IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MKUYE, J.A., KAIRO, J.A And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 603 OF 2020

NGESELA KEYA ISMAIL JOSEPH .....1ST APPELLANT

RASHID MZEE ATHUMANI.....2ND APPELLANT

ALLYU DAUDA HASSANI.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Rumanyika, J.)

dated the 13th day of August, 2020

in

Consolidated Criminal Case No. 56 & 57 of 2018

JUDGMENT OF THE COURT

11th & 22nd March, 2024

MKUYE, J.A.:

The appellants, Ngesela Keya Ismail Joseph, Rashid Mzee Athumani and Allyu Dauda Hassani were charged before the District Court of Bukoba at Bukoba with two counts, to wit, 1st count of conspiracy to commit an offence contrary to section 384 of the Penal Code, Cap 16 R.E 2022 (The Penal Code) and 2nd count of arson contrary to section 319 (a) of the Penal Code.

The particulars of the offence in the 1st count were that the appellants, on 22nd of September, 2015 during noon hours at Omkibeta area within the municipality and District of Bukoba in Kagera Region did conspire to commit an offence, to wit, arson. In the 2nd count, it was alleged that the appellants on the same date, time and area did wilfully and unlawfully set fire on a church famously known as Evangelist Assemblies of God Tanzania (EAGT) located at Omkibeta.

Upon a full trial, the appellants were each convicted and sentenced to seven years imprisonment for the 1st count; and life imprisonment for the 2nd count. Aggrieved, they appealed to the High Court but their appeal was not successful. Still protesting their innocence, they have brought this second appeal to this Court.

Before embarking on the merit of the appeal, we find it appropriate to narrate, albeit briefly, the background leading to the present appeal.

On the early morning of 22/9/2015, Alistidies Kabonaki (PW5), a Pastor of Evangelical Assemblies of God Tanzania (EATG) received information from his house girl that the church he was conducting religious services to his congregation had been razed down by fire. PW5 proceeded to the church which was a two minutes' walk and witnessed

that said church burnt out and only its leftovers remained. He reported the matter to the police who initiated some investigations which led to the arrest of the appellants.

According to the record of appeal, No. 8892 D/Cpl Fredrick (PW1) visited the scene of crime, drew the sketch map and took photographs which were tendered and admitted as Exh P1 and P2 respectively. PW1 and John Kessy (the OC-CID) (PW4) went to search the appellants' residencies where upon the 2nd appellant was found with a mobile phone, stamp seal of the church and two joined books belonging to the church leader, Pastor Kabonaki. The said search was conducted in the presence of Wilhelmina Ndibalema (PW7) and Shamimu Tesha (PW8) and a search order (Exh P4) was filled and signed by all witnesses.

According to PW1, Hamida Mussa (PW2), Nelson Bagenda (PW3) and Almichius Kilaja (PW6), the appellants were taken to the justices of peace after they had indicated to confess participation in the commission of the offence. Their Extra Judicial Statement (EJS) were tendered and admitted as Exh. P2 (Allyu Dauda), Exh. P3 (Ngesela Keya Joseph @ Ismail) and Exh. P6 (Rashid Mzee Athumani) respectively.

In defence, all appellants disassociated themselves from the commission of the offence. Each explained on how he was arrested by

unknown people. In particular, the 2nd appellant explained on how he was arrested by unknown people and bundled into a motor vehicle, blind folded and taken to a certain rest house. He explained on how he was tortured and interrogated over the incidences of burning churches and cutting peoples throats. He also claimed to have been forced to confess and sign certain papers.

The 1st appellant explained that he was born on 22/9/1995 and that his mother used to throw a birthday party for him and that on 22/9/2015 he was at his mother's house at Rumbale within Bukoba for a small party to celebrate his birthday and that he spent two days there. He also testified to have been arrested on 21/11/2015 at 14:00 hours, in the same manner the 2nd appellant was arrested and taken to a certain residential house and interrogated like 2nd appellant, tortured and forced to sign some documents by thumb print.

