IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUANDA, J.A., MMILLA, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL NO. 470 OF 2015

NYAMHANGA S/O MAGESA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Ebrahim, J.)

Dated 30th day of September, 2015
in
HC. Criminal Appeal No. 111 of 2013
.....

JUDGMENT OF THE COURT

8th & 12th December, 2017

MMILLA, J.A.:

Nyamhanga s/o Magesa is currently in prison serving a life sentence. The sentence was meted against him by the Court of Resident Magistrate at Musoma before which he was charged with the offence of arson contrary to section 319 (a) of the Penal Code Cap. 16 of the Revised Edition, 2002. Following that conviction, the appellant unsuccessfully appealed to the High Court of Tanzania at Mwanza, hence the present appeal to the Court.

The facts of the case are short and straight forward. On the night of 4.8.2013, Nyangi w/o Warioba (PW1), who is the appellant's mother, was asleep at her home at Makutano Nyakanga village within Bunda District in the Region of Mara. At about 23:00 hours, she heard an alarm which happened to have been raised by her grandson one Samson Samwel (PW2), she hurriedly woke up and rushed outside. She comprehended that one of her houses was on fire. Around that time she saw the appellant torching the second and the third houses. She raised an alarm, but the appellant ordered her to keep quiet. In all, three houses were burnt. Another person who was around when that was happening was PW3 Nyambura Magesa, who was the appellant's sister. She said she saw the appellant torching the third house. The appellant was later on arrested and charged with that offence.

The appellant had protested his innocence. He testified that on the night of 3.8.2013 he arrived home around 20:00 hours and went to sleep immediately after eating. He allegedly woke up at mid-night after experiencing unusual heat in the house in which he was and rushed out, whereupon he found his mother's houses on fire. He denied commission of the alleged crime.

When the appeal came for hearing before us, the appellant appeared in person and was not represented, whereas the respondent Republic enjoyed the services of Mr. Castuce Ndamugoba, learned Senior State Attorney, assisted by Ms Docas Akyoo and Mr. Moris Mtoi, learned State Attorneys.

The appellant's memorandum of appeal raised four grounds which converge into one major complaint that the first appellate court did not properly analyze the evidence on which his conviction was based.

At the commencement of hearing of the appeal, the appellant chose for the Republic to commence, but reserved his right to submit thereafter if need would arise.

On his part, Mr. Ndamugoba hurried to inform the Court that they were opposing the appeal. He submitted generally that the evidence of PW1, PW2 and PW3 who were the prosecution's eye witnesses established beyond doubt that the appellant was the person who willfully set those three houses on fire. He refuted the idea that the appellant could have done so by accident, adding that even, there was nothing to establish that the appellant was mentally sick at the time he committed that offence. Besides, he added, PW1, PW2 and PW3, all of whom were his relatives,

had no any grudges against the appellant. He urged the Court to dismiss the appeal.

On the other hand, Mr. Ndamugoba was concerned that the sentence was excessive. He submitted that section 319 (a) of the Penal Code under which the charge was based does not prescribe a minimum sentence, therefore that the trial magistrate ought to have complied with the provisions of section 170 of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA) which limits the sentencing powers of subordinate court magistrates. He contended that under that section, the trial magistrate ought to have imposed a sentence of 5 years imprisonment. He requested the Court to intervene. On the basis that the appellant has so far served about 4 years, Mr. Ndamugoba urged the Court to impose a sentence which may result into appellant's immediate release from prison.

The appellant insisted that he was innocent, and pressed the Court to constructively consider the grounds he advanced and allow the appeal. On the question of sentence, he left the matter in the hands of the Court.

We have carefully considered the submission advanced by Mr. Ndamugoba on the light of the ground of appeal rephrased above, as well

as the point he raised concerning the severity or otherwise of the sentence which was meted against the appellant.

To begin with, we agree with the findings of both courts below that PW1, PW2, and PW3 were material witnesses in this case. Foremost is the evidence of PW2 who told the trial court that on arrival home on the night of 4.8.2013, his uncle (the appellant) woke him up, and talked to him very briefly. Immediately thereafter, the former lit a wick lamp, took a bicycle tyre which he put on the burning wick lamp until it caught fire, and used it to torch the three houses. He raised alarm which was immediately answered by his grandmother, PW1. Later on they were joined by PW3. PW2 was emphatic that it was the appellant who perpetrated that crime, and that the burning houses resulted into a big ball of fire which brightly lit the entire area, making it possible for everyone around to see what was going on.

