IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 406 OF 2013

EMMA NGWADA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Karua, J.)

dated the 19th day of August, 2013

in

Criminal Sessions Case No. 8 of 2012

JUDGMENT OF THE COURT

28th August & 1st September, 2015

MASSATI, J.A.:

EMMA NGWADA (DW1), the appellant herein was the owner/operator of a pub known as OMEGA BAR at Isanga, in the outskirts of Mbeya City. She had employed NELLY SHEDRACK (DW2) as the only attendant at the bar. On 28.9.2011 at around 5.00 pm, DW1 went to the bar and left at about 7:30 pm. At around 10.00 pm, DW2 rang her (DW1) to inform that there was one customer who had taken a lot of drinks but refused to pay. DW1 instructed DW2 to hand over the matter to a security guard, employed by New Imara Security Guards to deal with him. Next day, at around 4.30 pm she received a call from someone who wanted to see her at OMEGA BAR. She went there where she witnessed DW2 talking to some

woman. When she was about to pack out she noticed smoke coming from one of the rooms at the backyard house. After the fire was put out, it was then discovered that there was a body of a dead person. That was when the police were involved.

The police collected the charred body of the person. After a postmortem examination of the body, it was established that that it was the body of one **HANSEN MTONO** (the deceased) and that the cause of death was fire or burn injury. The report was received in court as Exhibit P1. He was identified to be the person who refused to pay for the drinks at OMEGA BAR and left in the hands of a security guard, identified simply as a Maasai.

The prosecution case was that it was the appellant's unlawful act or omission which caused the death of the deceased. The central axle in the prosecution case was in the fact, which is not disputed, that the deceased died in a room, in which he was confined, and from which the fire started.The theory was that, DW1 and DW2 had a hand in it because he refused to pay for the drinks and that she (DW1) refused to let him out, when his mother **MAGDALENA MTONO** (PW1) pleaded with her, for long even before the fire broke out. The theory was built from the investigation

by PW2 **No. 382 D/Cpl. SIMON**, who supervised the post mortem examination, and after interrogating "the accused" realized that:

> *"the accused were negligent in locking the deceased in a room; and that*
>
> *It is the second accused who conspired with the watchman to lock the deceased in the room in question."*

On the other hand, **PW4D. 6578 D/Cpl RASHID** was just assigned to draw a sketch map of the scene of crime which was admitted as Exh. P2. **PW3, ANGELO EMMANUEL SANGA**, Chairman of the area where the bar was situated was just called to the scene to witness the fire and the dead body, whom he identified as that of HANSEN MTONO. It was on the basis of such evidence and theories that DW1 and DW2 were charged with the offence of manslaughter contrary to section 195 of the Penal Code.

When called upon to defend themselves, both DW1 and DW2 denied responsibility for causing the deceased's death. Although DW2 acknowledged that the deceased owed some shs. 52,400/= for the drinks he and his party had partaken, both denied responsibility for locking him up in the room, shifting the blame to the Maasai guard who had since disappeared in this air.

However, after hearing the prosecution and the defence cases, the High Court (Karua, J.) acquitted the duo of the offence of manslaughter, but convicted them of the minor offence of unlawful confinement contrary to section 253 of the Penal Code. In addition, the trial court also ordered the appellant to pay PW1, a compensation of Tshs. 10,000,000/=. The appellant is aggrieved by that decision and has filed an appeal to this Court.

The appellant's memorandum of appeal consists of two grounds, namely: -

> *"1. The High Court, erred on Convicting the Appellant with the offence of wrongful Confinement C/s 253 of The Penal Code* ***(Cap. 16 R.E. 2002)*** *which offence was not proved against her.*
>
> *2. The High Court, erred on ordering the Appellant to pay* ***Tshs: 10,000,000/=*** *Compensation to the Mother of the deceased, in the circumstances of the case."*

At the hearing of the appeal, Mr. Mika Mbise, learned counsel appeared for the appellant, and Mr. Francis Rogers, learned Senior State Attorney appeared for the respondent/Republic. Mr. Mbise, informed the

Court that he adopted the written submission which had earlier on been filed, and had nothing more to add.

On his part, Mr. Rogers submitted that it was wrong on the part of the trial court to have convicted the appellant of the offence of unlawful confinement contrary to section 253 of the Penal code, under section 300 of the Criminal Procedure Act (the CPA) since the substituted offence was neither cognate nor minor to the one of manslaughter. This was the more so because there was no evidence that the appellant was the one who ordered the confinement, so the mens rea required under section 253 of the Penal Code, was not proved. In aid, he cited to us the decision of the High Court in **JOSEPH SHAGEMBE v R** (1982) TLR. 147.

With regard to the order of compensation, Mr. Rogers submitted that, since the trial court acquitted the appellant of the offence involving causing death; it was wrong and contradictory for it to order compensation as solace to PW1 for the loss of her son as if the appellant had caused it.

But, the learned counsel went on, it was equally wrong because it was imposed without inquiring from the appellant on the means of payment. He cited **SELEMANI MISURI v R** (1973) LRT n.9.in support of that proposition. With these remarks, Mr. Rogers prayed that we allow the appeal.

The only important issue that has to be determined in this appeal, is whether the trial court was right in entering a conviction for unlawful confinement, as an alternative or minor offence to that of manslaughter, with which the appellant was charged. In his judgment the learned trial judge justified this under the aegis of section 300 of the CPA. Section 300 of the CPA is reproduced below:

> *"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*
>
> *(2)When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*
>
> *(3)For the purpose of this section the offences specified in section 222 of the Penal Code shall, where a person is charged with the offence of attempted murder under section 211 thereof, be deemed to be minor offences."*

the Penal Code which, reads as follows:

> *"253:* ***Punishment for wrongful confinement***
>
> *A person who wrongfully confines another person is guilty of an offence and is liable to imprisonment for one year or to a fine of three thousand shillings."*

For a court to resort to section 300 of the CPA, the particulars of the offence sought to be substituted must be a combination of at least some particulars which in themselves constitute a minor offence. Section 195(1) of the Penal Code comprises of an unlawful **act** or **omission** which causes the death of another person. Section 195 (2) provides that for an omission to amount to an unlawful one, it must be one amounting to culpable negligence to discharge a duty tending to the preservation of life or health whether or not the omission is accompanied by an intention to cause death or bodily harm.

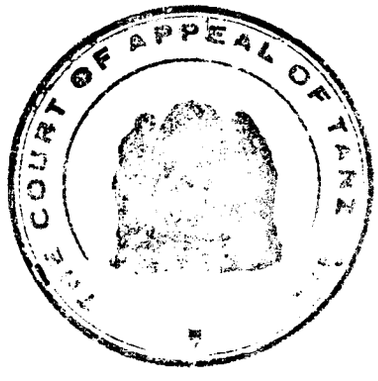
But in the present case, there was no evidence as to the cause of fire which consumed the deceased. There was also no evidence whether it was the appellant who ordered the deceased's confinement, which would have given her the corresponding duty to open the door to the room from which she completely disassociated herself of the responsibility. Given

such evidence there is no way PW2's theory on conspiracy and negligence by DW1 and DW2 could be sustained. In the circumstances we agree with both learned counsel that even the minor offence of unlawful confinement was not established. Accordingly we allow the appeal on this ground alone.

Having allowed the first ground of appeal, we quash the conviction and set aside the sentence and order of compensation, which rested on the conviction.

Appeal allowed.

DATED at **MBEYA** this 31st day of August, 2015.



S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL