

TANZANIA / JUDGMENT

20161229 TZHC Dar es Salaam

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM PC CRIMINAL APPEAL NO. 192 OF 2015
(Appeal from the decision of the decision of the District Court of Morogoro in Criminal Appeal
No. 61 of 2015 before Hon. R.R. Futakamba, RM. Original Criminal Case No. 192 of 2015,
Chamwino Primary Court, between Wilberd Stanslaus v. Amasha Iddi and 2 others. WILBARD
STANSLAUS APPELLANT VERSUS

1. AMASHA IDDI
2. MOHAMED IBRAHIM · RESPONDENTS
3. ABDUL IDDI

JUDGMENT

30th Sept. & 29 th Dec. 2016 DYANSOBERA, J: This is a second appeal. The appellant one Wilbard Stanslaus was a complainant before the Primary Court of Morogoro District at Chamwino in a Criminal Case No. 192 of 1 2015 in which the three respondents namely, Amasha Iddi (1 st respondent), Mohamed Ibrahim (2 nd respondent) and Abdul Iddi (3 rd respondent) were charged with and acquitted of the offence of malicious damage to property c/s 326 of the Penal Code, Cap.16 R.E. 2002. His first appeal to the District Court was dismissed hence this appeal. The background of the matter can be, briefly, stated as follows. The appellant and the three respondents are neighbours. The 3 rd respondent is the elder brother of the 1st respondent and both are friends of the 2 nd respondent. The appellant owns a house behind which there is a road. In a bid to avoid unnecessary accidents, the appellant made a knoll on the said road near his house. This bump did not please the neighbours, particularly motor cyclists, the 1 st and 2 nd respondents, inclusive. The 1st and 2 nd respondents were complaining that the appellant was blocking the way and the complaint was registered at the Ward Tribunal. The said respondents, however, went on bullying him and calling him names. On 12 th day of June 2015 a commotion ensued between the appellant and the 1st respondent. This led to the 1st respondent being injured. The 1st respondent then called the 2 nd and 3 rd respondents telling them that he, the 1st respondent had been injured by the appellant with a stone. The 1st respondent then threw a piece of brick to the appellant's house and the 2 nd and 3 rd respondents and others joined the move. This resulted in the destruction of the grills, glasses and corrugated iron sheets. After the appellant's communication with the police at Morogoro through the police at the Head Quarters

at Dar es Salaam, the police arrived at the crime scene in two Defenders and took the appellant to the police station for interrogation where he was also told that he had injured the 1st respondent. After the investigation was completed, the three respondents were arraigned in court. The trial Primary Court reviewed the evidence and was satisfied that the case against the respondents was not proved beyond reasonable doubt. The appellant unsuccessfully appealed to the District Court. In his petition of appeal before this court, the appellant is armed with two grounds of appeal, that is:-

1. That the Resident magistrate in the first appeal erred in applying the law while evaluating the evidence on record. 3 ·----- ·-----
2. That the Resident Magistrate in the first appeal, erred in law when failed to give weight to the rules regulating alibi. On 25 th July, 2016 when the appeal was called for hearing, Ms Esther Shoo, learned counsel, appeared for the applicant while the three respondents were represented by Mr. B. Tarimo, learned advocate. It was agreed that the appeal be disposed of by way of written submissions. Both counsel filed their written

submissions.

Submitting in support of the first ground of appeal, learned advocate is attacking the learned Resident Magistrate on his comment that the complainant's witnesses seemed to her as witness with interest to serve particularly with regard to his' observation that the complainant's witnesses were his child and wife and that it was obvious that these two should favour the appellant and if the respondents committed the offence in the light as it was early before the darkness why then the complainant does not have independent witness. This, Prof. C. Binamungu insists that the first appellate Magistrate erred in applying the law while evaluating the evidence on record. He buttressed his point by citing the case of R. v. Lulakombe s/ o 4 ...- Mikwalo and Kibenge (1936) EACA 43 at p. 44 where Sir Sidney Abraham, CJ held: 'There is no rule of law or practice which permits the evidence of near relatives to be discounted because of their relationship to an accused person'. In the same vein, the court was referred to the case of Deo Bazili Olomi and Another v. Republic, Criminal Appeal No. 245 of 2007 where the Court of Appeal, quoting their rule of guidance in Paulo Tarayi v. R, Criminal Appeal No. 216 of 1994 stated: We wish to say at the outset that it is, of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of non-relative corroborating their story. While the possibility that relatives may choose to team up and truthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should also the totality of the story told by them. The veracity of their story must be considered and gauged judiciously, just like the evidence of non-relatives. It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common

