IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J. A., SEHEL, J.A And MAIGE, J. A.)

CRIMINAL APPEAL NO. 116 OF 2021

1. NGESELA KEYA JOSEPH @ ISMAIL
2. RASHID MZEE ATHUMAN }.....**APPELLANTS**
3. ALLYU DAUDA HASSAN

VERSUS

THE REPUBLIC .....**RESPONDENT**

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

(Rumanyika, J.)

dated the 5th day of August, 2020

in

Criminal Appeal No. 84 of 2019

.....

JUDGMENT OF THE COURT

12th & 19th July, 2022.

SEHEL, J.A.:

On the 5th day of November, 2015, a Roman Catholic Church, Kabirizi Parish (the RC Church) located at Kabirizi village within the Bukoba District in Kagera Region was set on fire by unknown persons thereby destroying various Church items, namely the statutes of Virgin Mary and Saint Yohana Maria Mzey, Pictures of the way of the Cross, benches, altar, table and a rosary. The incident was reported to Lubale

Police Station in the next morning by Fr. Gozbert Byamungu (PW5). Upon receipt of the report, the police started to look for the culprits.

The appellants, Ngesela Keya Joseph @ Ismail, Rashid Mzee Athuman and Allyu Dauda Hassan were arrested in connection with the incident. They were then jointly and together charged before the District Court of Bukoba at Bukoba with three counts, to wit, conspiracy to commit a crime contrary to section 384, arson contrary to section 319 (a) and malicious damage to property contrary to section 326 (1), all of the Penal Code, [Cap. 16 R.E. 2002] (now R.E. 2022) (The Penal Code). It was alleged in the first count that on 5th November, 2015, during night hours at Kabirizi village, the appellants had conspired to commit an offence of arson. It was further alleged in the second count, that on the same date, time and place, the appellants did wilfully and unlawfully set fire on RC Church. The particulars of the third count was that on the same date, time and place, the appellants entered into the RC Church and destroyed various properties namely, *Sanamu ya Bikira Maria, Sanamu ya Mtakatifu Joseph, Picha Kumi na nne za Njia ya Msalaba, kabati moja, viti viwili, altar ya ibada, meza moja ndogo and Msalaba mmoja mdogo*, the properties of RC Church.

For reasons which shall shortly become apparent, we shall not reproduce the evidence adduced before the trial court. It suffices to state here that after a conduct of full trial, the learned trial magistrate relying on the extra judicial statements made by the appellant before the justices of peace which were admitted in evidence as exhibits P1, P2 and P3, found that they were guilty of the second and third counts. Accordingly, they were convicted and sentenced each of them to life imprisonment and two years jail, for the second and third counts, respectively. Concerning the first count, the learned trial magistrate held that it was a cognate offence to arson and thus, acquitted them.

Aggrieved, they appealed to the High Court. Their appeal was partly allowed because the conviction of malicious damage to property was quashed and two years sentence was set aside, but the conviction and sentence for the second count of arson were upheld. Still aggrieved, the first appellant preferred his separate notice followed by his memorandum of appeal consisting of the seven grounds whereas the second and third appellants preferred a joint appeal through a joint notice of appeal and a joint memorandum of appeal containing ten grounds. The grounds of appeal raise the following five points of grievances: **One**, that the appellants were convicted on a defective

charge which was amended by a pen and was not read over to the appellants after it was amended. **Two**, that the first appellate court erred to uphold the conviction and sentence which was grounded on extra-judicial statements of the appellants that required corroboration, but there was none. **Three**, that the learned trial magistrate did not act fairly as he denied the appellants the right to defend thereby contravening the provisions of section 231 (4) of the Criminal Procedure Act, [Cap. 20 R.E. 2022] (the CPA). **Four**, the learned trial magistrate erred in law when he admitted in evidence the extra judicial statement without conducting an inquiry after an objection was raised against its admission. **Five**, that the offence against the appellants was not proved beyond reasonable doubts.

At the hearing of the appeal, the appellants appeared in persons, unrepresented, whereas Messrs. Emmanuel Kahigi and Juma Mahona, both learned State Attorneys, appeared for the respondent Republic.

When invited to argue their appeal, the 1st appellant took the floor to argue his appeal. Expounding on his first ground of appeal that he was denied a right to defend and thus, there was non-compliance of section 231 (4) of the CPA, he argued that although the learned trial magistrate explained to them their right to defend, he failed to accord

them such right. He referred us to page 83 of the record of appeal where the 1st appellant chose to defend himself under oath and to call two witnesses. He added that when the defence case was called on for hearing, the appellants were not feeling well. They requested for adjournment but they were denied and the learned trial magistrate proceeded to close their defence case without calling his witnesses. It was his submission that failure to afford him an opportunity to call his witnesses denied him the right to be heard.

The second and third appellants raised the same complaint in their second ground of appeal. It was the third appellant who argued it on his behalf and the second appellant's behalf. Basically, he made a similar submission that they were denied a right to be heard as the learned trial magistrate having refused the request to adjourn hearing, he closed their case without calling their witnesses. He also referred us to page 87 of the record of appeal that they had to boycott after being forced to give their defence.

Responding to the complaint, Mr. Mahona argued that the appellants waived their right to defend. He submitted that when the case was called on for hearing on 11th April, 2019, the appellants requested for adjournment advancing a reason that they were not

feeling well as on 23rd March, 2019 they were beaten up by certain prison officers. After hearing both parties' arguments, he argued, the learned trial magistrate rightly refused the request after being satisfied that there was no proof of their claim. Having declined their request, he required the appellants to mount their defence. Nevertheless, he argued, the appellants opted to waive their right to defend thus the learned trial magistrate invited the prosecution to comment which they did. Thereafter, the case was fixed for judgment. It was the submission of the learned State Attorney that having waived their right, the learned trial magistrate correctly closed their case and fixed the date of delivering the judgment.

In re-joinder, the 1st and 2nd appellants reiterated their earlier submissions while the 3rd appellant referred us to page 46 of the record of appeal where the learned State Attorney requested for adjournment of the hearing on the reason that his witness was sick. He contended that the request was allowed without requiring proof of sickness whereas they were denied because they failed to bring proof.

Having heard the competing arguments and after we have gone through the record of appeal, we find it prudent to briefly review what transpired after the trial court ruled that the appellant had a case to

answer. It is on record that after the appellants were explained their right to defend, each of them responded as follows:

> *"1st accused [now the second appellant]: I will defend on oath. No witness. I pray for copy of proceedings.*
>
> *2nd accused [now the first appellant]: I will defend on oath. I have two witnesses and exhibits.*
>
> *3rd accused [now the third appellant]: I have one witness. I will defend on oath. I have exhibit and I pray for the copy of proceedings."*

Given that the appellants requested for copies of proceedings, hearing of the defence case was adjourned to 4th April, 2019 and an order for issuance of summons to the witnesses was made. However, on 4th April, 2019, hearing could not proceed due to the request made by the learned State Attorney that he had another hearing before another magistrate and in that other hearing, the witnesses came from far away. Having heard that request, the learned trial magistrate adjourned the hearing of the defence case to come on 11th April, 2019 without affording the appellants the right to comment on such request. Nonetheless, on the adjourned date, the appellants prayed to the trial

court to adjourn the hearing because they were not feeling well as they claimed that they were beaten on 25th March, 2019 by prison officers. The learned State Attorney opposed the prayer on grounds that there was no proof of a medical chit or any other reliable evidence and that the beating, if any, took place long time ago. He therefore, urged the trial court to proceed with the hearing. As stated earlier, the learned trial magistrate declined the prayer and ordered the appellants to proceed with the hearing of the case. Here, we find it convenient to reproduce the reasoning of the learned trial magistrate in declining the prayer:

> *"I am in agreement with prosecuting State Attorney Mr. Kahigi that there is no proof that the accused persons were beaten and their health was not good to the extent that they cannot know what to defend their case, not only that* ***but also the case is pending for quite long time in the court. Therefore, by any means, the case must come to end today without unnecessary delay.*** *There is no sufficient reason for adjourning this case today to another date.* ***This court is not in good position to entertain any delay tactic today so as to prevent backlog.*** *It appears to this court that all accused persons are physically and mentally fit*

to defend their case today. Therefore, I order the defence hearing to proceed."

It appears from the above extract that the learned trial magistrate declined the prayer not only because there was no proof but also the case had been pending in court for long time.

On appeal, the appellants raised the same complaint before the High Court that they were denied a right to defend since they had good reason for adjournment but the learned trial magistrate denied them thus there was a breach of natural justice. The High Court found that the ground lacked merit as from 4th-11th April, 2019, they had enough time to prepare for their case and though they might have been beaten but they managed to appear on 4th April, 2019 and on 11th April, 2019, yet they did not complaint before. It then concurred with the learned trial magistrate that it was important to clear backlog than to entertain flimsy reasons seeking to adjourn cases called on for hearing. It thus dismissed it.

With due respect with that reasoning, we have gathered from the record of appeal that the cause of delay or rather the pendency of the case in court for a long time was not the making of the appellants. If there was any delay in the disposal of the case, it was not caused by the

appellants. We have shown that the prayer for adjournment was made by the appellants only once. That is, the prayer was made on the date when they were asked to start their case. The last two adjourned dates, on 21st March, 2019 and 4th April, 2019, were not prompted by the appellants. As such, to refuse the request on the reason that the appellants were deploying delay tactics was a travesty of justice and a denial of their right to be heard guaranteed under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, [Cap. 2 R.E. 2002] and provided under section 231 (1) of the CPA.

In **Alex John v. The Republic**, Criminal Appeal No. 32 of 2003 (unreported) the Court said:

> *"... Article 13 (6) (a) of the Constitution ... imposes a duty on a trial court to create or provide an environment for a fair hearing or a fair trial. So,* ***an accused's right to give evidence on his own behalf*** *[as stipulated under section 231 (1) (a) of the CPA],* ***simply means that he must be given a fair trial. This right would be illusory if an accused person is ordered, to conduct his defence without being afforded reasonable***

opportunity to present his case fairly and fully to the court. *" [Emphasis added]*

Yet, in the case of **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 33 of 2002 (unreported), the Court emphasized that:

> *"The right of a party to be heard ... is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

From the foregoing, we are of the settled position that the learned trial magistrate breached the basic rights of the appellants when he refused to grant them at least one adjournment since it was their first time to advance such a request. We hold that the appellants were denied their fundamental right to be heard by not being afforded reasonable opportunity to present their case fairly and fully to the trial court. For that reason and consistent with the settled law, we are of the firm view that the decision of the trial court cannot be allowed to stand.

At the end, we allow the appeal on that complaint only. Therefore, we see no reason to go into determining any other grounds of appeal.

Accordingly, we nullify the proceedings of the two lower courts, quash the conviction and set aside the sentence. For the interest of justice, we remit the file to the trial court and order immediate retrial of the case by another magistrate. In the meantime, the appellants are to remain in remand custody waiting for their trial.

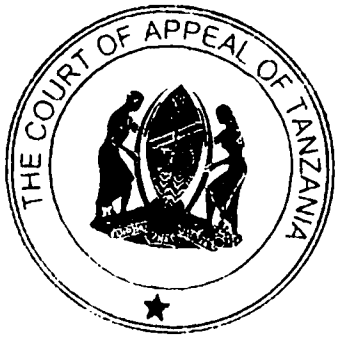
DATED at **BUKOBA** this 19th day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 19th day of July, 2022 in the presence of both appellants in person and Mr. Juma Mahona, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



O. A. AMWORO
DEPUTY REGISTRAR
COURT OF APPEAL