused, he said he mentioned them as they were leaders mobilizing the crime.

The evidence of PW1 based on hearsay as he alleged to be absent at the time when the crime was committed. He was just informed that people who allegedly accused him of stealing from them, surrounded and demolished his house. Being the owner of the houses which were

demolished, reported the matter to Police on his return and consequently the respondents were arrested, and charged.

Basing on that evidence the trial Court found the accused persons with the case to answer and informed the respondents of their right to defence. In their defence, the respondents relied on the defence of alibi. the 1st respondent claimed to be at his home, the 2nd respondent said he was sick and went for treatment, the 3rd respondent said he was in his farm planting rice at Busoloto, 4th respondent said he was at the funeral of his fellow choir member at Ilyamchele and so is the 5th respondent.

Each of the respondents called the witness to justify his alibi, the 1st respondent being defended by DW6, 2nd respondent by DW7, 3rd respondent by DW8, 4th respondent by DW9, while the 5th respondent was defended by DW10.

Basing on the said prosecution evidence and defence the trial Court found the charge not proved beyond reasonable doubt and acquitted all the accused persons who are now the respondents in this appeal.

Dissatisfied by the decision of the trial Court, the appellant appealed against the acquittal of the respondents and filed one ground of appeal to that effect. The filed ground of appeal is that;

1. The trial Magistrate erred in law and in fact by acquitting all accused while there was enough evidence to prove the case against the appellants.

At the hearing of this appeal, the appellant was represented by Mr, Rehema Mbuya – learned Senior State Attorney, while the respondents were represented by Mr. Linus Estomihi Munisi - Advocate. In the submission in chief, the learned Senior State Attorney submitted that the evidence presented by the prosecution was enough and sufficient to found a conviction. Demonstratively, she recited the evidence of all four prosecution witnesses, but insistently she submitted that the evidence of PW2 in particular pointed out that the 2nd respondent was the one ordering the people who gathered there to demolish the houses of the victim. She submitted that the evidence by the PW2 is reliable as he had nothing to worry as he went there as a person who responded to the alarm, and he personally mentioned the 2nd respondent before the trial court and that, had the trial Court considered all the evidence and given weight to the

evidence of all the prosecution witness, particularly PW2, it would not have acquitted all the respondents.

In response to the submission in chief, Mr. Linus Munisi, counsel for the respondent submitted that, there was no base upon which the respondent would have been convicted. He said there was no evidence to prove that there were such houses and that the house was demolished. There was also no valuation report proving that the alleged houses were worthy Tshs 20,000,000/ neither was there sketch map of the scene of crime, and no cautioned statement was tendered.

Attacking the evidence of PW1, he submitted that his evidence was hearsay. He also submitted that the evidence of PW2 is contradictory in nature as it was talking about two things at one point. He submitted that, the demolition was done by the citizen, while at the same time saying it is the accused but did not mention their names.

Further to that, he submitted that, PW3 also did not identify the person who committed the offence therefore did not identify them by names. In his opinion, identification by names is satisfactory where the witness knew the accused person, to support that contention; he cited the

case of **Fadhili Gumbo @ Matola vs. The Republic** [2006] T.L.R. 50 and submitted that since there was no identification parade he insisted that the mode used to identify them left a lot of doubt. He in the end submitted that the prosecution failed to prove the case beyond reasonable doubt.

In rejoinder submissions the learned Senior State Attorney submitted that, given the nature of the case there was no need of tendering exhibit and as the respondent did not confess there was no cautioned statement to be tendered. He submitted that PW2 proved at page 16 of the proceedings that people who were there were many but five persons who introduced themselves as leaders were the ones who went ahead and interrogate the wife of the victim, PW3. She further submitted that, PW3 could not mention their names because she did not know their names, and that since it was at 07:30 hours when PW2 identified them, there was enough light to identify the respondents. She in the end submitted that, although not all respondents were identified but at least two were identified in the evidence of PW2. She asked the appeal to be allowed, as prayed.

From the above summary, basing on the grounds of appeal and arguments by the parties, I find only one issue is for determination, **one**,

whether the case was proved beyond reasonable doubt against the respondents.

It is both a common and statutory law principle as stipulated in Sections 110, 112 and 114, read together with section 3 (a) of the Evidence Act [Cap 6 R.E 2019], that the prosecution is duty bound to prove the case, and the standard of proof is beyond reasonable doubt. See **John Makolobela vs. The Republic** [2002] TLR 296.

