start fresh proceedings in the proper court.

There should be no outcry on damages or costs that may have accrued since the inception of this case in the High Court.

Order accordingly.

MICHAEL HAISHI *v.* REPUBLIC

[COURT OF APPEAL OF TANZANIA

(Omar, Ramadhani and Mnzavas, JJ.A.)]

13 May, 1992 - ARUSHA

Evidence - Witnesses contradicting themselves on vital details - Whether credible.

Evidence - Bias - All witnesses from a village hostile to that from which accused comes from -Inconsistency in evidence given by witnesses - Fears of bias must be dispelled.

Evidence - Identification - Witnesses contradicting themselves - Whether reliable.

The appellant is alleged to have been a party in malicious damage of property of another person. He was prosecuted, acquitted by the trial court, convicted on appeal to the High Court and then he appealed to the Court of Appeal challenging the decision of the High Court. His conviction was supported by evidence of identification and other pieces of evidence adduced by witness who hailed from a village which harboured hostility against the appellants village. It was argued in favour of the appellant that the evidence given by the witness had so many contradictions that it was unsafe to ground conviction on such evidence. Further it was said that since all the witnesses hailed from a hostile village there was need to dispel fears of bias and on the evidence these fears were not dispelled.

Held: (i) Since the witnesses contradicted themselves on the question of identification of the appellant that evidence cannot remain unshaken;

(ii) since all the witnesses hailed from a village which was hostile to that of the appellant a high degree of consistency than the one displayed is essential to dispel fears of bias.

Appeal allowed. A

Sang'ka, for the appellant.
Lyimo, for the respondent.

Ramadhani, Omar and Mnzavas, JJ.A.: At about mid-day B of 23/3/1987 the house of Slaa s/o Malley (P.W.1) at Gongali Village in Mbulu District was rid of its roof which was then put on the ground and set on fire. This was done by about fifty people of whom six were prosecuted for malicious damage to property contrary to section 326(1) of the Penal Code. The District Court of Mbulu found C that three accused persons had no case to answer and at the end of the trial the remaining three were acquitted because of insufficient evidence.

The Republic was aggrieved by that judgment and appealed against two of the discharged accused persons before the High Court D of Tanzania at Arusha. In the course of the hearing the Republic abandoned the appeal against one respondent but proceeded to secure a conviction and a sentence of imprisonment for two years with respect of the remaining respondent, Michael Haishi, the present appellant. E

As in the High Court, the appellant was represented before us by Mr. Sang'ka, learned advocate. The memorandum of appeal contained five grounds which crystalizes down to three. The first ground is on the credibility of the Prosecution witnesses while the second is on the existence or non-existence of circumstantial F evidence and lastly the severity of the sentence.

Mr. Sang'ka submitted that the learned first appellate Judge (Mchalla, J.) "erred in law and fact in interfering with the trial magistrate's findings on the issue of credibility in the absence of circumstances of unsual nature apparent in the record of the trial G court". To support his proposition, the learned advocate cited the following authorities: *Daudi Mwabusila v. John Mwalefila* [1967] H.C.D.n.59 and *Ibrahim Ahmed v. Halima Gullet* [1968] H.C.D.n. 76

Mr. Sang'ka said that the trial Magistrate who saw the H witnesses disbelieved them but the first appellate Judge accused him of having "acted on wrong principles and thereby grossly misdirected himself on the law and hence wrongly acquitted the 1st respondent". Mr. Sang'ka submitted that it was the learned Judge who misdirected himself when he said "I really fail to see how the I trial magistrate disbelieved P.W.2's evidence."

Mr. Sang'ka had a twofold attack on the credibility of the Prosecution Witnesses. First, he contended that they were not independent. He said that there were two hostile bordering villages: Gongali and Bassodowish. Mr. Sang'ka pointed out that all the P.W.s. were from Gongali while the appellant was the chairman of Bassodowish. Secondly, Mr. Sang'ka pointed out that the only eye witness, Akweso s/o Baric (P.W.2), was unreliable as he had contradicted himself in a material particular.

On behalf of the respondent/Republic was Mrs. Lyimo, learned State Attorney. She conceded that there was the inter-village hostility but contended that it was prejudicial since the four crucial prosecution witnesses were at various localities when they saw what they testified to in court and therefore did not have an occasion to conspire against the appellant. She thus argued that the prosecution witnesses were independent. Against Mrs. Lyimo admitted that there were contradictions in the testimony of P.W.2 but she submitted that they were not fatal because of the circumstantial evidence from the other prosecution witnesses.

At this juncture it is imperative that we pose to review what these prosecution witnesses testified in court.

The eye witness, P.W.2, stated that he had seen the appellant leading a group of about fifty persons to the house of P.W.1. This witness was very positive that he saw these people lifting off the roof of P.W.1's house, resting it on the ground and that the appellant then applied a lighted match-stick to it and thereby set the roof ablaze. On the other hand, P.W.3, Yohana d/o Ako, only recognised the appellant out of the fifty strong who were warming themselves against a fire which was about thirty paces from the house of P.W.1.

P.W.4, Bura s/o Lehema, testified that he was told by the appellant that the appellant "will demolish the house of P.W.1". Soon after that P.W.4 saw from far away smoke rising up to the sky but he did not know what was burning. P.W.4 added "when I saw them passing I did not know where they were going". P.W.4, Sahware Barie, saw the appellant with his group going to the house of P.W.1. We better let him tell his own story:

> They started to break the house of P.W.1. they break all the house and started to carry it from there and went with it outside the shamba. After a short time I saw a big smoke which was followed by fire.

P.Ws 2 and 5 claimed to have been eye witnesses yet their testimonies are irreconcilable. Whereas P.W.2 saw just the roof being hoisted down and set on fire by the appellant, P.W.5 witnessed the whole house being demolished and then merely saw a big smoke. P.W.5 did not see who lighted the fire and all that he said about the appellant was that "all that they did this accused was there" - So according to P.W.5 the transgression committed by the appellant was being present without knowing whether innocently or otherwise.

Then, as Mr. Sang'ka had pointed out, P.W.2 contradicted himself. Both in his examination-in-chief and in his cross-examination by the sixth accused, P.W.2 was emphatic that "It was only Michael [the appellant] who set fire to the house and no one else". However, P.W.2 shifted ground when he replied to the fourth accused that "Even this accused [fourth accused] did set fire to the house". So it was no longer only the appellant and no one else who lighted the fire.

Again P.W.2 testified that the whole mob of fifty people was in a single group. P.W.4, on the other hand, talked of three district groups and that the appellant was in the second one. At first, however, this witnesses had deposed: "They were too many but I only identified two of them, that were village chairman (1st accused) and 2nd accused. They passed me in a group." It is not clear whether by "in a group" he meant the whole lot was in a single group or as he had said later in the second group. Not only that, but P.W.4 went on to say that he identified the fifth accused too in the third group thus contradicting his earlier deposition that he had identified only 1st and 2nd accused persons. Then P.W.5 talked of two groups and that the appellant was in the first group contrary to what P.W.4 had said.

So we find that P.W.2 was not the only one who had contradicted himself but that P.W.4 did that as well and that P.Ws 2, 4 and 5 contradicted one another hopelessly-in vital details.

However, the learned Judge found that "Inspite of the discrepancies in P.W.2's evidence as pointed out by Mr. Sang'ka, that evidence on the whole remains unshaken. With respect we are a shade unsure whether that could be so and particularly as P.W.2 is controverted by the other who are themselves irreconcilable - and the fact that the learned Judge did not pose to consider these. On the contrary he found that "The evidence of P.W.2 was highly corroborated by another cogent evidence that was given by P.W.3 and P.W.4 who were also physically present at the scene..."

A This unhealthy state of evidence is aggravated by the fact of hostility which was established to exist between the two villages. The learned Judge stated:

> I tend to agree with the finding of the trial magistrate that the
B source of the problem in this matter could be a dispute over ownership of land which the parties in this case are contending.

If so, in our considered opinion, then the probability of biased testimony, prompted by that hostility becomes a matter of nagging
C concern which could not be lightly waived aside by saying:

> There is no reason, let alone good reason, given why these witnesses who are independent witnesses at that should have conspired to testify falsely against the 1st respondent and
D thereby implicate him in this charge.

The trial magistrate correctly pointed out that all the six prosecution witnesses hail from Gongali Village while the appellant was the chairman of Bassodowish Village. So a high degree of
E consistency than the one displayed is essential to dispel fears of bias. Thus we agree with the trial magistrate that:

> These collection of those doubts make any court of justice and law find the accused not guilty at all.

F

Once we have come to this conclusion then the remaining two grounds of appeal are superfluous. There could be no question of corroborating circumstantial evidence since that, too, would have come from the other biased witnesses. Of course if the appellant is
G not guilty there is no question of punishment.

We thus allow the appeal, quash the conviction, set aside the punishment and order the immediate release of the appellant unless he is otherwise lawfully held.

H

Appeal allowed.