The 3rd appellant gave a similar narration as was to the 1st and 2nd appellants and how he was arrested on 21/11/2015 while on a commuter bus at Ibwa heading to Kemondo. He was taken to a certain house where he was tortured and forced to sign certain documents.

Both the trial and first appellate courts were convinced of the appellants' criminal culpability leading to their conviction and sentence as hinted earlier on.

The appellants have fronted twelve (12) grounds of appeal most of which assailed the conviction founded on the appellant's extra judicial statements which were improperly admitted in evidence; the seizure order which was not read over after being admitted in evidence; the circumstantial evidence to the effect that the 2nd appellant was found in possession of two joined books belonging to PW5, the Pastor to the burnt church; and that the case was not proved beyond reasonable doubt.

When the appeal was called on for hearing, the appellants appeared in person without any representation; whereas Misses. Edna J. Makala and Agness T. Awino teaming up with Mr. Yusuph A. Mapesa, all learned State Attorneys appeared representing the respondent Republic.

On being availed an opportunity to expound their joint grounds of appeal, each appellant sought to adopt them to form part of their submission and opted to let the learned State Attorneys respond first, with a leave to rejoin later, if need would arise.

At the outset, Ms. Makala declared their stance that they were supporting the appeal. She contended that, although the appellants fronted a total of twelve grounds of appeal, she will argue the twelfth ground of appeal to the effect that the case was not proved beyond reasonable doubt and in the course the other grounds of appeal will also be argued.

Ms. Makala was fairly brief and focused. She argued that, basically the conviction of the appellants is based on the evidence of PW2, PW3 and PW6, the justices of peace, who recorded the extra judicial statements of the appellants. She explained that, when PW2 prayed, as shown at page 15 of the record of appeal, to tender the 3rd appellant's (Rashid Mzee Athumani) extra judicial statement, the appellant objected to its being tendered contending that he never made it and that he did not even see PW2. However, she argued, the trial court rejected the objection by the 3rd appellant and admitted the extra judicial statement in question as Exh. P2.

The learned State Attorney went on arguing that, the same happened to the extra judicial statement of the 2nd appellant. She contended that, although its tendering in court (page 20 of the record)

was objected when PW3 prayed to tender it, the trial court overruled the objection and admitted it as Exh. P3.

Also, when PW6 who recorded the 1st appellant's extra judicial statement prayed to tender it in court, despite the fact that maker raised an objection to its being admitted on account that he never made it or even saw PW6, the trial court admitted it as Exh. P6.

Ms. Makala rounded it up that, it was wrong to admit the objected extra judicial statements without conducting an inquiry. She referred us to the case of **Sabas Bazil Marandu @ Myahudi and Another**, Criminal Appeal No. 299 of 2013 page 14 (unreported) in which the Court cited the case of **Shukuru Ramadhani Makumbi and 4 Others v. Republic**, Criminal Appeal No. 1999 of 2010 (unreported), where the Court expunged the confessional statement admitted in court without conducting a trial within trial after it was objected from being tendered in court.

In relation to this case, it was Ms. Makala's submission that, since the trial court did not conduct an inquiry after the extra judicial statements were objected to be tendered, the same were wrongly admitted and that they be expunged from the record.

The learned State Attorney went on to argue that, after the expungement of Exhs. P2, P3 and P6 there remains oral evidence by PW5 to the effect that, after the appellants were taken to him by the Police, they confessed to have burnt the church. However, Ms Makala assailed PW5's evidence relating to the appellants' oral confessions in that they cannot be admissible as they were made while the appellants were under the custody of the police. While referring to the case of **Tabu Malebeti @ Medard v. Republic**, Criminal Appeal No. 115 of 2020 (unreported) page 22, she argued that the appellants cannot be said to have been free agents when they made such confessions.

It was Ms. Makala's further argument that, the other remaining evidence is the circumstantial evidence from PW4 regarding the search which was supported by PW7 and PW8 who witnessed when the said search was conducted at the 2nd appellant's home and led to the recovery of two joined books of PW5 whose church was burnt. She was of the view that, the remaining evidence was not sufficient to prove the offence of arson.

