

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TABORA DISTRICT REGISTRY)**

AT TABORA

CRIMINAL APPEAL CASE NO. 185 OF 2018

(Arising from Criminal Case No. 82 of 2018, District Court of Kigoma)

SEMENI ISSA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 23/05/2023

Date of Judgment: 31/05/2023

KADILU, J.

In the District Court of Kigoma, the appellant was convicted of the offence of malicious damage to property contrary to Section 326 (1) (a) of the Penal Code [Cap. 16, R.E. 2002]. It was alleged that on 10/06/2017 at about morning hours at Butunga street, Kibirizi Ward within the District and Region of Kigoma, the appellant willfully and unlawfully broke one (1) wooden table valued Tshs. 150,000/= and one (1) umbrella valued Tshs. 40,000/= the properties of Edward Mrisho. He was sentenced to pay a fine of Tshs, 100,000/= or serve one (1) year custodial sentence. He was in addition ordered to compensate the victim Tshs. 190,000/= being the value of damaged property.

Aggrieved with the conviction and sentence, the appellant preferred the instant appeal based on the following grounds:

- 1. That, the learned trial Magistrate erred in law when he found the appellant guilty of the offence charged while the prosecution side did not prove the case against the appellant beyond reasonable doubt.*
- 2. That, the learned trial Magistrate erred in law and fact by finding the appellant guilty of the offence charged while there was no prosecution witness who testified that he saw the appellant destroying the property and the said property were not brought to the court as exhibits.*
- 3. That, the learned trial Magistrate wrongly relied on the circumstantial evidence in finding the appellant guilty of the offence charged.*

The appellant prayed this court to allow the appeal, quash the conviction, set aside the sentence and nullify all orders of the trial court against the appellant. On the day of hearing, the appellant was present under representation of Mr. Emmanuel Musyani, Advocate and the respondent, Republic was represented by Ms. Suzan Barnabas, the learned State Attorney. Mr. Musyani prayed to argue the 1st and 3rd grounds of appeal jointly. He submitted that the offence against the appellant was not proved beyond reasonable doubt.

He explained that the proceedings of the trial court are quite clear that, PW1 who was the victim of the offence was not at the scene of the crime, but he was informed by his watchman that his properties were damaged by the appellant. The learned Advocate told the court that PW2 testified in the same way by stating that he was informed by Salum Mwasengo that the

appellant and other persons who were not before the court, destroyed PW1's property. Mr. Musyani said it was the testimony of PW3 at the trial court that the appellant was mobilizing 500 persons to damage PW1's property hence, making it unclear as to who between the appellant and the said 500 persons had damaged the property.

According to Mr. Musyani, there is no proof that the appellant had damaged the alleged property because the watchman who told PW1 that the appellant damaged the property was not called to testify at the trial court. The Advocate submitted further that the learned Magistrate misdirected himself by relying on hearsay evidence which is not admissible in law. Regarding the 2nd ground of appeal, Mr. Musyani argued that the trial court erred in convicting the appellant without the alleged damaged property being tendered as exhibits during the trial of the appellant.

He referred to the case of *Scholastica Paulo v R.*, [1984] TLR 189 in which it was stated that in cases involving malicious damage to property, there should be proof of the damaged property. Mr. Musyani concluded that the conviction and sentence of the appellant were improperly founded. He then prayed the court to allow the appeal.

Ms. Suzan responded to the 1st and 3rd grounds of appeal jointly as were submitted. She generally opposed the appeal and stated that all prosecution witnesses linked the appellant with the charged offence as they testified about how the appellant damaged the property. She stated that the

proceedings of the trial court indicate that the appellant was found in the scene of the crime. She refuted the appellant's allegation that he was convicted based on circumstantial evidence. The State Attorney added that the appellant was actually seen in the scene where he demonstrated the conduct which resulted into his arrest by PW3.

Responding to the appellant's assertion in the 2nd ground of appeal that the damaged properties were not tendered as exhibits during the trial, Ms. Suzan said it is true, but the appellant's participation in the commission of the charged offence was well established during the trial. She thus maintained that the prosecution proved the case against the appellant beyond reasonable doubt. She prayed the appeal to be dismissed for lack of merits and conviction of the lower court together with the sentence to be upheld.

