IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE SUB-REGISTRY OF ARUSHA]

AT ARUSHA

PC CRIMINAL APPEAL NO. 14 OF 2023

(C/F Criminal Appeal No. 8 of 2023 District Court of Karatu at Karatu, Original Criminal Case No. 473 of 2022 Karatu Primary Court)

SIFUNI ZEFANIA ..... APPELLANT

VERSUS

CHRISTINA ISAYA ..... RESPONDENT

JUDGMENT

23rd November & 28th December, 2023

TIGANGA, J.

Before Karatu Primary Court, (the trial court), the appellant herein was arraigned for the offence of malicious damage to property contrary to section 326 (1) of the **Penal Code**, Cap 16, R.E. 2022.

At the trial court, the evidence showed that, the appellant and respondent are co-parents to one daughter living with the respondent herein. It was alleged by the complainant, before the trial Court, who is the respondent herein, that on 02nd December, 2022 around 19:30hrs while the respondent was on safari, the appellant went to her house broke the door padlock and put his own on the ground that the respondent has been denying his right to see his daughter. Upon arrival, the respondent reported

the matter to the Police who visited the premises and broke the new padlock and allowed her to get inside. However, the respondent claimed that, her money tuning Tshs. 200,000/= which she kept inside the house was missing.

She reported the matter to the police who arrested the appellant. In his defence, the latter completely denied breaking into the respondent's house or changing the padlock. He pleaded defence of *alibi* that, he was not even around the vicinity when the offence allegedly happened.

In the end, the trial court found the appellant herein guilty, he was sentenced to twelve months conditional discharge and ordered to pay back the total of Tshs. 220,000/=. Tshs. 200,000/= being the money taken from the respondent's house and Tshs. 20,000/= is the cost of a broken padlock. Aggrieved, the appellant herein filed Criminal Appeal No. 8 of 2023 before the District Court of Karatu (the 1st appellate court) which upheld the trial court's decision hence the current appeal with five (5) grounds as follows;

1. the District Court erred in law and failed to find that the charge against the appellant was not proved beyond reasonable doubt.
2. That, both lower courts erred in law and in fact in failing to properly scrutinize the evidence and employ wrong reasoning thus made wrong findings and decisions.

3. That, the District Court erred in law and in fact in failing to find that, there was no legal justification to order compensation of Tshs. 200,000/=.
4. That, both lower courts erred in law and in fact in relying on weakness of defence contrary to the law.
5. That, the district court erred in law and in fact in misdirecting itself on probable consequences of the purported appellant's act.

During the hearing, which was by way of written submission, the appellant was represented by Mr. Samwel Welwel whereas the respondent was represented by Mr. Emmanuel Safari, both learned Advocates.

Supporting the appeal, Mr. Welwel submitted on the 1st ground that, the appellant and respondent being husband and wife co-owned the property alleged to have been damaged. Therefore, since the trial court established that the respondent owned the property in exclusion of the appellant, then the ownership of the said house was not established and that, the appellant could have not destroyed his own house.

Learned counsel also challenged the way the appellant was identified at the crime scene. He argued that, since the incident took place during night hours none of the prosecution witnesses explained the intensity of the light or their distance to the appellant which made them identify him. To cement

this point, he referred the Court to the case of **Waziri Amani vs. The Republic** [1980] T.L.R 250 and asked the Court to find that the was conditions for identification laid in the case of **Waziri Amani** were not met.

On the 2nd ground of appeal, Mr. Welwel submitted that, all prosecution witnesses were neither credible nor trustworthy. He argued that, they all claimed to have witnessed the appellant break into the respondent's house go inside and when he came out change the padlock. However, if they were trustworthy, they should have stopped him from committing the offence or reported the same to the authorities instead of just watching the appellant commit the alleged offence and calling the respondent to notify her of the incident. He argued, that if what they testified was true, the appellant would have been charged with the offences of burglary and theft.

