IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 62 OF 2023

(Originating from Criminal Case No. 192 of 2022 District Court of Muleba)

DENIS S/O DANIEL..... 1ST APPELLANT
MKAPA S/O LAURIAN..... 2ND APPELLANT
DEVID S/O DEORENCE @ PATRICK..... 3RD APPELLANT
HASSAN S/O BENJAMIN..... 4TH APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

22nd February and 22nd March, 2024

BANZI, J.:

Before the District Court of Muleba ("the trial court"), the appellants and Eradius Raulian, who is not a party to this appeal were jointly and severally charged with the offences of malicious damage to property, gang rape and killing animals; contrary to sections 326(1), 131A (1) (2) and 325 and 35 of the Penal Code [Cap. 16 R.E. 2022]. The offences were alleged to be committed on 26th October, 2022 at 00:00hrs at Nyamilanda village, within Muleba District in Kagera Region.

In a bid to prove the case against the appellants, the prosecution side summoned five witnesses without tendering any exhibit. On the other hand, a total of nine witnesses were called for the defence side.

A brief factual background leading to the conviction of the appellants reveals that on the fateful date during night hours, the appellants invaded the houses of Livinus Laurian (PW1), Laurent Christian (PW2), Suzan Christian (PW3), Alexisius Christopher (PW4), Tresphory Christian (PW5) where they cut down banana trees, killed the pig of PW1 and set fire to their kitchens. It was also alleged that Eradius Raulian, 3rd and 4th appellants raped PW3, a woman aged 70 years. Although the incident occurred at night hours, the witnesses claimed to identify the appellants due to the light from the burning kitchens and they were living in the same locality.

In their defence, all appellants denied to have committed the alleged offences. They contended that, they were arrested on 7th November, 2022 and taken to Muleba Police Station accused of destroying properties and raping PW3. On 10th November, 2023 they were arraigned before the trial court charged with six counts as alluded herein above.

At the end of the trial, the learned magistrate was satisfied that, the prosecution side managed to prove its case beyond reasonable doubt against the appellants on the 1st, 2nd, 3rd, 4th counts but failed to do so on the 5th and 6th counts. Also, he was satisfied that the case was not proved against the Eradius Raulian on all counts, hence, he acquitted him forthwith. Consequently, the appellants were convicted on those four counts and sentenced to six years imprisonment for each count. The sentences were

ordered to run concurrently. Aggrieved with their conviction and sentence, the appellants through Mr. Pereus Mutasingwa, learned advocate lodged this appeal comprising two grounds.

At the hearing of this appeal, the appellants were represented by Mr. Pereus Mutasingwa, learned advocate, whereas the respondent Republic had the services of Mr. Erick Mabagala, the learned State Attorney.

In his submission, Mr. Mutasingwa consolidated both grounds of appeal into one ground that, the case against the appellants was not proved beyond reasonable doubt. He argued that, the prosecution was duty bound to prove the case beyond reasonable doubt however, in this case, the prosecution failed to prove the case against the appellants to the required standards. There was no evidence connecting the appellants with the commission of the offences considering that, the alleged offences were committed on 26/10/2022 but the appellants were arrested on 7/11/2022. According to him, had the witnesses identified the appellants and informed the local leaders and police officers on the same night, the appellants would have been arrested on the same night, not a week later. He added that, there was no explanation why they were not arrested on the same date if at all, they were seen by many people as contended by witnesses. It was further his submission that, key witnesses like a village chairman where the offences were committed, the police officers who arrested the appellants and

investigated the case and the agricultural officer who conducted valuation on the damaged properties were not called to testify. It was his contention that, failure to call those witnesses creates a strong doubt on the prosecution evidence which ought to have been resolved in favour of the appellants.

In respect of identification of the appellants, Mr. Mutasingwa insisted that, such evidence was very weak because all witnesses did not state the intensity of light and the distance between them and the appellants. With such weakness, the case against the appellants was not proved to the required standards. He prayed for the court to quash the conviction, set aside the sentence and release the appellants from prison.

On his side, Mr. Mabagala quickly supported the appeal by stating that, according to the available evidence, the offences were committed during night hours, and therefore, as it was stated in the case of **Chacha Jeremiah Murimi and Three Others v. Republic** [2019] TZCA 52 TanzLII, the court had to satisfy itself that the evidence of identification was watertight before relying on such evidence to convict the appellants. In the case at hand, PW1 said that, he identified the appellants by the aid of fire light, while PW2 claimed to use torchlight. But, none of the witnesses disclosed the intensity of the said lights. On his side, PW3 did not state about the source of light that assisted him to identify the appellants. According to him, the source of light mentioned by the prosecution witnesses creates a strong doubt whether

there was proper identification. He further submitted that, although the witnesses contended that the appellants were known to them, still there was possibility of mistaken identity under those unfavourable conditions. He was of the view that, the case against them was not proved to the required standards.

Having carefully perused the grounds of appeal and on evidence on record and having considered the submissions by learned counsel for both sides, the issue for determination is whether the appeal has merit.

The prosecution evidence relied on identification of the appellant with the aid of light from the burnt kitchen that was alleged to be set by the appellants. In his judgment, the learned magistrate reproduced at length the evidence of both sides but he did not at all evaluate the evidence of either party before reaching into conclusion. It is trite law that failure to evaluate the evidence may lead to miscarriage of justice. In the case of **Leonard Mwanashoka vs Republic** [2015] TZCA 294 TanzLII, it was stated that:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis... **Failure to evaluate or improper evaluation of the evidence inevitably***

leads to wrong and/or biased conclusion or inferences resulting in miscarriages of justice."

In the final verdict, the learned magistrate acquitted the 1st accused after he had raised the defence of alibi which was supported by his witness (DW6). However, he did not elaborate why he was satisfied with that defence and disagreed with the appellants' defence. Looking at the contents of his judgment, it is undisputed that the learned magistrate did neither consider nor evaluate the evidence by the appellants and their witnesses. Worse enough, he just reproduced the evidence of the prosecution witnesses without going further to evaluate such evidence before reaching into a conclusion, that the case against the appellants was proved beyond reasonable doubt. This was a fatal error which usually vitiates the conviction.

In the main, the conviction of the appellants depended on evidence of visual identification made by victims. Each witness contended to have identified the appellants with the aid of fire light from the burnt kitchen that was alleged to be set by the appellants. It is settled principle that, before the court convicts the accused depending on evidence of identification, it has to be assured that, there was a proper identification and all possibilities of mistaken identity are eliminated considering that identification is the weakest kind of evidence and unreliable especially where the incident occurs at night. In the cited case of **Chacha Jeremiah Murimi and 3 Others** (*supra*)

where PW1, the wife of the deceased, alleged to have identified the second appellant on the night the deceased was killed, it was held that:

> *"Admittedly, evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated."*

Also, in another case of **Sadick Hamis @ Rushikana and Others vs Republic** [2021] TZCA 625 TanzLII where PW1 who was invaded together with her husband alleged to have identified the first appellant being one of the bandits who stormed into their house and robbed them, the Court of Appeal stated that:

> *"...eyewitness visual identification evidence is of the weakest character and most unreliable which should be acted upon cautiously after the court has first satisfied itself that the conditions were favourable for a proper identification, such evidence is watertight and all possibilities of mistaken identity have been eliminated. This rule applies even in cases of recognition."*

In this case, the witnesses stated that, it was around 00:00hours when they were astonished by the whistle and voices of people speaking outside. Upon getting out, they saw the appellants setting fire to their kitchens whereby the light from the burning kitchens helped them to identify the

assailants. However, no one disclosed the intensity of the light that enabled them to easily identify the appellants. Under the prevailed condition which was not favourable, it cannot be said that, the appellants were properly identified or recognised.

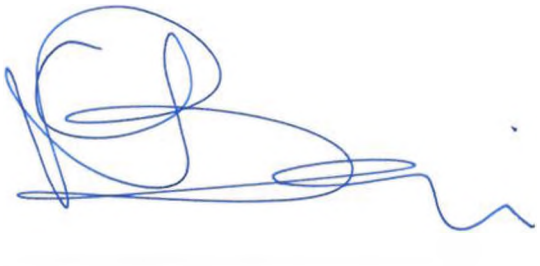
Apart from that, in their evidence, PW1, PW2, PW4 and PW5 stated that after being invaded on 26th October, 2022, they informed the Chairman and reported the matter to the police who arrived at the scene on the next day. Had they identified the bandits and gave that information to the police and the village chairman on the same night, the appellants would have been arrested immediately. However, the appellants were arrested on 7th November, 2022 which is more than ten days after the incident. Worse enough, there is no explanation for such delay while the appellants were alleged to be known by the victims. In absence of explanation for such delay, while it was not stated if they escaped after the incident, it casts doubts whether the appellants were really identified on that night. Apart from that, no police officer to whom the incident was reported appeared before the trial court to testify and explain for the delay on arresting the appellants while they had information on who invaded and destroyed the properties. Had the police officers testified, they would have cleared doubts on this delay. Consequently, in absence of such evidence, it raises doubt if the witnesses really identified their assailants more specifically, the appellants.

In respect of the damaged properties, the particulars in the charge sheet stated that, the appellants were accused of destroying 130 belonging banana plants of PW1, 45 banana plants of PW2, 83 banana plants belonging to PW3 and 20 banana plants of PW4. However, in their evidence, PW1, PW2, PW3 and PW4 did not state the number of the banana plants that were destroyed as alleged in the charge sheet. Moreover, the records are silent on how and who conducted valuation on the banana plants that were alleged to be destroyed. For that matter, there is no proof of destruction, leave alone the extent of such destruction. In that regard, the learned magistrate strayed into error to convict the appellants in absence of proof of destruction. It was an error to convict the appellants basing on particulars of the charge sheet which were not proved by the prosecution.

For the reasons stated above, I am satisfied that, the case against the appellants was not proved to the required standards. Consequently, the appeal is allowed. I quash the conviction and set aside the sentence imposed on each appellant for all four counts. I order their immediate release from custody unless held for other lawful cause.

I. K. BANZI
JUDGE
22/03/2024

Delivered this 22nd March, 2024 in the presence of Mr. Pereus Mutasingwa, learned counsel for the appellants, Mr. Erick Mabagala, learned State Attorney for the respondent, all appellants, Mr. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala RMA. Right of appeal duly explained.



I. K. BANZI
JUDGE
22/03/2024