The evidence of PW2 was corroborated by that of PW1 who told the trial court that on rushing out after the alarm, she found out that one of her houses was on fire and that though she did not witness the appellant torching the first house, she saw her son setting fire to the second and the

third houses. On the other hand, PW3 testified that he witnessed the appellant torching the third house.

We have traversed all the circumstances which surrounded the commission of that offence. On the evidence, we are satisfied that the crime was executed by none other but the appellant. As correctly submitted by Mr. Ndamugoba, there was nothing on the record to suggest that the torching of those houses was accidental, or that could be the appellant was at the time mentally sick. The evidence clearly shows that the appellant burnt those houses willfully.

In the circumstances, we find that the courts below justifiably found and held that that atrocious crime was willfully committed by the appellant. Consequently, his appeal on conviction lacks merit and we dismiss it.

We now turn to consider the concern raised by Mr. Ndamugoba that the sentence of life imprisonment which was meted out to the appellant was excessive.

The starting point is the provisions of section 319 (a) of the Penal Code under which the charged offence was founded. Section 319 of that Act provides that:-

"Any person who willfully and unlawfully sets fire to–

(a) any building or structure whatever, whether completed or not;

(b) any vessel, whether completed or not;

(c) any stack of cultivated vegetable produce or of mineral or vegetable fuel; or

(d) a mine or the workings, fittings or appliances of a mine,

is guilty of an offence and is liable to imprisonment for life." [The emphasis is ours].

As correctly submitted by Mr. Ndamugoba, this section does not provide for a minimum sentence; and has used the words ". . . **liable to imprisonment for life**". We hasten to say that where those words are used in any particular provision providing for a punishment, the proper interpretation is that the court has discretion to pass a sentence which may be appropriate in the circumstances of that particular case. We wish to borrow a leaf from the Ugandan case of **Opoya v. Uganda** (1967) E.A. 752, in which the Court stated that:-

"It seems to us beyond argument that the words ***"shall be liable to"*** *do not in their ordinary meaning require the imposition of the*

stated penalty ***but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only*** *and while the liability existed the court might not see fit to impose it."* [The emphasis is ours].

See also the cases of **Dauson Athanaz v. Republic**, Criminal Appeal No. 285 of 2015, CAT and **Abdi Masoud @ Iboma v. Republic**, Criminal Appeal No. 116 of 2015, CAT (both unreported).

Therefore, guided by the above expression, section 319 (a) of the Penal Code in the present case creates a liability for the convicted person to suffer a certain mode of punishment, but it does not impose an obligation upon the sentencing court to award the mentioned penalty.

We also wish to point out that, since section 319 (a) of the Penal Code does not prescribe the minimum sentence, the trial magistrate was duty bound to observe the dictates of section 170 (1) and (a) of the CPA under which, **a magistrate of the rank below a Senior Resident Magistrate** cannot impose a sentence of imprisonment of more than five (5) years, unless it is indicated that such sentence is subject to

confirmation by the High Court, or falls under the Minimum Sentences Act. Section 170 (1) (a) of the CPA provides that:-

> *"170(1) A subordinate Court may, in cases in which such sentences are authorized by law, pass the following sentences:*
>
> *(a) imprisonment for* ***a term not exceeding five years****; save that where a Court convicts a person for a scheduled offence it may if such sentence is authorized for such offence for a term not exceeding eight years."* [The emphasis is ours].

In the present case, the sentencing magistrate was a mere Resident Magistrate. The offence of arson is not a scheduled offence under the Minimum Sentences Act. It follows therefore that the sentence under consideration was illegal.

Since that aspect escaped the mind of the first appellate court, *ipso dure,* the Court has an unreserved duty to intervene. Consequently, we invoke the powers obtaining under the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap, 141 of the Revised Edition, 2002, on the basis of which we set aside the sentence of life imprisonment which was imposed against the appellant. In its stead, taking into account that the appropriate sentence ought to have been imposed is a term not exceeding

five (5) years, and in so far as the appellant has up to now served about 4 years, we sentence him to such a period as will result into his immediate release from prison.

Order accordingly.

DATED at **MWANZA** this 12th day of December, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL