IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 342 OF 2020

1. HALID MAULID.....1ST APPELLANT
2. FARIJARA HAMISI @ NTARE.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of Resident Magistrate's Court of Dodoma)

(Dudu, PRM Ext. Jur.)

dated the 2nd day of July, 2020
in
(DC) Criminal Appeal No. 52 of 2020

JUDGMENT OF THE COURT

31st May & 11th June, 2021

MWARIJA, J.A.:

In the District Court of Kondoa, the appellants, Halid Maulid and Farijala Hamisi @ Ntare (the 1st and 2nd appellants respectively) were charged with six counts under the Penal Code [Cap. 16 R.E 2002, now R. E. 2019] (the Penal Code). In all counts, they were charged with the offence of arson contrary to s. 319 (a) of the Penal Code. It was alleged that on 26/1/2016 during the night time at Mitati Village within Kondoa District in

Dodoma Region, the appellants did unlawfully set fire to the houses of six different persons thereby causing loss of the houses and other properties.

According to the charge sheet, the appellant wilfully burnt the houses of the following persons, causing the loss of the houses and the properties to the tune shown as follows: Karani Naamo, TZS 73,970,000.00, Balii Sagas, TZS 4,700,000.00, Luumi Muhindi @ Slaa, TZS 16,420,000.00, Barasa Humayi, TZS 9,000,000.00, Theresia Yamahe, TZS 11,415,000.00 and Amani Karani, TZS 3,200,000.00. The offence against each of the victim constituted a separate count hence the 1st to 6th counts respectively. Except for Theresia Yamahe, the named victims testified in the trial court as PW1, PW2, PW4 PW5 and PW6 respectively.

The appellants denied all counts and as a result, the case proceeded to a full trial at which, whereas the prosecution relied on the evidence of six witnesses, the appellants were the only witnesses in their defence. Apart from the evidence of the five victims named above the other witness who gave evidence for the prosecution was Sabina Alibay (PW3), the wife of PW4.

Having heard the evidence of the prosecution witnesses and the appellants' defence, the trial court found that the 1st, 4th and 6th counts had been proved against the appellants. It was of the view however, that the

evidence was insufficient to prove the 2nd, 3rd and 5th counts. Whereas therefore, the appellants were convicted of the 1st, 4th and 6th counts, they were acquitted of the other counts (the 2nd, 3rd and 5th counts). Following their conviction as shown above, they were each sentenced to five months imprisonment on each of the three counts with an order that the sentences should run concurrently.

The Director of Public Prosecutions (DPP) was aggrieved by the acquittal of the appellants on the 2nd, 3rd and 5th counts as well as the sentence which was imposed on them in respect of the 1st, 4th and 6th counts. He was also aggrieved by the trial court's failure to award compensation to the victims for the houses and other properties which were burnt. He thus appealed to the High Court. The appeal was transferred to the Resident Magistrate's Court of Dodoma to be heard by Dudu, PRM in the exercise of his extended jurisdiction (Ext. Jur).

In his decision, the learned PRM (Ext. Jur) faulted the trial court for sentencing the appellants to five months imprisonment contending that the sentence was inadequate. He proceeded to enhance it to five (5) years imprisonment on each of the three counts but ordered that the sentences should run concurrently. The learned Magistrate also faulted the finding of the trial court that the prosecution did not prove the 2nd and 3rd counts

against the appellants. He was of the view that the evidence of PW2 and PW4 sufficiently proved those counts. According to the learned Magistrate, the inconsistency in the evidence of the two witnesses regarding the date of commission of the offence was insignificant. He therefore, found them guilty of the 2nd and 3rd counts and proceeded to convict and sentence them to the same imprisonment term of five years as in the 1st, 4th and 6th counts. He also ordered the sentences to run concurrently as ordered in respect of the 1st, 4th and 6th counts. As for the 5th count however, he agreed with the trial court that the prosecution evidence did not prove that count beyond reasonable doubt. He therefore, upheld that finding.

With regard to the trial court's decision that compensation for the burnt properties may be claimed in a civil suit, the first appellate court agreed with that decision. It held that the value of the properties may only be appropriately established in a civil suit.

The appellants were aggrieved by the decision of the first appellate court and thus preferred this appeal. In their memorandum of appeal, they have raised nine grounds of their dissatisfaction. The grounds may, however, be consolidated into seven grounds as reworded below:

1. That, the first appellate court erred in law in entertaining the appeal which was initiated by a defective notice of appeal.

