

**IN THE REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MTWARA)**  
**AT MTWARA**  
**PC CRIMINAL APPEAL NO 4 OF 2021**

(Originating from Criminal Appeal No. 3 of 2021 Originating from  
Kinjumbi PR/Court of Kilwa at Masoko Criminal Case No. 3 of 2020

**SAID DUKA ..... APPELLANT**

**VERSUS**

**SALIMA SAIDI MALISEN ..... 1<sup>ST</sup> RESPONDENT**

**FATUMA SAIDI MALISEN .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Muruke, J**

At Kinjumbi primary court, the two respondent together with Said Mfaume Lipwele were charge for an offence of setting fire to the crops on the shamba of Said Duka contrary to section 231 of the Penal Code Cap 16 R.E 2002 by then. The two respondents were found guilty thus convicted, and sentenced to six months in prison, together with payment of 300,000 Tshs as compensation.



Being dissatisfied they filed appeal to the district court of Kilwa at Kilwa Masoko, in which primary court decision was overturned. Same dissatisfied Said Duka, the appellant, thus preferred present appeal raising two grounds namely: -

- 1. That the Resident Magistrate in appellate court erred in law by quashing the conviction and set aside sentence while in trial court the appellant proved his case beyond reasonable doubts.***
- 2. That the appellate court erred in law in disregarding the evidence of prosecution witnesses two and three who saw the accused committing the offence charged with, which corroborated the evidence of PW1.***

Respondent were dully served but refused service in terms of an affidavit of Yusufu Ali Machuya Mwenyekiti wa Kitongoji cha Ndumbwe Somanga that was witnessed by Vumilia Mussa Matemela honourable magistrate and commissioner for oaths, on 14<sup>th</sup> June 2022, available in the court records. Upon proof of service, this court ordered case to proceed in the absence of the, respondents. On the hearing date, appellant who was in person request court to adopt his ground of appeal as his submission in support of his appeal, prayer that was accepted by this court.

It should be noted that this is a second appeal, dispute having ordained from primary court. Issue to be considered is whether there is point of law worth discussing by this court. From the records of trial court and first appellate court, this court will determine whether first appellate court invoking section 21(1) (b) of the magistrate Court Act, Cap 11 R.E 2019 was proper in the circumstances of this case. In the conclusion District court ruled that, respondent should not be convicted basing on the weak



defense case. Legally, In the trials parties who adduces heavier evidence is the one that, scale of law will fall in his/her side.

SM4 Vumi Hemedi Kangaya testified at page 11 of typed proceedings that,

***“Nashuhudia, Fatuma na Salma walichoma moto mashamba ya mketo na Duka na Mumwera – majira ya saa saba lakini tarehe sikumbuki”.***

While SM3 Vumi Hemedi Kangaya was being cross examined by Fatuma 2<sup>nd</sup> respondent at page 12 of trial court proceedings she replied: -

**Nilikuona unachima moto nilimpigia simu SM2 Duka majira ya saa saba.**

On further clarification on the same page 12 of trial court proceedings SM3 said,

***“Walichoma mashamba ya Mketo, Duka, Kitelebu na Mwera. Niliwaona wakichoma shamba la Duka (SM2) shamba hilo lilikuwa na nyasi sijaona kizinga na kiberiti ila moto ulikuwa unawake maeneo waliyokuwa wanasimama wao. Ushahidi wangu ni wakuona kwa macho “***

On another account SM3 Athumani Omari Kitelebu, at page 9 of trial court proceedings testified that: -

***“Siku fulani nilikuwa shambani. Shamba la mlalamikaji tunapakana, niliua moto unawake shambani kwa SM1 ndipo nikasogea kwenye huo moto nikamuona Saidi Mfaume anatokea pale pale ambapo moto ulianza kuwaka hivyo niliendelea na kazi zangu, ndipo niliongoza kwenda kwa mama Mwera na nilipofika nikakuta wanazima moto ili kuzuia nyumba yao isiungue. Nilipoenda kuelekea nyumbani kwangu nilikuta Salma na Fatuma wako katika***



***shamba la SM2 wakiwa wanachoma moto shamba la SM2, hivyo sikuwauliza chochote maana hatunaga mazungumzo na wao.***

When trial court gave the two respondents then accused chance to ask question, as seen at page nine (9) of trial court proceedings both two respondents said they don't have any questions as reflected below:

***Salma – sina swali***

***Fatma – sina swali***

It is only said Mfaume not party to this case at this stage asked questions to SM3. Failure by the two Respondent to cross examine SM3, implied that all what he testified is true. On further response to clarifications question MS3 at page 10 of trial court proceedings he replied:

- ***Said Kipindi namuona alikuwa amesimama na aliponiona aliondoka kuongoza nyumbani kwake.***
- ***Nilimuona wakikoleza moto kwa pamoja palipokusanywa nyasi. Sikuchukua hatua maana hawa akina dada maana ni watu washari.***

More evidence to implicate the two respondents was given by Fatuma at page ten (10) of trial court proceedings that: -

***“Nilishuhudia moto unawaka tarehe nisiyoikumbuka nikaenda kuona waliochoma maana moto ulitokea upande washamba la Mketo (SM1). Nilivyoona nikarudi kwenda nyumbanu nikakuta akina Fatuma na Salma wanachoma moto shamba la duka SM2 na kipindi nateremka mara ya kwanza nilimuona mjomba wao aitwae Saidi Mfaume.”***



From the above clear evidence by the three eye witnesses, let alone SM1 and SM2, who were the complainant, first appellate court wrongly invoked section 21(1) (b) of the magistrate courts Act Cap 11 R.E 2019 to quash conviction, to set aside sentence and compensation. There was nothing seriously said by the two respondents worth evidential value to uphold their appeal at first appellate court. To the contrary, their defense did not at all challenge evidence adduced by SM1, SM2, SM3, SM4 at the trial court.

In the end, appeal allowed, District court decision is quashed. Trial court decision is restored with some variations. Sentence of six months' imprisonment is set aside. Two Respondents to serve conditional discharge for twelve (12) months not to commit any criminal offence from the date of this decision. The two respondents, Salma Saidi Malisen and Fatuma Saidi Malisen, to comply forthwith including payment of compensation as ordered by primary court.



  
**Z. G. Muruke**

**Judge**

**30/11/2022**

Judgment delivered in the presence of appellant in person and in the absence of respondent.



  
**Z. G. Muruke**

**Judge**

**30/11/2022**