IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

RMC CRIMINAL APPEAL NO. 88896 OF 2023

(C/F Economic Case No. 06 of 2022 of Resident Magistrate's Court of Moshi)

DANIEL BOSCO TARIMO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

14/05/2024 & 28/05/2024

SIMFUKWE, J

In the Resident Magistrate's Court of Moshi at Moshi, Daniel Bosco Tarimo (hereinafter referred as the appellant) was charged with two offences to wit: Arson contrary to **section 321 (d) of the Penal Code** [CAP 16 R.E 2022] and Occasioning loss to the specified authority contrary to **Paragraph 10 (1) of the first schedule and sections 57(1) and 60 (2) of the Economic and Organized Crimes Control Act** [Cap 200 R.E 2022].

The facts of the case were to the effect that on 29th October, 2022 at Lesoroma area in Kilimanjaro National Park within Rombo District in Kilimanjaro Region, the accused person did willfully and unlawfully set fire to trees and shrubs of Kilimanjaro National Park. As a result, he caused Tanzania National Parks (TANAPA) to suffer a pecuniary loss of Tanzania shillings two hundred and twenty-seven million, five hundred and twenty thousand, nine hundred and seventy-one cents only (TZS 227,520,900.71/=). To prove their case, the prosecution side paraded five witnesses and tendered five exhibits.

The appellant strongly denied the charges against him and claimed to be arrested by two police officers at Ubethu Kilawoi village in the shop of DW2 and not within Kilimanjaro National Park. His defence was supported by the testimony of DW2, Laurian Josephat Shirima.

Upon hearing the prosecution and the defense case, on the first count, the trial court convicted the appellant as charged and sentenced him to pay fine of one million (TZS 1,000,000/=) or serve two years imprisonment in default. On the 2nd count the appellant was sentenced to serve twenty years imprisonment.

Aggrieved, the appellant has now appealed before this Court on the following grounds:

1. *That the trial court Magistrate erred in both law and facts by held (sic) the appellant guilty while the prosecution side failed to prove their case on the standard that required by the law contrary to* ***section 110 and 111 of the Evidence Act*** *[Cap 6 R.E 2022].*
2. *That the trial Court Magistrate erred both in law and facts by convicted the appellant without consider his evidence or based on the weakness of the defence. (sic)*
3. *That the trial Court Magistrate erred in both law and fact by imposed capital punishment to the appellant without considers his suffering from mental illness contrary to* ***section 216 of the Criminal Procedure Act*** *[Cap 20 R.E 2022]. (sic)*
4. *That the trial Court Magistrate erred in both law and fact by issue the judgment contrary to* ***section 311 and 312 (1) (2) of the Criminal Procedure Act*** *[Cap 20 R.E 2022].*
5. *That the trial Court Magistrate erred in both law and fact by convicted the appellant based on the cooked evidence. (sic)*

Based on the above grounds, the appellant implored this court to allow his appeal by quashing and setting aside the whole proceeding, decision, conviction, sentence and orders of the trial court.

Hearing of this appeal was done by way of written submissions. The appellant was represented by Mr. Innocent Msack, learned Counsel while the respondent Republic was represented by Mr. Innocent Ng'asi, the learned State Attorney.

Submitting on the 1st and 5th grounds of appeal, Mr. Msack referred this court to the case of **Agasto Emmanuel versus Republic,** Criminal Appeal No. 8 of 2020 HC Mbeya at pg 4.

Mr. Msack urged this court to refer to pages 7, 9, 10, 15, 18 of the trial court proceedings in order to find out that the prosecution side did not prove their case beyond reasonable doubts and that their case was based on cooked evidence.

It was submitted further that, during the Preliminary Hearing, the appellant was alleged to have committed the offences at 14:20 while evidence of PW2 and PW3 at page 15 and 18 of the trial court proceedings revealed that, the appellant was apprehended at 14:00. The learned counsel believed that, those contradictions bring confusion and cast doubt to the prosecution evidence.

Mr. Msack continued to aver that, at page 10, PW2 and PW3 named Bakari Mpala or Bakari Mkala to be the name of the third ranger who was present at the scene of crime but he was not listed as key witness. Also, the prosecution side failed to call Baraka Mbarouk and Siwema Oswald from KINAPA as key witnesses to corroborate the evidence of PW2 and PW3.

Mr. Msack went on to state that, the appellant together with his witness testified to have been apprehended on 30th October, 2022 by two police officers and not three as testified by PW2 and PW3. Furthermore, PW2 and PW3 did not testify on how long they took to apprehend the accused person, to extinguish the fire and the distance from the forest to Rombo Police Station. That, what can be seen at page 15 of the trial court proceedings, is time of signing the handing over certificate which made the learned counsel believe that, the appellant was convicted based on fabricated evidence because there was no doctrine of Res Gestae.

Explaining on failure by the prosecution to call material witnesses; Mr. Msack referred at page 20 of the trial court proceedings, where PW4 testified that he went together with one Valerian and other rangers who did not testify before the trial court as key witnesses. Also, at page 22 of the trial court proceedings, PW5 testified that, 30.36 hectors of standing trees and shrubs were burnt by the fire which was set by a match box or sulphur gas (Kiberiti cha gesi). That evidence was supported by the

evidence of PW2, PW3 and PW4. Mr. Msack averred that, according to his low level of reasoning and understanding, those facts are impossible.

He further referred to the date of commencement of trial court proceedings and the date of valuation report and commented that, the appellant did not commit the crime. That, the valuation report was prepared after institution of the case and after investigation was complete.

Mr. Msack cited the case of **Jonas Paschal v. Republic,** Criminal Appeal No. 69 of 2021, HC Bukoba at page 12 where it was held that:

> *"…. the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either prosecution or defence creates a reasonable doubt as to the guilty of the accused person in respect of that offence."*

From the cited case, Mr. Msack contended that the prosecution evidence did not meet the required standard of proof as the incident was alleged to had occurred in autumn and there was no sketch map of the scene of crime.

The 2nd and 4th grounds of appeal were argued jointly. On the outset, Mr. Msack cited the case of **Shaban S/O Adamu Mwajulu and Baraka Msafiri Mwakapala Versus Republic,** Criminal Appeal No. 131/2019, HC Mbeya at Page 4, 6 and 7 where the Court discussed the difference between summarising evidence and considering evidence.

Referring to the instant case, the learned Counsel lamented that the defence of the appellant was discussed a bit at page 8 last paragraph of the trial court judgment. That, the court did not consider that, evidence of the defense witnesses corroborated and they never met, as DW1 was in prison while DW2 was out. Mr. Msack reproduced page 8 of the trial court judgment to support his argument. Also, the learned counsel referred the case of **Christian s/o Kale and Rwekaza s/o Benard v. Republic [1992] TLR 302** which held that:

> *"An accused ought not be convicted on the weakness of his defence but on the strength of the prosecution."*

Mr. Msack went on to submit that, evidence of prosecution contains a lot of errors and the trial court did not consider the defence evidence which is contrary to **section 312 (1) of the Criminal Procedure Act** (Cap 20 R.E 2022). To cement his argument, the learned counsel cited the case of **Jonas Paschal Versus Republic,** Criminal appeal No. 69 of 2021 HC Bukoba at page 11 where the court emphasized that the court is duty

bound to analyze the prosecution evidence and the defence of the accused person and come up with its own findings. He further cited the case of **Shaban s/o Adamu Mwaulu and Baraka Msafiri Mwakapala v. Republic,** Criminal Appeal No. 131/2019 HC Mbeya at page 10 and 11.

Mr. Msack explained that, the appellant raised the defence of Alibi that he was not arrested at the scene of crime. Moreover, they did not inform him the reasons of his arrest which was contrary to **section 11 of the Criminal Procedure Act** (supra). The learned counsel was of the view that, the trial court should have considered the appellant's evidence and weigh it vis- a-vis the prosecution evidence in order to satisfy itself if the prosecution proved the charges against the appellant.

Concerning the 3rd ground of appeal, Mr. Msack submitted that, at page 28 of the trial court proceedings during mitigation, the appellant stated that he was treated at Mirembe hospital due to mental problems. The learned counsel was of the opinion that, the trial court did not consider those facts while sentencing, that's why the appellant was sentenced to suffer 22 years in prison. To strengthen his assertion, the learned counsel cited the case of **Francis Siza Rwambo v. Republic,** Criminal Appeal

No. 17 of 2019, CAT AT DSM, at page 12-18, where the Court directed how to deal with accused persons who have mental problems.

In his conclusion, Mr. Msack submitted that, as a general rule, in criminal cases, the burden of proof rests throughout with the prosecution, as established in the case of **Ali Ahmed Sale Amgara v. R [1959] EA 654.** That in this case, the *actus reus* and *mens rea* of the appellant was not established by the prosecution evidence beyond reasonable doubt, as the prosecution failed to call any witness before the trial court to establish that the appellant intentionally did set fire on that forest as alleged.

He urged this court to allow this appeal by quashing and setting aside the decision of the trial court.

