

TANZANIA / JUDGMENT

# JACOB EMMANUEL MBEBA final

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The Judiciary of Tanzania IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
SHINYANGA SUB REGISTRY AT SHINYANGA CRIMINAL APPEAL NO. 000017956 OF 2024 CASE  
REFERENCE NO. 202407012000017956 (Arising from the decision of district Court of Meatu in  
Criminal case No. 00003757) JACKOBO EMMANUEL MBEBA ..... 1st  
APPELLANT BAHAME NTOBI NGONZO .....2ND APPELLANT MEMBI  
NTOBI SAMSON.....3RD APPELLANT MISHIGWA JIDAYI @  
EMMANUEL KULWA KISEME TANITANO .....4TH APPELLANT Versus  
REPUBLIC ..... RESPONDENT

## JUDGMENT

5th & 30th August 2024 F. H. MAHIMBALI, J The 1st, 2nd, 4th and 3rd appellants herein above, were on 14th June 2014 jointly convicted on a charge of arson contrary to section 319 of the Penal Code and accordingly sentenced to four years and six years 1 respectively (i.e 4 years for the 1st,2nd, 4th appellants and 6 years' imprisonment for the 3rd appellant). The disparity on the sentence is because the 3rd appellant is the habitual offender whereas the remainder are the first offenders. It was alleged by the Republic that on the 1st July, 2023 at Lubiga Village within Meatu District in Simiyu Region, the above named appellants, committed the offence of Arson Contrary to Section 319 of the Penal Code, Cap. 16 RE 2022 to wit, they, willful and unlawful, set fire to the house of Charles Kwilasa @ Giguna valued at Tshs. 1,825,000/=. The appellants denied the accusations made against them, thus compelled the prosecution to summon three witnesses in order to substantiate the charge laid before the court. The witnesses were Charles Kwilasa (PW1); E. 6662 D' Sargent Fidelis (PW2) and Kulwa Masaga (PW3). The substance of the prosecution's evidence as correctly summed up by the trial court as per examination of evidence in the record through the three witnesses, particularly the evidence of PW1 and PW3 show that on the fateful date, a house of PW1 was set on fire. PW1 on his side, said, he was called by his wife and told him that the accused herein, burned their house. This information made him and PW3 to go to the scene of crime. When they 2 reached there, saw the appellants and others who are still at large setting fire PW1's building. PW2 on his side corroborated the evidence of PW1 and PW3 on the aspect of burned house. A scene visits on 11 August, 2023 was contrary to what he heard from VEO. The house remnants show; it was not a hut but a house as exhibited by exhibit P1 – a sketch map drew by PW3. Exhibit P1 was admitted without objection and no cross-examination questions put before the court to challenge it. In the circumstance, the trial court, firmly

established that on the incident date, PW1's house was set on fire. As to who set a fire the PW1's house. PW1 testified that he saw the appellants and other persons who are at large burning his house. The similar version was said by PW3. PW2 on the other hand testified that, PW1's house was constructed in a disputed land between Lukungu Mbeba and Doma Kulwa. Prior to the incident, Lukungu Mbeba threatening to kill. A report was made and he was arrested. Following his arrest gossips emerged that Lukungu was killed. Mwano was called and villagers wanted to retaliate by destructing the house constructed in the land in dispute. Since the mwano was called at morning hours, 10:00 hours where there was light; and PW1 and PW3 mentioned the appellants and others who are at 3 large at earliest opportunity, there was no possibility of mistake of identity as per trial court's conviction. In their defense, all the appellants resisted the allegations, each saying that they were not present at the scene of crime on the fateful date, rather they were away doing each one's business. The trial court was of the view that all the appellants' defence suggested that on the fateful date none of them was at the scene of crime. Basically, in their defense, they intimidated a defence of alibi. Since the law on question of alibi is well settled that a person who intends to rely on the defence of alibi to give notice of that intention before the hearing of the case (Section 194(4) of the Criminal Procedure Act, if the said notice cannot be given at that early stage, the accused is under obligation, then to furnish the prosecution with particular of alibi at any time before the prosecution closes its case as per Section 194(5) of the CPA. Should the accused person raise the alibi much later, later than what is required under subsections (4) and (5) above, as was the case herein, the trial court correctly made a finding that as to its discretion, accorded no weight of any kind to the defence while relying to Section 194 (6) of the CPA, and the case of Hamis Bakari Lambani vs. Rep, Criminal Appeal No. 4 108 of 2012 (Court of Appeal at Mtwara, Unreported). In this case, the appellants, neither gave notice nor furnished particulars of alibi. Notwithstanding however, the court has to scrutiny their defence. The trial court, on this consideration made its conclusion that cumulatively, failure to give notice, failure to furnish particulars of alibi and failure to account how they utilized time with whom, on the fateful day, leaves no reasonable doubt of the Prosecution evidence. Thus consequently convicted all the appellants and accordingly sentenced them as stated above, thus the basis of the current appeal rooted on five grounds as they are not amused by both conviction and sentence. The basis of the appellant' appeal is rooted in five grounds of appeal, namely:

1. The prosecution's charge was defective.
2. The prosecution's charge was not established beyond reasonable doubt.
3. That conviction was based on the law that does not create an offence.
4. That conviction was based merely on hearsay evidence. 5
5. That there was no proof of ownership and value of the alleged burnt house. During the hearing of the appeal, the appellants were represented by Mr. Mboje learned advocate, whereas the respondent was represented by Ms. Caroline Mushi, learned state attorney. Arguing for the appeal, on the first ground of appeal, he submitted that the grievance is, the

appellants' conviction was based on a defective charge. Since the foundation of any criminal case is on the proper charge, if the same is defective, it renders the trial and its resulting effect a nullity. As to why the charge was defective, he had two two reasons: Firstly, he submitted that the charge was not in compliance with section 4 (1) &(3) of the MCA. On this, he clarified that according to law, the establishment of every administrative district authority, goes hand in hand with the establishment of district court, whose designation is as per law within the established district. However, the jurisdiction of every district court may be varied as per designation by the Chief Justice. In this case, the appellants' advocate challenged the competence of the charge sheet as ought to have addressed the district court of Meatu at Meatu. Surprisingly, this charge reads: at the district court of Meatu at Mwahunzi. The place 6 Mwahunzi ought to have been so had there been directives by the Chief Justice designating the said district court. Thus, he concluded that this anomaly, makes the charge sheet lacking legal power to hold the said charges as alleged. Secondly, the charge sheet has not disclosed the specific offence charged with, thus contravening section 132 of the CPA. The offence of arson in which the appellants were charged with, falls within section 319(a)&(b) of the Penal Code which means, suggesting carrying two scenarios i.e setting fire against a building, and also setting fire against a vessel. The particulars of the offence and the evidence adduced speak of something else. Whereas the testimony adduced by the prosecution centered on setting fire against a house and that even the complainant claimed so at the police, the conviction likewise. The inclusion of both paragraphs of the provision of section 319 of the penal code, has made the appellants being not aware of which charge they were charged with. So, it is not clear whether it was an arson against a vessel or house. There are several authorities guiding this position. Amongst them is the case of Abdalah Ally V. Rep Criminal Appeal 253 of 2013. In this case at page 13, the CAT at 2nd paragraph, the Court of Appeal speaks volume. He also invited 7 this case to be guided by the holding of the Court of Appeal in the case of Mnazi Philmon v. Rep, Criminal Appeal No. 401 of 2015, CAT at Mbeya. On this submission, he faulted the charge defective. With the second ground of appeal, the grievance is that, the facts constituting the charge were not established beyond reasonable doubt. He submitted that, since it is trite law that the prosecution's case must be established beyond reasonable doubt (See Jonas Nkize V. R [1992] TLR 213) and that an accused person should not be convicted on the weakness of his defense (See Christian Kaale and Rwekaza Benard v. Rep, [1992] TLR 302), he was of the considered view that, reading the testimonies of the case, there were several weaknesses. PW1's testimony is against that of PW2. The size/description of the fired house is not clear. Whereas Pw1 says this, the pw2 says another. Who is speaking the truth between them? Another doubt is as to when the said offence was committed. Since PW1 says he had received a call from his wife about the burning of the house, suggesting that he was not at home. By that time, the pw1 had stated how when he was at Mwambashimba he had received the said call. At 10.00hrs, PW1 had arrived at the scene. It is undaunted that villages live 8 somehow longer from each other. Thus, it involves moving from one place to another. Another doubt is on the time of the commission the offence. Whereas it alleged that the offence was committed at 10.00hrs, but the 1st appellant was arrested at 08.00hrs on the

