IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 292 OF 2018

SALUM SAID MATANGWA @ PANGADUFU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Dar es Salaam]

(Kitusi, J.)

dated the 31st day of July, 2017

in

(DC) Criminal Appeal No. 84 of 2017

JUDGMENT OF THE COURT

23rd September & 9th October, 2020

KWARIKO, J.A.:

Salum Said Matangwa @ Pangadufu, the appellant, and three others (the first, second and fourth accused persons) who are not parties to this appeal were arraigned before the District Court of Rufiji at Utete. They were jointly and together charged with two counts of house breaking contrary to section 294 (1) (a) and malicious damage to property contrary to section 326 (1) both of the Penal Code [CAP 16 R.E. 2002] (now R.E. 2019). The prosecution alleged that on 24th January, 2013 at 10:45 hours at Kibiti 'B' Village within Rufiji District in Coast Region, the four accused persons broke into the house of one Kiarimu s/o Kimila, entered a room

rented by a police officer one Lwidiko s/o Finias Fuime and took his various household items which they set on fire. They denied the charge and as a result a full trial was conducted in that respect.

At the end of the trial, the appellant was convicted and sentenced to three and seven years' imprisonment in the first and second counts respectively. The terms of imprisonment were ordered to run concurrently. Other accused persons were acquitted in both counts.

Aggrieved by that decision, the appellant preferred his appeal before the High Court of Tanzania at Dar es Salaam but he was not successful. He is therefore before this Court on a second appeal.

The facts of the case leading to the appellant's conviction can be summarized as follows: On 24/1/2013 in the morning hours, a group of people armed with various weapons converged at Kibiti Police Station demanding to get a Police Officer who allegedly killed a relative of some of the members of that group. In the course of that mayhem, they destroyed police motorcycles. Apparently, a police officer No. E 7755 Cpl Lwidiko (PW1), was the suspected killer. On sensing danger, PW1 sneaked and drove his car which he hid at Consolata Mission Hospital. Whilst there, he received a phone call from one Jamila informing him that his rented house had been invaded by some people.

When PW1 arrived near the scene, he saw a group of armed people burning his properties. Fearing for his safety, he camouflaged about 20 meters away at a neighbour's house and witnessed the destruction being done by the mob. According to his evidence, from that distance, PW1 identified from the group the first and second accused persons together with the appellant whom he knew before. The burnt items included a fridge, bicycle, TV Deck and a fan whose remains were admitted in court as exhibit PA collectively.

No. F6055 DC. Godwin (PW2) of Kibiti Police Station was among police officers who visited the scene of crime on the material day. He testified that on arrival, he found the fire on. He identified the fourth accused and the appellant in the group of people. He saw the appellant put PW1's bicycle on fire. During the trial, a sketch plan map of the scene of crime was also tendered by No. E 3951 Det. Sgt Stanley (PW3) and was admitted as exhibit PB.

In his defence, the appellant testified that he was arrested on 01/3/2013 at his home for allegations of jumping bail and was taken to a police station where he was forced to mention his accomplices but denied any involvement in the incident. He raised a defence of alibi in that he was at Kinyanya area on the material day. The appellant challenged the

prosecution evidence for being contradictory and doubtful. He also queried why an important witness like Jamila who was alleged to have called PW1 to the scene of crime was not summoned to testify.

At the end, the trial court evaluated the evidence from both sides and found that the appellant was sufficiently identified at the scene as he took an active role in destroying the complainant's properties. He was thus convicted and sentenced as indicated earlier. The first appellate court concurred with the finding of the trial court in respect of the appellant's involvement in the commission of the crime. It thus found the appellant's appeal devoid of merit and dismissed it.

Before this Court the appellant has raised seven grounds of appeal, five of which are in the substantive memorandum of appeal lodged on 9/10/2018 and two are additional grounds he raised at the hearing of the appeal. We find it convenient to paraphrase the grounds of appeal as follows: **One**; that, the evidence of visual identification by PW1 and PW2 was not sufficient; **two**, that, exhibits PA and PB were improperly admitted in evidence; **three**, that, there was no evidence to prove that the appellant who was alleged to be a prime suspect was traced immediately after the incident; **four**, that, there was no evidence to connect the appellant with the alleged crime; **five**, that the prosecution

case was not proved beyond reasonable doubt; **six**, that section 214 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA) was not complied with during the trial; and **seven,** that there was no compliance with section 231 of the CPA during the trial.

Apart from the grounds of appeal, we invited the parties to address us on the propriety of the sentence imposed against the appellant by the trial Resident Magistrate. Our question became necessary in the light of sentencing powers of the trial magistrate under section 170 (1) (2) of the CPA.

At the hearing of the appeal, the appellant did not appear physically but was linked from Ukonga Central Prison through a video conferencing facility. On the other hand, the respondent Republic was represented by a consortium of the State Counsel led by Mr. Emmanuel Maleko, learned Senior State Attorney assisted by Ms. Aurelia Makundi and Ms. Rehema Mgimba, both learned State Attorneys.

The appellant adopted his grounds of appeal and preferred for the learned State Attorney to begin his address in respect of the appeal. He urged us to allow his appeal and release him from prison.

For the respondent Republic, Mr. Maleko addressed the Court on behalf of his colleagues. He opposed the appeal and argued that the third and fourth grounds of appeal were new grounds which did not feature before the first appellate court hence the Court has no jurisdiction to determine them. He supported his argument with the Court's decision in the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported).

Arguing the first ground of appeal, the learned Senior State Attorney submitted that, the appellant was sufficiently identified at the scene by PW1 and PW2. He reiterated what PW2 testified about the appellant's involvement in the crime. According to Mr. Maleko, the two witnesses were reliable and credible who ought to be believed placing reliance on our earlier decision in **Goodluck Kyando v. Republic** [2006] T.L.R 363 As regards the conditions for identification, Mr. Maleko argued that the incident took place in broad daylight without any obstruction and the witnesses knew the appellant before.

The learned Senior State Attorney conceded to the second ground of appeal by confirming that exhibits PA and PB were improperly admitted in evidence. He urged us to expunge them from the record of the proceedings. However, he was quick to add that even without the said

exhibits, the remaining evidence is sufficient to prove the case against the appellant.

In respect of the fifth ground of appeal, Mr. Maleko argued that PW1 and PW2 saw the appellant at the scene and explained how he actively participated in the crime when he took PW1's bicycle and put it on fire. He reiterated that the prosecution case was thus proved beyond reasonable doubt.

Mr. Maleko's argument in the sixth ground of appeal was that although the trial magistrate indicated that section 214 of the CPA was complied with, he did not state the reasons for taking over the trial from his predecessor. However, the learned Senior State Attorney argued that no any prejudice was occasioned to the appellant.

The learned Senior State Attorney argued in respect of the seventh ground that section 231 of the CPA was complied with. He submitted that, if there was any omission, the appellant's advocate would have raised it. After all, he argued, only section 231 of the CPA was not mentioned but the trial court addressed the rights of the accused provided under that provision before the appellant was called upon to defend the case. In the circumstances, Mr. Maleko argued that the appellant's conviction was properly grounded.

As regards the question relating to sentence, Mr. Maleko submitted that the trial magistrate who was a Resident Magistrate, did not have powers to sentence the appellant to seven years' imprisonment. He urged us to revise the sentence which will result into the appellant's immediate release from prison.

In rejoinder, the appellant argued that PW1 could not have sufficiently and positively identified any person from a group 20 metres away. Finally, he submitted that PW1 and PW2 did not mention him at the earliest possible moment. Being a lay person, the appellant did not have any comment regarding the propriety of the sentence.

We have considered the grounds of appeal and the submissions of the parties. We would like at the outset to state that the two courts below made concurrent findings of facts that the appellant committed the offences charged. It is trite law that, unless there has been a misdirection or non-direction of the evidence occasioning a miscarriage of justice, the second appellate court as in this case, is not entitled to interfere with such findings. Some of the Court's pronouncements in respect of this settled principle are in the cases of **Mbaga Julius v. Republic,** Criminal Appeal No. 131 of 2015, **Nchangwa Marwa Wambura v. Republic,** Criminal Appeal No. 44 of 2017, **The Director of Public Prosecutions v. Simon**

Mashauri, Criminal Appeal No. 394 of 2017 and **Thobias Michael Kitavi v. Republic,** Criminal Appeal No 31 of 2017 (all unreported). We shall therefore, for the purpose of determining the appeal, examine whether the courts below rightly concurred in their findings.

To start with, we are at one with the learned Senior State Attorney that the third and fourth grounds of appeal have been raised before this Court for the first time. Section 4 (1) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] provides for the jurisdiction of the Court thus:

> *"(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction".*

According to the cited provision, the Court has jurisdiction to hear and determine appeals from the High Court and subordinate courts with extended jurisdiction. This means that the Court has no jurisdiction to determine new matters which were not first decided by the first appellate court. This position has been made clear in a number of the Court's decisions. Some of them are: **Julius Josephat v. Republic,** Criminal Appeal No. 03 of 2017, **Omary Lamini @ Kapera v. Republic,** Criminal Appeal No. 91 of 2016, **Kubaja Omary v. Republic,** Criminal Appeal No.

6 of 2017 and **John Madata v. Republic,** Criminal Appeal No. 453 of 2017 (all unreported). In **Julius Josephat** (supra) the Court stated that:

> *"...those grounds are new. As often stated, where such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction".*

For these reasons, we will not consider and determine the third and fourth grounds of appeal.

As regards the first ground of appeal, we entertain no doubt as to the identification of the appellant at the scene of crime. The incident took place in broad daylight. The distance between the witnesses and the appellant was short for easy identification. PW1 and PW2 who said they knew the appellant before explained how they identified him among others, they explained how he took an active role in the crime. Precisely, PW2 explained how he saw the appellant taking PW1's bicycle and setting it on the fire. This evidence proves that the witnesses were credible and reliable and there is no good reason given for not believing them. In **Goodluck Kyando** (supra), the Court emphasized at page 367 that:

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness".*

We are thus satisfied that in view of the evidence of PW1 and PW2 who knew the appellant before the incident, there could not have been any possibility of mistaken identity. In the event, the first ground of appeal fails.