On being prompted on the relevance of the search order (Exh P4) to this case, she argued that, it was irrelevant since it related to the case of murder and not the case at hand of arson.

In this regard, she implored the Court to find that the case was not proved beyond reasonable doubt and allow the appeal.

Rejoining from what was argued by Ms. Makala, the 1st appellant joined hands with her and referred us to the case of **Ndhalahwa Shiranga Buswelu and Another v. Republic**, Criminal Appeal No. 62 of 2004 page 20 (unreported) insisting that the circumstantial evidence, as a chain was not connected. He stressed that the Court should allow the appeal and set him free.

As regards the 2nd and 3rd appellants, both conceded to what was submitted by Ms. Makala and urged the Court to allow the appeal and release them from custody.

Having examined and considered the grounds of appeal and the arguments of both sides, we think, the issue for our determination is whether or not the case was proved beyond reasonable doubt.

It is common ground that, in convicting the appellants in this case, the trial court relied on four types of evidence. **One**, the appellant's extrajudicial statements (Exh P2, P3 and P6); **two**, the search order (Exh P4) showing the items recovered from the 2nd appellant; **three**, the circumstantial evidence from PW5 whose joined books were retrieved through search carried out at the 2nd appellant's residence; and **four**,

the purported confession made by the appellants to PW5 when they were taken to him by the police officers.

The appellants' grievancies in grounds nos. 3, 4 and 6 are on the extrajudicial statements. The gist of their ground no. 6 of the memorandum of appeal is that their extra judicial statements were illegally admitted as the inquiry was not conducted despite the fact that they were objected from being tendered in court.

As hinted above, Ms. Makala conceded to it. She clarified on how the 3rd appellant objected his extra judicial statement to be admitted in evidence after PW2 prayed to tender it alleging that he never gave his statement or even met PW2, (see page 15 of the record of appeal). Also, the 2nd appellant objected the tendering of his extrajudicial statement sought to be tendered by PW3 on the ground that it was not given voluntarily (see page 20 of the record of appeal). She also explained on how the 1st appellant objected his extrajudicial statement sought to be tendered by PW6 on the same ground that it was not given voluntarily. The learned State Attorney added that, it was wrong for the trial court to admit them without conducting inquiry after being objected by the appellants.

Our scrutiny of the record of appeal particularly at pages 15, 20, 21 and 22 has revealed that, each appellant objected when his respective extrajudicial statement was sought to be tendered in court challenging their voluntariness when the said statements were made or that they were not made at all among them denying even seeing the recorders. However, the trial court proceeded to admit them as exhibits P2, P5 and P6, respectively without conducting any inquiry in order to ascertain if they were made or if they were made voluntarily and they signed them.

This, as was rightly argued by the learned State Attorney, was wrong. When confronted with a similar scenario in the case of **Manje Yohana and Another v. Republic,** Criminal Appeal No. 147 of 2016 (unreported), the Court had this to say:

> *"... the first appellant who was alleged to be the maker of the confession sought to be tendered, refused it being tendered in evidence under the pretext that he did not agree with its contents and that he did not sign it. With this remark of the first appellant, it is our view that the document assumed the status of a retracted or repudiated confession. By that statement, we think the accused simply meant he did not make*

the statement or that he was forced to make it and therefore disowned it. ***What the court should have done in such an eventuality was to clear the documents for admission. The clearing process intended here comprises conducting an inquiry with a view to verifying whether or not the first appellant made it and whether or not he did not sign it.*** *That was not done and we are of the considered view that the omission was prejudicial to the appellants ..."*

[Emphasis added]

In dealing with a similar situation, the Court also in the case of **Paulo Maduka and 4 Others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported), cited with approval the case of **Twaha Ali and 5 Others v. Republic**, Criminal Appeal No. 74 of 2004 (unreported) and stated as follows:

"... If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, ***the trial court must stop everything and proceed to conduct an inquiry (or trial within trial) into the voluntariness or not of the alleged***

> ***confession. Such an inquiry should be conducted before the confession is admitted in evidence...***" [Emphasis added]

See also **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010, **Makelele Kulindwa v. Republic**, Criminal Appeal No. 175 "B" of 2013 and **Semeni Mgomela Chiwanza v. Republic**, Criminal Appeal No. 49 of 2019 (all unreported).

We are, therefore, in accord with the learned State Attorney that the appellants' confessions were not properly admitted in court. After the appellants had objected to their admission, the trial court ought to have conducted inquiries for ascertaining their existence and/or their voluntariness before they were admitted in evidence as Exhs. P2, P3 and P6. Since that was not done, we are of the considered view that such omission was prejudicial to the appellants.

As to the effect of such anomaly, in the case of **Sabas Bazil Marandu @ Myahudi** (supra), we stated as follows:

> *"Coming back to the appeal at hand, it is clear that failure to conduct a trial within trial makes the confessional statement inadmissible. We therefore find Exh. P1 inadmissible and should*

not have been admitted in evidence. We accordingly expunge it from the record."

Even in this case, we subscribe to the above guidance and we, accordingly, expunge Exhs. P2, P5 and P6 from the record.

The other evidence that was relied upon by the trial court was that of PW5 that the appellants confessed orally after being taken to him by the police. This evidence was taken to have corroborated the confessional evidence.

According to PW5, following the appellants' arrest, search was conducted in their residences whereupon the 2nd appellant was found with various items including the two joined books (Exh. P5). The same was identified by PW5 at the police station. The police promised to take the suspects (appellants) to the burnt church, and indeed, were taken there. PW5 testified that, he asked them (page 33 of the record of appeal) if they burnt the church and they admitted to have done so and explained the reasons for doing so in that being Islamic followers if they burn a church, they get a reward from God. Then they asked forgiveness. It is noteworthy that, the appellants were taken to PW5's burnt church by the police, meaning that all through they were under their custody.

The issue here is whether this kind of confession can be said to have been made freely.

In the case of **Tabu Malebeti @ Medard** (supra) cited by the learned State Attorney, when we were faced with akin scenario, we stated that:

> *"...The absence of the torture or intimidation to the appellants was not the only factor that should have been considered. Given that the alleged statements were given when the appellants were under restraint by the Sungusungu and that they were enclosed by a throng of villagers whom we can presume to have been agitated, the atmosphere was not conducive for them to give self-incriminating statements voluntarily. They simply were not free agents volunteering to give confessional revelations"*

See also in **Kija Iseme v. Republic**, Criminal Appeal No. 175 of 2015 (unreported).

In this regard, guided by the above authority, we agree with Ms. Makala that the purported oral confession made by the appellants to PW5 while they were brought to him by and under the custody of the

police, cannot be said to have been made by free agents. They cannot be said to have given their self-incriminating statements voluntarily under such atmosphere which must not have been conducive to them. Such evidence was therefore suspect and cannot be safely relied on.

Besides that, the other evidence which could have been taken to corroborate the extrajudicial statements is the circumstantial evidence from PW4, PW7 and PW8 relating to the search that was conducted to the 2nd appellant's home leading to the recovery of assortment of items including the two joined books (Exh. P5) belonging to PW5. The search was conducted under the authority of the search order (Exh. P4) found at pages 122 and 123 of the record of appeal. The said search order issued on 25/11/2015 authorised to search the 2nd appellant on suspicion to have been involved in murder and seditious incidences. It was conducted in the presence of the appellants who by then had been arrested on arson offence together with PW7 and PW8 who also witnessed the search. As it is, the said search order (Exh. P4) had no linkage with the offence of arson to which the appellants were arrested.

Given the nature of Exh, P4 that it related with the offences of murder and sedition, we are not convinced with its authenticity. This is because, we wonder why the OCS, if the appellants' arrest was in

connection of arson and the police were aware of this, had to issue a search order relating to murder and seditious incidences instead of arson. We think, it raises doubt which ought to be resolved in favour of the appellants.

Apart from that, on the same Exh. P4, the court record also revealed that, after its admission in court, it was not read out in court. It is a well-established principle that an exhibit admitted in evidence must be read out in court to the appellants - see **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported). There is unbroken chain of authorities which emphasise the need to read out the exhibit after being admitted in court. Just to mention a few, they include, **Robinson Mwanjisi and 3 Others v. Republic**, [2003] TLR 218; **Sunni Amman Awenda v. Republic**, Criminal Appeal No. 393 of 2013; **Anania Clavery Betelo v. Republic,** Criminal Appeal No. 355 of 2017; **Erneo Kidilo and Another v. Republic,** Criminal Appeal No. 206 of 2017; and **Wambura Kiginga v. Republic,** Criminal Appeal No. 301 of 2018 (all unreported). The omission to read out the exhibit or failure to read the contents of the exhibit after it is admitted in evidence is a fatal irregularity which is prejudicial to the appellants – see **Mbaga Julius v. Republic**, Criminal Appeal No. 131 of 2015 and **Thomas**

Pius v. Republic, Criminal Appeal No. 245 of 2012 (both unreported). Apart from that, it is a clear violation of the right of fair trial of the accused to understand the contents of the evidence tendered and admitted against him – see **Anania Clavery Betela** (supra). In this regard, Exh. P4 would be liable to be expunged from the record as we hereby do.

The effect of expungement of the evidence emanating from the search illegally obtained is that even the purported items or exhibits it purported to have been seized will flop. This stance was taken in the case of **DPP v. Doreen John Mlemba**, Criminal Appeal No. 359 of 2019 (unreported) in which the Court observed that, where the search which was conducted is illegal all other documents pegged on it, crumble. In particular, the Court stated as follows:

> *"Consequence to expunging the basic evidence (Exhibit P2) upon which the conviction could only be based, any other evidence in support of the recovery of or trafficking in the same drugs, like exhibit P1 (the report ascertaining that the substances were narcotic drugs) Exhibit 6, (the certificate of seizure) and exhibit P4 (the certificate of value of the drugs) including any oral evidence accompanying such*

documentary exhibits, spontaneously crumble under their own weight, for having nothing to support. "

Even in this case, guided by the above authority, we are settled in our mind that following the expungement of the search order (Exh P4), whatever exhibit that was seized in its strength would also crumble or flop. This would include the two joined books (Exh P5) belonging to PW5 whose church was burnt together with the oral evidence relating to such exhibit. Nothing remains.

Ultimately, following the expungement of the extra judicial statements (Exhs. P2, P3 and P6) for being illegally admitted in evidence coupled with the same fate on the search order (Exh. P4) which led to the recovery of Exh. P5 linking the appellants with the burnt church as well as discrediting the purported oral confession made by the appellants to PW5, there remains no other evidence to sustain the conviction.

Now coming to the main issue whether the case was proved beyond reasonable doubts, we are of a considered view that it was not. Having expunged the confessional statements of the appellants which were heavily relied in convicting the appellants, there remains no other

evidence which could sustain the conviction since even the evidence which was taken to have corroborated it, have crumbled.

That said and done, we are in agreement with Ms. Makala that the case at hand was not proved beyond reasonable doubt. We, therefore, allow the appeal, quash the conviction, set aside the sentence meted out against the appellants and order for their immediate release from prison unless otherwise held for other lawful reasons.

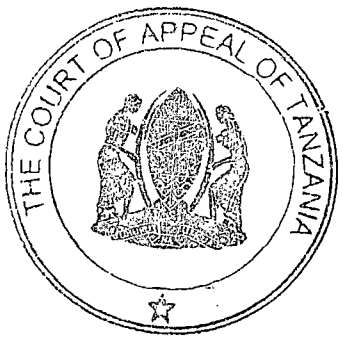
DATED at **BUKOBA** this 21st day of March, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2024 in the presence of Appellants appeared in person and Ms. Gloria Lugeye, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL