

IN THE DISTRICT COURT, DZODZE HELD ON TUESDAY THE 27TH OF JUNE, 2023
BEFORE HIS WORSHIP NELSON DELASI AWUKU DISTRICT MAGISTRATE.

Case No. B1/12/21

THE REPUBLIC

VRS

KELVIN ASHIAGBOR & 2 OTHERS

JUDGMENT

PARTIES

COMPLAINANT PRESENT

ACCUSED PERSONS PRESENT

REPRESENTATION

CHIEF INSPECTOR HAMID MOHAMMED FOR PROSECUTION PRESENT

BACKGROUND

The accused persons were arraigned before this Court on 5th March, 2021 on charges of Conspiracy to commit crime to wit causing unlawful damage and Causing Damage contrary to Sections 23(1) and 172 of the Criminal Offences Act, 1960 (Act 29).

BRIEF FACTS

The facts as read by Prosecution stated that, the complainant Stephen Kwame Soshie is a 48-year-old teacher and a resident of Weta-Ashiyor. The accused persons, Kelvin

Ashiagbor 30 years is a teacher, Kofi Ashiagbor 47 years is a lotto writer and Agbeshie Awudi 35 years is also a farmer.

The Prosecution stated that there is a pending chieftaincy dispute between the family of the complainants and the accused persons which matter was the subject of a suit before the Sogakope High Court.

The Prosecution stated that in order to ensure that the peace in the community is sustained, the District Commander of the Dzodze District police command invited both families for a meeting on 15th January, 2021.

The prosecution stated that whiles the family of the complainant were preparing to attend the meeting, the accused persons went to the compound in between the Goba shrine and Ewle shrine at Weta-Ashiyor and demolished three traditional earth tripod stoves valued at GHC 1, 840.00 belonging to the complainant.

The prosecution stated that the accused persons were seen by the complainant's daughter, Margaret Soshie and her Auntie Mercy Alipui who were sweeping the compound at the time.

The prosecution stated that a report was made to the police and the accused persons were subsequently arrested but they denied the offences in their respective cautioned statements. After investigations, they were charged and arraigned before the court for prosecution.

PLEA OF ACCUSED PERSONS

The accused persons pleaded not guilty to the charges and were admitted to bail.

Witness statements of witnesses for prosecution together with charge statements and investigation cautioned statements of the accused persons were filed by the prosecution and served on the accused persons for trial.

THE CASE OF PROSECUTION

The prosecution relied on the evidence of the complainant as his first witness and called as additional witnesses Margaret Soshie as PW2 and the police investigator D/Corporal Theodore Effah Abayie as PW3.

In his evidence to the Court, the complainant, first prosecution witness stated that, after the death of Torgbui Soshi there arose a need for the Soshi family to install a successive chief as custom demanded to avoid unwanted deaths in the family.

PW1 stated that in view of that, the Soshi family commenced the necessary rituals towards the installation of the next chief in the latter part of the year 2020.

PW1 stated further that whiles the performance of the rituals was still in progress the family of the accused persons caused a writ of summons to be served on them on 8th January, 2021.

PW1 stated that on the 14th of January, 2021 when they appeared before the High Court, the judge after adjourning the case upon the request of their lawyer advised both parties to go about their activities in a peaceful manner without interference from each side until the next adjourned date. They were also cautioned to report any incident that happen within the period to the police.

PW1 stated that on the 15th of January, 2021 whiles preparing to attend a meeting scheduled by the District Police Commander between both factions, he heard loud shouts

from their family compound located in between the Goba shrine and Ewle compound so he rushed there together with his brother Benjamin Soshi.

PW1 stated that on his arrival, he noticed that his three earth tripods valued at GH¢1,840.00 had totally been broken down.

PW1 stated that his daughter Margaret Soshi who always swept the compound was there with her Auntie Mercy Alipui and they both stated that it was the accused persons who demolished the tripods with their hands and absconded.

PW1 stated that after they had returned from court, the family of the accused threatened that they were going to shoot them if they came out to continue the rituals. But they refused to respond to them for the sake of peace.

In her evidence in support, PW2 stated that on the 15th of January, 2021 at approximately 6:30 she was sweeping the compound and saw the accused persons walking towards their compound.

PW2 stated that as soon as the men arrived, they started demolishing their tripods with their hands.

PW2 stated that her Auntie who heard the noise of the destruction immediately rushed to the scene and saw her with the three men.

DEFENCE OF FIRST ACCUSED

In his witness statement filed on 28th October 2022, A1 admitted that there is a chieftaincy dispute between the Soshi and Ashiagbor family which matter was the subject of a dispute before the Sogakope High Court.

A1 stated that on the said 15th January, 2021 they had earlier received an invitation to attend a settlement meeting with the District Police Commander and that he was in their palace at 5:30am prior to their departure to the meeting at 8:00am.

A1 stated that it was in the office of the police commander that he heard about the purported destruction of the tripods.

A1 stated that PW1 was present at the meeting with the police commander on the said day but did not mention his name or any of the Ashiagbor family members as the ones responsible for the incident.

A1 denied his involvement in the alleged incident and stated further that when he was invited by the police he stated in his caution statement that he knew nothing about the offence.

DEFENCE OF THE SECOND ACCUSED

The second accused stated that, at the time of his arrest, he had just been discharged from the Ho Teaching Hospital where he was being treated after a motor accident and was then in crutches.

A2 stated that it was at the District Police Commander's office that he also first heard about the incident and that at the said meeting, PW1 never mentioned him as being part of those who perpetrated the act.

A2 denied committing the offences and stated that he was surprised when the police charged him for prosecution.

DEFENCE OF THE THIRD ACCUSED

A3 stated that he had left Weta Ashiyor to Atsavi about six years prior to the incident and that on that day, he was in his house at Atsavi preparing to go to the farm before his elder brother Tsamiga Felix Agbeforbu visited him.

A3 stated that he had not seen the other accused persons any time prior to and on the day of the alleged incident for him to conspire with them to commit any offence.

A3 stated he was surprised when he was charged with the offence and denied committing any offence.

THE LAW

Burden of Proof

In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind will find the existence of the facts beyond reasonable doubt.

In the case of **Abdulai Fuseini v the Republic**, reported in [2020] Crim LR, page 331, the Supreme Court reiterated the basic principle underpinning criminal prosecution in our courts as follows;

“Proof beyond reasonable doubt is actually proof of the essential ingredients of the offence charged and not mathematical proof”. See also Frimpong alias Iboman v. The Republic [2012] 1 SCGLR 297.

Section 11(2) of the Evidence Act, 1975 (NRCD 323) provides as follows;

“In a criminal action, the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt required the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of a fact beyond reasonable doubt”.

The accused persons in this case have been charged with the offences of conspiracy to commit crime namely unlawful damage contrary to sections 23 and 172 and causing unlawful damage contrary to section 172 of the Criminal Offences Act, 1960 (Act 29).

Conspiracy

Section 23(1) of the Criminal Offences Act, 1960 (Act 29) in defining the offence of conspiracy states that;

“where two or more persons agree to act together with a common purpose for or in committing or abetting a criminal offence, whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet the criminal offence”.

In the case of ***The Republic v Ernest Thompson & Others [2021] DLSC 10174 at page 10174*** the court stated that; *“under the definition of the offence of conspiracy, a conviction could be secured upon proof of the following ingredients;*

- i. Prior agreement for the commission of a substantive crime;*
- ii. Acting together in the commission of the crime in circumstances which show that there was a common purpose;*
- iii. Previous concert even if there was evidence that there was previous meeting to carry out the criminal conduct”*

See also the cases of *Francis Yirenkyi v The Republic* (2016) 99 GMJ 1 SC and *Agyapong v The Republic* [2015] 84 GMJ, 142, CA.

Same elements were stated in the case of *Republic v Baffoe Bonnie & Others (Suit No. CR/904/2017) (Unreported) dated 12th May 2020*, where the elements of conspiracy were outlined by the court as follows;

“For prosecution to be deemed to have established a prima facie case, the evidence led without more should prove that:

- a. there were at least two or more persons*
- b. there was an agreement to act together*
- c. the sole purpose for the agreement to act together was for a criminal enterprise”.*

The effect of the principles in the above authorities is that, persons accused of conspiracy must not only be established to have agreed to act but there must be an agreement to act together for a common purpose to commit crime.

It is also significant to note that, under the new formulation of the law on conspiracy as defined by the Supreme Court, a person could no longer be guilty of conspiracy in the absence of the evidence of any prior agreement. *See KINGSLEY AMANKWA (a.k.a SPIDER) vs. THE REPUBLIC [2021] DLSC 10793 @ page 28 per Dotse JSC.*

Causing Unlawful Damage

A person who intentionally and unlawfully causes damage to any property to a value not exceeding one million cedis or without a pecuniary value, commits a misdemeanour. **Section 172 (1) (a) of the Criminal Offences Act, 1960 (Act 29).**

Under Section 173 of Act 29, damage is defined to include not only damage to the matter of a thing, but also any interruption in the use of that thing, or an interference with that thing by which the thing becomes permanently or temporally useless or by which expense is rendered necessary in order to render the thing fit for the purposes for which it was used or maintained.

Section 174 (1) of Act 29 provides in respect of causation in relation to unlawful damage that, *“a person does an act or causes an event unlawfully where that person is liable to a civil action or proceeding, or to a fine or other punishment under any enactment;*

- a) in respect of the doing of the act causing an event, or*
- b) in respect of the consequences of the act or event, or*
- c) in which that person would be so liable if that person caused the event directly by a personal act, or*
- d) in which that person is liable to be restrained by injunction or any other proceeding from doing that act or causing that event”.*

ANALYSES AND EVALUATION OF EVIDENCE

For the purposes of Count one in respect of the offence of conspiracy, the prosecution had a duty to adduce evidence to establish the fact that there was a prior agreement between the accused persons to act in common purpose towards the commission of the substantive offence or any other offence.

The accused persons having denied the allegations, the veracity of the complainant's claim could only be ascertained by subjecting the evidence of the witnesses of prosecution to scrutiny in addition to the other forms of evidence put before court.

As stated earlier, the prosecution called as its first witness, the complainant Stephen Kwame Soshie. The substance and nature of his entire evidence regarding the damage caused was contained in paragraph 13 of his witness statement dated 7th April, 2021.

Paragraph 13 of his evidence- in-chief is as follows;

“My daughter Margaret Soshi who always swept the compound was there with my Aunty Mercy Alipui and they both told me that it was A1 Kelvin Ashiagbo, A2 Kofi Ashiagbor and A3 Agbeshi Awudi who deliberately demolished the stoves with their bare hands and took to their heels”.

The effect of the above evidence was an admission that PW1 himself did not see the accused persons actually causing the damage but was relying on what others told him.

PW1 emphasized the above point under cross examination by counsel for the accused persons as follows;

Q. On 15th January, 2021 did you see the accused persons with your own eyes destroying the tripods?

A. I did not see them myself.

Q. So what you told this court in your witness statement is not because you saw the yourself, not so?

A. That is so

Q. So you cannot tell the court that the three accused persons used their bare hands in destroying the tripods, not so?

A. Yes I did not see them but I have witnesses.

Whatever PW1 states that he was told is hearsay so long as PW1 was not present and did not see the damage being caused by the accused persons. Admitting the testimony of PW1 would be against the hearsay rules provided under section 117 of the Evidence Act, 1975 (NRCD 323).

In simple terms, the rule against hearsay requires that a witness talks about something of which he has knowledge. He should rely on his own observation and recall of the matter in dispute.

The other witness called to speak to the issues was PW2. PW2 stated that, she together with her Aunty Mercy Alipui saw the accused persons on the day of the incident causing damage to their tripods.

By her evidence, the only person who witnessed the incident together with her and could corroborate her claim was Mercy Alipui. The witness statement earlier filed for the said Mercy Alipui to give evidence was withdrawn by the prosecution without any apparent reason.

The effect of the withdrawal left the evidence of PW2, the only witness who claimed to have witnessed the accused persons destroy the tripods uncorroborated.

Although corroboration is not mandatory per the provisions of section 7 of the Evidence Act, 1975 (NRCD 323), it is held by the Supreme Court in the case of **Eric Asante (No.1) v the Republic [2020] Crim LR, page 618** that; *“the fact that corroboration is generally not mandatory to secure conviction does not mean that where corroborative evidence could be obtained*

in a case, the prosecution can fail to lead such evidence and turn around to argue that corroboration has not been made a requirement by the statute creating the offence in question”.

The police investigator who gave evidence as PW3 also relied entirely on the accounts of PW2 and the said Mercy Alipui.

The said Mercy Alipui in the opinion of the court was a material witness who ought to have spoken to the issues attributed to her because she is mentioned as the only one to have witnessed the act of the accused persons together with PW2.

