IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUSSA, J.A., LEVIRA, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 355 OF 2018

EMMANUEL CHIGOJI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the Resident Magistrate Court of Dodoma at Dodoma)

(Rutta, PRM- Extended Jurisdiction)

dated the 23rd day of November, 2015
in
Criminal Appeal No. 27 of 2015

JUDGMENT OF THE COURT

18th & 25th September, 2019

LEVIRA, J.A.:

The appellant, Emmanuel Chigoji was arraigned before the District Court of Dodoma at Dodoma, tried and found guilty of two counts. The first count was Arson contrary to section 319 and the second count was Assault Causing Actual Bodily Harm contrary to section 241 both of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). He was sentenced to serve life imprisonment in respect of the first count and three years imprisonment for the second count;

however, the two sentences were ordered to run concurrently. Aggrieved with both the conviction and the sentence he unsuccessfully appealed to the Resident Magistrate Court of Dodoma, Extended Jurisdiction and hence this second appeal.

The brief background of the case as obtained from the record states that, on or about 8th day of July, 2012 at Chonde Village within Bahi District and Region of Dodoma after having set fire to the house of Hagali Mukatalo (PW1) did cause her child one Andrea Banda (PW4) to sustain severe burn injuries. However, when arraigned before the trial court to answer charges he was facing, the appellant denied the both charges. Thus the prosecution had to call five witnesses to discharge their obligation of proving the charges. PWI who was the complainant testified to the effect that on 7/7/2012 at 20:00 hours one Emmanuel Chigoji (the appellant herein) set on fire to her house. PW1 exited her house after the fire had been set. She said, there was heavy light due to that fire and thus, she went to the rear of the house where she saw the appellant with her naked eyes, she moved closer to him and asked him why he set on fire to her house. The appellant did not respond, instead, he ran away. PW1 testified further that, her children were inside the

house and in the cause of attempting to get out, one of the said children called Andrea Banda (PW4) was injured by fire. PW1 raised an alarm for help and many people assembled at the scene of crime including village chairman, one Daud Ng'uti (PW2), Tano Chomola (PW3), Joshua Mtemi and Msafiri Chavumbi. In that fateful night, Msafiri Chavumbi told the people who had gathered to disperse till the following morning where they made a follow up of foot prints up to the house of the appellant. According to PW1, upon being asked why he set on fire to the said house, the appellant, firstly, conceded that he set on the fire due to the reason that PW1 refused to cohabit with him. PW1 admitted that in 2008 she had a love affair with the appellant and they used to cohabit. But their relationship did not last because the appellant had bad habit. However, the appellant requested PW1 for another chance so that they continue with their relationship but PW1 refused; as a result, the appellant set on fire to PW1's house. PW2 and PW3 being among people who responded to PW1's alarm testified to the effect that they were told by PW1 that the appellant was the one who set on fire to the house in question. PW4's evidence was to the effect that he was injured by fire. The Police Officer, No. 65439 Mwamin (PW5) was the investigator who among others visited the scene of crime and saw the house which

was destroyed by fire. He also saw PW4 who sustained fire injuries on the material day. PW5 issued PF3 for PW4's treatment.

In his defence the appellant denied to have been involved in committing the alleged Arson. However, during cross examination the appellant admitted that he used to cohabit with PW1 as husband and wife and they have one child. He stated further that they (the appellant and PW1) divorced for about three years by then due to intolerable conducts of PW1 but still, PW1 was hunting him by any means after their divorce.

The appellant presented before us his memorandum of appeal containing six grounds of appeal expressing his dissatisfaction with the decisions of the lower courts. Mainly, in his **first** ground of appeal the appellant is challenging the identification evidence that the same was not watertight. **Second,** he complained that the *voire dire* test was not properly conducted to PW4. **Third**, that the PF3 was tendered as exhibit without calling the Doctor who performed medical examination to testify. **Fourth**, that the PF3 did not bear the name of the person alleged to be injured. **Fifth,** that the prosecution evidence was insufficient to prove that he committed

the alleged offences; and **sixth**, that the prosecution did not prove the case against him beyond all reasonable doubts.

