IN THE HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO 25. OF 2021

(Originating from Criminal case No 96 of 2020 of Rombo District Court)

WOLFGAN COSTANTINE KIMARIO@ KASESE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

9/8/2021 & 19/8/2021

SIMFUKWE, J

The appellant Wolfgan s/o Costantine Kimario alias Kasese was charged and convicted of two offences before the District of Rombo:

1st Count: Arson contrary to section 319 (a) of the Penal Code (Cap 16 RE 2002)

That, Wolfgan Costantine Kimario @ Kasese on the 1st day of April, 2020 at about 1: 00 at Ushiri village, within Rombo District in Kilimanjaro Region did wilfully and unlawfully set fire to the house valued at Tsh 3,700,000/= the property of one Consolata D/O Pius Kimario

2nd count: Malicious damage to property contrary to section 326 (1) of the Penal Code (CAP 16 Re 2002).

That the appellant herein on the same date, time and place did wilfully and unlawfully damage one table and four plans valued at Tsh 5,000/=,

two crates of rahapoa beer valued at Tsh 20,000/=, different agencies valued at Tsh 40,000/=, three empty bottles of Safari beer valued at Tsh 24,000/= clothes valued at Tsh 20,000/=; all total valued at Tsh 200,000/= the property of Joyce d/o Anglibert Shirima.

The trial court found the appellant guilty of both offences and convicted him on both counts. He was sentenced to serve eight month and nine months in jail respectively

The appellant was not satisfied by the decision of the trial court. He has appealed before this court on four grounds:

1. That the learned trial Magistrate erred in law and fact for convicting the appellant basing on evidence taken contrary to the law.
2. That the learned trial Magistrate erred in law and fact for entering conviction against the appellant basing on evidence unsupportive to the charge.
3. That the learned trial Magistrate erred in law and fact in convicting the appellant on circumstancial evidence while the same did not meet the test required to sustain conviction.
4. That the learned trial Magistrate erred in law and fact in convicting the appellant while the available evidence did not prove the case beyond reasonable doubt.

The appellant prayed that this appeal be allowed and both conviction and sentence of the trial court be quashed.

At the hearing, the appellant was represented by Mr. Julius Focus learned counsel, while Mr. Kassim Nassir learned State Attorney appeared for the Respondent Republic.

Starting with the first ground of appeal Mr. Julius Focus submitted that the learned trial Magistrate did not comply **with section 210 (3) of the Criminal Procedure Act, Cap 20 RE 2019** *which provides that the Magistrate shall inform each witness that he is entitled to have his evidence read over to him. If a witness asks that his evidence be read over to him, the Magistrate shall record any comments which the witness may make concerning his evidence.*

It was the argument of the learned counsel for the appellant that the proceedings of the trial court did not indicate that section **210 (3) of the CPA** was complied with. That the same was fatal. He cemented his arguments by referring the case of ***MOHAMED RASHID SHEMBAZI V R Criminal Appeal No 22 of 2019;*** in which it was held that non-compliance of procedure was fatal. The learned counsel prayed this court to declare that non compliance to **section 210 (3) of the CPA** is fatal.

On the second ground of appeal, that the learned trial Magistrate erred in law and fact for entering conviction against the appellant on evidence unsupportive to the charge, Mr. Julius Focus submitted that there was no direct evidence against the appellant. That evidence tendered by the prosecution was hearsay evidence. Even policemen who arrested the suspect were not called to testify before the trial court. Thus there was no sufficient evidence to support the charges against the appellant.

On the third ground of appeal , that the learned trial Magistrate erred in law and fact in convicting the appellant on circumstantial evidence while the same did not meet the tests required to sustain conviction. Mr. Julius submitted that three tests of circumstantial evidence were not met in this case. He supported his argument by referring to the case of

JIMMY LUNANGAZA VS REPUBLIC Criminal Appeal No 159B/2017 Court of Appeal at Bukoba in which it was held that in order for circumstantial evidence to ground conviction, it must point directly to the accused and must pass three tests:

1. The circumstances from which an inference of guilt ought to be drawn must be urgently and firmly established

2. It should be of definite tendency unerring pointing towards the guilty of the accused.

3. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

Mr. Julius submitted further that according to the proceedings of the trial court the victim (PW1) was informed by her neighbour that her house was on fire. Thus she did not see the person who set the said fire.

