IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 40 OF 2012
(From Original Criminal Case No. 39 of 2012 in the District Court of Sumbawanga)

KELEBI KASONJE..... ..... APPELLANT
Versus
THE REPUBLIC ..... RESPONDENT

4th September & 20th November, 2014

JUDGMENT

MWAMBEGELE, J.:

The appellant, Kelebi Kasonje was charged, tried and convicted in Sumbawanga District Court in Criminal Case No. 39 of 2012 with two counts: first; naming a person witch c/ss 4 (a) and 5 (1) of The Witchcraft Act, Cap. 18 of Revised Edition, 2002 and secondly threatening with violence c/s 89 (2) (a) of the Penal code, Cap. 16 of Revised Edition, 2002. Upon conviction he was sentenced to seven (7) years imprisonmentr. He was aggrieved with both conviction and sentence hence, protesting his innocence, he appealed to this court.

Before this court appellant lodged his memorandum of appeal containing four (4) grounds. But, having read them between the lines, the appellant's main grounds of complaints are two; that the prosecution's case was

marred with doubts which ought to have been resolved in his favour and, secondly, that most of the prosecution witnesses were relatives and no independent witness was called to testify to support their testimony.

When the appeal came up for hearing on 04.09.2014, the appellant appeared in person and unrepresented and was therefore fending for himself. Mr. Mwashubila, learned State Attorney appeared for the respondent Republic to argue the appeal. Arguing for the appeal, the appellant adopted and relied on his grounds of appeal he earlier filed as his submissions. On the other hand. Mr. Mwashubila, learned State Attorney supported the appeal in respect of the first count but was loathe to do the same in respect of the second count. On the first count he submitted that the case against the appellant was not proved beyond reasonable doubt because of the discrepancy in evidence. The crucial witnesses in the instant case were the victim Andrea Kalungwiza PW2 and Jacob Kalungwiza PW3. A perusal of the trial court proceedings reveal that PW2 never testified that the appellant called him a witch but PW3 testified that he heard the appellant calling him so. According to him, the discrepancy goes to the root of the charge and creates doubt on the prosecution case which must be resolved in favour of the appellant. To bolster his argument he referred this court to the case of ***Maruzuku Hamis vs R*** [1997] TLR 1.

In respect of the second count Mr. Mwashubila, learned State Attorney submitted that the Republic proved the case to the standard required by the law that the appellant threatened with violence and also threatened to

destroy the property of PW2. However, as the provision under which the appellant was charged with, its sentence upon conviction is one year, since he was convicted on 12.05.2012 and on the date when this appeal came for hearing he had already served more than two years, he opined and submitted that the appellant be released from prison by this court.

Before dealing with the present appeal on merits, I wish to address one or two pertinent points pertaining to this appeal, to see whether the charge in respect of the first count was proper or not. The first one respects the charge sheet. In respect of the first count the appellant was, as shown in the first paragraph to this judgment, charged with naming a person a witch contrary to sections 4 (a) and 5 (1) of the Witchcraft Act. In order to appreciate the points I am about to canvass shortly, I take the liberty to reproduce the relevant provisions. Section 4 of the Witchcraft Act, so far as is relevant to the present discussion, reads as follows:

> "Any person, otherwise than in the course of communicating information to or obtaining advice from a court, a member of the police force, a local government authority or any public officer–
>
> (a) whether with or without any of the intents mentioned in subsection (1) of section 5, names or indicates any person as being a witch or wizard by imputing to him the use of witchcraft or any instrument of

witchcraft with intent to cause injury or misfortune to any person or class of persons or to cause damage to any property; or

(b) with any of the intents mentioned in subsection (1) of section 5, names or indicates any person as being a witch or wizard,

commits an offence under this Act."

And section 5 (1) of the same Act provides:

"Any person who commits an offence under this Act **with intent** to cause death, disease, injury, or misfortune to any community, class of persons, person, or animal, or to cause injury to any property shall be liable to imprisonment not less than seven years."

[My emphasis].

The charge sheet as is in the first count appears on record as follows:

"IN THE DISTRICT COURT OF SUMBAWANGA

AT SUMBAWANGA

CRIMINAL CASE NO. .....OF 2012

REPUBLIC

VERSUS

KELEBI S/O KASONJE

CHARGE

1ST COUNT

STATEMENT OF THE OFFENCE

NAMING A PERSON A WITCH: contrary to section **4 (a)** and **5 (1)** of the Witchcraft Act CAP 18 as amended by Act No. 12/1998

PARTICULARS OF THE OFFENCE

KELEBI S/O KASONJE on 20th day of February, 2012 at Lyapona village within Sumbawanga District in Rukwa Region did name one **ANDREA S/O KALUNGWIZI** to be a witch."

The appellant herein was charged with an offence of naming a person a witch under sections 4 (a) and 5 (1) of the Act under which intent is an important ingredient. The particulars of the offence as quoted above do not disclose as to whether he did so with intent as required by the relevant provision quoted above. It is my view that intent of the accused person ought to have been shown in the charge. Failure to disclose the intent made the charge defective as it become difficult for the court to give a proper punishment to the convict, because intent under section 5 (1) of the Act is a prerequisite ingredient while it is not under section 5 (2). Be it as it may, even if I am to dispense with the requirement, the offence

would no longer fall within the purview of subsection (1) but under subsection (3). The latter subsection requires that the trial under the subsection shall not commence unless the consent of the Attorney-General or Zonal State Attorney In-charge has been sought and obtained. This would exacerbate the position as the trial would turn into a nullity.

Having said so, I find the charge against the appellant in respect of the first count was defective for the reasons as hereinabove stated. Under the circumstances, the defect is not curable under section 388(1) CPA. The proper course to take in the circumstances would be to order a retrial. However, before I give that order, let me, firstly satisfy myself as to whether the evidence in respect of the first count is sufficient to ground a conviction. I propose to start with the appellant's complaint to the effect that the prosecution witnesses were relatives and that no independent witness was called to testify to give credence to their testimonies. This complaint will not detain me. There is no law in this jurisdiction which prohibits relative witnesses to testify. As was held by this court in ***Jacob Mlongo Vs R***, Criminal appeal No. 240 of 1995 (unreported) what is important is the credibility of the witnesses involved and also the circumstances surrounding a particular case. And in the case of ***Mahamud Mbeta Vs R***, criminal appeal No. 54/1978, this court [Samatta, J. (as he then was)] reiterated that there is no principle of law which says that evidence of a relative cannot support conviction. Therefore, every witness is entitled to credence and must be believed and his testimony accepted unless there is good and cogent reason for not believing a witness - see ***Damiani Kilua & Another Vs Re*** [1992] TLR 16. With

these authorities in mind, I find the complaint by the appellant in this regard has no merit and the same is rejected.

Regarding the complaint to the effect that the case against him has doubts to prove beyond reasonable doubt, I wish to state here that, as rightly submitted by Mr. Mwashubila, learned State Attorney, that the case against the appellant in respect of the first count was not proved to the standard required by law. The evidence of PW2; the victim, does not show that the appellant called him a witch. It was PW3 who testified that he heard the appellant calling him so. This discrepancy is not a minute one which one would hold as not going to the root of the offence. If it were true that he was called him a witch, the victim would not have failed to state so in his testimony. It was only PW3 who touched upon the first count. But because the evidence of PW2; the victim, is silent on this otherwise very important information of the charges leveled against the appellant, it becomes uncertain if at all the appellant uttered those words. I am in agreement with the learned State Attorney that the appellant has sufficiently casted doubts in the prosecution case which doubt must be resolved in favour of the appellant. In the premises, I find the case against the appellant in respect of the first count was not proved to the standard required by law; beyond reasonable doubt.

Coming to the second count which Mr. Mwashubila, learned state attorney submitted that was proved beyond reasonable doubt that the appellant threatened with violence to destroy the property of PW2, I think he is right. I have considered the evidence of PW2 and PW3. They both

testified that the appellant threatened to kill or demolish his property. The appellant gave PW1 an ultimatum of one week to relocate to another place after which he would demolish his house and take his property. That was sufficient to prove the case on the second count to the hilt.

Now, coming to the sentence, the sentence of seven years meted out to the appellant was illegal on two fronts; first, it was omnibus and second it was above the ceiling which the trial magistrate could competently impose. As for the sentence being omnibus, the trial court, in inflicting the sentence against the appellant on the two counts, stated:

> "The accused person shall be imprisoned for solely seven years for both counts as both of the counts had been done at the same time ..."

Despite some linguistic challenges that look apparent in the foregoing excerpt, the message coming out of it is clear that the trial court intended to sentence the appellant on a cumulative sentence of seven years for both counts as the offences were a result of the same transaction. With due respect, in so doing, the trial court entered into an error. In an unreported decisions of ***Peter Pinus & 3 Others Vs R***, DC Criminal Appeal No. 10 of 2012, ***Charles Kasoni Vs R*** DC Criminal Appeal No. 42 of 2013 and ***Julius Kalunga & Another Vs R*** , DC Criminal Appeal No. 8 of 2012, faced with an identical situation, I had an opportunity to canvass on this point. I will reiterate the position I took on those cases as I still hold the same view today.

The sentence of seven years imposed by the sentencing court, having meant for both counts without stating how many years were meant for the first or and how many for the second was but an omnibus sentence. It was incumbent upon the sentencing court to pronounce a separate sentence in respect of each count. An omnibus sentence is, at law, illegal. Brian Slattery; the learned author of **the Handbook on Sentencing**, published by the Faculty of Law of the University of Dar es Salaam, 1970, states at p. 5 as follows:

> "... a separate sentence must be imposed for each count. What has been termed as 'omnibus' sentence, that is, a single sentence designed to embrace all the convictions and reflect their gravity as a totality, has been repeatedly held to be illegal."

The learned author makes reference to ***R Vs Charles Henry Meyerowitz*** (1947) 14 EACA 130, ***Mohamed Warsama Vs R*** (1956) 23 EACA 576; ***Salumu s/o Dulu Vs R***, Law Report Supplement to Tanganyika Gazette, No. 5 of 1962, P. 4, ***R Vs Ramadhani s/o Mrisho***, (1963) Tanzania High Court Bulletin n. 188, ***Lucas Katingisha Vs R*** [1967] HCD n. 263 and ***John Ngarama Vs R*** [1967] HCD n. 264 as authorities for the statement of the law that an omnibus sentence is illegal.

In the ***Mohamed Warsama*** case (supra) it was held:

> "As regards sentence, no authority is needed for the proposition that an omnibus sentence is unlawful. **For every count on which a conviction is had there must be a separate sentence.**"
> [My emphasis].

The foregoing position of the law was restated by Cross, J. in the ***John Ngarama*** case (supra) as follows:

> "Where an accused is convicted on two or more counts, the sentence given must be allocated among the various counts, or to a particular count ..."

The same position was taken by Weston, J. in ***Burton Mwakapesile Vs R*** [1965] 1 EA 407 wherein it was reiterated that there must be a separate sentence for each count on which a conviction is made and that an omnibus sentence is unlawful.

In the instant case, the learned trial Resident Magistrate seemed to justify the course he had taken because the offences "had been done at the same time". That was an error. The appellant, having been charged with and convicted of both counts, and the learned trial Resident Magistrate having been satisfied that there was enough material upon which to found

convictions, the prosecution having proved the case beyond reasonable doubt on the two counts, it was incumbent upon him to allot the sentence in respect of each count. The fact that the two counts were a result of the same transaction should have been considered when deciding whether or not the sentences should have run concurrently or consecutively.

And to clinch it all, the sentence of seven years was illegal on the ground that it is above the powers which the learned Trial Resident Magistrate could competently impose. The sentence was illegal as it is beyond the sentencing powers of the trial court as provided for by subsection (1) (a) of section 170 of the CPA. The sentencing powers of subordinate courts are provided for under section 170 of the CPA of which subsection (1) (a) thereof provides:

> "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"

The offences of calling a person witch contrary to sections 4 (a) and 5 (1) of The Witchcraft Act, and threatening with violence contrary to section 89 (2) (a) of the Penal code, are not scheduled offences. In the premises, the trial court was bound by the provisions of section 170 (1) (a) of the CPA. My reading of the said provision (quoted above) has it that the trial court could not have competently imposed a custodial sentence in excess of five years. If the trial court felt the circumstances of the case attracted a sentence in excess of five years which the trial court had power to inflict, it ought to have committed the accused person to this court for sentencing in terms of section 171 of the CPA. The sentence of seven years meted out to the appellant was therefore illegal.

For the avoidance of doubts, it may be instructive to state at this juncture that as for scheduled offences, subordinate courts have powers under the Act; the Minimum Sentences Act, Cap. 90 of the Revised Edition, 2002 only in respect of certain offences under the Stock Theft (Prevention) Act, Cap. 265 of the Revised Edition, 2002. These are: trespassing with intent to steal and any offence relating to brands contrary to, respectively, sections 4 and 7 of Cap. 265 (as per the first schedule); being found near stock in suspicious circumstances and passing through, over or under, tampering with, fences around a stock enclosure or cattle *boma* contrary to, respectively, sections 5 and 6 of Cap. 265 (as per the second schedule) and being in possession of stock suspected of having been stolen contrary to section 3 of Cap. 265 (as per the third schedule). Most of the offences under which subordinate courts had powers to inflict minimum sentences under the Act, were removed by the Written Laws (Miscellaneous

Amendments) (No. 2) Act, 2002 – Act No. 9 of 2002 which legislation deleted the first schedule thereof.

After stating what I have endeavoured to hereinabove, under normal circumstances, having reached the above conclusion on the stated procedural irregularities; that the charge sheet was defective and that the sentence imposed on the appellant was illegal for being omnibus and that it was not within the powers of the trial Resident Magistrate to competently inflict, well in flagrant contravention of the mandatory provisions of subsection (1) (a) of section 170 of the CPA, this court would have ordinarily ordered for a retrial to have the ailments rectified by the trial court and to make appropriate orders in respect of the sentence. However, as rightly pointed out by the learned State Attorney, the appellant has served enough of his custodial sentence that to take that course would be tantamount to adding salt to the injury.

In the upshot, the appellant Kelebi Kasonje should therefore be released from custody forthwith unless still confined there for some other lawful grounds.

DATED at SUMBAWANGA this 20th day of November, 2014.

J. C. M. MWAMBEGELE
JUDGE