By way of a rejoinder, Mr. Musyani submitted that PW1 was not in the scene of the crime as alleged and nobody saw the appellant damaging PW1's property. He added that there is no evidence that the appellant demonstrated any conduct suggesting that he was part of the mob which damaged the property. The learned Counsel for the appellant maintained that the offence was not proved beyond reasonable doubt as required by the law. He urged the court to allow the appeal.

Having set out the submissions of the parties, the issue for determination is whether the appeal at hand is meritorious or not. The

appellant alleges that he was wrongly convicted because there was no single witness who testified that he was seen damaging the property. As if that was not enough, the said the damaged properties were not brought to the court as exhibits. To that end, the appellant contended that his conviction and the resultant sentence were based on circumstantial evidence. Without much ado, I should hasten to point out that the trial court's proceedings are glaringly clear that there was no prosecution witness who told the court that the appellant was seen damaging the alleged property.

It was the testimony of the appellant in defence that he joined the crowd which was wondering about what was going on in the scene of the crime, but he was surprised to be arrested. Ms. Suzan told the court that the appellant was seen in the scene being among the 500 persons whom were being mobilized by the appellant to commit the offence. However, it is unclear as to why the appellant was charged alone while the offence was committed by him in a company of several other persons who were present at the time the appellant was arrested. For these reasons, I agree with the assertion that the conviction of the appellant was based on circumstantial evidence.

Whereas circumstantial evidence is acceptable in finding the conviction, it should meet certain conditions in order to be relied upon to justify conviction of the accused. In the case of ***Awadhi Gaitani @ Mboma v R.***, Criminal Appeal No. 288 of 2017, the Court of Appeal laid down six conditions to be fulfilled before basing conviction of the accused on

circumstantial evidence. **Firstly**, the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established. Those circumstances should be of a definite tendency precisely pointing towards the guilty of the accused and that, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else.

Secondly, the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no existing circumstances which would weaken or destroy the inference. **Thirdly**, ... **Fourth**, each link in the chain must be carefully tested and, if in the end it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. **Fifth**, the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person.

Sixth, the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. In the instant appeal, the appellant was charged with malicious damage to property contrary to Section 326 (1) of the Penal Code. The provision provided:

"Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise

stated, is a misdemeanour, and he is liable, if no other punishment is provided, to imprisonment for seven years."

From the quoted provision, it is my interpretation that for a person to be convicted under Section 326 (1) of the Penal Code, there should be a destroyed property and the destruction must be willfully and unlawfully. It is a settled position of the law in our jurisdiction that for conviction of the accused person in any criminal offence to stand, it should be proved beyond reasonable doubt that the offence was not only committed, but also it was the accused person who committed it. In the present case, a wooden table and the umbrella which the appellant was alleged to have destroyed were nowhere to be found during the trial.

The prosecution kept on insisting that it was the appellant who destroyed the said properties, but none of its witnesses was able to vividly connect the appellant with the said destruction. In the circumstances, I cannot conclude without hesitation that there were properties which were destroyed and that it was the appellant herein who destroyed them. Even if the above conclusion could be reached by using circumstantial evidence, the conditions laid down by the Court of Appeal were not met in the case at hand so as to justify the conviction and sentence of the appellant. That said, the second and third grounds of appeal have succeeded which also leads to the conclusion that the case against the appellant was not proved beyond reasonable doubt.

In view thereof, I allow the appeal, quash the proceedings of the District Court of Kigoma, set aside the conviction and all orders of the trial court against the appellant. Right of appeal is fully explained.


Order accordingly.


KADILU, M.J.,
JUDGE

31/05/2023

Judgement delivered in chamber on the 31st Day of May, 2023 in the presence of the appellant who is represented by Mr. Emmanuel Musyani, Advocate for the appellant and Ms. Aneth Makunja, State Attorney for the respondent, Republic.




KADILU, M. J.,
JUDGE

31/05/2023.