Coming to the second ground of appeal, it is clear that the trial court did not follow the required procedure before it admitted exhibits PA and PB in evidence. The appellant was not given opportunity to comment when the remains of household items were introduced by the prosecution in evidence and admitted in court as exhibit PA. The Court discussed a similar issue in the case of **Juma Adam v. Republic,** Criminal Appeal No. 79 of 2011 (unreported) where it stated at page 10 thus:

> *"As already shown, the bicycle was admitted in court as exhibit P2. The record of appeal at page 8 speaks by itself. The appellant was not given opportunity to comment on it before it was admitted in court. The appellant had a right to comment on the admission of the bicycle before it was admitted in court. For the same reason we have shown above, we agree with the learned Senior State Attorney that justice was not done to the appellant".*

As for the sketch map of the scene of crime admitted as exhibit PB, the procedure for its admission ought to have been as discussed in the

case of **Robinson Mwanjisi & Three Others v. Republic** [2003] T.L.R 218 where the Court held *inter alia* at page 220 that:

> *"...Whenever it is intended to introduce any document in evidence, it should* ***first be cleared for admission, and be actually admitted, before it can be read out****."*
> (Emphasis added).

On the contrary, in the present case according to the record of appeal, exhibit PB was not properly admitted in evidence. The appellant was neither given opportunity to comment about the exhibit, nor was the same read over in court after admission. Those exhibits were thus not good evidence and we hereby expunge them from the record. We therefore find merit in the second ground of appeal and allow it.

In relation to the sixth ground of appeal, the record of appeal indicates at page 26 that the appellant was addressed in terms of section 214 of the CPA after the second magistrate namely; S.S. Sanga, RM took over the conduct of the case from M.T. Matitu, PDM. However, although the reasons for the taking over were not stated, we are of the considered view that the omission did not occasion any injustice considering the overriding objective principle and the fact that the appellant was legally represented by an advocate. This ground is unmerited.

As regards the seventh ground, we note that the trial magistrate only omitted to mention section 231 of the CPA when he addressed the rights of defence. This was not a fatal irregularity because the appellant gave his defence which signifies that he understood his rights. Again, as we have stated above, had there been any omission, the appellant's advocate would have raised it. This ground too fails.

Finally, the fifth ground of appeal is devoid of merit following our finding in the first ground of appeal. In that ground, we plainly explained how the appellant was identified at the scene of crime by PW1 and PW2. These witnesses explained that they identified and saw the appellant's acts of setting PW1's bicycle on fire. Besides, we alluded to the fact that the conditions for proper identification were favourable as it was during broad day light and that both witnesses knew the appellant well before the incident. The prosecution case was thus proved beyond reasonable doubt against the appellant. In the circumstances, for what we have shown herein concerning the evidence from both sides, we are settled in our mind that the appellant's conviction was properly reached as the appellant did not raise any reasonable doubt against the prosecution case. Consequently, the fifth ground of appeal is devoid of merit and stands

dismissed. On the whole, we dismiss the appellant's appeal against conviction.

On the other hand, with regards to sentence, we are in agreement with the learned Senior State Attorney that the trial magistrate had no powers to sentence the appellant to seven years' imprisonment. Section 170 of the CPA provides for sentences which a subordinate court may pass thus:

> *"(1) A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences–*
>
> *(a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;*
>
> *(b) a fine not exceeding twenty million shillings;*
>
> *(c) subject to the provisions of the Corporal Punishment Act, corporal punishment;*
>
> *(2) Notwithstanding the provisions of subsection (1)–*
>
> *(a) a sentence of imprisonment–*

(i) for a scheduled offence [as defined in subsection (5)], which exceeds the minimum term of imprisonment prescribed in respect of it by the Minimum Sentences Act;

(ii) for any other offence, which exceeds twelve months;

(b) a sentence of corporal punishment which exceeds twelve strokes;

(c) a sentence of a fine or for the payment of money (other than payment of compensation under the Minimum Sentences Act, which exceeds six thousand shillings,

shall not be carried into effect, executed or levied until the record of the case, or a certified copy of it, has been transmitted to the High Court and the sentence or order has been confirmed by a Judge:

Provided that this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank". [Emphasis provided]

In this case, the sentence of seven years was meted out by a Resident Magistrate. That punishment exceeded his statutory sentencing powers as shown above. Unfortunately, the first appellate court did not deal with this irregularity. In the circumstances, as the appellant has been in prison for a considerable period after his conviction, we reduce that sentence to

a period which will result into his release from prison. As a result, the appellant's appeal against sentence is allowed to the extent shown above.

DATED at **DAR ES SALAAM** this 8th day of October, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

Judgment delivered this 9th day of October, 2020 in the presence of the Appellant in person - linked via video conference from Ukonga Prison and Ms. Haika Temu learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL