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IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 64 OF 1999

(ORIGINAL CRIMINAL CASE NO. 170 OF 1998 OF THE
DISTRICT COURT OF KISARAWE DISTRICT AT KISARAWE)

ABDULHAMANI ALLY ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

J U D G E M E N T

IHEMA J:

This is an appeal by Abdulhaman Ally against conviction and sentence by the Kisarawe District Court. The appellant who was charged and convicted of two counts of arson c/s 321 and 319 respecticely, on 17/6/99 was sentenced to three years imprisonment on each count and the sentences were to run concurrently.

The prosecution's case is that the appellant on 6th October, 1998 at Chamungu, Vikindu Village willfully and unlawfully set fire on the farm and house of Shaban Fupi Alias Makoye (PW1). Five prosecution witnesses testified including PW1 the complainant; however the evidence of PW3 the only eye witness is of great significance to the appellant's case as will be seen in the course of the judgment. The trial District Magistrate was satisfied on the strength of the prosecution witnesses that the appellant was guilty as charged and further that the land in dispute in civil case No. 6/97 at Mkuranga Primary Court is not one and the same in the criminal case.

The appellant in his defence admitted to have set fire to his farm (shamba) in the course of preparing for cultivation. He demied setting fire to any one's house in the process. In proof of his claim of right over the farm (shamba) the appellant tendered as evidence copy of the judgment in civil case No. 6/1997 in Mkuranga Primary Court dated 29/12/98. The appellant had seccessfully sued Juma Ally (PW2) over the farm which is one and the same being referred to in the criminal case.

In this appeal he is represented by Mr. Rutabingwa learned advocate and has preferred five grounds as following:

- that the trial Magistrate erred in law and fact on relying on the evidence of PW1 and PW2 without cautioning himself in view of their role in Civil Case No. 6/97 at Mkuranga Primary Court.

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- that the trial Magistrate erred in finding that the act of the appellant was wilful and unlawful.
- that the trial Magistrate erred in holding that the land in dispute and the subject matter in civil case No. 6/97 was different from the one in this criminal case.
- that it was wrong for the trial Magistrate to refuse to give weight on the judgment by the Mkuranga Primary court confirming appellant's claim of right over the dispated land.
- that appellant's conviction under Section 319 of the Penal code was without cogent proof on the existence of the house.

Mr. Rutabingwa submitting for the appellant has that there was no evidence by the prosecution that appellant willfully and unlawfull set fire to the farm and house. On. the contrary there is evidence that the land in dispute being one and the same as that in Civil Case No. 6/97 belongs to the appellant in terms of PW3. Further there was no cogent evidence on the existence of a house alleged to have been set on fire by the appellant. Mr. Rutabingwa has also contended that the evidence of the appellant is corroborated by PW3 on the ownership of the Shamba set on fire in preparation for cultivation, a common practice in the area.

Mr. Ntwina, who advocated for the Republic, supported the trial court's finding and conviction following appellant own admission to setting five to the shamba in question. Curiously Mr. Ntwina conceded to existence of a cloud and or confusion with regard to the ownership of the shamba /land in question, whereby he urged for a trial in the interest of justice.

On examination and consideration of the evidence on record I agree with Mr. Rutabingwa learned advocate that the land in dispute is one and the same in the civil case as well as the criminal case and that the appellant is the owner of the land. The evidence is abound both from the judgment of the Mkuranga Primary Court and PW3 Selemani Saidi, who claims paternity to both Juma Ally PW2 and the appellant. It is undoubtedly the same shamba which appellant set on five on 5/10/98. I also find no evidence in support of the second court under Section 319 of the Penal code to the extent that no house existed in the shamba.

The question which calls for determination is whether the appellant willfully and unlawfully set fire on the shamba as charged in the first court; in other words was the appellant's action without lawful justification. In my considered view in the light of the evidence I do not think so. Appellant claim of right over the shamba is beyond question, while the setting on fire.

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of shambas is in keeping with the practice while preparing for cultivation, not withstanding the fact that the alleged offence took place before the judgment in civil case No. 6/97 was pronounced. It was held by this court (Duff. J) in the case of R V AMOS MWAKISITU (Crim. Rev. 59-D-67) 1967 HCD 185 that it would be unlawful for a person to set fire to his own properly if another person is in the premises or other buildings were endangered. In that case it appeared that only the home of the accused was damaged and that cannot constitute arson within the meaning of Section 319 of the Penal code. Furthermore courts have held that where evidence establishes an accused's careless or negligent conduct but does not establish wilful or unlawful behaviour a conviction of arson will not stand. I have found no wilful or unlawful behaviour on the part of the appellant from the evidence on record. In the circumstances I allow the appeal, quash the conviction and set aside the sentence of three years imprisonment by the trial court. Appellant to be set free forth with unless otherwise lawfully held.

S. IHEMA

JUDGE

11/1/2000