IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 109 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

1. **CHIBAGO S/O MAZENGO**
2. **ALOYCE S/O DAUDI** } **..... RESPONDENTS**
3. **YOHANA S/O PAUL KAYEGA**

(Appeal from the judgment of the High Court of Tanzania at Dodoma)

(Kalombola, J.)

dated the 12th day of December, 2018
in
Criminal Appeal No. 43 of 2018

.....

JUDGMENT OF THE COURT

16th & 19th June, 2020

NDIKA, J.A.:

The respondents herein, Chibago Mazengo, Aloyce Daud and Yohana Kayega, were charged, along with another person not a party to this appeal in the District Court of Manyoni at Manyoni in Criminal Case No. 60 of 2017, with four offences of conspiracy to commit an offence, arson, assault causing actual bodily harm and grave sexual abuse. While their co-accused was only convicted of conspiracy and acquitted on the rest of the counts, the respondents were each convicted of the offences on counts 1, 2, 3 and 4. Furthermore, the first respondent was convicted

of grave sexual abuse on the fifth count. These convictions, which earned each respondent concurrent terms of imprisonment ranging from one year to thirty years, were subsequently quashed on appeal by the High Court of Tanzania at Dodoma (Kalombola, J.). That outcome aggrieved the Director of Public Prosecutions who has now lodged the present appeal against the respondents' acquittal.

The brief background of the case is as follows: on 14th April, 2015 around 16:30 hours, a thatched home of PW1 Shigara Mboje at Magasai village within Manyoni District in Singida Region was raided by a group of arsonists who then torched it. The home was completely consumed by the flames, causing a loss of agricultural produce and other property worth TZS. 14,600,000.00. PW1 was not at the scene at the material time but his son, Duta Shigara (PW2), who testified that he was there, mentioned the respondents as the arsonists. Three other family members, PW4 Gedy Mwandu, PW5 Gindu Kulwa and PW6 Galima, claiming to have been at the scene at the material time, also pointed the accusing finger at the respondents. Another family member, PW3 Lutega Shigara, said that he came back home around the time the respondents had just set fire to the home.

While the fire was raging, the first respondent raped PW4 who had then been assaulted by all the respondents along with PW2. The duo sustained bodily injuries as certified by Dr. Kusata Madomee Mchaka (PW7) from nearby Makanda Dispensary. This witness tendered in evidence two medical examination certificates (PF.3), which were admitted collectively as Exhibit P.1. There was further medical evidence from PW9 Dr. Christopher Ibrahim of Manyoni District Hospital who also attended PW2 on 16th April, 2015. The PF.3 he tendered on PW2 was admitted as Exhibit P.2.

According to PW2, PW3, PW4 and PW5, one of the persons who ventured to the scene in response to the call of distress was PW8 Jingu Mwalimu Mtiama who happened to be the Hamlet Chairman. It is in evidence that PW8 helped rescue children and property from the burning home. About an hour or so later, a police officer No. E.842 Cpl. Yazid (PW10) and a colleague named Adolf, arrived at the scene. At that time, the house had been completely gutted down. When he interrogated the members of the PW1's family, they said that the home was set ablaze by "citizens from Makorongo."

While the first and second respondents elected to remain silent in terms of section 231 (3) of the Criminal Procedure Act, Cap. 20 RE 2002

("the CPA") and called no witnesses, the third respondent gave evidence on oath raising an *alibi* to the effect that he was in Dar es Salaam in the fateful evening. His wife (DW3 Suzana Mathias) supported his *alibi*.

As intimated, the trial court (F.H. Kiwonde, RM) was impressed by the prosecution's version of the events. Apart from rejecting the third respondent's *alibi* on the ground that it was not properly raised, the learned Resident Magistrate drew an adverse inference against the first and second respondents, as shown at page 83 of the record, thus:

> *"The 2nd and 3rd accused persons opted to remain mute despite being informed of the right to defend, and that the entire prosecution evidence implicated them. This makes me take an adverse inference under section 231 (3) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] that the 2nd and 3rd accused persons admitted the allegations against them."*

The High Court allowed the respondents' appeal principally on the ground that it was in evidence that PW1's home was thronged by many people at the material time and that it could not be said with certainty that the respondents were clearly identified as the torchers and assailants.

Learned Senior State Attorney Pius Hilla teamed up with Mr. Leonard Challo, learned Senior State Attorney, and Ms. Lucy Uisso, learned State Attorney, to prosecute the appeal for the Director of Public Prosecutions. On the other side, Mr. Fred P. Kalonga, learned advocate, appeared for the respondents who were also present.

It was Mr. Challo who argued the appeal for the appellant on a consolidated ground faulting the High Court for holding that the prosecution case was not established beyond reasonable doubt against the respondents. The essential submission by Mr. Challo was that the evidence of PW2 and PW4 established beyond doubt that the respondents were seen and identified at the scene of the crime in broad daylight as they set fire to PW1's home and assaulting the two victims. He argued that there could not be a possibility of mistaken identity as the identifying witnesses were familiar with the respondents.

When queried by the Court over an apparent contradiction between the evidence of PW2 and PW8, learned Senior State Attorney submitted that the incongruity was minor. Responding to another question from the Court over the failure by PW2, PW3, PW4, PW5 and PW6 to mention the respondents as the culprits to the police investigator (PW10) who arrived at the scene about an hour after the incident had occurred, still Mr.

Challo played down the effect of this piece of evidence especially on the credibility and reliability of the testimonies of PW2, PW3, PW4, PW5 and PW6. We will revert to these two questions later in this judgment.

Finally, when we queried the propriety of the learned trial Magistrate's ruling on whether there was a *prima facie* case against the accused as shown at pages 58 and 59 of the record of appeal, Mr. Hilla rose up and acknowledged that the ruling contained an improper finding disclosing the learned trial Magistrate's predisposition to finding the respondents guilty. He conceded that the remark was prejudicial and that it vitiated the entire trial. In view of this anomaly, learned Senior State Attorney urged us to correct the error vide our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 ("the AJA") by nullifying the proceedings of the courts below and the corresponding decisions. On the way forward, he urged that a retrial be ordered.

For the respondents, Mr. Kalonga initially supported the High Court's decision on the basis that the evidence adduced by PW2, PW3, PW4, PW5, PW6 and PW8 was contradictory and unreliable. He added that the witnesses' failure to name the suspects at the earliest opportunity was as fatal to the prosecution as the prosecution's failure to

explain and link the respondents' arrest with the evidence that they were spotted at the scene.

As regards the apparent impropriety in the ruling on a case to answer, Mr. Kalonga acknowledged that it was an irredeemable irregularity.

In a brief rejoinder, Mr. Challo conceded that the offences of conspiracy and grave sexual abuse were unproven but remained insistent that the respondents were positively identified at the scene as the arsonists and assailants.

Having closely examined the record of appeal and after full consideration of the oral submissions of the learned counsel for the parties, we are of the settled view that the fate of this appeal rests on the point of law we raised *suo motu*.

It is evident from the record of appeal that at the close of the evidence for the prosecution on 4th April, 2018, the learned trial Magistrate delivered a ruling in terms of section 231 (1) of the CPA that a case had been made out against all the respondents and their co-accused. As shown at page 59 of the record, the learned trial Magistrate pronounced in the part of the ruling that:

> *"Upon going through the prosecution evidence* ***I am satisfied that the 2nd, 3rd and 4th accused persons were identified at the scene of crime as the event took place at 16:30 hours and the accused were known by the victims well before the date of the event*** *and the 1st accused is the one said to have incited and then sent the rest of the* ***accused persons to commit the offences.****"*[Emphasis added]

The above pronouncement in the course of determining whether a *prima facie* case had been made out or not against the respondents before they were placed on their defence is manifestly injudicious, prejudicial and biased as it declares that the respondents and their co-accused had committed the charged offences. Of course, the learned trial Magistrate had not yet officially convicted the accused before him of the offences, but he exhibited a predisposition to convicting them irrespective of the cogency of the defences that they were going to put up. That predisposition is evidenced by the dismissive manner in which the learned trial Magistrate brushed aside the third respondent's defence in his judgment, as shown at page 81 of the record:

> *"... the defence of alibi of the 4th accused fails since the procedure is violated and it is not proved."*

That conclusion was evidently hurried and obviously erroneous. Apart from the fact that an accused does not assume the burden of proving his *alibi*, failure to give notice of *alibi* in terms of section 194 of the CPA does not mandate or authorize an outright rejection of the alibi though it may affect the weight to be placed on it – see **Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 39.

A further illustration of predisposition is at page 82 of the record, where the learned trial Magistrate insisted that the respondents were identified at the scene:

> *"The 2nd, 3rd and 4th accused persons were identified at the scene of crime by the victims and the event took place during the evening of 16:30 hours so there must be light ..."*

A similar situation of naked bias was confronted by the Court in **Kabula d/o Luhende v. Republic**, Criminal Appeal No. 281 of 2014 (unreported), where the trial High Court Judge made the following pronouncement in his ruling whether there was a case to answer or not:

"Having gone through the evidence by the prosecution, ***I consider that the accused committed the offence for which she stands charged****."* [Emphasis added]

In the above case, the Court held the trial vitiated as the trial Judge had exhibited bias such that he could not have approached and treated the defence case with an open mind. It is instructive to extract a passage quoted in that decision from an earlier decision of the Court in the case of **Alex v. Republic,** Criminal Appeal No. 32 of 2003 (unreported) thus:

"It is settled law which binds us that fair trial guarantees must be observed and respected from the moment the investigation against the accused commences until the final determination of the proceedings, the appeal process inclusive. See, for instance, Manfield Nowak in his UN Covenant on Civil and Political Rights, CCPR Commentary (N.P Engel, Arington 1993) at page 244.

Relying on the case of ***EKPETO V.WANOGHO*** *(2004) 18 NWLR. (Pt. 905) 398, the Supreme Court of Nigeria in the case of* ***NEWSWATCH CONN. LTD v. ATTA (2006) ALL FWLR*** *(Pt.318) page 580 at 611, held that fair hearing*

according to the law envisages that both parties to a case be given opportunity of presenting their respective cases ***without let or hindrance from the beginning to the end.*** *It went on to hold that a fair trial also envisages that the court or tribunal hearing the parties' case should be fair and impartial* ***without it showing any degree of bias against any of the parties.*** *So, a fair trial, first and foremost, encompasses strict adherence to the rules of natural justice, whose breach would lead to the nullification of the proceedings."*

See also the decisions of the Court in **Joseph Lushika @ Kusanya and Another v. Republic**, Criminal Appeal No 18 of 2014; **Njile Mpemba v. Republic**, Criminal Appeal No. 419 'B' of 2013; **Janeroza d/o Petro v. Republic**, Criminal Appeal No. 269 of 2016; and **Nicodem Daudi v. Republic**, Criminal Appeal No. 528 of 2015 (all unreported).

In view of the aforesaid procedural infraction, we are constrained by the law to hold that the respondents' trial was unfair, and thus it was a nullity. We, as a result, are minded to invoke our revisional jurisdiction under section 4 (2) of the AJA to nullify the entire proceedings of the trial court and the judgment thereon as well as the proceedings of the High Court and the judgment thereon that stemmed from a nullity.

On the way forward, we have considered the idea whether or not to order a retrial in consonance with principles enunciated in **Fatehali Manji v. Republic** [1966] EA 343. The general principle in determining whether to order a retrial is that a retrial should be ordered when the original trial was illegal or defective. It would not be ordered when conviction is set aside on account of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. At the end of the day, a retrial should only be ordered if it is in the interests of justice to do so depending upon the circumstances of the case concerned. In the instant case, we think it would be improper to order a retrial in view of the weaknesses in the prosecution case. Let us demonstrate.

For a start, Mr. Challo for the appellant rightly conceded that the offences of conspiracy on the first count and grave sexual abuse on the fifth count were not established.

As regards the offences of arson and assault causing actual bodily harm, it is our firm view that the evidence is weak and unreliable. We say so because of the following: **first**, according to PW2, PW3, PW4 and PW5, one of the persons who ventured to the scene in answer to the call of distress was PW8 Jingu Mwalimu Mtiama, the Hamlet Chairman, but

this witness contradicted a material part of PW2's evidence. While, according to PW2, as shown at page 25 of the record, PW8:

> *"**asked the accused to stop but they ignored**, he went take out from the house the children and my in-laws ...."* [Emphasis added]

PW8 himself denied being aware of the identity of the arsonists. Answering the first and second respondents' questions in cross-examination, he said, at page 42, that he did not see any of the "accused persons at the scene of the crime" at the material time. This, we think, is a material contradiction going to the root of the prosecution case as PW8 was the only independent witness in this case.

Secondly, further to the evidence of PW2, PW3, PW4, PW5 and PW6 on visual identification, there is one disquieting feature that must be pointed out. Under normal circumstances, one would have expected the aforesaid five witnesses to name the respondents at that early opportunity as the culprits, they did not do so even when they were interrogated by the police investigator, PW10 No. E.842 Cpl. Yazid, who arrived at the scene about an hour after the inferno had started. Rather surprisingly, they told PW10 that their home had been set ablaze by "citizens from Makorongo." We think that the failure by these witnesses

to name the respondents at that earliest opportunity was not consistent with identification of the respondents at the scene. Indeed, as this Court stated in **Marwa Wangiti Mwita** (supra):

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

Another decision of the Court in **Swale Kalonga @ Swale and Another v. Republic**, Criminal Appeal No. 46 of 2001 (unreported) accentuates this same point.

In the instant case, the absence of any report by the five witnesses against the respondents means that the alleged identification by the five witnesses can never be held credible and reliable. In fact, to make matters worse, the entire prosecution case is silent on how the respondents were nabbed and charged with the offences. It is thus impossible to link their apprehension with the evidence that they were seen and identified at the scene.

The upshot of the matter is that the proceedings and decisions of the courts below are nullified as aforesaid and that for the reasons we have assigned there shall be no retrial of the respondents.

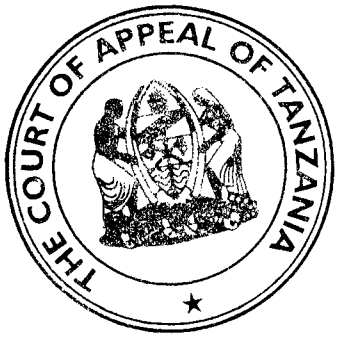
DATED at **DODOMA** this 18th day of June, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered on 19th day of June, 2020 in the presence of Ms. Judith Mwakyusa, learned State Attorney for the Appellant and presence of all three Respondents together with Mr. Fred Kalonga, learned advocate for the Respondents, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL