THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 30 OF 2022

(Originating from Economic Case No 7 of 2020 In the Resident Magistrate's Court of Lindi at Lindi)

RAJABU HASSAN MFAUME.....1ST APPELLANT

HAMISI ABDALLAH SEIF.....2ND APPELLANT

MOSHI HAMISI MBELENJE.....3RD APPELLANT

DADI HASSAN SHAMTE.....4TH APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order: 13/4/2022
Date of Judgement: 11/5/2022

LALTAIKA, J.:

The **18TH DAY OF FEBRUARY 2022** might have been a day like any other, to other people. The sun rose from the east and set on the west on usual times like any other day. However, it was not an ordinary day or a

day just like any other in the lives of Rajabu Hassan Mfaume, Hamisi Abdallah Seif, Moshi Hamisi Mbelenje and Dadi Hassan Shamte (herein after referred to collectively as the appellants, and, at times singularly as the 1st, 2nd, 3rd, and 4th appellant respectively). On this rather dreadful day, the appellants were convicted by the Resident Magistrate's Court of Lindi on six counts and sentenced to, among others, to serve a jail term of five years each. The next paragraph shed some light on the nature of the charge upon which the appellants were arraigned in court and more details on the sentence meted.

The appellants were charged with six counts namely: 1st count; Arson contrary to section 319A of the Penal Code 2nd Count Occasioning Loss to a specified authority contrary to paragraph 10(1) of the 1st schedule to and section 57(1) and 60(2) of the Economic and Organized Crimes Control Act Cap 200 RE 2019, the 3rd Count: malicious damage to property contrary to section 226(1) of the Penal Code. The 4th, 5th and 6th counts being Causing grievous harm contrary to section 225 of the Penal Code.

The particulars of the above counts as can be gleaned from the charge sheet are as follows: 1st Count: that the appellants (and Fatuma d/o Raphael Protas and Fatuma d/o Ibrahim Kumwalu who were later on acquitted) on the 18th October 2022 at Majengo Ward within the District and Region of Lindi did willfully and unlawfully set fire to the office of Majengo Ward the property of Mtama District Council valued at twenty million two thousand two hundred sixty six thousand Tanzanian Shillings (TSH20,266,000) 2nd Count: the appellants and 2 others at Majengo ward...did set fire and damaged the office of Majengo Ward hence caused

Mtama District Counsel to suffer the loss of 20266000 3rd Count: the appellants and 2 others on the 18th October 2020 the appellants did damage a motor cycle make SNOLEY 110.09 with Reg. No MC 600 CCG valued at One Million Six Hundred Thousand (Tsh 1,600,000) the property of Arafa d/o Shaha Saidi. The 4th count: the appellants and 2 others [...] did grievous harm to one WP 7657 PC Esther Pallangyo by beating her on several parts of her body by using stones and clubs. The 5th count: the 4 appellants and 2 others [...] grievous harm to Hamza s/o Hassan Zameya by beating him on several parts of his body by using stones, clubs and machetes

6th Count: [...] Did grievous harm to one Khaifu s/o Hamisi Abdulrahaman by beating him on several parts of his body by using stones, clubs and machetes.

Having been satisfied that the prosecution had proven the case beyond any reasonable doubt, the learned Senior Resident Magistrate C.P. Singano convicted the appellants as alluded to above. The learned Senior Resident Magistrate went on and sentenced the applicants as follows: On the first count the appellants were sentenced to a five years' jail term each. On the 2nd Count: to pay a fine of 1 million Tanzanian Shillings (TZS 1,000,000) each or to a five (5) years' imprisonment term in default of the fine. On the 3rd count: to pay a fine of Tanzanian Shillings five hundred thousand (TZS 500, 000) or three (3) years in prison in default of the fine. On the 4th Count: three years' jail term. The 5th count: three years' jail term and the 6th count: three years' jail term. The court indicated that the sentences would be served concurrently.

The brief facts for purposes of connecting the dots and appreciate the essence of this appeal are as follows: The 28th of October 2020 was the General Election Day in Tanzania. The first appellant was a contestant in the position of a Ward Councilor commonly referred to in Kiswahili as "Diwani" for Majengo Ward in Lindi District on a *Chama Cha Demokrasia na Maendeleo* (CHADEMA) ticket. The 2nd to the 3rd appellants were Agents "Mawakala" on behalf CHADEMA, one of the political parties that took part in the election. It is alleged by the prosecution that in the night hours of that day, mayhem or fracas erupted which led to the setting ablaze of the office of Majengo Ward. A few days later, that is the 1st of November 2020 to be exact, the appellants were arrested. They were arraigned in court charged and convicted as already alluded to.

Aggrieved by both conviction and sentence, the appellants have approached this court in its appellate jurisdiction. Theirs is a zealous attempt to demonstrate that the lower court erred in both law and fact in convicting and sentencing them and, in the course of doing so, prove their innocence before this court. The appellant's main goal is for this court to quash the conviction of the lower court, set aside the conviction and order their release from prison forthwith.

In their joint petition of appeal, the appellants have lodged a total of nine (9) grounds. The sum total of these grounds, which I take the liberty of not reproducing them in this judgement, are to fault the entire process leading to their identification, arrest, prosecution, conviction and ultimate sentencing as referred to in passing above.

When the appeal came up for hearing, the appellants appeared under custody while enjoying legal advocacy services of Mr. Alex Dotto Massaba, learned Counsel. The respondent Republic, on the other hand, was represented by Mr. Gideon Magesa, learned State Attorney.

Mr. Massaba started off his submission in chief by asserting that the prosecution case had not been proven guilty. Zooming in to the first count of arson, it is Mr. Massaba's argument for anyone to be convicted with the offence of Arson contrary to section 319(a) of the Penal Code the prosecution must prove each of the following ingredients:

(i) The accused has destroyed or significantly damaged property
(ii) The property [so damaged] belongs to another
(iii) The accused intended to destroy or damage the property
(iv) The damage or destruction occurred by fire
(v) The accused intended to damage or destroy the property by fire
(vi) The accused did not have a lawful excuse on his or her action.

Mr. Massaba argued further that if the prosecution fails to establish any of the above elements an accused person would not be found guilty of the offence of arson. The mentioned elements are necessary to satisfy the meaning of arson before the court.

Driving the point home to this matter at hand, it is Mr. Massaba's submission that although the appellants were charged with the offence of arson, they were not legally identified that they took part in the alleged arson. The learned counsel emphasized that among all the 8 witnesses

summoned by the prosecution to testify in court, none of them said anything related to seeing the appellants dealing with fire. To beef-up his argument, the learned counsel referred this court to page 23 of the proceeding of the lower court where PW1 provides that he suddenly saw a group of people whose number he couldn't identify.

It is Mr. Massaba's submission that improper identification of the appellant wasn't confined to the offence of arson but also other offences including causing grievous bodily harm. The learned counsel called the intention of this court to page 26 of the lower court proceedings where PW2 (Hamza Hassan Zameya) provides that as he was inside the building, he didn't see the people rioting. At page 27 the learned counsel asserts, PW2 had told the court that he didn't know the people who attacked him.

It is Mr. Sabba's submission further that even the fourth Prosecution Witness (PW4) one Corporal Esther who was allegedly one of the victims of the violence, had testified, as recorded at page 33 of the lower court proceedings, that the people who rioted were more than one hundred. She testified further that she did not know who had hit her with a stone. Based on the above testimonies, Mr. Massaba contended, the offence of arson was not proved because the appellants were not identified. The learned counsel referred this court to the cases of **Francis Kashabi Masanja and 4 Others v R.** Crim App 21 of 2021 HCT, Shinyanga (Unreported) and **Jackson Mwakitoka and 2 Others v Republic** [1990] TLR 17

Moving on to the second ground of appeal also aimed at faulting the proof of the case beyond reasonable doubt, Mr. Massaba submitted that that

the valuation report upon which the trial court convicted the appellants was made by an unqualified person. It is the learned counsel's argument that since the person purported to have made the valuation had introduced himself as an engineer he wasn't qualified to do so and as a result the trial court should not have relied upon it because the author is not registered with the Valuers Board. To buttress his argument, the learned counsel cited Section 3 of **Valuation and Valuers Act 2016** which defines a Valuer as a person who holds at least a first degree in Real Estate or equivalent qualification with specialization in Valuation.