At the hearing of this appeal the appellant who was also present was represented by Mr. Godfrey Wasonga, learned advocate whereas, the respondent, Republic was represented by the learned Senior State Attorney Ms. Catherine Gwaltu.

Before commencement of the hearing, Mr. Wasonga raised two preliminary matters. The first being that, the sentence imposed by the trial court to the appellant was not confirmed by the High Court as per the requirement of the law under section 170 of the Criminal Procedure Act, Cap. 20 RE. 2002 (the CPA) and second, that the charge sheet is defective as it did not specify which paragraph of section 319 of the Penal Code the appellant was charged with. According to him, the omission to specify which paragraph among the four, (a)-(d) of the said section prejudiced the appellant as he did not understand the exact offence he was charged with. Finally, Mr. Wasonga prayed that, if the decision of the Court will be that the identified defect in the charge sheet did not prejudice the appellant, then the Court should exercise its

revisionary powers to order for the confirmation of the sentence in accordance with the law.

In reply, Ms. Gwaltu did not oppose Mr. Wasonga's submission in regard to the defectiveness of the charge sheet but, she argued that the appellant was not prejudiced because the particulars of the offence were very clear that he set fire on the house and thus, he understood the charge he was facing. To support her argument she cited the decision of the Court in **Jamali Ally @ Salum v. R,** Criminal Appeal No. 52 of 2017 (unreported) where at page 17 it was stated that:

> *"In the instant appeal before us, the particulars of the offence were very clear and in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age."*

In the strength of the above authority, Ms. Gwaltu urged us to find and hold that even in the current case the appellant was not prejudiced.

On our part, we reserved our ruling on the two preliminary issues and we undertook to give our ruling in the course of writing the judgment and thus, we allowed parties to proceed submitting on the grounds of appeal.

In regard to the merits of appeal, Mr. Wasonga opted to submit generally on the grounds of appeal. He submitted that the major issue in this appeal is on identification of the appellant at the scene of crime. According to him, the only prosecution witness who testified to have seen the appellant at the scene of crime was PW1. PW2 and PW3 went to the scene of crime after the incident. PW4 did not say anything about the identification of the appellant and PW5 was just an investigator who witnessed nothing about the commission of the alleged offences.

Mr. Wasonga went on submitting that, there is nowhere in the evidence on the record of appeal showing who saw the appellant while setting on fire to the house of PW1. He insisted that, the only evidence on record is to the effect that, PW1 said, she saw the

appellant at the scene of crime and not that she saw him setting on the fire. Another weakness pointed out by Mr. Wasonga in relation to the identification of the appellant was that, the intensity of the light which illuminated the scene of crime was not described by PW1 despite saying that the light was heavy. The learned counsel also doubted whether it was true that PW1 went close to the appellant as she stated in her evidence because, the evidence is not so clear whether, PW1 went out of her house immediately when the fire was set on or while the fire was at the advanced stage. And, if it was at advanced stage, he questioned on how then she managed to move closer to the appellant without being injured by the said fire. Mr. Wasonga also doubted the evidence that, the appellant was seen by PW1 setting fire as he said, if at all is true that he was seen setting on the fire, the means which he used to set the said fire was not stated. According to him, the identification evidence adduced by PW1 was not watertight and therefore, could not be used by the trial court to ground appellant's conviction.

Regarding the second count of Assault Causing Actual Bodily Harm which the appellant was also facing, Mr. Wasonga submitted that the same was not proved to the required standard. It was his

observation that, the PF3 which was issued for PW4's treatment was un-procedurally admitted in evidence as the trial court did not inform the appellant his rights under section 240(3) of the CPA. He said, since the Doctor who examined PW4 was not called to testify as per the requirement of the law under the above provision, the PF3 deserves to be expunged from the record. He added that, there is no evidence on the record of appeal to prove that PW4 was assaulted by the appellant. According to him, the evidence of PW4 was not enough to ground conviction as he only said that he was injured by fire but did not say who injured him or caused the said fire.

Mr. Wasonga submitted further that, PW1 as the sole eye witness who testified that she saw what happened on the material day, had some interest to serve because she had broken love relationship with the appellant and therefore, her evidence needed corroboration but, it was not the case.