-=: interests to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative." It is learned counsel's contention that in this case, the learned first appellate magistrate did not

discharge his duty as he failed to consider the evidence on merit. That the record shows that PW 1, PW 2 and PW 3 testified that they saw the respondents at the crime scene and witnessed their damaging the appellant's house. This was direct evidence which was not refuted, learned advocate contended. As regards the ground of appeal No. 2, Prof. Binamungu invited the court to find that not only the law relating to a defence of alibi was flouted but also the defence did not raise any reasonable doubt in the prosecution case. This court was referred to the two cases of *Alli Salehe Msutu v. R.* [1980] TLR 1 at 3 and *Maruzuku Hamis v. R.* [1997] TLR 1. Replying to the submission in chief, learned counsel for the respondents one B.L. Tarimo told this court that there was no sufficient evidence to prove the case against the respondents beyond reasonable doubt. He submitted that the learned first appellant Resident Magistrate correctly analysed and evaluated the evidence which was unfurled at the trial and was satisfied the evidence adduced by the appellant and his two witnesses was too weak to ground conviction. Learned counsel for the respondents contended that the first appellate magistrate considered the six grounds advanced by the trial court in finding the respondents not guilty and invited this court to consider what this court said in the case of *Marco s/o Gervas v. R* [2006] TLR 27 that: "The trial court that sees and hears the witnesses is the best judge to assess the credibility of such witness rather than an appellate court that sees only the scripts of the evidence, often translated". According to learned counsel for the respondents, the credibility of PW 1, PW 2 and PW 3 was correctly assessed by the trial court and the appellate court can only interfere if the trial court acted with material irregularity and wrong principle in assessing and evaluating the available evidence. As to the second ground of appeal, it is the contention of Mr. Tarimo that the burden of the prosecution to prove the charge beyond reasonable doubt does not shift to the accused only because they have raised an alibi and fail to prove it. To support his contention, learned counsel cited the case of *Jumanne Rajab 7 @ Ngalamgongo and Another v. R.* [1999] TLR 69 where this court held: "An accused person bears no burden to prove an alibi; an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the accused person in such a case." --Furtner, this court was referred to the case of *Charles Samson v. R* [1990] TLR 39 where the Court of Appeal of Tanzania stated, inter alia, "the court is not exempted to take into account the defence of alibi, where that defence has not been disclosed by an accused person before the prosecution closes its case". As pointed out hereinbefore, the three respondents were charged before the trial Primary Court with malicious damage to property c/s 326 Penal Code, Cap 16 (R.E. 2002). The charge sheet preferred before the trial Primary court was couched in the following words: "KOSA NA KIFUNGU CHA SHERIA: Kuharibu mali chini ya K/F cha 326 Kanuni ya Adhabu Sura ya 16 8 _ _ _ _" _ _ _ Q MAELEZO YA KOSA: Wewe AMASHA S/O IDDI, ABDUL S/O IDDI na MOHAMED S/O IBRAHIM, wote kwa pamoja mnashtakiwa kwamba mnamo tarehe 12.6.2015 majira ya saa 3.00 asubuhi huko maeneo ya Kihonda W /M wa Morogoro, mliharibu madirisha ya nyumba ya WILBARD S/O STANSLAUS kwa kuvupja vioo kwa kutumia mawe huku mkijua kuwa kufanya

- - - - -hivyo in -kosalffsneria" In the first place, the charge which was levelled against the three appellants was fatally defective in that it cited section 326 of the Penal Code, Cap. 16 which is non-existent in our law. Indeed the Court of Appeal of Tanzania held the same view in the case of Deus s/ o Gendo v. R; Criminal Appeal No. 480 sitting at Iringa, when it observed at p. 9 of the typed judgment thus: "On looking at 3 rd count (malicious damage to property), the relevant provision is 326 (1) of the Penal Code section 326 is non-existent. (Emphasis supplied) The offence of malicious damage to property is found under section 326 (1) and is both a definition and punishment section. It provides as hereunder: - 9 «326.- (1) any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, and except as otherwise provided· in this section, is liable to imprisonment for seven years." Second, going by the above definition, the act must intentionally or deliberately cause damage to personal, private or commercial property and the damage must be the result of a wilful act with the purpose to- harm- of cause ffamage to property. · -- In the instant case, there is no dispute that upon consideration of the evidence gathered at the trial and the visit to the crime scene conducted on 27 th August, 2015, the trial court found that the doors and glasses were broken, the corrugated iron sheets were destroyed, there were two bricks which were removed from the wall and a grill was also removed. The issues for determination at the trial and before this court are, in my view, two. First, is who destroyed what and how and second, whether the possibility of self-defence was ruled out. Going by the above definition of the law above, the ingredients of the offence which the prosecutor, the present appellant had to prove at the trial are, one, whether the respondents caused damage or destroyed the property; whether the property that was 10 damaged or destroyed belonged to the appellant and three, whether the culprits intended to cause damage. I have no doubt the appellant proved beyond any sane of doubt that the property that was damaged or destroyed belonged to him. But who actually were the perpetrators? Were the respondents implicated by the evidence? The answer is, I think, found at p. 12 and 13 of the typed judgment. It is stated as follows: "Sita, SU 4,na SU 5 ambao ni askari maaskari waliweza kuifafanulia Mahakama kwamba uhalifu ule ulitendwa na wananchi, baada ya mlalamikaji kumpiga SU 1 akaanguka na kupoteza fahamu ndipo walianza kumshambulia kwa mawe na vipande vya matofali na kusababisha uharibifu nyumba ya SM 1. Hata SU 4 alidai hata yeye alipigwa jiwe. Na kwa vurugu hiyo, SU 4 na SU 5 walisema ilisababisha eneo lote la cheers kujaa watu mpaka kwenye nyumba na SM 1 na hata kusababisha magari kusimama. Na wao kama askari walishindwa kuhimili ile fujo kwa kuwa wananchi na waendesha pikipiki kwa kuona SU 1 ambaye ni mwendesha pikipiki mwenzao ameum1zwa ndipo walitoa taarifa kituo cha polisi zikaja defenders mbili na askari wengine kuja kuongeza nguvu kwa kuwa waendasha pikipiki na wananchi walikuwa wanataka SU 4 na SU 5 wamtoe SM 1 juu 11 'l ~ it.- .----=-e-----=-:-:=-:,,-:-:,-----:~-----=-:-:=-:-7t;,t ghorofani ili wamshambulie kitu ambacho ilibidi SU 4 na SU 5 wapande kwenye ngazi kuzuia SM 1 asidhuriwe yeye na familia yake. Kwa ufupi, kwanza Mahakama inakubali nyumba ya mlalamikaji iliharibiwa kama Mahakama ilivyohamia kwenye tukio kukagua na kuona vioo vyote vya madirisha, vilivunjwa na mawe yalitupwa kwenye ukuta na juu ya bati lakini tukirudi upande wa ushahidi uliotolewa inaonyesha tukio hilo lilisababishwa na wananchi

na waendesha pikipiki wengi kwa kitendo cha SM 1 kumshambulia SU 1 na jiwe na kusababisha kupotea fahamu. Hata SM 1 mwenyewe alieleza katika ushahidi wake wakati anajibu hoja kwamba alishangaa kwa nini wakamatwe SU 1, SU 2 na SU 3 wakati siyo waliohusika SM 1 na SM 2 na SM 3 waliwataja sana Ramadhani na kaka yake wa washtakiwa namba 1 na 3 kwa jina la Rajabu ambao hawapo kwenye kesi hii kwamba ndiyo waliohusika na hawakukamatwa." This excerpt of the trial court's judgment tells all. The destruction was done by a mob of people. It was difficult in that situation to identify who actually did what and the evidence is clear that there was no proper and unmistakable identification of the real culprits. In criminal cases such as this, the prosecution 12 . !

I'!...-----:-----:--:'! • has a duty to prove beyond reasonable doubt not only that the offence was committed but also that it is the accused who committed the offence. That burden, the appellant and his witnesses failed to discharge. As correctly pointed out by learned counsel for the respondents, the trial Primary Court who saw and heard the witnesses testifying was placed in the best position of assessing the demeanours of the witnesses and credibility of their evidence. The -first appellate District Court concurred with the factual finding of the trial court. This court has no material upon which to fault the findings of fact arrived at by both lower courts. I find that there was no sufficient evidence to prove that the offence of malicious damage to property was committed by none other than the appellants. Besides, considering the totality of the evidence, it cannot be gainsaid that the defence of self-defence was not ruled out on part of the respondents. This is so because, the evidence was insufficient to prove that the perpetrators of the damage of the appellant's house intended to cause damage and were not aimed at self-defending themselves. With those reasons, I am satisfied that the decisions of the two courts below in finding that the case against the respondents 13 :i was not proved beyond reasonable doubt cannot be impeached. The decisions were sound in law and justified according to the evidence. The appeal fails and is dismissed. , ~ W. P. yansobera JUDGE 29.12.2016 Delivered at Dar es Salaam this 29 th day of December, 2016 in th presence of r~,fc? I \ \ W. P. Dyansobera JUDGE 14

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