same date. That suggests he was arrested before he committed the offence. Another doubt which was pointed is on the duration of reporting the crime. Pw1 has offered a conflicting information about the firing incidence. Pw1 says he was informed so by his wife that the house is already burnt. While at the scene he saw the appellants burning the said house. The PW1's wife was an important witness in this case. From these statements, it is not clear who is speaking the truth. After all, the PW1's evidence was challenged by the appellants. Thus, the missing of PW1's wife as witness in this case vitiated the prosecution's case. It is the testimony of PW2 that the house was burnt after the mwano people had gathered. The doubt is whether the village had just these four persons to manage the said fire. 9 He concluded his submission on this ground by faulting the trial court did not exercise its mind well on the digest of the available evidence to reach the proper verdict as per law. On the third ground, the concern is, the appellants were convicted on the law that does not disclose any offence. As per page 5 of the trial court's judgment, it is clear that the appellants were convicted of arson contrary to section 319 of the Penal Code. There is no such a provision in the Penal Code but section 319 (a) & (b). The conviction ought to have been on a specific offence charged with and established. On the fourth ground, the appellants were convicted only because their conviction was based on hearsay evidence. Since section 62 of the Evidence Act, strictly dictates on best evidence rule in a proof of any fact. It was unsafe for the evidence of PW1 which solely was hearsay evidence, it could not in law base conviction as done. The story of PW2 is not a direct evidence but purely hearsay. Lastly, he faulted the trial Magistrate on his finding, where there was no any concrete proof of ownership of the alleged burnt house. As there is evidence that pw1 had no longer had residential house there, it was 10 important for the prosecution to establish the ownership and value of it. A mere empty words, couldn't be legal evidence on proof of a fact of ownership. With the above submissions, he prayed that the appeal be allowed on both; legal and factual perspective. Ms Caroline Mushi learned state attorney who represented the respondent, firstly resisted the appeal as she supported both the conviction and sentence meted out. On the first ground of appeal, it is based on legality of the charge. Firstly, it is true that District Court of Meatu is located at Meatu as per section 4(1) of the MCA. However, the missing of that name in the charge sheet has not occasioned any miscarriage of justice as long as they made appearance before it. The word Mwanuzi is not fatal as per this case. In the case of Makubi Dogani V. Ngodongo Maganga, Civil No. 78 of 2019, CA at Shy at page 12, such an error is curable as the same has not occasioned miscarriage of justice. That the offence is not well stated as per section 319 of the Penal Code, Ms. Caroline firstly admitted that the charging section 319 has two paragraphs (a) and (b): building and vessel respectively. Reading the facts 11 of the case, everything is clear that the appellants were charged of arson of setting fire against the building. Thus, not indicating the specific paragraph, by itself, she argued that does not make the defectiveness of a charge incurable. With the cited case, she maintained that it is not offensive. Section 388 of the CPA can be invoked. On the invoking of section 388 of the CPA, she drew support from the case of Jamal Ally V. Rep, Criminal Appeal No. 52 of 2017, CAT at Mtwara, the CAT. Thus, she is of the view that, this first ground of appeal is merit less. On the proof of the case, Ms Caroline was of the firm

view that the charge was proved beyond reasonable doubt as per law. She fortified that, in this case, what the republic was supposed to establish is whether there was fire and that it destroyed the alleged properties. It is PW1's testimony that just after he had got the said information, he ran to his home and saw the appellants making the said fire. This witness also stated that the said house is his whose value is 1,825,000/=. This evidence is supported by the evidence of PW3 who stated how the said house got fire and saw them setting fire to the remaining house. The report was made to police. This testimony was also supported by PW2 who visited the scene and drew the sketch map plan of the scene of crime (P1 exhibit). Therefore, by the 12 testimony of these three witnesses and the evidence they established, the offence was established. Regarding the said size and morphology of the house as per description of PW1 and PW2, it was immaterial as the said disparity is minor and does not affect the root of the case. As regards to the time of the incident being either 10.00hrs or 08.00hrs, Ms Caroline was of the considered view that as this fact was not disputed by at the trial, bringing it now is an afterthought as per stand of the case of *Nyerere Nyague v. Rep*, Criminal Appeal No. 67 of 2010, CAT at Arusha at page 5. She bolstered that, the occurrence of the incident at 10.00hrs and the arrest of the first appellant at 08.00hrs of the same date, as the first appellant didn't question on that fact, he is now estopped. On the report of fire and reporting it, Ms. Caroline was of the firm view that to her there is no any confusion. It is just the matter of reading and understanding. In consideration of the fact that no particular number of witnesses is needed to prove a fact, (section 143 of the TEA,), she is confident that the proof of the charge vide the three witnesses was beyond reasonable doubt as per law. Clarifying on the point, as to what mwano is 13 comprised of, it was not his evidence but just in a way responding his question. Thus, there is nothing of doubt in it. As regards to the third ground of appeal that the appellants were wrongly convicted solely on section 319 of the Penal Code, she is of the view that, the fatality can be cured under section 388 of the CPA. On the fourth ground of appeal which is about hearsay evidence, reading the testimony of PW2 extensively, she couldn't grasp the issue directly, nevertheless, the fact in issue – arson, was well established. Lastly, that there was no proof of ownership and value, she too discounted it. She discounted so, in consideration of the testimony of PW 1 who went to Court and his testimony is clear. If Pw1 had claimed well how that the house belongs to him and the value of it, as there was no such question at trial, raising it now is considered as a mere an afterthought. She placed her reliance to the case of *Nyerere Nyague* (supra). In totality, Ms Caroline was of the considered view that this appeal is bankrupt of any merit, she prayed that it be dismissed. Resting his case in rejoinder submission, Mr. Mboje firstly reiterated his submission in chief. He further added, failure to cross examine does not justify their conviction. That notwithstanding, the prosecution was still duty 14 bound to establish their charge on all the ingredients forming the offence. The appellants being accused persons could even elect to remain silent, yet the prosecution was duty bound to establish the charge as it is their primary duty do so. On PW2's testimony, it is Mr. Mboje's view that digesting the submission of the Respondent's attorney, it has been admitted that it was hearsay. Further, it is undisputed that the testimony of PW1 and PW2 differed on the volume/size of the burnt house. It is also undisputed that the charge sheet is defective and

did not disclose the specific offense. The designation of district court is a matter of law and not procedure, similarly the requirement of offence charged is not a matter of procedure but law. All these deficiencies are not curable under section 388 as they affect the root of the case. With the cited case of Jamal Ally and Nyerere Nyague, both are distinguishable as per the facts of the current case. He argued that, reading section 319 of the Penal Code clearly, creates almost four offences. Why then not being so specific in charging? He maintained that the specific offence must be shown in a charge and not cropping them together and differentiate them on particulars of the offence. Perhaps it is 15 important to know the intention of the legislature in enacting these provisions of the law. With the cited case of Makubi Dogani, he considered it as misplaced with the current facts of the case as the former is a civil case but this is the criminal case in which the degree or standard of proof is different. The latter is on strict water tight proof. With all this, he humbly prayed that this appeal be allowed. Having heard both parties on merit, I have now to determine the appeal and the issue for deliberation is whether this appeal has merit. This being a criminal case, it is the trite law that the prosecution is the one placed with a heavy burden than that of the accused persons. The first long-established principle in criminal justice is that of onus of proof in criminal cases that the accused committed the offence for which he is charged with, always lies on the side of the prosecution and not on the accused person (See section 110 and Section 112 of the Evidence Act Cap.6 [R.E 2022] and as cemented in the case of Joseph John Makune vs. Republic [1986] TLR 44 at page 49. 16 The second principle is that the standard of proof in criminal cases that is required by law is proof beyond a reasonable doubt (See section 3(2)(a) of the Tanzania Evidence Act, Cap 6, R.E 2022). See also Mohamed Haruna@ Mtupeni & Another v R, Criminal Appeal No. 25 of 2007 (unreported). That means the evidence must be so convincing that no reasonable person would ever question the accused's guilt. See cases of Mohamed Said Matula vs. Republic [1995] TLR 3, Anatory Mutafulungwa vs. Republic, Criminal Appeal No. 267 of 2010 (unreported) and Festo Komba vs. Republic, Criminal Appeal No. 77 of 2015, the Court of Appeal of Tanzania (both unreported). I have dispassionately considered the appellant's grounds of appeal and the submissions made for and against the appeal. I propose to begin by considering the ground on the propriety of the charge. On this, as also readily conceded by Ms Caroline, there is no dispute that the charge was defective for omission to properly cite the relevant sub sections in the statement of the offence. As pointed out earlier, the statement of the offence cited "sections 319 of the Penal Code". Since the particulars of the charge and 17 evidence established the offence of arson against a building which is an offence under section 319(a) of the Penal Code. Now it is apparent that the charge was defective; the only issue for our determination is whether the defect was not curable and if it prejudiced the appellant. In terms of sections 132 and 135 (a) of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) every charge must contain a statement of a specific offence or offences with which the accused is charged. It is also required that the statement of offence must make reference to the specific provision of the law creating such offence. Further, the charge must contain particulars of the offence. The reason or aim of the charge to contain the statement and particulars of offence is to give an accused person reasonable information as to the nature

and seriousness of the offence and to enable him prepare his defence. It is also settled that in determining whether a charge which suffers ailments of wrong, non or improper citation of provisions of the law under which the accused is charged is curable or not, the test is whether from the particulars of the offence and the evidence, the accused is able to fully understand the nature and seriousness of the offence he stands charged. In 18 the case of *Deus Kayola v Republic*, Criminal Appeal No. 142 of 2012 (unreported) the charge of rape was challenged for being preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1) of the same law. The Court held, among other things, that: "We have taken note of the fact that the charge against the appellant was preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1). However, we are of the firm view that the irregularity is curable under section 388 of the CPA, the particulars of the offence having sufficiently informed the appellant that he was charged with the offence of raping a girl of 12 years old." The decision in *Deus Kayola* (supra) was cited in *Jamali Ally @ Salum* (supra) where the provisions under which the appellant was charged were not properly cited. It was observed by the Court as follows: "It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are 19 prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA." Being guided by the above settled principle, let me now examine the particulars of the offence in the instant case and find if from the particulars the appellants were able to appreciate the nature and seriousness of the offence he stood charged. The particulars of the offence in question were as follows: " On the 1st July, 2023 at Lubiga Village within Meatu District in Simiyu Region, Jacob Emmanuel Mbebac, Bahame Ntobi Ngongo, Membi Ntobi Samson and Kulwa Kiseme Tanitano willfully and unlawfully did set fire to the house of Charles Kwilasa @ Giguna valued at Tshs. 1,825,000/= Contrary to Section 319 of the Penal Code, Cap. 16 RE 2022." It is my observation that looking at the above particulars it cannot be said that the appellants did not understand the nature and the seriousness of the offence of arson they were charged with. The particulars were very clear giving the appellants sufficient notice about the date, the place the offence 20 was committed, the nature of the offence committed, and the value of the burnt house. Therefore, the ailment in the charge is curable under section 388 (1) of the CPA. The ground that the charge was fatally defective is thus found not meritorious and it is accordingly dismissed. As regards to the issue of the name of the court as per charge sheet, I had to revisit the laws on the establishment of the district court. The law is, District Courts are established under section 4 of the Magistrates Courts Act (the MCA), Cap 11 R.E 2022. Once established under section 4(1) of the MCA, a district court shall exercise jurisdiction within the district in which it is established, but under section 4(5), the Chief Justice, may, by order published in the Gazette, confer upon a district court established for any district jurisdiction over any other contiguous district or districts and where such order is made, such district court shall have concurrent jurisdiction in relation to the district court for which it is established and also in relation to such other districts as may be specified in such

order. For easy of reference, the whole of section 4 of the MCA is reproduced: “4.-(1) There is hereby established in every district a district court which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the district in which it is established.

- (2) Subject to subsection (3), the designation of a district court shall be the district court of the district in which it is established.
- (3) The Chief Justice may, by order published in the Gazette, vary the designation of any district court.
- (4) The variation of the designation of a district court or of the area within which such court may exercise jurisdiction, shall not affect the jurisdiction of such court to continue the hearing of, or to determine, any proceedings commenced before it prior to such variation.
- (5) The Chief Justice may, if in his opinion it is in the public interest so to do, by order published in the Gazette, confer upon a district court established for any district, jurisdiction over any other contiguous district or districts and where such order is made, such district court shall have concurrent jurisdiction in relation to the district for which it is established and also in relation to such other district or districts as may be specified in the order”. But the place of trial of an offence is also governed by the Criminal Procedure Act (Cap. 20 R.E. 2002). Sections 180, 181, 182, 183 and 184 of the CPA: Section 180 specifically provides: "Subject to the provisions of section 178 and to the powers of transfer conferred by section 189, 190 and 191 every offence shall be inquired into and tried as the case may be, by a court within the local limits of whose jurisdiction it was committed or within the local limits of whose jurisdiction the accused person was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging him with the offence". The appellants contend that although the offence is alleged to have been committed in Meatu District, and they were arrested in Meatu, and whereas there is a District Court in Meatu, they do not know why their charge sheet reads in the District Court of Meatu at Mwanhunzi. 23 The issue for consideration is whether, the charge sheet describing the district court of Meatu at Mwanhunzi is defective as per law making their trial a nullity? Firstly, I take note that Mwanhunzi is the central part of Meatu district. So it is within Meatu the central part of Meatu as it is the case of the District Court of Serengeti at Mugumu. That notwithstanding, my research has made me reach the case of *Makoye Masanya & Others vs Republic* (Criminal Appeal No. 29 of 2014) [2015] TZCA 397 (7 December 2015) in which it discussed at length the legality of territorial jurisdiction in criminal cases. In that case, the CAT also cited their previous case in *JAMES SENDAMA v R*, Criminal Appeal No. 279 "B" of 2013 (unreported) where the issue of jurisdiction of the trial court also arose. In that case the offence was committed in Bariadi District, but the charges were filed in Shinyanga Resident Magistrate's Court. The Court of Appeal quashed the conviction, not because it was tried in another district, but because it was presided over by a district magistrate who had no business sitting in the Court of the Resident Magistrate. So

though the facts in that case are plainly distinguishable from those in this case where a district resident magistrate presided over a case originating in a different district, however there is a good legal learning in it as far as the criminal jurisdiction of a district court. 24 So, the important issue here is, does that affect the validity of the trial? The answer to that issue is provided by section 387 of the CPA which provides as follows: "No finding sentence or order of any criminal court shall be set aside merely on the ground that the inquiry, trial, or other proceeding in the course of which it was arrived at or passed, took place in a wrong region, district, or other local area, unless it appears that such error has in fact occasioned or failure of justice. " So, even if the designation of district court of Meatu is at Meatu, and that the offence was committed in Meatu, and the appellants were arrested there; their charge sheet reading in the District Court of Meatu at Mwanhuzi and that their trial took place at Meatu district court is not necessarily an incurable irregularity unless they could show what injustice has been occasioned to them by the insertion of that name Mwanhuzi. The appellants have not suggested so in their grounds of appeal neither in their oral submissions in Court. I therefore reject that ground of appeal. If the Court of Appeal in JAMES SENDAMA v R, (supra) while interpreting section 387 25 of the CPA could not fault the offence committed in Bariadi District, but the charges were filed in Shinyanga Resident Magistrate's Court, should I dare so just on account of the charge sheet designating title of the district court of Meatu being at Mwanhuzi. Even if held so, the same is not incurable pursuant to sections 387 and 388 of the CPA. See also the detailed reasoning of the Court of Appeal in Baraka Leonard V. The Republic, Criminal Appeal No. 590 of 2020, CAT at Shinyanga at pages 8-10. That said, the grounds of appeal on the defectiveness of a charge is hereby dismissed on account of the reasoning above and the guided authorities. Next, I will discuss the central part of the case in which I will combine the 2nd, 4th and 5th grounds of appeal jointly that whether the prosecution's case was established beyond reasonable doubt as per law and whether the appellants are responsible. To start with, according to law, the offence of arson is charged at section 319 of the Penal Code, Cap 16 R.E 2022. The same reads:

319. Any person who willfully and unlawfully sets fire to- 26
- (a) any building or structure whatever, whether completed or not;
  - (b) any vessel, whether completed or not;
  - (c) any stack of cultivated vegetable produce or of mineral or vegetable fuel; or
  - (d) a mine or the workings, fittings or appliances of a mine, is guilty of an offence and is liable to imprisonment for life. As per the charging section, there are four scenarios in which an offence of arson can be committed. Firstly, is setting fire against any building or structure either completed or not. Secondly, is on a scenario of setting fire against any vessel either completed or not. Thirdly, is on a situation of setting fire against any stack of cultivated vegetable produce or of mineral or vegetable fuel; and fourthly, it is on a scenario of setting fire on a mine or the workings, fittings or appliances of a mine. In the current case as stated

above on the facts of the case, the said arson falls under the first category, that is setting fire against the building or structure belonging to PW1. This is what he said, I quote: 27 I know all the Accused Persons. They are Jacob Emmanuel, Bahame Ntobi, Membi Ntobi and Mishigwa Jidahi@ kulwa Kiseme. On 01.07.2023 I remember I received information from my wife that our house is set on fire. I was at Mwamashimba. When I got information I went at the scene of crime. When I was there I saw the Accused continue to set fire, they are these Accused Persons and one Sita Bujiku. They used firewood. It was 10:00 hours. The said house is at Lubiga. Village within Meatu District. The house is worth Tshs. 1,825,000/=. The house was constructed by bricks and roofed by sands (miti na udongo). It has two rooms and one lounge. In the house there was maize 10 bags, rice pad and dengue five bags and 3 bags of groundnuts, five bags of michembe (dried potatoes). Other things destroyed was a water pump. Another person witnessed the incident was Kulwa Masaga. When I saw that, I reported at Police, Meatu central Station. The police arrested the Accused Persons. The Accused persons burned the house with no colour of right. As regards to the PW2 who was the investigating officer of the case, he had stated the following, I quote: 28 On 11.08.2023, at 14:00 I went at Jilunguli at Lubiga Village to witness myself. The first Accused is chairman of the said Hamlet. A picture I got was different from what I heard from executive officer. It was resident house. It was constructed by unburned bricks/mabichi and roofed by glasses and soil. The roof is a tembe one. That house has width of 8.8 feet and length of 25 feet. The house has one ingress door to living room and there were two sleeping room and one kitchen. The house was burned and demolished. The wall was no above 2 feet. Therefore, I prove the burned house was a home no hat. I thus drew a sketch map. When I tried to exhume the sand, we found food, and clothes buried therein. The independent witness (PW3) on his part, as far as the setting of the said fire of the PW1's building/structure is concerned had this to say, I quote: On 01.07.2023 during morning hours at 10:00 when I was at Lubiga, we saw many people burning house of Charle Kwilasa. The house was at Lubiga Village in Jilinguli hamlet. I identified Jacob Emmanuel, Bahame Ntobi, Membi Ntobi and Mishigwa Jidai. Those persons pushed the house and it fell down. They used firewood. The house is known as tembe. It was constructed by tope bricks. Charles Kwilasa also witnessed it. The house was situated at Meatu District. I told Charles Kwilasa to report to Police Station. 29 In a criminal charge, a fact is said to be established when the court is satisfied by the prosecution beyond reasonable doubt that the fact exists (see section 3(2) (a) of the TEA, Cap 6, R.E 2022. Is a mere saying by PW1 and PW3 that they saw the appellants out of many people setting fire at the said house sufficient proof of a fact of setting fire in the absence of proof how they identified the said culprits out of many? What so unique was it that out of the many culprits made them easily identify the culprits? There was no any description of the said culprits, their morphology/structure for the court to be satisfied with etc. Perhaps it is important to revisit what is evidence? Section 3(1) of the Tanzanian Evidence Act, (supra), defines evidence to mean an alleged matter of fact, the truth of which if submitted to investigation, is proved or disproved; and without prejudice to the preceding generality, includes statements and admissions by accused persons. Therefore, the fact that the there was arson as alleged is not established by empty words as done here. In my considered view,

a mere utterance of something is not by itself an evidence, but ought to have been an established fact. Otherwise, it is dangerous that street stories are gathered and take consider them as evidence. 30 In essence, I had expected there to be a strong evidence by the prosecution drawing strong inference against the appellants that they are no others but them who actually did set the said fire. Otherwise, it is a mere gossip. If PW1's wife had seen these culprits setting fire against their structure/building, where was she and how did she manage to identify the named culprits? In my considered view, there was no such strong inference from the prosecution's evidence that the appellants are; and no others but the appellants. Further, PW1 says he saw them setting fire at his building. He is silent whether, after he had seen them what measures he had taken against them instantly. He neither even described the said culprits how he had identified them. PW1 says, he saw the culprits setting fire by use of the alleged fire woods. None was tendered in court to substantiate the said fact. PW2 says, he had visited the scene on 11th August 2023 while the report of it was made on 1st July 2023 and got satisfied that the said house was completely consumed by fire. On seeing the burnt house, the witness is making a sketch map instead of taking still pictures and video for production of the said fact. Should this court believe of the alleged burnt house from a police drawing? PW2 further says, at the scene, he had also exhumed food, and clothes 31 buried from the sands therein. None was tendered in court for its satisfaction on the fact of recovery from site. He further testified that his investigation established that the house it is worth Tshs. 1,825,000/=. It was the property of Charles Kwilasa. How he reached that finding, is unclear from the court record, yet the trial court nodded with the prosecution's story that the accused persons shall compensate the Victim his loss incurred to the tune of Tshs. 1,825,000/=. What establishes the damage being valued at 1,825,000/= For that compensation to stand, there ought to have been a strict proof on the fact as it is specific damage. On this finding above, I find discussion on the 3rd ground of appeal of no merit, mainly because it is deficient to the findings of the preceding paragraphs on none strength of the prosecution's evidence in the establishment of the charge beyond reasonable doubt as per law. In totality, I find the appeal being brought with sufficient cause, I allow this appeal and quash the conviction meted against the appellants and I accordingly set aside the respective sentences meted out against each appellant. In its place, I order their immediate release from custody unless lawfully held by other causes. 32 It is so ordered. DATED at SHINYANGA this 30th day of August, 2024. F.H. Mahimbali Judge. 33

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