On the fourth ground of appeal , that the learned trial Magistrate erred in law and fact in convicting the appellant while the available evidence did not prove the case beyond reasonable doubts. It was submitted by Mr. Julius that there are some doubts on part of prosecution which were not cleared. First PW1 alleged that she had grudges with the family of the appellant. PW1 was once a tenant of the appellant but terminated the contract due to grudges. That the prosecution did not clear the doubt that possibly the charges against the appellant were fabricated due to hold grudges.

It was submitted further that another doubt was that the offence was alleged to have been committed at mid night. The prosecution did not state how they managed to identify the appellant.

Another doubt was stated to be the circumstances of the arrest of the appellant That, policeman who arrested the suspect were not called to testify the circumstances of the arrest of the appellant and that there was no direct evidence connecting the appellant with the arson incidence.

The learned counsel for the appellant concluded by praying the appeal to be allowed and the decision of the trial court and its sentence to be set aside.

On his part Mr Kassim Nassir learned State Attorney opposed the appeal and all the grounds of appeal. He submitted that non compliance to **section 210 (3) of CPA** was curable under **section 388 (1) of the CPA** which is to the effect that the court should ask itself whether such contravention caused failure of justice. The learned State Attorney cited the case of **VUYO JAKI V.R**

Regarding ground no 2 and 4 Mr. Kassim Nassir argued that the prosecution proved its case beyond reasonable doubts. It was his contention that PW1 (victim) proved that there was no other suspect apart from the appellant who was alleged to have uttered statements one day before the incidence which were the basis of PW1's evidence. The learned State Attorney quoted the said statements from page 10 of the trial court proceedings.

" ***Ulihama kwetu ukatangaza kashfa kuwa tumekuibia nitakufanya kitu utakaa usahau katika maisha yako***

In support of his contention Mr. Kassim cited the case of **PASCAL KITIGWA V.R (1994) TLR 65** at page 66 in which the Court of Appeal held that:

> ***"Corroborative evidence may be circumstantial and may come from the words and acts of the accused"***

That, in the instant case, the trial magistrate was correct in convicting the appellant on the basis of the words uttered by the appellant. The learned state Attorney also referred the case ***of CHANDRANKAT J .PATEL V. REPUBLIC (2004) TLR 218*** in which it was observed that the court must satisfy itself on the circumstance of commission of the offence.

In addition, Mr Kassim submitted that evidence of PW1 was corroborated with evidence of PW2 which was to the effect that the appellant was arrested at the scene of crime. DW2 the mother of the appellant also testified to the effect that the appellant was arrested at the scene of crime.

Regarding the third ground of appeal, it was submitted for the Respondent that requirements of circumstantial evidence were met. PW1 started well the chain of events which were done by the family of the appellant. Mr. Kassim was of the view that the said events satisfied all the requirements of circumstantial evidence. The fact that the burnt house had no electricity and that the appellant was arrested at the scene of crime proves beyond reasonable doubts that it is the appellant who committed the offence

In his rejoinder, advocate Julius Focus submitted among other things that it is bad in law to ground conviction on suspicion.

Concerning the issue that the appellant was found at the scene of crime, Mr. Julius submitted that the appellant had responded to the alarm together with other neighbours. That the issue that the appellant had grudges with the family of the victim was an afterthought as the victim did not report the same at the police station.

I have carefully examined the proceedings of the trial court, the grounds of appeal and the rival submissions of both parties. There are two issues to be considered:

1. Whether non compliance to **section 210(3) of the CPA** was fatal
2. Whether circumstantial evidence on the trial courts' record proved beyond reasonable doubts the offences charged against the appellant

Starting with the first issue whether non compliance to **section 210 (3) of the CPA** is fatal, it is worth to quote the provision of the said section which provides that:

> *"The Magistrate shall inform each witness that he is entitled to have his evidence read over to him. If a witness asks that his evidence be read over to him the magistrate shall record any comments which the witness may make concerning his evidence".*

In my view, in terms of the above quoted provision of the law, compliance to the said section is mandatory. As a matter of practise at the end of evidence of each witness before signing in compliance to section **210(1) of the CPA** the trial Magistrate has to show that section **210 (3) of CPA** has been complied with.

In the present case, the proceedings of the trial court shows that the trial Magistrate signed at the end of evidence of each witness. Impliedly the trial Magistrate complied with section 210 (3) of the CPA as well, since she had complied with section 210 (1) of the CPA.

In the case of ***YUDA JOHN V R Criminal Appeal No 238 of 2017***, Court of appeal of Tanzania at Arusha found that the trial Magistrate's signature was missing at the end of evidence of each witness. It was held that failure to comply with section 210 (3) of the CPA is curable under section 388 of the CPA as absence of the trial Magistrate's signature does not prejudice the appellant.

Likewise, in the instant matter as rightly observed by the learned State Attorney for the Respondent, failure to indicate that Section 210(3) was complied with was not prejudicial to the appellant. The same is curable under Section 388 (1) of the CPA.

On the issue whether circumstantial evidence on the trial court's record proved beyond reasonable doubts the offences charged against the appellant, this court refers to the case of ***HASSAN FADHILI VS REPUBLIC (1994) TLR 89*** in which the Court of Appeal of Tanzania found that the circumstances relied upon to convict the appellant were capable of more than one interpretation. In other words, to ground conviction on circumstantial evidence, it must be incapable of more than one interpretation.

In its decision the trial court found that;

"Even though the evidence of all the prosecution witnesses does not disclose who set fire at the victim's place but the circumstances suggested only the accused to be the one who set fire into that house". (Emphasis added).

It was also found by the trial court that the appellant had uttered some words to the victim that let to him being the only suspect of the offence of arson. The learned State Attorney in his submission before this Court quoted the said words alleged to have been uttered by the appellant from the testimony of PW1 (victim). That the Appellant had said;

"***Ulihama kwetu ukatangaza kashfa kuwa tumekuibia, nitakufanya kitu kutakaa usahau katika maisha yako".***

Mr. Julius Focus was of the view that the fact that the victim was threatened by the appellant and that the appellant had grudges with the family of the victim was not reported at the police station. With due respect to the learned counsel of the appellant, page 11 of the proceedings of the trial court shows that the victim had reported the matter to the hamlet chairman Selestine but before they were summoned, the house of PW1 was set on fire. The said Selestine was called before the trial court as PW3. He said on 22/3/2020 at 10:00 hrs Joyce Angelbert (victim) went to his place reporting that Wolfagan Constantine Kimario uttered to her that he will do something bad to her. Then, PW3 planned to meet the victim together with her witnesses on 02/4/2020.

From the chain of events, the circumstances in this matter irresistibly suggested the appellant to be the only suspect as correctly found by the trial court. Had the appellant been suspected on the basis of old grudges only that would raise some reasonable doubts on part of prosecution However apart from old grudges, the appellant was suspected on the basis of his words which he uttered to the victim few days before the alleged arson. The testimony of PW3 the hamlet chairperson proved beyond reasonable doubts that the appellant had threatened the victim as the matter was reported to him.

It is not disputed that the alleged arson took place. The appellant was among those who were found at the scene of crime, that's why he was arrested instantly at the scene of crime.

From the above discussion, it is a considered opinion of this court that the charges against the appellant were proved beyond reasonable doubts. The sentence imposed on both counts are within the prescribed sentence. Thus, this appeal lacks merit, it is dismissed accordingly.

S. H. SIMFUKWE

JUDGE

19/8/2021

Dated and delivered at Moshi this 19th day of August, 2021.

S. H. SIMFUKWE

JUDGE

19/8/2021

Date: 19/8/2021

Coram: S. H. Simfukwe J,

Appellant- Absent

For Appellant- Mr Julius Focus (Advocate)

Respondent

For Respondent- Ms Lilian Kowero (State Attorney)

C/C: Amos

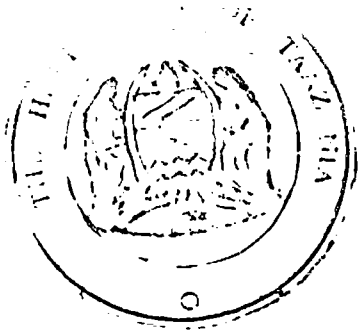
COURT: Judgment delivered this 19th day of August, 2021 in the presence of Mr. Julius Focus learned counsel for the Appellant and Ms Lilian Kowero Learned State Attorney for the Respondent.

S. H. Simfukwe

Judge

19/8/2021

Right of further appeal explained.



S. H. Simfukwe

Judge

19/8/2021