In conclusion, he submitted that the appellant's sentence was excessive taking into consideration that he was the first offender and he has a child with PW1. Thus, he urged us that if in our

determination of this matter we will find that the appellant is guilty, then we should reduce the sentence.

Ms. Gwaltu commenced her reply submission by supporting the appeal. She argued generally that both charges which the appellant was facing were not proved beyond reasonable doubt. Firstly, she said, the prosecution evidence fell short of the proper date of commission of the alleged offences. It was her observation that while the charge sheet indicates that the offence was committed on 8 /7/2012, PW1, PW2 and PW3 stated that the said offence was committed on 7/7/2012. According to her, the said difference of dates prejudiced the appellant because he was supposed to prepare his defence while full aware of the charges facing him.

Regarding the second count which the appellant was facing, Ms. Gwaltu argued that, the appellant was improperly charged for that offence. According to her, the proper definition of the term assault as per **Blacks Law's Dictionary 20th Edition** page 122 means, physical attack. However, she argued, in the current matter there was no physical confrontation between the appellant and PW4.

Secondly, it was Ms. Gwaltu's argument that PW1 did not give direct evidence to the effect that she saw the appellant while setting

on fire to her house. As for her, the appellant is not directly connected to the offences of Arson and Assault he was charged with.

Thirdly, that the identification evidence of the appellant was not watertight according to Ms. Gwaltu. She expounded that, PW1 said that there was heavy light but her evidence was not corroborated despite being weak. The learned Senior State Attorney added that, although it can be said that the identification which was done by PW1 was by recognition still the same cannot sail through because PW1 had prior conflict with the appellant and thus her evidence was supposed to be corroborated. However, the said evidence was not corroborated.

Regarding the sentence of the appellant, Ms. Gwaltu concluded by abstaining from commenting anything, as in the first place, she argued that the appellant was not properly convicted.

We have respectful considered the submissions by the counsel for both parties. Before we address on the grounds of appeal raised by the appellant, we wish to state at the outset that, we agree with Ms. Gwaltu's submission and the authority she cited in regard to the preliminary matter raised on the defectiveness of the charge sheet.

Much as it is true that, it is not categorically stated in the charge sheet under which sub-section the appellant was charged, we are firm that the appellant understood the offence he was charged with as the particulars of the offence were very clear that he set fire on the house of PW1. We entertain no doubt and we hold that, failure to disclose the specific sub-section of section 319 of the Penal Code did not preclude the appellant from preparing his defence. Therefore, the first preliminary matter on the defectiveness of the charge sheet is hereby overruled. Having so decided, we now move to determine this appeal and the issue in regard to the confirmation of sentence will be determined later.

As introduced earlier on, in the first ground of appeal the appellant is challenging the prosecution evidence on identification that the same was not watertight. It can be gleaned from Mr. Wasonga's submission that, the appellant is not only challenging that he was not at the scene of crime on the material night but also that he was not seen by PW1 setting fire on her (PW1's) house.

According to the record of appeal, there is no doubt that PW1 was the only eye witness who testified to have seen the appellant at the scene of crime. It is also undisputed fact that PW1 and the

appellant knew each other and they had love affairs before the offences were alleged to have been committed. This being the case, whatever identification claimed to be done by PW1 on the material night was by recognition. The law in regard to identification by recognition is settled. In **Shamir John v. Republic,** Criminal Appeal No. 166 of 2004 (Unreported) the Court stated that:

> *"…. Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made".*

See also **Issa Ngara @ Shuka v. Republic,** Criminal Appeal No. 37 of 2005 (Unreported).

With the above caution in our mind, we now move to consider whether the appellant was properly identified at the scene of crime. It was PW1's evidence in regard to what happened on the material night that, when she came out of her house she saw fire and the appellant was standing at the rear side of her house. She moved

closer to him and asked him why he did set fire. The appellant did not respond but he ran away.

It is crucial at this juncture to consider the ingredients of Arson as the first count which the appellant was charged with. Section 319 (a) of the Penal Code provides that:

> *"Any person who wilfully and unlawfully sets fire to-*
>
> *(a) any building or structure whatever, whether completed or not is guilty of an offence and is liable to imprisonment for life."*

Under the above quoted provision the elements to be proved in Arson are that, someone set fire to a building and that he/she did so wilfully and unlawfully. We had an opportunity of perusing the whole record of appeal and in particular the evidence of PW1, the sole 'purportedly' eye witness in this matter but, we could not find anywhere PW1 stating that, she saw the appellant while setting fire to her house. Part of her evidence was to the effect that:

> *"Emmanuel Chigoji is my neighbour. On 7/7/2012 this year, which was on Sunday at 20:00 hours one Emmanuel Chigoji set on fire my house. After*

he had set on fire my house, ***I exited outside, as there was heavy light due to that fire I see (sic) him as he was familiar to me,*** *I asked him in Gogo, as to why he set on fire my house,* ***Emmanuel did not respond, rather he run (sic) away,*** *where I shouted for help....****The light was heavy, which made my easier to identify him*** *(slc), as he put a yellowish shirt, blue trouser which had a strip on aside with batton (sic)."* [Emphasis added]

The above extract is very clear that, when PW1 came out of her house the fire had already been set. The record is silent as to why she decided to go out of her house at that particular night hour but, it is on the record of appeal that, when she came out of the house, she saw the appellant whom she knew through the aid of heavy fire. It can be noted that, PW1 made a bare assertion that the heavy fire light helped her to identify the appellant on the fateful night. She did not explain further on how heavy or the intensity of the said light and probably, the area illuminated. Apart from that, PW1 did not describe the peculiar features of the appellant which

made her to recognise him. She ended up explaining the colours of clothes being wore by a person whom she saw on the material night. It is our considered observation that, although there is no dispute that PW1 and the appellant knew each other very well even before the incident, PW1's evidence did not clear all the doubts on mistaken identity. With respect, we differ with the first appellate court's observation where the learned Resident Magistrate with Extended Jurisdiction stated at page 64 of the record of appeal that:

> *"Having carefully heard the submissions and surveyed the proceedings of the trial court* ***it is my position that there was proper identification.*** *Because the light shed by a burning grass house is of* ***high intensity and full illumination.*** *PW1 saw and approached the appellant at the scene. She gave the details of the clothes dressed by the appellant. i.e. the yellow shirt and blue stripped trousers. PW1 mentioned the appellant to PW2 and PW3 who went at the scene for rescue. When all those are taken*

together it is clear that PW1 made proper identification." [Emphasis added]

We shall give reasons. **First,** PW1 said, when she inquired to know why the appellant set fire to her house, the appellant did not respond instead he ran away. This means that, PW1 did not even hear the voice of the person whom she found outside her house during the incident. The voice in our respective view could assure her that it was the appellant taking into consideration that PW1 knew the appellant very well. **Second,** there was no evidence connecting the appellant and the clothes described by PW1 despite the fact that, PW1 and the appellant were neighbours and they once had a close relationship. It is not stated with certainty that only the appellant was having those clothes within the locality or may be, any other explanation which could link him with the said clothes was not given. **Third,** PW1 stated that the appellant ran away after being asked why he set fire but, the people who responded to PW1's alarm traced his footprints on the following day and they ended at appellant's house. We note that, the distance between PW1's house and the appellant's house was not stated so as to determine whether the appellant ran away as stated by the appellant or went

back to his house after the incident. **Fourth,** if the houses of PW1 and the appellant are so close and according to the evidence on the record of appeal many people respondent to PW1's alarm, how then was it possible for those people to trace and distinguish the footprints of the appellant from of those other people who gathered at the crime scene on the following day leave alone the fact that, nothing was stated about the weather condition. We find this more wanting as the record of appeal is also silent in regard to the time when those people went to trace the said footprints. Whether it was very early in the morning that there was no possibility of any other person to have passed there or it was late and may be, other people had already passed at that area before those who went to trace the footprints, we find nothing on the record of appeal. We further note that, even if it could have been proved beyond reasonable doubt that, indeed, the appellant was the one who was seen by PW1 at the scene of crime on the material night, still the prosecution evidence is wanting as being seen at the scene of crime by itself is not a proof that one has committed the alleged offences as it was held in **Jackson Mwakatoka & 2 Others v. Republic** [1990] TLR 17 that, mere presence of the first appellant at the scene of the crime was not sufficient to implicate him to the murder.