On the 26th of September, 2022 when A3 asked the investigator why he was charged with the offences despite he denying same in his cautioned statement, the witness answered as follows;

Q. Are you saying that your investigation revealed that I caused damage to the tripods?

A. Yes

Q. Do you remember when I came to the police station I told you that I do not know anything about the damage caused because I was not around that place?

A. Yes you did.

Q. What did you discover through your investigation that made you charge me with the offence?

A. There are witnesses who saw you.

Q. I am putting it to you that I did not cause damage to the tripods?

A. You did.

The documents tendered in evidence by prosecution through PW3 consisted of the investigation cautioned statements and charge statements of the accused persons, a copy of photograph taken at the scene showing the damaged tripods and an estimated cost of the damaged tripods.

For the offence of causing damage, the elements to be established are;

- a. Whether or not a property belonging to the complainant had been destroyed?*
- b. Whether or not the damage was caused by the accused persons?*
- c. Whether the actions of the accused persons were intentional and could not be justified in law.*

By the failure of Mercy Alipui to give evidence, the entire case of prosecution relied on the evidence of PW2. Her evidence however remained uncorroborated because both PW1 and PW3 as earlier stated gave hearsay evidence which by our laws cannot provide a foundation for corroboration. **See the case of G/L/Cpl Ekow Russel v the Republic [2020) Criminal Law Report page 181.**

To rely on the evidence of PW2 alone to convict the accused persons, the court must be convinced that the evidence is without any shred of doubt. However, PW2 failed to convince the court when she was unable to describe what the accused persons she claimed to have seen were wearing on the said day.

The responses of PW2 under cross examination by counsel for accused persons on 2nd June, 2022 are reproduced as follows;

Q. Can you describe the shirt A1 was wearing that morning when you claimed you saw him?

A. No.

The above response was also repeated by the investigator under cross examination by A1 on 26th September, 2022;

Q. Did PW2 tell you the colour of the shirt I was wearing when she saw me?

A. No

The defence put up by A3 that he was not available on the day of the incident is in the nature of alibi but he failed to give the necessary notice. In the case of **Afwireng v. the Republic [1972] 1 GLR 270** it was held that, *“where a magistrate does not call upon an accused person to give a notice of alibi when such defence is raised, and the prosecution also does not call the attention of the court to the requirement and does not apply for the particulars of the defence to be given, such failure does not exclude the evidence of alibi”*.

Under Section 131 (3) of Act 30, where the accused puts forward a defence of alibi without having given notice the court shall call on the accused to give notice to the prosecution of the particulars forthwith or within the time allowed by the court and after the notice has been given shall if the prosecution so desires adjourn the case.

Given the opportunity, A3 called one Felix Tsamiga Agbeforbu as witness who stated that at about 6:15am on the day of the incident he visited A3 to discuss some family related issues in A3's house. The credibility of the witness and his assertions were not put in doubt by prosecution under cross examination.

A2 who stated that he had just been discharged from the Ho Hospital and was in crutches provided no evidence of the alleged hospitalization but as a general rule, an accused has no burden to prove his innocence or call any witness. Where the prosecution is unable to call witnesses who could put an issue beyond reasonable doubt, it is not the duty of the accused to remedy that defect. **See the case of Bruce-Konuah v. the Republic [1967] 611.**

CONCLUSION

In sum, although the burden of proof in criminal cases has been held in the case not to mean proof beyond a shadow of doubt, it is also the principle that *A prosecution who fails to call corroborative evidence when same can be obtained does so at its own peril as that failure may raise a reasonable doubt in the mind of the court as to the guilt of an accused person*". **See Eric Asante (No.1) v the Republic (supra).**

The prosecution failed to prove the elements of conspiracy against the accused persons on count one.

Given the failure of prosecution to call Mercy Alipui as a witness, the entire case of the prosecution relied on the evidence of PW2 which stood uncorroborated and weakened in some aspects under cross examination by her failure to respond accurately to some relevant questions.

The mandate for the court to convict is to be only exercised upon satisfaction that a case has been proved beyond reasonable doubt by the witnesses called and evidence put before it.

In this circumstance, the court does not deem the threshold to have been met and on the basis of that acquit and discharge the accused persons on all counts.

NELSON DELASI AWUKU
MAGISTRATE