

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO 133 OF 2022

REPUBLIC

VERSUS

ALOYCE S/O EMMANUEL

JUDGMENT

28th February & 28th March 2023

F. H. Mahimbali, J.:

The accused person who is VEO, is charged by the prosecution that on 30th April 2019, while at Neruma village which is within Bunda District in Mara Region unlawfully caused grievous harm to the victim one Exavery Magesa by pouring petrol fuel on his body and thereafter lit fire on him which then exploded and badly made him catch fire and started exploding. He was finally served. Thus, the basis of this charge which is an offence contrary to section 222(a) of the Penal Code, Cap 16, R.E 2022.

The accused person disputed the charge, thus compelled the prosecution to summon a total of three witnesses and tendered four

exhibits. Out of four exhibits, PE1 and PE2 exhibits are summons to call two potential prosecution witnesses (the victim Exavery Magesa and the doctor who attended the said victim). PE3 exhibit is the victim's evidence recorded at Police which was tendered on behalf of his oral testimony on account that he was not traced anywhere. PE4 is the PF3 of the victim.

In their testimonies, PW1 and PW2 told the Court how on 30th April 2019 they had received accusations of motorcycle battery belonging to one Magoti Bigambo being stolen by Exavery Magesa. They convened a family gathering inquiring on the said stolen battery by the said Exavery Magesa. Whereas PW1 says it was returned, PW2 says it was not, but in vain. Eventually, they both testified that the said Exavery Magesa was taken by Kabega Ibrahim (mgambo) while being accompanied by Mwl Francis. They arrested the said Exavery Magesa, saying that he was needed by VEO at his office. By that time, it was around 19.00hrs. The said Exavery Magesa was then taken by the said mgambo and those PW1 and PW2 were amongst the people who made follow-up after him. They then reached to the VEO's office around 20.00hrs. They were astonished only to see their VEO Aloyce Emmanuel inquiring of the said stealing. As the said Exavery kept on refusing stealing or knowing it, the VEO ordered to be brought

petrol fuel where one motorist volunteered it from his motorcycle and gave to the VEO who then poured it around Magesa's body who by then was put under arrest and seated. The fire was lit up, and the explosion emerged. Rescuing from it, the victim tried to escape by running and in the course, put off all his dresses. However, he was badly burnt. He was rushed to Kibara hospital where he was admitted and hospitalized for about two months (PE3 and PE4 exhibits).

There was no testimony from the victim himself and the doctor who attended the said victim. Furthermore, there was no any testimony from the motorist, mgambo and Mwl Francis or Mzee Magoti Bigambo. As to how they managed to identify the culprit as the accused person, the witnesses (PW1 and PW2), testified that they know him as their VEO and that as it was night time, they used sim torch lights to identify him, though without describing the illuminating intensity of the said sim torch lights.

D/SSGT Kingi, testified as PW3 who stated in his testimony that on 30th April 2019 around 21.00hrs while at Kibara Police station, he had received a young person with injuries on his body caused by fire burn accompanied by his parents. He hurriedly recorded his statement and thereafter issued PF3 for his medical examination and further treatment at

Kibara Mission hospital. In his further testimony, he issued court's summons for two prosecution witnesses: Exavery Magesa and of Dr. Esther who attended the victim (Exaver Magesa) which were admitted as exhibits PE1 and PE2. As the said Exavery Magesa was not traced, he tendered his recorded statement (Exhibit PE3) and the PF3 of the said victim which was admitted as exhibit PE4.

In his defense, the accused person admitted that he was VEO of the said Neruma village but now shifted to Usambara village. He further stated that in his recollection, on 30th April 2019 around 20.00 to 21.00hrs while at his pub popularly known as PESA MBILI pub, he heard many people shouting "thief, thief, thief". He got out and saw mob people gathered stoning at one person who then he had identified to be Exavery Magesa (whom he knows much). Before he intervened, he just witnessed him being fired. What he did as VEO was to inform Police Post Kibara who then replied that as it was night time, he had to report the incident on the next morning there at Police. The next day which was 1st May 2019, he could not go to report the said incident at Police first, instead he went to Workers Day (1/5/2019) at Bunda town where then was arrested by police while on his way to. He denies burning fire the said victim as alleged, however he

accused police and the victim's relatives as needing money from him, in his refusal this case was eventually staged against him.

That was all about the testimony of the case on both sides. Both sides prayed to make the final closing submissions.

On her part, Ms Marry Joachim learned advocate for the accused person, submitted that in consideration of the prosecution's evidence in respect of this case, it is clear that the prosecution case has not been established beyond reasonable doubt as per law. Since that is the mandatory requirement of the law, (See section 110 of TEA) the burden of proof lies to the prosecution. The prosecution in this case have failed to discharge their legal obligations as per law.

First, she challenged that there have not been key witnesses to the offence charged. The victim himself has not been availed in court for his testimony to tell how the accused person unlawfully harmed him. Even PE1 (summons to the victim) has failed to establish why the victim person was not accessed. This vitiates the case. Also, the attending doctor (clinical officer) in respect of the PF3 tendered as exhibit, was not accessed for her testimony in court. This in total weakness the prosecution's case. There have not been other independent witnesses apart from the close relatives.

It was thus expected that for fairness of the trial, there ought to have been independent witness. In the absence of corroborating evidence by prosecution to support the testimony of PW1 and PW2, weakens the prosecution's case. In the case of **Mujuni Joseph Kataniya vs Samwel Mtambala Luhangisa and another**, (1996) TLR 53, it was held that failure to bring key witnesses weakens the case for the prosecution's case. Also, in the case of **Emmanuel Kabelele vs Republic**, Criminal appeal No 536 of 2017, CAT at Shinyanga at page 18, held:

- The prosecutions are under prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on the material facts.
- If such witnesses are within reach but are not called without sufficient reasons being shown, the court may draw an inference adverse to the prosecution.

On this, she invited this court to draw adverse inference against the prosecution for failure to call the important witnesses.

Furthermore, she submitted that there has been doubt on the visual identification of the victim at the scene. Relying in the case of **Waziri**

Amani vs Republic, (1980) TLR 250, she submitted that it was warned by the CAT on reliance to visual identification evidence. It set basic criteria for the visual identification. With the case at hand, she criticized the testimony of PW1 and PW2 how the victim was identified being poured with Petrol fuel and eventually setting fire on him. The PW1 and PW2 didn't describe how the said sim torch lights had been able to identify the accused person it being night. Also, it was not established if they knew the accused person before. She also pressed reliance in the case of **Lemon Francis vs Republic**, (1994) TLR 100, where the CAT also insisted on the criteria of visual identification. There must be stated conditions favoring visual identifications.

In addition, there has been contradictory evidence by Republic between PW1 and PW2. Whereas PW1 says the stolen battery was recovered, PW2 says there was nothing recovered. PW1 also testified that when the victim was taken to the VEO by one Mgambo (Kabega Ibrahim), but PW2 says the victim was taken by Mgambo and another person by name of Mwl Francis. At the scene, also there is a contradiction on where the match box was fetched. Whereas PW1 says the accused person had ordered it from someone else, PW2 says had taken it from his pockets.

With these issues she argued that these are reasonable doubts which must benefit the accused person. She humbly prayed that the accused person be acquitted as he must benefit from these legal deficiencies.

Ms. Agma Haule learned state attorney for the Republic submitted that it is the legal duty that the Republic is at burden to establish the accusations against the accused person beyond reasonable doubt as provided under section 3 (2) a and 110 of TEA and as stated by many cases including the case of said **Mohamed vs. Republic** (1987) TLR 117.

In establishing the two ingredients of this case (motive of the accused person and commission of unlawful act) there have been called three prosecution witnesses and tendered four exhibits. On what PW1 and PW2 testified, it is clear that these are eye witnesses and they corroborated exhibit PE3. In the case of **Enock Kipela vs Republic**, Criminal Appeal No 150 of 1994, CAT at Mbeya on page 7, listed conducts to be taken into account when considering the motive of the doer. Such things are nature of weapon used. In this case there is no physical weapon used but petrol fuel which is highly inflammable. Parties of the body inflicted is also another criterion for consideration. In the current case the file burns are established on stomach, legs, hands and neck. Motive can

also be considered on the number of blows inflicted. In the current matter, the accused person tried more than four times in setting the said fire. Therefore, it is clear that the accused person really intended to harm the victim.

The three witnesses' testimony have not been shaken. As they are credible witnesses, she prayed that their evidence be accorded weight (see **Goodluck Kyando vs Republic** (2006) TLR 363). There has not been any material contradiction by these witnesses to weaken the prosecution's case.

On the issue of discrepancy, she relied support from the case of **Mohamed Said Matura vs Republic, (1995)** TLR3 where the court held that not every discrepancy weakens the case unless there are material discrepancy/contradiction. So, the testimony of PW1 and PW2 be considered as a whole and not in isolation.

Regarding the issue of visual identification, she nodded head with Marry Joachim that this incident happened at night. It is true also that in the case of **Waziri Amani** (supra) said all on visual identification especially for offences committed at night. Amongst the aids are

- Duration of the incident. In this case it was about a 45 minutes' lapse time incident.
- Close distance. Pw1 and PW2 stated being front. Thus, capable of witnessing anything taking place including identification of the doer.
- Type of lights. In this case it was sim torch light.
- Familiarity with the accused person as their VEO.

On these above aids, Ms Agma learned state attorney is of the considered view that all these conditions set in the case of Waziri Amani, have been met out by the identifying witnesses in the circumstances of this case.

Regarding the absence of the victim in the criminal trial is not always an escape of guilty of the accused person. So long as the provisions of section 34 B (1) of TEA Cap 6 have been met by the Republic, in law, that evidence if it is incriminating sufficiently meets the legal thresh hold. In the circumstances of this case, that has been well met. Thus, it is legally actionable. She humbly prayed that the accused person be convicted as charged.

In my full assessment of the prosecution's case, the reasons why the victim of this incident had not been called in court is not sufficient to

convince this Court to consider his statement in amounting conviction. The reasons stated as to his whereabouts are not sufficient to warrant this Court give it the full accord the evidence in exhibit PE3 in lieu of himself. In essence I am alive that evidence as per law includes statements. However, by best evidence rule, the evidence to be adduced before a court of law must be direct (section 60 and 61 of the Evidence Act).

According to law, the use of recorded statement of a witness or electronic evidence in lieu of his personality can only be used in very rare circumstances and upon satisfaction of the court. The rationale being one; evidence of a particular fact must be direct

34B.-(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written or electronic statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written or electronic statement may only be admissible under this section-

*a) where its maker is not called as a witness, if he is **dead or unfit by reason of bodily or mental condition** to attend as a witness, or **if he is outside Tanzania and it is not reasonably practicable to***

call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

b) if the statement is, or purports to be, signed by the person who made it;

c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to

a. tender it, on each of the other parties to the proceedings;

e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence:

a. Provided that, the court shall determine the relevance of any objection;

f) if, where the statement is made by a person who

i) cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.

In the circumstances of this case, it was not the intention of the legislature that oral evidence be replaced by tendering witness's statement easily like that. Should it be considered light like that, then no one would be ready to be subjected to cross-examination as it is ordinarily done. That is the flavor of adversarial system or hybrid of adversarial and inquisitorial system. Always, a witness is produced in court for his testimony and then subject to cross examination.

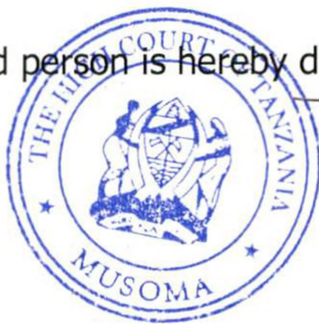
Since the said victim is not dead, not unfit for reason of sickness (bodily or mentally) and that no such reasonable steps have been established done and by affidavit, I can hardly agree with the prosecution's submissions that a mere tendering of that statement, sufficed the legal requirement of proof beyond reasonable doubt.

Since the prosecution is charged with the Primary duty of establishing the case beyond reasonable doubt, they only do that by producing in court tangible direct evidence via competent witnesses. Failure of calling key prosecution's witnesses, I agree that weakens the prosecution's case and

the court is rightly entitled to draw an adverse inference as I hereby do. No victim of the case, no doctor who attended the said victim. What a case is this then?

I thus rule that the prosecution's case as not established beyond (see **Mohamed vs Republic and Emmanuel Kabelele vs Republic** (supra).

Accused person is hereby discharged.



F. H. Mahimbali

Judge

28/03/2023

Court: Judgment delivered this 28th day of March, 2023 in the presence of Mr. Felix Mshana, state attorney for the Republic and Mr. Marry Joachim, advocate for the accused person.

Right to appeal fully explained to any aggrieved party.

F. H. Mahimbali

Judge