

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA AT DODOMA APPELLATE JURISDICTION (DC) CRIMINAL APPEAL NO. 24 OF 2011 (ORIGINAL CRIMINAL CASE NO. 143 OF 2010 OF THE DISTRICT COURT OF KC) NDOA AT KONDOA BEFORE F.J. KIGING ESQ; RESIDE NT/DISTRICT MAGISTRATE) MESSO PETER APPELLANT versus THE REPUBLIC
RESPONDENT 15.02.2012 & 5.03.2012

JUDGEMENT

HON. MADAM, SHANGALI, J. The District Court of Kondoa at Kondoa charged and convicted the appellant, Messo s/o Peter of the offence of Arson contrary to the provisions of section 319 of the Penal Code, Cap 16 of the laws as revised in 2002. It would appear that the trial magistrate did not so far as appears from his judgement cite a specific paragraph of the aforementioned law which the 2 appellant is said to have contravened as though the appellant did contravene the whole of the dtd law above. But the defect in question ensued from the charge sheet. However, in his judgement, the trial magistrate happens to have stated what was set on fire, it was a grass hatched house which is said to be the property of one, AMAN S/o ALLY and the appellant was alleged to have been responsible for the act which act caused the victim to suffer loss of properties valued at TShs.270,000/=. Therefore, the facts as told by the prosecution before the trial court show that the appellant did contravene the provisions of section 319 (a) of the Penal Code, Cap 16 of the laws as revised in 2002. In my opinion the defect was minor and did not occasion any failure of justice. Before the trial court the prosecution case rested on the evidence of five witnesses. PW1 told the trial court that On 5/10/2010 while at his business area, he was informed that the appellant had a plan to set fire to his house, the grass hatched house. And at about 10.00 p.m. he heard an alarm from outside saying "Messo why setting fire to our house" which if interpreted in Swahili would mean "Messo kwonini uriachoma moto nyumba yetu." On getting out PW1 saw his house on fire. Efforts by people to rescue the situation were in vain. PW1 alleged that, the house * 3 was solely for business purposes. PW1 told the trial court that the appellant came to him for forgiveness. Then, PW1 told the appellant to come along with his relatives in order to have the matter settled amicably but that was not done. It is only then PW1 had to report the matter to the police. PW2, Hamisi Aman, told the trial court that, on 5/10/2010 he saw the accused smoking a cigarette and had the same thrown to the house of the complainant (PW1). According to PW2 the house could easily get burned for it was a grass hatched house. PW2 also told the trial court that after the incident, the appellant had to ask for an apology to the complainant (PW1). PW3 testified

to the effect that on the same date and time he was at the PW1 's place and he saw the appellant entering in the said house while smoking a cigarette and later disembarked from that house. The PW3 claimed that the appellant used his cigarette to set fire on that grass house of PW1. Also, before the trial court was the evidence by PW4 E.951 D/SSGT George who in the company of his colleague, CPL, Kichonge who investigated the case and visited the scene of crime. PW4 drew a sketch map in the presence of the complainant, the same was admitted as exhibit P1. 4 In his defence, the appellant categorically denied to have committed the offence and told the trial court that he was not at the scene of crime when the alleged offence was committed. He claimed that on 5/10/2010 he was on safari to Mrijo and he came back on 08/10/2010. On the totality of evidence before it, the 'trio I çuēt convicted and sentenced the appellant to imprisonment of IQ years. Aggrieved by the trial court's decision, the appellant has grounds of appeal appealed to this court and he has raised five which if paraphrased will make a total of four grounds as follows;