2. That, the first appellate court erred in law and fact in upholding the decision of the trial court in which the appellants, who were arrested on 7/12/2017 were wrongly convicted of the offence alleged to have been committed on 27/6/2016.
3. That, the first appellate court erred in law and fact in upholding the conviction of the appellants while the offence was not investigated thus lacking not only the evidence of an investigator but also that of the arresting officer who was not called to testify.
4. That, the first appellate court erred in law and fact in upholding the conviction of the appellants based on the evidence which was not corroborated by a sketch map of the scenes of crime.
5. That, the first appellate court erred in law and fact in failing to find that, in the absence of evidence of any independent witness or any leader of the area where the offence was committed, including the Village or Ward Executive Officers, the prosecution did not prove the case against the appellants to the required standard.

6. That, the first appellate court erred in law and fact in failing to find that the charge against the appellants was fabricated for the purpose of incriminating them.
7. That, the first appellate court erred in law and fact in upholding the appellants' conviction while the prosecution did not prove the case against them beyond reasonable doubt.

At the hearing of the appeal which was conducted through video conferencing facility, the appellants who were not represented by a counsel, were linked to the Court from Isanga prison. On its part, the respondent DPP was represented by Ms. Lina Magoma, learned Senior State Attorney who was being assisted by Ms. Janeth Mgoma, learned State Attorney. When they were called upon to argue their appeal, the appellants opted to hear first, the respondent's reply to their grounds of appeal and thereafter make their rejoinder, if they would find it necessary to do so.

Ms. Magoma opposed the appeal. In her brief but focused submission, she argued that the grounds of appeal raised by the appellants are not worth consideration by the Court because they bring in new issues which were not considered and determined by the first appellate Court. Relying on the Court's decision in the case of **Godfrey Wilson v Republic**, Criminal Appeal no. 168 of 2018 (unreported) the learned Senior State Attorney

urged us to disregard the appellants' grounds of appeal and find that the appeal is, as a result, devoid of merit. She added that, although the 1st ground raises a point of law, that ground was withdrawn by the appellant's counsel at the hearing of the appeal in the first appellate court. On that submission, Ms. Magoma urged us to dismiss the appeal.

In their rejoinder, the appellants did not have substantial arguments to make than praying the Court to allow their appeal. The 1st appellant admitted that he did not appeal against the decision of the trial court. He argued however, that the appeal by the DPP in the first appellate court was time barred. He went on to complain that his conviction was based on the evidence which did not prove the case against him beyond reasonable doubt.

On his part, although he also admitted that he did not appeal against the decision of the trial court, like his co-appellant, the 2nd appellant argued that the first appellate court erred in upholding the decision of the trial court while the DPP's appeal was filed out of time. He prayed that this appeal be allowed.

From the submissions made by the learned Senior State Attorney and the appellants, the issue for our determination is whether or not the appellants' grounds of appeal raise issues which were not canvassed in the

first appellate court. From the contents of grounds 2 – 6, we agree with the learned Senior State Attorney that the appellants have raised issues which were not dealt with in the first appellate court. The five grounds are challenging the decision of the trial court while, as agreed by the appellants, they did not appeal against that decision.

As shown above, it was the DPP who appealed against that decision and therefore, the appellants who did not exercise their right of appeal before the first appellate court, cannot raise issues which were not dealt with by that court. That amounts to an afterthought. As a principles, this court lacks jurisdiction to entertain such grounds – see for instance the case of **Godfrey Wilson** (supra) cited by Ms. Magoma**, Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015, **Emmanuel Josephat v. Republic**, Criminal Appeal No. 323 of 2016 and **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 385 of 2015, (all unreported). In the latter case, the Court stated as follows:

> *" Mr. Ngole, for obvious reasons resisted the appeal very strongly. First of all, he pointed out that the first and third grounds were not raised in the first appellate court and have been raised for the first time before us. We agree with him that the grounds must have been an afterthought. Indeed, as argued by the learned Principal State Attorney, if the High Court did not deal with those*

grounds for reasons of failure by the appellant to raise them there, how will this Court determine where the High Court went wrong?. It is now settled that as a matter of general principle this Court will not look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal.

On the basis of the above stated position, we decline to consider the 2nd -6th grounds.

With regard to the 1st ground of appeal, as submitted by the learned Senior State Attorney, even though it is a new ground, since it is on a point of law, the Court is not precluded from entertaining it. This is because, as a general principle, a point of law can be raised at any stage of proceedings. That position has been stated in a number of decisions of the Court including **DPP v. Benard Mpangala and 2 Others**, Criminal Appeal No. 29 of 2001, **Venant Kagaruki v. Permanent Secretary, Ministry of Finance and Anr.**, Civil Appeal No. 103 of 2007 and **Mathias Eusebi Soka v. The Registered Trustees of Mama Clementina Foundation**, Civil Appel No. 40 of 2001 (all unreported).

The argument by Ms. Magoma is that the point which has been raised by the appellants was earlier on withdrawn by their counsel in the first

appellate Court. With respect, we do not think that the learned Senior State Attorney is correct in her contention. The 1st ground raised by the appellants in this appeal is different. The ground raised in the first appellate court concerned the period of limitation for filing the appeal. Mr. Wasonga, learned advocate, who was representing the appellants had contended that the appeal was filed out of time. Having heard the respondent's reply however, the learned counsel withdrew his point of objection.

In this appeal the appellants are challenging the competence of the notice of intention to appeal lodged in the first appellate court (the notice). It is their contention that the notice is defective because it does not indicate the date of its endorsement, the person who endorsed it and the specific provision of the law under which the said notice was filed.

Having gone through the notice, we could not find any substantial defect in it. It is possible that the appellants did not have, in their record of appeal, page 2 thereof which appears after page 148 of the record. We say so because that page is not numbered. Otherwise, the notice, which was received by the trial court on 6/12/2019 was duly signed by a State Attorney on the same date of its lodgement in Court, that is, on 6.12.2019. On its first page, it is clearly shown that it was prepared by the National Prosecution Services Office.

As for the contention that the notice is defective because of non-citation of the specific provision for filing it, it is true that the respondent omitted to cite paragraph (a) of s.379 (1) of the Criminal Procedure Act [Cap. 20 R.E 2002, now R.E. 2019]. In our considered view however, the omission is not fatal because that paragraph provides for the period within which a notice of intention to appeal should be given, the requirement which the respondent complied with. This ground of appeal is also without merit and is thus hereby dismissed.

On the 7th ground of appeal, the learned State Attorney had initially argued that, like the 2nd - 6th grounds of appeal, it has also been raised for the first time in this appeal. We realized later, before we delivered our judgment that, since the appellants were convicted of the 2nd and 3rd counts by the first appellate court, the issue arises as to whether that ground does not also cover those counts. We thus re-opened the hearing so as to hear the parties, first on that issue and secondly, if the issue is answered in the affirmative whether or not that ground has merit.

During the second hearing at which the parties appearance was as had been at the first hearing. Ms. Mgoma, learned State Attorney admitted, and correctly so in our view, that the complaint in that ground; that the prosecution did not prove the

case against the appellant beyond reasonable doubt covers also the 2nd and 3rd counts. Although the appellants did not appeal against their conviction in the 1st, 4th and 6th counts, since they were convicted of the 2nd and 3rd counts by the first appellate court, they are entitled to appeal to this Court against the conviction arising from those counts. The 7th ground is therefore worth consideration by the Court. Adopting the procedure which they applied at the first hearing, the appellants opted to let the respondent make its reply to the ground of appeal and thereafter, submit in rejoinder if the need to do so would arise.

Submitting in reply to that ground of appeal, Ms. Mgoma argued that, as far as the second count is concerned, the appellants were properly convicted on the strength of the evidence of PW2 which was supported by that of other witnesses. With regard to the third count, it was her submission that the same was proved by the evidence of PW3 and PW4. According to the learned State Attorney, in her evidence, PW3 said that he saw the first appellant setting fire to her (PW3's) house and later, both appellants approached and beat him at the bush where he had ran to.

When acquitting the appellants of the 2nd and 3rd counts, the learned trial Resident Magistrate observed that, in their evidence, PW2 and PW4 stated that the offence took place on 27/1/2016 while according to the

charge sheet, the incident took place on 26/1/2016. The learned magistrate thus found the evidence of the two witnesses not credible. On appeal, the first appellate court found that, since the evidence of all witnesses including PW2 and PW4 was about a single incident of arson, the assertion by PW2 and PW4 that the house of PW2, PW3 and other victims were set on fire on 26/1/2016 instead of 27/1/2016 did not render that evidence invalid.

We respectfully agree with the finding of the first appellate court. This is because, the variance on the date on which the incident occurred did not prejudice the appellants – see for instance the case of **Oswald Mokiwa @ Sudi v. Republic**, Criminal Appeal No. 190 of 2014 (unreported). In that case, the Court was confronted with a similar situation whereby the date of the offence was wrongly stated in the charge and therefore differed with that which was stated in the witness's evidence. Having considered other decisions including the case of **Maneno Hamza v. Republic**, Criminal Appeal No. 338 of 2014 (unreported), the Court observed that, since the variance had neither prejudiced the appellant nor occasioned any injustice to him, his complaint had no substance. As stated by Ms. Mgoma, the variance between the charge and the evidence of PW2 and PW4 as regards date of the incident did not affect their credibility. In the circumstances, we do not also find merit in ground 7 of the appeal.

On the basis of the foregoing reasons, we find that this appeal has been brought without sufficient reasons. The same is thus hereby dismissed in its entirety.

DATED at **DODOMA** this 11th day of June, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This judgment delivered this 11th day of June, 2021 in the presence of the Appellants in person connected through video conferencing facility linked to Isanga Prison and Ms. Phoibe Magili, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.

H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL