IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

(PC) CRIMINAL APPEAL NO. 12 OF 2021

(Arising from (PC) Misc. Application No. 39 of 2021 and Criminal appeal No. 11 of 2020 of the Karagwe district Court at Kayanga, and originating from criminal case No. 265 of 2019 of Mabira Primary court))

ANAJOYCE FORTUNATUS.....APPELLANT

VRS

SALVATORY LEOPORD .....RESPONDENT

JUDGMENT

22/03/2022 & 29/04/2022

NGIGWANA, J.

At Mabira Primary Court the Respondent Salvatory Leopord was charged with the offence of causing disturbance in such a manner as likely to cause a breach of peace contrary to section 89 (1) (b) of the Penal Code Cap. 16 R: E 2019. In the trial court, it was alleged that on 9th day of October, 2019 at 22:00hours at Kamuli village within Kyerwa District in Kagera Region, the Salvatory Leopord did unlawfully cause disturbance by throwing stones to people who gathered mourning the death of the child who according to the respondent, was not among the clan members, hence causing two cooking pots to be stolen valued at TZS. 1,100,00/=.

When the charge was read over and fully explained to the respondent, he pleaded not guilty to the charge. The prosecution side featured four witnesses while the respondent defended himself and called two witnesses. At the end of the trial, the trial court was convinced that the case against

the respondent had not been proved beyond reasonable doubt, thus acquitted the respondent.

Aggrieved by the decision of the trial court, the appellant lodged an appeal to the District Court of Karagwe at Kayanga. The appeal was registered as Criminal Appeal No. 11 of 2020. The grounds of appeal raised before the 1st appellate court were as follows: -

1. *That, the Primary Court Magistrate erred in law and facts for failure to convict and sentence the respondent who admitted before the court his facts on the breach of peace during the burial which was contrary to section 89 (1) (b) Penal Code (Cap. 16 R: E 2002).*

2. *That, the Primary Court Magistrate erred in law and facts for failure to know that on 07.10.2019 the respondent unlawfully breached the peace during the burial by intimating and threatening violence to the people who attended the burial to leave the burial without any minutes written document and permission from the clan members.*

3. *That, the Primary court Magistrate erred in law and in fact for failure to know that the late Baraka Fortunatus died without his wife and his dead body was buried in the home place of her mother and thus the respondent did unlawfully to disrespect the death of her son during the funeral activities.*

4. *That, the Primary court Magistrate erred in law and in fact for failure to take into consideration that on 08/10/2019 the respondent came back around 10:00 PM to disturb the people who were sleeping in the*

burial's place in which the respondent took two big pots with value of 1,100,000/= without any legal any justification.

5. *That, the Primary court Magistrate erred in law and in facts for failure to know that the respondent in claiming to be absent from 09/10/2019 up to 10/10/2019 while the respondent started committing an offence on 07/10//2019 up to 08/10/2019 hence wrong decision against the appellant.*

6. *That, the Primary Court Magistrate erred in law and facts for failure to consider the oral evidence which was direct (watertight evidence adduced by the Appellant as well as appellants' witnesses who proved the criminal case beyond reasonable doubt.*

After hearing the parties, the 1st appellate court found that on the material night, the respondent was not correctly identified. Consequently, the appeal was dismissed for being devoid of merit. The decision of the primary court was upheld.

Again, the Appellant was aggrieved by the decision of the 1st appellate court, hence this appeal. In his petition of appeal, the appellant raised four (4) grounds of appeal which were coached as follows:-

1. *That, the District Court Magistrate erred in both facts and law by failure to evaluate and assess the evidence of the trial court by virtue of being the first Appellate court.*

2. *That, the first Appellate court erred in both facts and law by failure to consider and determine each ground of appeal presented before it to*

finality and went on to deal with issue not presented by the Appellant.

3. *That, the District court Magistrate erred in both facts and law by misdirecting himself and failure to recognize that at the date of commission of crime, the Respondent was present at the scene of crime and he was the one who committed the offence.*

4. *That, the District Court Magistrate erred in facts and law to dismiss the appeal without taking into consideration that the appellant proved the case in the required standards of the law.*

At the hearing, the appellant had the legal services of Mr. Samwel Kiula learned advocate while the respondent had the legal services of Mr. Frank Karoli, learned advocate.

Arguing the first ground of appeal, Mr. Kiula submitted that Karagwe District Court as the 1st appellate court had the duty to assess and re-evaluate the evidence adduced before the trial court so as to come into its own finding, however, it is unfortunate that the court did not discharge its duty. Mr. Kiula further submitted that the evidence of PW1, PW2 and PW4 is very clear as to how the offence was committed and who committed it.

He added that, at page 14 of the trial court typed proceedings, the respondent is seen announcing that people should not involve in the morning of Baraka Fortunatus, deceased. The learned counsel referred me to the case of the **Registered Trustees of Joy in the harvest versus Hamza K. Sungura**, Civil Appeal No. 149 of 2017 CAT (unreported) where it was held among other things that the first appellate court is

entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision.

Arguing the 2nd ground, Kiula submitted that, the records of the first appellate court shows that the appellant raised six (6) grounds of appeal but the District Court addressed the 1st, 2nd and 6th grounds only and no reasons assigned as to why grounds No. 3rd, 4th and 5th were not addressed. Mr. Kiula added that, it was the duty of the District Court to address each ground and/or assign reasons for not addressing the rest of the grounds. Mr. Kiula referred me to the case of **Hatari Masharubu @ Babu Ayubu versus The Republic**, Criminal Appeal No. 590 of 2017 CAT (unreported) where it was emphasized that the 1st appellate court has the duty to ensure that unless the grounds of appeal are compressed thereof and the reason given, each ground must be considered and determined to finality. Kiula added that, the District Court dealt with the issue of identification which was not raised in the grounds of appeal.

Submitting in support of the 3rd, and 4th grounds of appeal, Kiula submitted that the case was proved by the appellant to the required standard and that the witnesses were credible and worth to be believed. The learned counsel referred me to the case of **Goodluck Kyando versus Republic** [2006] TLR 263. Mr. Kiula ended his submission urging this court to allow this appeal, quash and set aside the concurrent judgments of the lower courts.

In reply to the 1st and 4th grounds of appeal Mr. Karoli submitted that the appellant who was the complainant in the trial court did not prove the charge against the respondent beyond reasonable doubt. Mr. Karoli further

argued that the 1st appellate court discharged its duty by re-evaluating the evidence adduced before the trial court. That according to the evidence of PW1, PW2 and PW4, the respondent is alleged to have been identified during night hours while running. That PW1 said she saw the respondent and other three persons, but no descriptions given as to how the respondent was identified. The learned counsel referred me to the case of **Waziri Amani versus The Republic [1980] TLR 250** to emphasize that the evidence of visual identification has to be watertight in order to ground a conviction. Karoli went on submitting that in the trial court, the respondent duly raised the defense of alibi.

Replying on the 2nd ground, Karoli submitted that in the District court, the matter was heard by way of written submissions, thus the learned counsel for the appellant did not specify which grounds were not argued. Mr. Karoli further stated that the issue of identification was raised in the petition of appeal as ground No. 6, and therefore the 1st appellate court judgment shows that the grounds of appeal were considered. He added that, the 1st appellate court is not bound to address each and every ground especially where they have no merit. He ended his submission praying for the dismissal of this appeal for want of merit.

In his brief, rejoinder, Mr. Kiula stated that the issue of identification was not among the grounds of appeal in the 1st appellate court.

I have considered the lower court records, the grounds of appeal and the submissions by both learned counsel. I will determine the grounds of appeal in the course taken by the appellant's counsel.

The 1st ground hinges on the role of the 1st appellate court. The appellant's complaint is that the District court of Karagwe being a first appellate court did not discharge its duty.

It is trite law that the first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision. Describing the duty of the first appellate court, the court of Appeal of Kenya in the case of **David Njuguna Wairimu vs. Republic [2010]** eKLR held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also **Ally Patric Sanga versus R**, Criminal Appeal No. 341 of 2017 CAT (Unreported*).*

In doing so the appellate court must always bear in mind that unlike the trial court, did not have the advantage of hearing or seeing the witnesses testify, thus the guiding principle is that a finding of a fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles. ***See OKENO V. R [1972] EA 32.***

In the matter at hand, as per trial court record, the appellant (PW1) testify that the respondent on 09/10/2019 at 22:00hrs sought people and all started throwing stones over her house. That on 10/10/2019, she reported the matter to the Ward Councilor and Ward Executive Officer where the respondent was summoned orally confessed to have committed the offence and promised to pay the value of the two stolen pots. The record also revealed that both the Ward Executive Officer and the Ward Councilor did not appear in the trial court to testify that the matter was reported to them, and that, they really summoned the respondent, and when they asked the respondent the incident, the respondent confessed to have committed the offence and agreed to pay TZS. 1,100,000/= being the value of the cooking pots alleged to have been stolen on the material night.

When asked questions for clarification by the court, the appellant (PW1) told the trial court that she had a conflict with the respondent. She added that the respondent is a threat in the village. The appellant did not at all testify that she identified the respondent on the material night.

On her side, Restituta Fortunatus (PW2) told the trial court that she saw the respondent and other three men running into the respondent's house. When cross- examined, PW2 said, she identified the respondent by the help of cellular phone light.

PW3 Projestus Rugabela had nothing to explain as to what transpired on 09/10/2019 during the night. PW4 John told the trial court that he identified the appellant on 09/10/2019 running while carrying a cooking

pot, though no evidence that the alleged cooking pot was found in the house of the respondent.

On his side, the respondent denied to have committed the offence, and he duly raised the defence of alibi that he was away, and he tendered the visitor's book of the Guest House in which he slept on the material night and was admitted SUI "A".

It is trite law that the charge is the foundation of criminal trial. It should also be noted that one of the basic principles of our criminal justice is that the prosecution is, in every trial bound to prove the charged offence beyond reasonable doubt.

