IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 195 OF 2018

(Originating from Criminal Case No. 66 of 2016 Resident Magistrate's Court Morogoro)

OMARY MOHAMED MARUKULA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 25/09/2019
Date of Judgment: 31/12/2019

S.M. KULITA, J.

In the Resident Magistrate's Court the appellant was charged with ***Arson*** contrary to section 319 (a) of the Penal Code [CAP. 16 R.E. 2002]. It was alleged that on 03/08/2015 at about 21:00 hours at Kwelikwiji village, Turiani in Mvomero District the appellant did set fire to a dwelling house occupied by one Suzana Joseph. The accused person pleaded not guilty to the charge. He was tried, convicted and sentenced to life imprisonment. The appellant was aggrieved

by the decision of the trial court. He has appealed to this court on the following grounds: -

1. *That, the trial Magistrate grossly erred holding to un-credible and unreliable visual identification of PW2, PW4 and PW1 before and during occurrence of the crime respectively at the locus in quo.*
2. *That the learned trial Magistrate erred where he failed to realize a huge contradiction of testimonies of PW2 and PW4 as to who went to inform PW1 of the crime.*
3. *That, trial Magistrate grossly erred by holding to a retracted caution statement, Exhb P1 obtained against the appellant which was admitted un-procedural and read over to its alleged maker by the author PW3 who was not under oath.*
4. *That, the trial Magistrate erred by convicting the appellant in a case where none of the authorities to whom the victim first reported the crime was summoned to testify to the effect that he was the prime culprit.*
5. *That the trial Magistrate erred by finding the appellant guilty where the prosecution failed to establish his apprehension in connection with the crime.*
6. *That the trial Magistrate erred by convicting the appellant on the case which the proof was below the required standard.*
7. *That, the trial Magistrate erred by convicting the appellant on basis of unjustified corroborated prosecution evidence.*

8. *That, the trial Magistrate erred by holding that the prosecution proved the case against the appellant beyond reasonable ground.*

The matter was heard by way of written submissions. The parties' submissions based on two points which are visual identification and cautioned statement.

The appellant submitted that the visual identification was not proper. It was therefore wrong for the trial court to rely upon it. He submitted that, PW2 told the court that they saw the fire while they were inside the house. He said that PW2 could not identify outside while it was night. On the other hand the Respondent had a view that the court was aware of the principle provided in the case of **Waziri Amani Vs. Republic (1980) TLR 250**. The Defense Counsel stated that PW2 knew the accused before the incident because he is her uncle and there was strong moonlight which aided her to identify the assailant.

The appellant also submitted on the cautioned statement that it was procured illegally, because it does not show if the accused was cautioned. As well the arresting officer is the one who also acted as the investigation officer and he is the one who recorded the cautioned statement. He said that it is contrary to the law. He cited the case of **Njuguna Kamani and 3 Others V. Regnam (1954) EACA 316**. He also complained that it was admitted without inquiry ruling. The learned State Attorney submitted that the inquiry was made and

it was proved that the cautioned statement was voluntarily made. The State Attorney admits that the only irregularity that she had noticed is that the said cautioned statement was admitted in the ruling for inquiry instead of the time that the main case resumes, but the said irregularity did not occasion injustice to the accused. He supported his argument with the case of **Ausi Mamu and Others vs. Republic, Criminal Appeal No. 232 of 2004, CAT at Mbeya (unreported).**

In his rejoinder, the appellant is insisting that, visual identification was not proper as well as the cautioned statement was not properly procured.

Having considered the parties submissions and the lower court records I found that only the first, second and third grounds can resolve the matter. Starting with issue of cautioned statement which is the 3rd the ground; It is true that the cautioned statement being admitted as exhibit within the ruling of trial within trial has not occasioned into injustice as it was held in the case of **Ausi Mamu and Others vs. Republic (supra)**. But for the issue of a Police officer who is the Investigation Officer to record the cautioned statement it is not advisable. In the case of **Idd Muhidin @ Kibatamo v. Republic, Criminal Appeal No. 101 of 2008**, the Court of Appeal referring the case of **Njuguna Kimani and others (supra)** stated the following;

"it is the duty of every Judge and Magistrate to examine with closest care and attention, all the circumstances in which a confession has been obtained from an accused person,..... it is inadvisable, if not improper, for the police officer who is conducting the investigation of a case to charge and record cautioned statement"

But my interest is on the Police Officer who had recorded the said cautioned statement. The concept here is that a police officer who has been assigned the duty to investigate a crime should not record the cautioned statement of the accused, ie. another police officer should do the said task. The objective is to avoid biasness.

The records shows that PW3 is the one who arrested the accused, interviewed him and recorded the cautioned statement, I produce the said paragraph hereunder;

"I wrote a letter directing (sic) him to come to the police station for another case. When he reached at the station I put him under control and charged him (sic) for arson. I did interview him against his allegations and (sic) recorded his cautioned statement"

It is clear from the above paragraph quoted from page 16 of the typed proceedings that the cautioned statement of the accused was not properly procured hence expunged from the records. I therefore find the third ground of appeal has merit.

Having expunged the cautioned statement we have remained with the evidence of visual identification. The issue of visual identification has been raised in the first and second grounds of appeal. In this matter PW2 is the only eye witness. The incidence took place at night around 21:00 hours where the visual identification needs to be very clear so as to avoid mistake of identity. Several authorities have ever made this caution including the case of **Waziri Amani Vs Republic** (supra), **Vitalis Bernard Kitale Vs. Republic, Criminal Appeal No. 263 Of 2007,CAT at Arusha** (unreported) and **Harod Sekache @ Salehe Kombo Vs R, Criminal Appeal. No. 13 of 2007 (CAT) Dodoma Registry (unreported).** In her testimony PW2 stated that had she managed to identify the accused by the aid of light from fire which was burning their house and the moonlight. According to her the fire was set while they were inside the house and they run out after seeing it. The doubt is how did she manage to identify the accused while she was inside? There was a need of detailed explanation on that. Even if there was moonlight, what was the distance between the accused and PW2? In the case of **Harod Sekache @ Salehe Kombo Vs R, (supra)** it was held;

> *"We think that where a witness is testifying about identifying another person in an unfavorable circumstance like during the night, he must give clear*

evidence which leaves no doubt that the identification is correct and reliable. To do so he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, the length of time the person being identified was within the view and also whether he is familiar or a stranger"

Also in the case of **VITALIS BERNARD KITALE VERSUS REPUBLIC Criminal Appeal No. 263 of 2007, CAT at Arusha (unreported)** the court was of the view that;

"We do not think that knowing the appellant alone is sufficient. There should be more concrete detailed description of the appellant. The witness should have given a description of the appellant as he saw him at the time of the incident"

In this case PW2 claimed to have identified the accused at the scene of crime but she did not describe how the accused looks like and what he had worn at that material time. I therefore consider the first and second grounds of appeal have weight.

In light of all stated above, I am satisfied that the prosecution had failed to clear all doubts the appellant is the one who had set fire into the victim's house. The case at the lower court was not proved beyond all reasonable doubts. I find the appeal has merit and

therefore quash the conviction, set aside the sentence of life imprisonment imposed against the appellant and acquit him. He is to be released from the prison forthwith unless otherwise held for any other lawful cause.

S.M. Kulita

JUDGE

24/12/2019