Cementing his argument, the learned counsel referred to page 45-48 of the trial court's proceedings whereupon the person who conducted valuation was one **Abdurahamani Juma** who had studied Engineering at the Dar es Salaam Institute of Technology in 1998. The learned counsel asserted that the "valuer" had indicated that he was the district engineer for Lindi and he had received instructions from the District Executive Director to go and inspect the area and make a report on the impact of the fire. The learned counsel concluded by a submission that since the value of the purported property was erroneously valued, the second count was not proved beyond reasonable doubt as required by law.

The learned counsel moved to the third count asserting that commission of the offence therein was not proved beyond reasonable doubt. The learned counsel asserted further that there were disparities between the charge sheet and the evidence adduced to prove the third count. To beef up his argument, the learned counsel explained that while the charge sheet

provides for "Occasioning loss to a specified authority" the section of the law referred to namely paragraph 10(1) of the first Schedule to the Economic and Organized Crimes Control Act (EOCA) Cap 200 RE 2019 bears a different formulation namely "occasioning loss to at specified authority"

It is Mr. Sabba's assertion that such a difference, however minor, made it difficult for the appellants to prepare for their defence because the charge sheet and the law had provided for totally different charges. He emphasized that such mistakes on the prosecution side led to the conviction and sentence that were arrived at erroneously.

Still on the mission to fault the trial court on this count, the learned counsel for the appellants asserted that the charge which does not exist in law, was proved by a valuation report tendered in court and used as an exhibit which was prepared by un unqualified person leading the court to use a wrong exhibit upon which it [partly] based its conviction and sentence.

Before winding up on the second count, Mr. Massaba argued that the custodian of the properties of the District Counsel is the District Executive Director (DED) and he/she is the only person that was required to appear in court and testify that the property that was allegedly set on fire belonged to the District Council. It is Mr. Massaba's submission that this was not done and, the learned counsel asserted further, it makes it clear that the offence was not proven beyond reasonable doubt. He concluded by a prayer that this court arrives to a decision of acquitting the appellants.

Mr. Massaba moved on to the third count namely malicious damage to property contrary to section 326 of the Penal Code Cap 16 RE 2019. It is Mr.

Massaba's submission that the appellants were convicted and sentenced for causing damage to a motorcycle make SNOLEY 110.09 registered as MC 600CCG valued at Tanzanian Shillings One Million Six Hundred thousand (TZS 1,600,00). The learned counsel argued that in order to prove an offence of this nature, one must prove that the property existed and that the owner of the same was there. A third element, the learned counsel argued, is that the value of the property must be proved in court beyond reasonable doubt.

Driving the message home to this case at hand, Mr. Massaba submitted that the purported owner of the property was, allegedly, one **Arafa Shaha Saidi.** However, the learned counsel averred further, neither in the record of proceedings nor the judgement of the trial court is it indicated that the purported owner was summoned to testify before the court that his property had been destroyed. Mr. Massaba went on to assert that out of all the eight prosecution witnesses none of them had said anything on the alleged motorcycle.

It is Mr. Massaba's submission that the report of the engineer who alleged that he found remains of the motorcycle and conducted valuation on the same had to be corroborated by that of the owner of the property. The learned counsel emphasized that the evidential need for the owner's appearance in court with the registration card was not met. Mr. Massaba asserted further that as a result of such shortfalls, it was his reasoned opinion that the count was not proved beyond reasonable doubt to warrant conviction and sentencing of the appellants against the charges levelled on them.

The learned counsel concluded his submission on this count by asserting that it was impossible for the appellants to destroy a nonexistent property as the lower court records show no complainant's statement on his/her destroyed property. He prayed that the court finds the appellants innocent and set them free.

Moving on to the 4th count, the learned counsel explained that the appellants were all charged with causing grievous harm to Esther Pallangyo a lady police officer who later testified as PW4. It is Mr. Sabba's submission that PW4 had testified in the lower court that she didn't see who had hit her with a stone. To that end, the learned counsel averred, it is his considered view that there was no proof that the appellants were the ones who had attacked PW4 using stones and clubs.

Mr. Massaba referred this court to page 38 of the trial court records where PW Esther herself testified that she didn't know who had hit her. It is the learned counsel's reasoned opinion that it was wrong for the trial court to arrive to a decision based on evidence of PW4 who was also the victim and who had testified that she didn't know who exactly hit her.

To buttress his argument, the learned counsel cited the case of Huba **Hassan Makih v R.** Crim App 378 of 2018 HCT, Dar es Salaam. Expounding on the case law cited, Mr. Massaba asserted that **Ngwalla** J. (as then she was) at page 6 of her judgement provided that for the appellant to be convicted of the offence of causing grievous harm, the prosecution had to prove each of the following ingredient beyond reasonable doubts namely that:

(i) The victim sustained grievous harm

(ii) The harm was caused unlawfully

(iii) The accused caused or participated in causing the grievous harm

Applying the persuasive decision to the matter at hands, the learned counsel reiterated that PW4 Corporal Esther who was allegedly the victim had testified that she had lost conscious till the next day and that she didn't know who exactly had hit her. The learned counsel concluded that in his opinion, the offence was not proved beyond reasonable doubt since the victim didn't recognize the person who had injured her.

The learned counsel announced that he was shifting his attention to the 5th also on causing grievous harm to one **Hamza Hassan Zameya** who later testified as PW2. Mr. Massaba asserted that according to the case of **Huba (supra)** specifically at page 6 the evidence on causing grievous harm comes from the victim. Applying the case law to the matter at hand, the learned counsel asserted further that PW2 who was the victim had told the court at page 26 and 27 of the proceedings that since he was inside the building, he didn't see the person who had hit him.

It is Mr. Massaba's submission that the trial court misdirected itself for convicting the people who were not identified considering that PW2 had told the court that he didn't see the person who had injured him. The learned counsel concluded by a prayer that in this area as well the appellants be set free.

Mr. Massaba moved on to faulting conviction and sentence on the 6th count namely causing grievous harm to **Khaifu s/o Hamisi Abdurahaman** Mr. Massaba asserted that according to the proceedings of the trial court, the person who testified is called **Khafu Hamisi** but the person in the proceedings is a woman while the charge had provided that the victim was a person of a male gender described as son of (s/o).

The learned counsel asserted that as one read through the proceedings of the trial court, the person testifying was a woman called **Khafu** instead **Khaifu s/o Hamisi Abdurahaman** as hitherto indicated in the charge sheet. The learned counsel went on to assert that the person testifying at page 25 of the proceeding provided that she was married and lived happily with her husband. The learned counsel is of the opinion that such information was of a female person. To that end, the learned counsel opined that the prosecution had failed to prove the case beyond reasonable doubts as per the case **of Huba (cited).**

Before winding up on this ground, the learned counsel asserted that in addition lack of proof of identification as he had demonstrated, the learned counsel asserted that the appellants were punished through an offence whose law was not cited in the charge sheet. To buttress his point, Mr. Massaba asserted further that while the charge sheet provides for the offence of Arson c/s 319(a) the section cited doesn't provide any for any punishment.

The learned counsel asserted further that the punishment meted was provided for at section 319(e). It is the learned counsel's opinion that such

disparities made it impossible for the appellants to prepare their defence. He concluded his argument by praying that his argument on the wrongful application of a provision of law be extended to cover his earlier submission on the 1st and 2nd counts.

Having exhausted the counts, the learned counsel announced that he was shifting his attention to the fifth ground of appeal and it was his intention to abandon the 6th ground.

Mr. Massaba started off by a submission that in criminal cases, every charge starts with how the accused was arrested. He asserted further that in the matter at hand, although the appellants were arrested on 1.11.2020, it is not shown when they were interrogated and whether the Criminal Procedure Act was complied with especially sections 50 and 51 regarding reasonable time for interrogation and the right to have the next of kin or lawyer during taking of an accused person's statement.