1. That, the appellant did not commit the offence he was charged with which is why he pleaded.. ed no; t guilty th.rEcf. 2.. That the trial magistrate grossly erred in law and fact by convicting the appellant without proper proof of the latter's involvement.
3. That the appellant was convicted and sentenced based on hearsay evidence by PW1. . That PW2 and PW3 were unable to tell the trial court why they failed to take action when they saw the appellant throwing the cigarette on the grass hatched house of PW1. At the hearing of this appeal on 15/12/2012, the learned State Attorney Ms. Nsana supported the, appeal for the following reasons:- One, the prosecution side did not state how they managed to identify the appellant at night given that the offence was committed at about 10.00 p.m. To comprehend her argument, the learned State Attorney referred this court to the case of Waziri Amani v. R [1980] T.L.R. 250 which among other things points out on the importance of the evidence of visual identification when an offence is committed at night. The learned State Attorney also referred this court to the case of Magwisha Mzee and Another v. Republic Criminal Appeal No. 465 and 267 of 2007 (unreported) where the Court of Appeal observed inter alia that; "It is equally settled law that in a case depending for its determination essentially on identification, be of a single witness or more than one witness, that evidence must be watertight, even if it is evidence of recognition..." I am firmly in agreement with the learned State Attorney that, evidence of how PW2 and PW3 managed to identify the appellant at night (10.00 hours) ought to have been given and the failure so to do should have had the obvious result before the trial court in favour of the appellant because the appellant was not properly identified at the scene of the alleged crime. I wish to stress that the question of visual identification has been repeatedly cemented by various decisions of this court and the Superior Court of Appeal to the effect that evidence of visual identification has to be acted upon cautiously even if the question of recognition of an accused person arises. In the instant appeal the appellant was not identified in the first place let alone the duty which the prosecution side would have had to prove his proper identity had it been that he was identified at night. It is surprising that even the alleged person who mentioned the appellant and shouted "Messo kwo nini unachorna nyumba zetu" or "nyumba yetu" (whatever the case) was not mentioned nor called to testify. In Mwalim Ally and

Another v K. LAI) LThM ur. App. No. 39 of 1991 (Unreported) The Court of Appeal observed that; "Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction." 7 It is my considered opinion that it was unsafe for the trial court to convict and sentence the appellant of the offence of arson without evidence as to identification much less, visual identification of the appellant taking into account that the appellant raised the defence of alibi which as rightly pointed by the learned State Attorney in her submission was not considered at all by the trial court. In Charles Samson v. R El 9901 T.L.R. 39, the Court of Appeal pointed out that failure to take cognizance of the defence of alibi amounts to a miscarriage of justice. I take the view that the defence of alibi as put forward by the appellant before the trial court its cognizance was necessary for it would have answered why the appellant was not identified at the scene of crime. Two, the learned State Attorney, has submitted that the trial magistrate's judgment offends the provisions of section 312 (1) of the Criminal Procedure Act [Cap 20 R.E. 2002] for failure to give satisfactory explanation and reasons to justify his conviction decision against the appellant. In this also I am at one with the learned State Attorney. The trial magistrate has failed completely to state why he believes, that the prosecution case was strong against the appellant. In fact all that the trial magistrate did was to separately consider the prosecution case and then mention the defence case by passing without any critical analysis and consideration. In other words the trial magistrate decided to walk on the same road with the prosecution and parted way with the appellant without assigning any reason to that effect. Pertinent to this is the case of Hussein Idd and another v. R (1986) T.L.R. 166 (CAT) where the Court of Appeal observed that; "it was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence. The judge should have dealt with the prosecution and defence evidence and after analysing such evidence, the judge should then reach to a conclusion." The circumstances in the instant appeal and in Hussein Idd (supra) are the same for the trial magistrate decided not to evaluate the defence case at all. Again I might as well point out in this way, that failure to consider the appellant's defence evidence amounts to refusal for an opportunity to be heard. 9 Also having gone through the trial magistrate's judgment I found that he convicted and sentenced the appellant basing on suspicion. For example PW1 said he was informed that the appellant had a plan to set fire to his house, but then the evidence before the trial court does not show how the appellant was seen at night at about 10.00 hours committing the alleged offence given that there was no evidence as to the presence of bright moonlight or say, may be the prosecution witnesses were assisted by any means to identify the appellant. With all due respect to the trial magistrate I am of the considered view that he convicted and sentenced the appellant basing on suspicious evidence. To comprehend this I find the case of Ntinda v R (CAT) Mbeya Cr. App. No. 17 of 1991 (unreported) as being relevant, where the Court of Appeal observed inter alia that; "...suspicion no matter how grave cannot be the basis of conviction in a criminal charge." In the premises, I am alive to the effect that the prosecution evidence before the trial court was based on suspicion and hence the trial magistrate ought not to have relied on it taking into account the unfavourable circumstances which implicated the appellant to

have committed the offence. In the upshot the appellant was wrongly convicted on the very weak and poor prosecution evidence. The appeal is allowed. I hereby quash and set aside the conviction and sentence of ten years term of imprisonment imposed against the appellant. This court orders the immediate release from prison of the appellant unless he is lawfully held any other matter. v- /rJ M.S. SH/AN AU

- JU6G 05/03/2012 Judgement delivered to-dale 5th March, 2012 in the presence of Ms. Shio, Learned State Attorney for the respondent/Republic and in the presence of the appellant in person. ..Appal Explained. MS fD G JUDG 05/03/2012

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