As to the 3rd ground, the learned counsel submitted that there was no legal justification for ordering the appellant to pay the respondent compensation of Tshs. 200,000/= because the same was not proved. He argued that, since the parties are in a long-term marital battle, the story was only concocted by the appellant to get back at him. He maintained that had it been the case, after the investigation, the Police would have charged the appellant with the offence of theft also.

On the 4th ground, Mr. Welwel submitted that, the trial court convicted the appellant based on his weak defence evidence which is contrary to the law. He contended that, the trial court's judgment shows that, the appellant's conviction was motivated by his weak defence. More so, there was no proof at all of the said Tshs. 200,000/= allegedly to have been taken by the appellant was indeed in the respondent's house. The 5th ground was withdrawn. The learned counsel prayed that this appeal be allowed and both lower courts' decisions be quashed and set aside.

Opposing the appeal, Mr. Safari submitted on the 1st ground that, the case against the appellant was proved at the required standard as the prosecution witness witnessed the act and they all testified before the trial court to that effect. Regarding identification of the Appellant, he argued that, the appellant planned to commit the offence and told SM2 regarding his intention to break the padlock and he was seen by SM2 and SM3 executing his plan. He further argued that, prosecution witnesses are not Police Officers responsible for preventing the appellant from committing the offence.

It was Mr. Safari's argument on the 3rd ground that, payment of Tshs. 200,000/= as compensation was proper and in accordance with the provision

of the law under section 5 (1) (d) of the third schedule to the **Magistrates Court's Act**, [Cap 11 R.E. 2019] (MCA) which empowers Primary Court to make such orders.

As to the 4th ground, the learned counsel submitted that, the appellant's evidence and defence of *alibi* at the trial court was neither proved not posed any doubt to the prosecution case. According to him, the appellants' witnesses contradicted themselves, especially regarding the date of the offence which was analyzed and decided by the trial court. He maintained that, the appellant was not convicted based on his weak defence but after all evidence was scrutinized by the trial court and upheld by the 1st appellate court. He prayed that, this appeal be dismissed for want of merit. There was no rejoinder.

After going through the parties' submissions and the lower court's decisions, I now proceed to determine the appeal having in mind the principle that, this being the 2nd appeal on the concurrent findings of the lower courts, I can only interfere when there is a misapprehension of evidence. This was emphasized in the case of **Efeso Wasita vs. The Republic**, Criminal Appeal No. 408 of 2020, CAT at Mbeya where the Court of Appeal held that;

"...Trite law is that our interference is justified where the findings are manifestly unreasonable, there is a misapprehension of the evidence or misdirection or non-directions on the evidence (See ***DPP vs. Jaffari Mfaume Kawawa*** *[1981] TLR 149,* ***Issa Kumbukeni vs. Republic*** *[2006] TLR 277 and* ***Maneno Daudi vs. Republic,*** *Criminal Appeal No. 165 of 2013 (unreported). We shall therefore consider if we are justified to fault the finding of the courts below on those basis."*

In determining this appeal, I will deal with the 1st, 2nd and 4th grounds of appeal jointly as they all challenge the fact that the case against the appellant was not proven at the required standard. One of the doubts that the appellant's counsel raised was the fact that, the appellant was not properly identified considering the incident took place during night hours. The law is clear that, for identification to hold water, the necessary principles must be met, for instance, intensity of light, distance between the identifying witness and identified person, descriptions of the one identified etc. as was correctly propounded in the most famous judicial jurisprudence of **Waziri Amani vs. R** [1980] TLR 250 where the court emphasized on proper identification to avoid all possibilities of mistaken identity. On the same note, it is also necessary for the trial court to ascertain the credibility of witnesses

alleging to have properly identified the suspect. In **Jaribu Abdallah vs. R.**, (2003) TLR 271–Court of Appeal of Tanzania authoritatively held that:

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of the witnesses."*

In the present appeal, SM2, SM3 and SM4 testified to have seen the appellant breaking the respondent's padlock with the help of two young men. Before that, he told SM2 that, he was going to do so. SM3 is the appellant and respondent's daughter who lives with the latter. She told the court that, she was notified by SM2 that the appellant was planning to break their door and while at home in the evening hours, the appellant went with two young men and conversed with SM3 asking the whereabouts of his other children. He then broke the door padlock, closed the house with another one and left the scene. This version of the story was also corroborated with SM4 who was with SM3 when the incident happened.

Looking at the evidence, although there are no explanations regarding the intensity of light or the distance from where the observing witnesses stood from the appellant, his prior conversation with SM2 and his encounter with SM3, his daughter during the commission of the offence as he asked

for his other children is enough proof that there was no room for mistaken identity. More so, there is no reason cogent enough raised by the appellant regarding SM2, SM3 and SM4's credibility.

Apart from that, in his defence, the appellant told the trial court that, he had been in separation from his wife, the respondent for four years thus due to an ongoing marital battle, he left their home to the respondent. His witnesses SU2 and SU3 told the trial Court that, the appellant approached them on 27th October 2022 with a claim that, the respondent had not been at home since 29th September, 2022 and had left with children.

However, on page 8 of the typed proceedings, the appellant claimed that, he has never gone to the respondent's house for more than four years but he is aggrieved by the fact that, the respondent denies him access to see his children. This in my view challenges the appellant's credibility to the commission of the offence as to his intention and how did he know if the respondent was not home while he never goes to her house.

Regarding the ground and argument that the defence of alibi was improperly considered. On this issue, I am persuaded by and would like to be guided by the decision of my Senior brother, Gwae J in the case of **Plasid**

Philipo vs Regina Philipo, PC Criminal Appeal No. 02 of 2022 where he was confronted by a similar circumstance and held that.

> *"This issue need not detain me much, as it is clear that the procedure where an accused relies on the defence of alibi is founded under section 194 of the* ***Criminal Procedure Act*** *[Cap 20 R.E. 2022]. It should be noted that this law is not applicable in Primary Courts and therefore the procedures envisaged under the said section did not bind the respondent who raised the defence of alibi. In criminal matters, Primary Courts are guided by the Primary Courts Criminal Procedure Code and the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations. In these two procedural laws, there are no procedures to be adhered to where an accused person relies on the defence of alibi and therefore the respondent was not bound to give notice before her reliance to the defence of alibi."*

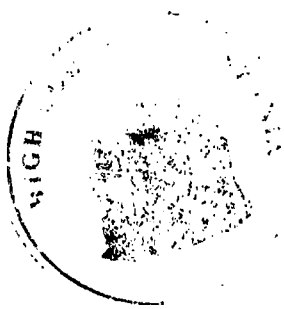
Guided by the above authority, I find the trial court to have not erred by not treating an alibi in terms of section 194 of the **Criminal Procedure Act** as it was not duty-bound to deal with the evidence in the manner provided by CPA. That said the three grounds lack merit; I find that the case against the appellant in respect to the offence of malicious property damage was proved at the required standard.

On the 3rd ground regarding compensation of Tshs. 200,000/= alleged to have been stolen by the appellant, I find the evidence to have not proved the offence of theft in the first place which would have entitled her to such a compensation. I hold so because apart from the respondent just saying that her money was stolen from the house where she left it, there was not enough proof if all the alleged money was really in the house before it was stolen or rather taken.

It is my considered opinion that, the respondent ought to have explained further regarding the source of money or proved its presence in any way before claiming the same to be stolen. Considering the feud between the parties, I find this a vexatious claim. This ground has merit and the same is allowed.

In the premises therefore, I find the case against the appellant was proved to the required standard in respect of the offence of malicious property damage, but was not in respect to the offence of theft, therefore the conviction in respect of the offence of theft is quashed and the sentence in that respect is set aside. The appeal is partly merited to the extent explained hereinabove.

DATED and Delivered at **ARUSHA** this 28th day of December, 2023.



J.C. TIGANGA

JUDGE