In the case of **Maliki George Ngenda Kumana vs. The Republic**, Criminal Appeal No. 353 of 2014 (CAT) - Bukoba (unreported), it was held inter alia that;

*"It is a principle of law that in criminal cases the duty of the prosecution is two folds, **one**, to prove that the offence was committed and **two**, that it is the accused person who committed"*

In the circumstances of this case, it has been alleged that the houses of the victim, PW1 were demolished unlawfully and without justification. This is according to the evidence of PW1, PW2, PW3 and some other witnesses of the defence side one of them being DW6, Eva Shadrack Nkobanyi, a village government leader (VEO) of Ilyamchele village.

Regarding to the issue who committed the offence, the Republic accuses the respondents to be the ones who committed the offence, all the witnesses mentioned of so many people who invaded the homestead of the victims PW1 and PW3 and demolished their two houses. They five people who were leaders of that group of people and who went forward and interrogated PW3 on the whereabouts of PW1 and some had conversation with PW2 who told him that the victim PW1 stole from them. Those five people were not mentioned by names.

Further to that, there was no evidence led to prove how the said accused were arrested. It has not been said that PW1 mentioned the names of the respondents before the Police Station. PW2, who seems to be a most sober prosecution witness, did not say in his evidence that he at any point in time mentioned the names of the people he identified at the scene of crime either to the Police Station or to PW1, neither did PW3.

Further more, the investigator also, did not reveal that there is any person who mentioned the names of the respondents to him for him to be satisfied that these respondents are the same five persons who were leaders of the group of the people who demolished the two houses in question.

The evidence shows that, the person who committed the offence were not arrested at the scene of crime on the date and at the time when the offence was being committed, that is on 24th day of October, 2020 at about 06:00 hours in the morning, the matter was reported to police on 12th or 13th day of November, 2020 by PW1. After he arrived, that means, in his reporting he must be the one who told the Police the names of the persons he was suspecting.

In the evidence of PW1, there is no evidence to show that he mentioned the names of the suspect (the respondents) to PW4, the investigator, if the names were revealed during the investigation by police then PW4 was supposed to tell the court but, did not tell the Court how he came to know that the respondents were the ones who committed the offence. That raises a question as on what bases were the respondents arrested and prosecuted. The second question is whether the respondents are the five leaders who were said by the evidence of PW2 to be the ring leaders of the mob justice?

As earlier on pointed out that, the prosecution is duty bound to prove the case beyond reasonable doubt. In the case of **Christian Kale and Another vs Republic** (1992) TCR 302 - CAT, it was held *inter alia* that

the guilty of the accused or suspect should base on the strength of the prosecution evidence not of the weakness of the defence evidence.

Looking at the evidence, all the prosecution witness were not led to identify the respondents at the dock as the persons they saw committing the offence or who were the ring leaders of the group which demolished the house of PW1 and PW3.

The mention of some of the suspects was when the said respondents were cross examining the prosecution witnesses. This practically means that, had the respondents opted to be mute, without asking questions, the said facts would not have been revealed.

That said, it cannot be said that the evidence by the prosecution identified the respondents, it was on the weakness of the respondents to ask the question, on which the Republic is trying to build its case.

Further to that, the accused (respondents) raised and relied on the defence of alibi, they said to be on various places on the date and at the time when the offence was being committed. They managed to call witnesses who testified in the favour of every one of them that they were at the respective places at which they claim to be on that date and at that

particular time. Their evidence was not seriously shaken by the prosecutor before the subordinate Court.

It should be noted, that the accused in criminal cases are not supposed to prove their innocence, they are required to raise doubt, reasonable doubt to be entitled to the favour of that doubt.

That said, I find the appeal to have no merit, as there was no strong evidence upon which the Court could have found the respondents guilty and convict them.

In the fine, the appeal is dismissed, the findings of the trial Court are upheld, and a finding that the respondents were properly acquitted is made.

It is so ordered.

DATED at MWANZA this 15th day of September 2021.



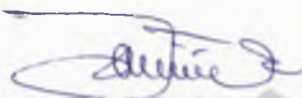
J. C. TIGANGA

JUDGE

15/09/2021

Judgment delivered in open chambers in the presence of Ms. Rehema Mbuya learned Senior State Attorney for the appellant and Mr. Linus Munishi, learned Advocate for the respondent on line video audio teleconference.




J. C. TIGANGA
JUDGE
15/09/2021