It is Mr. Massaba's submission further that although the appellants were arrested on the 1st of November 2020 they were not taken to court until four days later that is the 5th of November 2020 as could be gleaned from the proceedings. The learned counsel opined that such delay meant there was no fair trial as there was no any suggestion that the time in the police custody was enlarged by the District Magistrate as required by law since, the learned counsel averred, such an application was nowhere in the court records.

Mr. Massaba concluded by a prayer that the appellants be acquitted. The learned counsel prayed further that as an appellate court, this court goes

through the evidence of the trial court and upon doing so, nullify the decision of the trial court.

It was time for counsel for the respondent. Mr. Magesa started off by a brief historical backdrop to the case. He went on to assert that since he was addressing the High Court which is the court of record and competent enough, he was not going to waste time on obvious issues of law and evidence. However, he prayed to submit on some aspects of law raised by counsel for the appellants as summarized in the following paragraphs.

Mr. Magesa chose to focus his attention on the aspects of common purpose and identification. Referring to page 22 para 2 and 4 of the trial court judgement, Mr. Magesa asserted that in reaching its verdict the trial court provided that "Identification of the accused persons as done by PW4 and PW5 was enough to connect the accused persons with the offence because they were committed by the offender in the prosecution of a common purpose."

It is Mr. Magesa's submission that the trial court had invoked the doctrine common intention provided for by Section 23 of the Penal Code. He elaborated that the court had already provided that the appellants, in addition to their presence in the scene of crime, had a common purpose. Mr. Magesa maintains that it was erroneous for the court to reach to that conclusion as per the case **Jackson Mwakitoka** (supra) where the court had provided that mere presence in the scene of crime was not sufficient to invoke the doctrine of common intention.

Mr. Magesa submitted that according to Section 63(2) of the **Elections Act Cap 343** and Section 63 of the **Local Governments Elections Act Cap 292** it was not prohibited for the appellants to be in the polling station. The learned State Attorney averred that according to the sections cited, the contester and his agents, among others, have the right to be in the polling station. Mr. Magesa averred further that section 70 and 70A of the Local Governments Elections Act goes far enough to provide who is permitted to be in the polling station during counting of votes.

Having expounded on the provisions of the law, Mr. Magesa averred that he had been asking himself whether it was illegal for the 1st to 4th appellants to be in the polling station where the fracas erupted later. The learned State Attorney also asked himself whether the appellants had any intention of prosecuting an unlawful purpose. It is the learned Senior State Attorney's reasoned opinion that it was neither illegal for the appellants to be where they were nor was their presence meant for prosecuting unlawful purpose as the law was on their side.

Coming to the aspect of identification, the learned Senior State Attorney averred that the evidence of the trial court shows that the 2nd, 3rd and 4th appellants were in the scene of the crime but later left the place. However, Mr. Magesa averred further, none of the Prosecution Witnesses had indicated that these people had come back to the scene of crime. It is Mr. Magesa's stand that the trial court's finding that the 1st, 2nd and 4th appellants were identified by PW4 and PW5 was not founded on the evidence which was adduced before the trial court.

Faulting the trial court's finding even further. Mr. Magesa asserted that the source of light that allegedly led to identification was a tube light and that it was in the evidence that the said house had two rooms. The learned counsel averred further that the evidence didn't show which room had those tube lights and that the intensity of the tube lights was also not explained.

It is Mr. Magesa's submission that it is common ground that visual identification is one of the weakest identifications and in unfavorable conditions especially the one characterized with fracas in stone throwing and arson, relying on visual identification of PW5 the court had to warn itself that there was no possibility of mis identification. The learned State Attorney referred this court to the case of **Michael Lambeli Masolwa and 4 Others v R.** Crim App 282 of 2005

Still on identification, Mr. Magesa submitted that PW4 had told the court that she identified the 3rd appellant by the clothes she was on. However, Mr. Magesa averred further, the evidence shows that the witness didn't see the appellant coming and when the group of people were invading the office, she hid herself under the table. In reaching its decision, the trial court had emphasized that the 3rd appellant was identified by wearing a "dera" and a vail as documented at page 17 paras 2 and 3. It is Mr. Magesa's reasoned opinion that the identification evidence was clouded with doubts.

Having exhausted visual identification, the learned counsel moved on to sound identification. He asserted that PW4 Corporal Esther had (at page 36 para 5 of the trial court proceedings) testified that she knew PW3 Moshi Mbelenji and that she had known her for more than one year. Suprisingly,

Mr. Magesa averred, the same witness had said that before she went to hide under the table, she heard a voice but she couldn't recognize whose voice it was.

Mr. Magesa submitted that in law, voice identification is not conclusive and it is even doubtful if a person says she hadn't recognized the voice of a person she had known for more than a year. Mr. Magesa also opined that he had come across many inconsistencies in analyzing the evidence on identification and that such inconsistence affects credibility of PW4. The learned State Attorney concluded that the evidence was not sufficient to warrant conviction of a serious offence like arson. Had the same been proved beyond reasonable doubts, Mr. Magesa averred, he would have prayed for a life sentence as that is what the law provides.

Having exhausted the aspect of identification, Mr. Magesa moved on to the procedure on the arrest of the appellants. He averred that the evidence tendered in court and was not objected during cross examination is that the 1st 2nd 3rd and 4th appellants were arrested since the 1st of November 2020. The learned State Attorney wondered that none of the prosecution witnesses had provided information on who had mentioned or complained against the appellants to enable the OCS to call them to the police station.

It is Mr. Magesa's submission that there it was not disputed that the office was indeed set on fire. However, the learned Senior State Attorney averred, it was not established who exactly committed the offence. Mr. Magesa opined that the arrest of the appellants was done randomly simply

because they happened to be in the crime scene. He gave an example of the 4th appellant and averred that the person who had arrested the 4th appellant didn't testify in court and it is not shown in the records who had tipped the police to arrest the 4th appellant. It is Mr. Magesa submitted that although his learned colleague [counsel for the appellants] had lamented that the appellants were not interrogated it is his opinion that the same was not a requirement of the law as per section 48(1) of the Criminal Procedure Code Cap 20 RE 2019 which is in permissive terms as it used the word "may".

Mr. Magesa submitted that another reason he was in support of the application is variance between the charge sheet and the evidence. Expounding on his point, the learned State Attorney averred that, while the charge sheet in the first count shows that the damage caused due to the arson was TZ 20,266,000 what was proved by PW7 was TZ 22876000 (twenty-two million eight hundred seventy-six Tanzanian Shillings).

Before leaving the podium, the learned State Attorney decided to face the issue of sentencing. It is Mr. Magesa's submission that the sentence was dependent on the proof of the charges. Mr. Magesa averred that the court had misdirected herself in not knowing what the law says about sentencing. He averred further that since the appellant had not pleaded guilty, the court thought they didn't deserve any lenience. Referring to page 25 of the proceedings of the lower court, Mr. Magesa averred that the accused persons had prayed for the court to be lenient because they had a family. However,

since they didn't plead guilty the court declined such a prayer. It is Mr. Magesa's stand that not pleading guilty isn't a reason for the court not to be lenient. The learned State Attorney concluded that although it was regrettable that the government property had been destroyed, the accused persons were not properly identified. He prayed that they are acquitted.

In a brief rejoinder by Mr. Massaba, he thanked the learned State Attorney for pointing out the shortfalls of the trial court's judgement and prayed to be supplied with authorities cited by his learned colleague.

I have dispassionately considered submissions by both sides. This case, in my opinion, presents to this court yet another opportunity to proffer to its lower courts on the crucial issues of proper identification of an accused person and fair trial in general. I take the liberty to discuss these aspects of our criminal procedure law in relation to the matter at hand before I pronounce my decision.