The respondent was charged under section 89 (1) (b) of the Penal Code cap. 16 R: E 2019. The particulars of the charge were coached as follows;

"*Wewe Salvatory s/o Leopord unashitakiwa kuwa tarehe 09/10/2019 saa 4:00 usiku huko katika kijiji cha Kamuli Wilaya ya Kyerwa, Mkoa wa Kagera bila halali na kwa makusudi ulifanya fujo na kurushia wananchi mawe waliohudhuria matanga kisa ukitaka waondoke kwamba mtoto aliyekufa sio mwanaukoo na kusababisha sufuria mbili kubwa kuibiwa zenye thamani ya Tshs. 1,100,000/= na kitendo hicho ni kosa na kinyume cha sharia.*"

In that accord, the prosecution had the duty to prove beyond reasonable doubt that on 09/10/2019 at 22:00 hours the offence was committed and that it was really committed by the respondent. It is undisputed that the incident in the instant case occurred during night hours thus, the evidence on how the respondent was seen and identified is so crucial because

generally, the evidence of visual identification has never been reliable evidence. In **Waziri Amani (Supra);** it was held that;

"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that 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."

In **Raymond Francis v. Republic** [1994] TLR 100, the Court emphasized that;

"It is elementary that a criminal case whose determination depends essentially on identification evidence on conditions favoring a correct identification is of utmost importance."

In this case, PW2 alleged to have identified the respondent by the help of phone light and that the respondent with other three people were running while PW3 said, he saw the respondent running while carrying a cooking pot. PW2 just said she identified the respondent vide phone light but she did not describe the type of the phone and the intensity of the light. PW1 and PW3 on their side gave no descriptions on how they identified that respondent on the material night. The Court of Appeal in the case **of Anael Sambo versus the Republic,** Criminal Appeal No.274 of 2007 CAT (Unreported), rejecting identification done during night hours through torch light stated that;

"Under normal circumstances, it is not easy for a person towards whom a torch is flashed to identify the person flashing the torch at her/him. It was

not disclosed in the evidence whether the torch light was bright enough to allow for correct identification."

Being guided by the herein above Court of Appeal decision, and considering the circumstances of the case at hand, it cannot be concluded that the respondent was undoubtedly identified. Indeed, the respondent was entitled to enjoy the benefit of doubt.

The 1st appellate court went through the evidence of PW1, PW2, PW3 and PW4 and upon its analysis and re-evaluation, found that the prosecution was extremely weak in respect of the identification of the respondent. The argument that the issue of identification was not one of the grounds of appeal is immaterial. For the reasons stated above, this honorable finds no ground to fault the 1st appellate court.

As regards the 2nd ground, the complaint is that the appellant raised six grounds of appeal, but the 1st appellant court did not address the 3rd, 4th and 5th grounds and reason given. I do agree with Mr. Kiula that where more than ground is raised, unless reasons are assigned, each ground has to be addressed and determined to its finality. The 1st appellate court ought to have stated why the rest of the 3rd, 4th and 5th grounds were not addressed, as stated by Mr. Kiula.

However, it is my view that the omission is not fatal because it has occasioned no miscarriage of justice. Though the grounds of appeal were six in number, in reality, they could be merged into one major ground;

"That the trial court erred in law and fact for failure to convict and sentence the respondent while the offence was proved beyond reasonable doubt as against him."

The grounds of appeal appeared that way because they were drawn by the appellant who is not a lawyer by profession but a layperson. However, reading the judgment of the 1st appellate court, it is apparent that the ground that **the trial court erred in law and fact for failure to convict and sentence the respondent while the offence was proved beyond reasonable doubt as against him was fully** addressed.

The appellant stated in the trial court that she had a conflict with the respondent and that two days before the incident, the respondent differed with clan members on the burial of the appellant's son. However, it should be noted that suspicion however strong has never been accepted in our jurisprudence as sufficient evidence to convict. In the case of **Raphael Kimashi versus The Republic,** Criminal appeal No. 67 of 2002, the Court of Appeal held that;

"Suspicion however grave cannot be a substitute for proof beyond reasonable doubt."

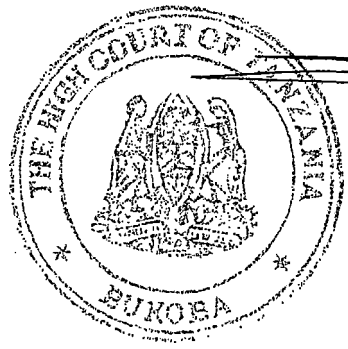
All said, I find no iota of merit in this appeal. Consequently, the same is hereby dismissed. The concurrent findings of the lower courts are hereby upheld. It is so ordered.

E.L. NGIGWANA

JUDGE

29/04/2022

Judgment delivered this 29th day of April 2022 in the presence of the appellant and her Advocate Mr. Samwel Kiula, Mr. Frank Karoli, learned advocate for the Appellant, Mr. E.M. Kamaleki, Judges' Law Assistant and Ms.Tumaini Hamidu, B/C.



E.L. NGIGWANA

JUDGE

29/04/2022