In the circumstances of this appeal we are of the view that, since the prosecution evidence was more circumstantial than direct, the prosecution side had the duty to ensure that all facts are consistent with the hypothesis of the guilty of the accused person. Meaning, circumstances excluded every reasonable hypothesis except that it was the appellant who set fire on the house of PW1 on material night and no one else. (See **Mswahili Mulugala v. R** (1977) LRT 25).

It is our respective view that, apart from mentioning the appellant to be the person who was seen at the crime scene, prosecution side had the duty to prove that the appellant was the only person who had access to PW1's house and opportunity to set fire at that particular night. In regard to proof of Arson, we wish to subscribe to what was stated by Samuel L. Stevens a prominent writer from Jacksonville, Florida in his Article titled: **Samuel L. Stevens, Evidence of Arson and Its Legal Aspects,** 44J. Crim. L. Criminology & Police Sci. 817 (1953-1954) that:

> *"On a specific Arson case that the accused was the* ***only person who had opportunity to set the building on fire;*** *that he was the only*

person who had a key or access to the burned building. Or, ***it may be proved that the accused is one of a limited few who had access to the building."*** [Emphasis added]

The said author went on explaining on what need to be proved when the evidence to be relied upon is circumstantial as in our current appeal as follows:

"All preparations and acts of the accused within a reasonable time prior to the fire can be used to indicate the circumstances of guilt. ***This prior conduct and preparations must of course be relative to the fire.*** *For instance, preparation made to cause or to spread the fire may be proved....That shortly before the fire he* ***(accused)*** *secured matches or other means of starting a fire.* ***It may be shown at the time of his arrest that such matches or a piece of cannel found on his person were identical with those found at the scene of the fire."*** [Emphasis added].

Also visit, *https://caselaw.findlaw.com/us-9th-circuit/1221620.html*

In the current appeal, as we have endeavoured to demonstrate above, apart from PW1, there were other people who gathered at the scene of crime including PW2 and PW3 however, none of them tendered any exhibit collected from the scene of crime suggesting the source of the said fire. Neither PW1 nor other prosecution witnesses testified to the effect that, the appellant was found with anything in his person or at his house during arrest which suggested that, he used the same to set the fire. In short, prosecution side did not prove anything regarding preparation of the appellant before commission of the alleged offence and nothing was tendered as exhibit to connect him with the charged offences.

Having considered all the above identified shortfalls of the prosecution evidence, it is our considered opinion that, the evidence of PW1 on identification of the appellant was not conclusive that it was the appellant who was seen by PW1 on the material night at the scene of crime and that, he set fire on the house in question. Under the circumstances, it is our finding that, without corroboration, PW1's evidence could not be relied upon by the trial court to ground the appellant's conviction, as the said evidence was not watertight.

Therefore, we agree with counsel for both sides that the appellant was not properly identified by PW1 at the scene of crime and the prosecution side failed to prove the charges against the appellant to the required standard. We thus find the first ground of appeal meritorious.

In the final analysis, we find that it was wrong for both lower courts to rely on uncorroborated evidence of PW1 who had interest as she is a divorcee of the appellant to ground conviction and sustain it on the first appeal. As such, PW1's evidence did not irresistibly point to the guilty of the appellant as she failed to prove that indeed it was the appellant who wilfully and unlawfully set fire on her house. We also find that, even the second count could not be established under the circumstance as the mere fact that PW4 was injured by fire on the material day does not have a direct connection with the guilt of the appellant. That being the case, even the sentences imposed on the appellant by the trial court were wrongly pronounced as the charges against him were not proved beyond reasonable doubt. In the event, we do not see the need of discussing the second preliminary issue raised by Mr. Wasonga regarding confirmation of appellant's sentence and the remaining

grounds of appeal. In fine, we allow this appeal, quash the conviction and set aside the sentences imposed on the appellant. We order the immediate release of the appellant unless he is lawfully held for other reasons.

DATED at **DODOMA** this 24th day of September, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 25th day of September, 2019 in the presence of Mr. Godfrey Wasonga, learned advocate for the appellant whereas, the respondent, Republic was represented by the learned Senior State Attorney Ms. Chivanenda Luwongo, is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL