IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

PC CRIMINAL APPEAL NO. 08 OF 2023

(Arising from Criminal Appeal No. 05 of 2023 of the Iringa District court and Originating from Criminal Case No. 69 of 2023 of the Primary Court of Iringa District at Isimani)

JANETH MDENYE .....APPELLANT

VERSUS

PLEKISILIDA KIHWELO ..... RESPONDENT

JUDGMENT

Date of last Order: **05.02.2024**

Date of Judgment: **22.03.2024**

A.E. Mwipopo, J.

The person is defined by his behaviour. The bedrock of social life is the ability to observe and understand the routine behaviour of others. Every person understands the behaviour and intentions of others through observation of their behaviour. It is the routine behaviour of an individual that defines the person. The appellant's previous conduct landed her in the Primary Court for Iringa District at Isimani, facing criminal charges.

The appellant, Janeth Mdenye, was charged and convicted by the Primary Court for Iringa District at Isimani for malicious damage to property contrary to section 326 of the Penal Code, Cap. 16 R.E. 2022. It was alleged that on the 13th day of December, 2022, at Mangawe Village within the District and Region of Iringa, the appellant maliciously destroyed various items valued at Tanzania shillings 1,089,000/= properties of Plekisilida Kihwelo, the respondent. The hearing of the case proceeded, and the appellant was convicted. The trial Court sentenced the appellant to pay a fine of Tanzania shillings 300,000/= and ordered the appellant to pay Tanzania shillings 100,000/= as compensation to the respondent.

The appellant unsuccessfully appealed to the District Court of Iringa at Iringa, which dismissed the appeal for wants of merits and sustained the conviction, sentence and orders of the trial Primary Court. The appellant was aggrieved with the decision of the 1st appellate Court and appealed to this Court. The appellant had one ground of appeal in her petition of appeal as follows:

1. *That, the trial Court erred in law and fact for misinterpreting the term proof beyond reasonable doubt and convicted the appellant on hearsay evidence.*

During the hearing, Advocate Msolamsimbi, who represented the respondent, prayed for the hearing to proceed through written submissions, and the appellant, who was present in person, did not object. As a result, the Court ordered the hearing of the appeal to proceed through written submissions, and both parties filed their submissions within time and according to the schedule.

In her submission, the appellant stated that the trial Primary Court convicted her on hearsay evidence. She submitted that the respondent had a duty to prove the case beyond reasonable doubt as it was held in **John Makame vs. Republic [1986] TLR 44**. She said both the trial Primary Court and Appellate District Court erred in entering judgment relying on hearsay evidence and previous acts of the appellant. The Appellate District Court erred to find that the appellant did not properly raise the alibi defence. She said that the evidence of SU2 and SU3 supported her defence of alibi. She cited in support of the position the case of **Kibale vs. Uganda** (1969) E.A. 148 vol. 1.

It was the appellant's submission on the claim the trial Primary Court and Appellate District Court based the conviction on the hearsay evidence that the respondent (SM1) said the reason for suspecting her (the appellant)

to be responsible for the damage to the properties is appellant's past acts of locking the respondent inside the house with padlock and insulting her. The trial Court found that SM1 evidence was supported by the evidence of SM2 (police officer), who found in the investigation that the appellant had done acts that resembled the present case despite her denial. The appellant said there is no evidence to prove the offence against her which was adduced in the trial Primary Court. She successfully defended herself by the defence of alibi, which shows that she was not present at the crime scene when the incident occurred.

In reply submission, the respondent stated that her (SM1) evidence proved that there was a grudge as the respondent was married to the former lover of the appellant. The respondent's husband and the appellant had a child together before he married the respondent. The appellant committed wrongful acts against the respondent in the near past such as locking the respondent inside the house and insulting her. In another incident, the appellant poured battery acid into the house of the respondent through a window and destroyed the respondent's clothes. Also, the appellant did write abusive words at the door of the respondent's house. All these facts point fingers to the appellant to be responsible for the damages to the

respondent's properties. The evidence of SM2 supports the evidence of the respondent (SM1) that in their investigation, he found the appellant has a habit of doing similar acts to the respondent. The respondent's evidence is not hearsay, and the respondent proved the case beyond reasonable doubt.

The counsel for the respondent submitted on the issue of alibi that the respondent had the duty to raise the defence of alibi to the police during the investigation and the trial by raising the issue through cross-examination as it was held **Kibale vs. Uganda** (supra). The appellant defence of alibi was contradictory. The evidence of the appellant (SU1) contradicted that of SU2 and SU3. The appellant said she was with her two students when SU2 and SU3 visited her place, and when SU2 and SU3 left, she remained with her students. However, SU2 and SU3 said nobody else remained at the appellant's house when they left. SU2 said he heard a noise at the appellant's house, while the appellant (SU1) and SU3 said they heard nothing. SU2 said the appellant cooked ugali and beans, while SU3 said the appellant cooked ugali and fish. The contradictions made the trial Primary Court and appellate District Court find that the defence evidence was fabricated.

The counsel said on the claim the conviction was based on suspicion that the evidence of SM2 proved the appellant had a habit of doing similar

acts. He confirmed that it was the appellant who maliciously damaged the properties of the respondent.

In her rejoinder submission, the appellant retaliated her submission in chief and emphasized that every witness testified about what she/he saw or heard. Thus, it was wrong for the Court to conclude that the evidence of SU1, SU2 and SU3 was supposed to be similar.

The issue for determination in this case is whether the appeal before this Court has merits.

The appellant in this case has just one ground of appeal: that the respondent's case at the trial Primary Court was not proved beyond reasonable doubt as the trial Court conviction relied on hearsay evidence. As both sides rightly submitted, it was the respondent's duty (complainant in the trial Primary Court) to prove the case beyond a reasonable doubt. The same is provided under items 1 (1), 5 (1), and (2) of the Schedule to the Magistrate's Courts (Rules of Evidence in Primary Courts) Regulations, G.N. No. 22 of 1964.

In this case, no witness testified to see the appellant setting the respondent's properties on fire, hence damaging them. In this case, the

evidence of the respondent (complainant in the trial Primary Court) is circumstantial. The Court may convict relying on circumstantial evidence where the facts are so connected that they lead to no other conclusion than the guilt of the accused person. In **Hamida Mussa vs. Republic [1993] T.L.R. 123,** the Court stated:-

> *"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt".*

The respondent's evidence in this case relies on suspicion and previous conduct of the appellant. The respondent (SM1) testified that there was a grudge between her and the appellant. The cause of the grudge is the respondent was married to the former lover of the appellant. The respondent's husband and the appellant had a child together. SM1 said the appellant committed wrongful acts against her in the near past, where she locked the respondent inside the house and insulted her, poured battery acid through a window and destroyed the respondent's clothes, and wrote abusive words in the door of the respondent's house. These routine habits of the appellant made the respondent to name the appellant as a suspect to a police officer with No. G. 3455 Coplo Amani (SM2).

SM2 said in his testimony that in the investigation, he found the appellant had a habit of doing wrongful acts to the respondent. SM2 called the appellant to the police post, and the appellant admitted during interview doing one wrongful act of locking the respondent inside the house and insulting her. SM2 said he seized the appellant's mobile phone and read the messages entered. Among the messages were messages coming from Asifiwe Mtweve. The appellant asked Asifiwe Mtweve in the message using appellant's phone if she knew she had destroyed the respondent's properties. Asifiwe Mtweve answered that she knew and was not going to tell anyone the same way she did when the appellant poured acid in the clothes of the respondent. SM2 summoned and interviewed Asifiwe Mtweve. Asifiwe Mtweve admitted the appellant told her about the incident of pouring acid on the respondent's clothes, but she knows nothing about the incident of damage to the respondent's properties. The said Asifiwe Mtweve was not brought to Court to testify, and the appellant's phone number or the messages between the appellant and Asifiwe Mtweve were not tendered as evidence.

The respondent's evidence (SMI) that there is a grudge between her and the appellant because she (respondent) is married to the former lover

and the father of the appellant's child, and the appellant's habit of doing wrong things to her, such as locking her inside the house and insulting her raises strong suspicion that possibly that the appellant is responsible for setting fire in respondent's house and damaging her properties. The appellant's habit was the reason the respondent named the appellant to SM2 as a suspect in the incident. I agree that the bad relationship between the respondent and the appellant shows the appellant was probably responsible for the fire incident. However, suspicion alone is insufficient proof that the appellant is responsible for maliciously damaging the respondent's properties. In **Shabani Mpunzu @ Elisha Mpunzu vs. Republic**, Criminal Appeal No. 12 of 2002, Court of Appeal of Tanzania at Mwanza, (unreported), it was held on page 10 of the judgment that:-

> *"However, it is a settled principle of criminal justice that in a criminal charge, suspicion, however strong it may be, is not enough to ground a conviction."*

There must be sufficient evidence to prove that the appellant maliciously damaged the respondent's properties. The respondent claimed that the evidence from SM2 proved that the appellant had damaged her

properties. On her side, the appellant contended that the evidence of SM2 is hearsay.

It is a settled law that all oral evidence must be direct. The fact must be perceived by the senses of the witness who perceived it as provided under Item 10 (1) and (2) of the Schedule to the Magistrate's Courts (Rules of Evidence in Primary Courts) Regulations, G.N. No. 22 of 1964. A fact is not proved by a witness telling the Court what some other person told him about the fact. A similar position was stated in **Subraminium vs. Public Prosecutor** [1956] W.L.R. 965, and **Lukondo Luseke vs. Shukrani Lusato**, PC Civil Appeal No. 19 of 2019, High Court Mwanza District Registry at Mwanza (unreported).

SM2 evidence that he read the chat between the appellant and Asifiwe Mtweve is not direct evidence. It is hearsay. He said he read the messages of the appellant chatting with Asifiwe Mtweve through the appellant's phone, and the appellant informed Asifiwe Mtweve that he was responsible for the damages to the respondent's properties. SM2 is not the owner of the phone allegedly used in the chat between the appellant and Asifiwe Mtweve. Asifiwe Mtweve was not brought to Court to testify and confirm the SM2's story. The mobile telephone alleged to belong to the appellant, which SM2 used to chat

with Asifiwe Mtweve, was not tendered as evidence. SM2 did not mention the phone number of the appellant and Asifiwe Mtweve used during the chatting. The evidence of SM2 is hearsay, which is not admissible and could not be relied on in conviction.

Besides, SM2 said in his evidence that during the interview, Asiwe Mtweve denied knowing anything about the incident of the damage to the respondent's properties. SM2 said due to previous wrong acts done by the appellant to the respondent, and he was sure that the appellant was responsible. The basis of SM2 evidence that the appellant is responsible for the offence is the appellant's previous acts. The trial Primary Court and the Appellate District Court erred to rely on the evidence of SM2, which is hearsay and based on suspicion, to convict the appellant. There is no sufficient evidence to prove the case against the appellant. The respondent's case was not proved beyond reasonable doubt.

Therefore, the appeal is allowed. The conviction entered by the trial Primary Court and sustained by the appellate District Court is quashed. The sentence and orders of the trial Primary Court are set aside. The appellant is acquitted of malicious damage to property offence contrary to section 326

of the Penal Code, Cap. 16 R.E. 2022, he faced at the Primary Court for Iringa District at Isimani. It is so ordered accordingly.

Dated at Iringa this 22nd day of March, 2024.

A.E. MWIPOPO

JUDGE