Courts must consider visual identification strictly. This would ensure that the innocents are not convicted and the guilty are not acquitted. This requirement is very well articulated in a 1993 United Kingdom Report which provides that the rationale for such high standard of proof needed in visual identification is to ensure that **"the risks of the innocent being convicted and the guilty being acquitted are as low as human fallibility allows"** (See; *The Royal Commission on Criminal Justice Report* ("The Runciman Report") (1993 London: HMSO p. 2.)

The treacherous nature of visual identification evidence was eloquently expounded by Mason J. in ***Alexander v. R (1981) 145 CLR 395 at 426*** thus:

> *"Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognizing on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed."*

As submitted by the learned senior State Attorney for the respondent, the Apex Court of this country had professed on criteria to be taken into consideration in determining proper identification. In my opinion, the prosecution has not met the threshold. They were arrested simply because they happened to be in the scene of crime on the fateful day. That is not the way to go in the administration of criminal justice.

I also want to discuss albeit briefly the doctrine of common intention also known in other jurisdiction as the doctrine of common purpose. See Section 23 of the Penal Code Cap 16 RE 2019 and **Jackson S/O Mwakatoka & Others vs Republic** () [1990] TLR. It is elementary criminal law that for the doctrine of common intention to be established the following ingredients must be met namely:

1. There must be some act which is criminal in nature.
2. The act must be done by two or more persons.

3. The act done by persons must be with the common intention of all.
4. Every person who is involved in that act is liable for such act.
5. Every person shall be liable as if he has done that act alone.

It does not take much thought to realize that participation in elections be it at national or local government level as it was for the appellants, is not an illegal activity. The appellants were exercising their civic right safeguarded by our constitution namely the right to elect to be elected. The fist element above has not been met hence the entire foundation crumbles. However, for the sake of clarity, I am inclined to put the rest of the requirements above in the context of the matter at hand.

The act must have been done by two or more persons. In the matter at hand, those two or more people have, unfortunately, not been identified. I join hands with the learned Senior State Attorney in regretting that the government building was set ablaze but that is not the reason for arresting, prosecuting, convicting and sentencing a person who can only be remotely connected to the criminal act.

The third element above provides that the act done by persons must be with the common intention of all. It is not connecting the four appellants who had been dully trusted with active participation in electoral activities to have premeditated the intention to set the government building on fire. If anything, the first appellant must have been anxiously waiting for election results to be announced by the returning officer. The second to the fourth appellants, likewise, must have been preoccupied with ensuring the tallying

of votes turned out in their favour and, by evening hours, it is safer to assume that they had been tired.

The third element provides that every person who is involved in that [illegal] act is liable for such act. This is how the doctrine of common intention differs with other forms of criminal liability. In simple terms, it means that when a court invokes the doctrine of common intention, accused persons are convicted not only for the acts that they actively took part in committing but also all other subsequent offences arising from the same transactions. In our case, one can only imagine that many offences were committed in the ensued fracas. However, the fact that the appellants were not in the scene of crime to prosecute an illegal purpose but to proudly take part in a democratic activity of their country acts as a shield against any logical application of the doctrine of common intention.

That fifth and last requirement provides that every person shall be liable as if he has done that act alone. I must emphasize that the doctrine of common intention does not lessen the requirement for the prosecution to prove the offence beyond reasonable doubts. Both the learned counsel for the appellants and the learned State Attorney agree that the prosecution case was not proved beyond reasonable doubt as required by law.

I have gone through the court file and the records therein and indeed I see no sufficient evidence to warrant conviction. In other words, since there is no harm repeating what the learned counsels have repeatedly told this court, it is my finding that the prosecution case has not been proved beyond reasonable doubt as required by law. There is very little connection between

the offences committed and the appellants as they were not properly identified.

In the upshot, I allow the appeal. I quash the conviction and set aside the sentence of 5 years imprisonment. The appellants are hereby set free forthwith unless otherwise lawfully held.

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE

11/5/2022

Court

This Judgment is delivered under my hand and the seal of this Court on this 11th day of May 2022 in the presence of Mr. Enosh Kigoryo learned State Attorney and Mr. Alex Dotto Massaba Advocate for the appellants and the appellants.

E. I. LALTAIKA

JUDGE

11.05.2022