In reply to the grounds of appeal, Mr. Ng'asi opposed this appeal vehemently. Arguing against the first and fifth grounds of appeal; the learned State Attorney submitted that the case against the appellant was proved to the required standard by the prosecution. He specified that, it was the duty of the prosecution witnesses to give evidence that proved that it was the appellant who committed the offence charged.

Elaborating evidence of the prosecution, Mr. Ng'asi illustrated that evidence of PW2 at page 15 of the trial court proceeding was to the effect

that while on patrol with other rangers, they saw the appellant setting fire to the bush. He was seen holding dry leaves and Sulphur gas. That, after arresting him, they found him in possession of a bush knife and a Sulphur gas pink in color. This story was also narrated by PW3 who was also the conservation ranger who was present during search and seizure of the appellant at the crime scene. PW3 said that he saw the appellant setting fire and witnessed the seizure from him of the items seized (Exhibits P4 Seizure certificate and Exhibit P3 - bush knife and Sulphur gas collectively). The appellant signed the seizure certificate and from the evidence of the two witnesses, it is clear that the appellant was seen setting fire to the bushes within the National Park.

The learned State Attorney explained further that, the appellant never objected to the admission of exhibit P3 (bush knife and sulphur gas) which support the prosecution assertion that the appellant was arrested setting fire to the National Park. That, according to PW5 the said fire affected the area measured 30.36 hector which occasioned loss to the tune of Tanzania shillings 227,520,900.71/= as per exhibit P5 as reflected at page 22 of the trial court proceedings. The learned State Attorney insisted that, the prosecution managed to prove both offences as per charge sheet.

Concerning the raised contradictions, Mr. Ng'asi was of the view that the noted contradictions are minor which resulted from human error and the same does not go to the root of the offence which was facing the appellant. He cemented his point with the case of **Director of Public Prosecutions v. Daniel Wasonga** (Criminal Appeal No. 64 of 2018) [2022] TZCA 418 (12 July 2022) (Tanzlii) at page 15 where it was held that:

> *"Contradictions by witness or between witnesses is something which cannot be avoided in any particular case."*

Responding to the allegations that the prosecution failed to call key witnesses from KINAPA namely Bakari Mpala, Baraka Mbarouk and Siwema; it was Mr. Ng'asi's reply that the prosecution brought two witnesses from the crime scene to wit PW2 and PW3 who were involved in the seizure and arrest of the appellant. The learned State Attorney opined that, witnesses mentioned by the appellant to have been at the crime scene during arrest, would have only come to narrate what was testified by PW2 and PW3. Thus, it would have been wastage of the trial court's time. He added that, the law is very clear that there is no required number of witnesses for the prosecution to prove their case. What is

required is the quality and credibility of witnesses as per **section 143 of the Evidence Act**, CAP 6 R.E 2022. He stressed that, the prosecution achieved the intended goal of proving the case to the required standard. Moreover, the appellant did not tell the court how he was prejudiced by failure to call the named witnesses. Reference was made to the case of **Tafifu Hassan @ Gumbe v. Republic**, Criminal Appeal No. 436 of 2017, TZCA (Tanzlii) at page 17 to buttress the argument.

In response to the second and fourth grounds of appeal which concerns failure to consider the defense of the appellant; Mr. Ng'asi submitted that as per page 8 of the trial court judgment, the defense evidence was considered but the same was disregarded on the reason that it did not raise any doubt against the strong evidence of the prosecution. He stated that the trial court judgment never violated the provision of **section 312 of Criminal Procedure Act** (supra) as contended by the appellant.

Mr. Ng'asi was aware that where the trial court fails to properly consider evidence, the first appellate court has the power to step into the shoes of the trial court and evaluate the defence and come up with its own findings. However, in this case, the learned State Attorney was of the opinion that the trial court rightly evaluated the defence evidence.

Contesting the third ground of appeal, the learned State Attorney said that, the trial court did not error in sentencing the appellant. Regarding the argument that the appellant was mentally unstable which was raised during mitigation, Mr. Ng'asi stated that it was an afterthought as the same was raised during mitigation and not during the defence. It was submitted that the law is very clear on how the defence of insanity should be raised. That, according to **section 216 of the Criminal Procedure Act** (supra) a written report as proof should have been made available to court so that the court could have time to make a ruling as to whether the accused person was of unsound mind or not at the time of making defence or during the commission of the offence. He said that, the mitigation of the appellant was meant to avoid the sentence meted by the trial court. Mr. Ng'asi cemented his submission by citing the case of **Joseph John Makune v. Republic**, Criminal Appeal No. 64 of 1986, TZCA at page 49 (Tanzlii) which stated that:

> *"The cardinal principle of our law is that the burden is on the prosecution to prove its case, no duty is cast on the accused to prove his innocence. There are few exceptions to this principle one example being where the*

accused person raises the defence of insanity in which case he must prove it on the balance of probability."

From the above quoted decision, Mr. Ng'asi commented that whenever the defence of insanity is raised, the accused person has the duty to prove on balance of probability. He contended that, in the present matter, the appellant never bothered to raise that defence when he had the chance instead, he raised it during mitigation which was an afterthought. The learned State Attorney added that, the appellant did not substantiate his assertion that he was mentally ill or he was ill while committing the crime. That, even if he adduced evidence as to his mental status, the same is not on record and his mentioned sister was not called as a witness to testify that the appellant was mentally unfit.

In his final remarks, the learned State Attorney prayed this court to dismiss this appeal in its entirety.

In rejoinder, Mr. Msack reiterated his submission in chief. He stressed that the prosecution case was not proved beyond reasonable doubt.

Countering the argument on failure to object the exhibits; Mr. Msack submitted that the appellant was a layman. Thus, the appellant left room for the court to see the validity of the content of those exhibits tendered,

during analysis of evidence but the court was blind to see that defectiveness.

Rejoining on the issue of insanity, the learned counsel referred this court to the case of **Republic v. Antony Arbogast Assenga,** Criminal session No. 27 of 2021 HC Moshi; and maintained that the appellant suffered mental illness due to the effect of drugs and he was once retained at Mirembe Hospital. That, even in prison the appellant isolates himself and he does not do any work due to his problem. He cited the case of **Thomas Pius v. Republic,** Criminal Appeal No. 145 of 2019, CAT at page 12-14 where the court expressed how to handle the issue of insanity or mental illness.

The learned counsel implored this court to take further step to scrutinize evidence of the trial court and make wise and just decision.

I have keenly examined the grounds of appeal, submissions of both parties and the lower court's records. The question to be determined is ***whether the raised grounds of appeal have merit***.

Starting with the 1st and 5th grounds of appeal, the appellant faulted the trial court for failure to prove the charge on the standard required by law contrary to **section 110 and 111 of the Evidence Act** (supra). On the 5th ground the appellant's counsel contended that the trial magistrate

relied on cooked evidence to convict the appellant. Mr. Msack for the appellant raised doubts on part of the prosecution case in respect of failure by prosecution to call material witnesses, contradictory evidence of PW2 and PW3 in respect of time of commission of offence and failure of the trial Magistrate to consider the defence and mitigation of the appellant.

On the other hand, Mr. Ng'asi for the respondent strongly contested the raised doubts and asserted that the prosecution managed to prove its case on the standard required by the law. That, the appellant was arrested by PW2 and PW3 at the scene of crime while setting fire to the trees. The loss occasioned to the specified authority amounted to Tanzanian shillings 227,520,900.71/= hence, both offences as per charge sheet were proved by material witnesses and exhibits were tendered before the trial court.

From the foregoing submissions, as rightly submitted by the learned counsels for both parties, the first long-established principle in criminal justice is that the onus of proof in criminal cases, always lies on the prosecution, with few exceptions. The same is reflected under **section 110 and section 112 of the Evidence Act** (supra) and cemented in numerous decisions of the Court of Appeal of Tanzania. See the cases of **Mohamed Said Matula v. Republic [1995] TLR 3, Anatory**

Mutufungwa v. Republic, Criminal Appeal No. 267 of 2010 (unreported) and **Festo Komba vs. Republic,** Criminal Appeal No. 77 of 2015 (unreported)**.**

This court is also guided by the second principle which prescribes the standard of proof in criminal cases to be beyond reasonable doubt as it was held in the case of **Emmanuel @ Magesa Chacha and Another v. Republic,** Criminal Appeal No. 538 of 2020, [2024] TZCA (2 May 2024) at page 11 where it was held that:

> *"It is a cardinal principle that unless otherwise stated the accused has no duty to prove his innocence at most, he can raise doubts by poking holes in the prosecution case.* ***Equally elementary is that the burden of proof is beyond reasonable doubt*** *and the burden never shifts except where legally stated. Also, that conviction should in no way be based on the weakness of the accused's case." Emphasis added*

On the strength of the above well-established principle of law, I am of the firm view that, in this case the prosecution managed to prove its case beyond reasonable doubt due to the following explanations: ***First,*** as it can be sketched from the trial court records, the prosecution paraded five witnesses and four exhibits. Among the prosecution witnesses, PW2 and PW3 were eye witnesses who saw and arrested the appellant while

continuing to set fire in the said forest. Their testimonies are reflected at page 14, 15, 16 and 17 of the trial court proceedings. ***Second,*** after being arrested, the appellant was found in possession of a bush knife and Sulphur gas, pink in colour. The exhibits were tendered before the trial court and admitted as exhibit P3 collectively. The records show that the appellant did not object the admission of the exhibits nor cross examine the same.

The law is well settled that no particular number of witnesses is required to prove any fact. Even a single witness can suffice to prove a fact as provided under **section 143 of the Evidence Act** (supra). The argument of Mr. Msack that the prosecution failed to call material witnesses to wit, Baraka Mbarouk and Siwema Osward from KINAPA are baseless as the prosecution are not bound to call all witnesses as it was demonstrated in **Republic v. Rugisha Kashinde and Sida Jibuge [1991] TLR 178,** that:

> *"The prosecution had the discretion to call or not to call someone as a witness. Where it did not call a vital reliable person without a satisfactory explanation, the court could presume that the person's evidence would have been unfavorable to the prosecution."*

Concerning the issue of contradiction in respect of time of arrest, Mr. Msack alleged that during the Preliminary Hearing the offence was said to have been committed at 14:20 while at the trial, PW2 and PW3 testified that they arrested the appellant at 14:00. With due respect to Mr. Msack, the Preliminary Hearing does not form party of evidence as it was established in the case of **George Claud Kasanda v. Republic,** Criminal Appeal No. 376 of 2017 (unreported) that:

> *"Before we proceed, we find opportunity to remind the court below and the prosecution that preliminary answer and particulars given prior to giving evidence are not part of evidence as the same are not given on oath..."*

On the strength of the above authority I am settled that the noted variance of time is unfounded.

From the above findings, it is the observation of this court that the first and fifth grounds of appeal are without merits.

In respect of the second limb of grounds of appeal which covers the 2nd and 4th grounds of appeal; the appellant's advocate complained that the trial court did not consider the defence evidence. He believed that by failure to consider the defence evidence, the trial magistrate contravened **section 311 and 312(1)(2) of the Criminal Procedure Act** (supra).

He added that the trial magistrate narrated a little bit about defence evidence and found that the same did not raise doubt.

Mr. Ng'asi for the Republic countered these grounds of appeal by arguing that the trial magistrate complied to **section 311 and 312 of the Criminal Procedure Act** (supra) since at page 8 of the judgment the trial magistrate considered the defence evidence.

As per the complaint of the appellant, I have noted that on both grounds of appeal, the appellant was not happy with how the trial magistrate considered his defence. To resolve this, I revert to the trial court judgment particularly at 8, last paragraph; the trial magistrate, while considering the defence evidence had this to say:

> *"I have also considered the defence by the accused person. He told this court that he was not arrested at Lesoroma Kilimanjaro national park rather he was found outside the shop of DW2 at Ubethu Kilawoi village. The accused person defence to my considered view did not raise any reasonable doubt to the strong evidence adduced by prosecution side."*

That being the case, the issue for consideration at this juncture is whether the defence of the appellant was considered. Without further ado, I am

of strong opinion that the defence evidence was dully considered. In considering the defence evidence, it is not necessary for the trial magistrate to reproduce the entire evidence of the defence side by weighing it vis a vis the prosecution evidence as contended by the appellant. With due respect to Mr. Msaki, in criminal cases, the law requires the court to consider whether the prosecution has proved its case beyond reasonable doubt and whether the accused person has managed to raise reasonable doubt on prosecution case.

Concerning the allegations that the appellant raised the defence of alibi, the procedures of raising the defence of alibi is provided for under **section 194 of the Criminal Procedure Act**. The accused who intends to rely on the defence of alibi, must file a written notice to that effect. In the present matter, the appellant herein did not comply with the said provision. However, the trial court considered his defence and found that the same did not raise reasonable doubt. Therefore, the 2nd and 4th grounds of appeal lack merits.

The next ground for consideration is the 3rd ground of appeal which I am of the view that it will not detain me. According to Mr. Msaki, the trial court did not consider the fact that the appellant was suffering from mental illness.

The proceedings of the trial court show that, the issue of mental illness was not raised as a defence as required by the law. The appellant raised it during mitigation, which is not the procedure of the law. Raising the defence of insanity during mitigation was an afterthought as rightly submitted by the learned State Attorney. Thus, the 3rd ground of appeal has no merit.

In the circumstances, I find the conviction against the appellant as well as the meted sentences as justifiable. Hence, this appeal is devoid of merit. It is accordingly dismissed in its entirety.

It is so ordered.

Dated and delivered at Moshi this 28th May 2024.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI SUB REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

28/05/2024