IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 33 OF 2022

(Originating from Sengerema District Court Criminal Case No. 78 of 2021 before Hon. A. G. Kyamba, RM)

BONIPHACE S/O PATRICK BUHANDIKWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

4th July, & 1st August, 2022

DYANSOBERA, J.:

The appellant Boniphace s/o Patrick Buhandikwa who, at the trial, stood as the 1st accused was, together with his four fellows, namely Mussa s/o Henry (2nd accused), Sijaona s/o Joseph (3rd accused), Mussa s/o Kakona (4th accused) and John s/o Magendo (5th accused) charged before Sengerema District Court with four counts.

In the First and Second Counts, the quadruple was charged with conspiracy to commit an offence while in the Third and Fourth Counts, the same persons were charged with arson. They all pleaded not guilty to the charge and after hearing six prosecution and nine defence witnesses, the trial court found that the charge against the appellant and his fellows in

the First and Second Counts was not proved to the required standard. The same court found that the evidence against the 2nd, 3rd, 4th and 5th accused persons was insufficient to hold them responsible in the Third and Fourth Counts. The District Court, however, was satisfied that the case against the appellant in both the Third and Fourth Counts was proved beyond reasonable doubt. It accordingly convicted him and sentenced him to life imprisonment. Being aggrieved by the trial court's decision, the appellant has appealed to this court on the following grounds of appeal:-

1. That the learned trial Magistrate erred in law and in fact by holding that the prosecution's case was proved beyond reasonable doubt
2. That the eye witnesses didn't mention the appellant to the police immediately after the commission of the crime.

It was common ground at the trial that on 3rd August, 2021, the appellant who is the Isaka Hamlet Chairperson, convened a meeting of villagers. The prosecution and defence were not at one on the agenda of that meeting. While the prosecution witnesses claimed that the agenda were on discussing the fate of the villagers who were practising witchcraft, the wife of Paschal Stephano in particular, the defence claimed that the agenda were on development activities and contribution for school

construction. Notwithstanding different versions of what the agenda were, there is no dispute that the meeting resulted into the destruction of the houses of PW 1 and PW 2 leading their being burnt with fire.

The hounds of justice were informed and the appellant and his fellows were arrested and subsequently arraigned in court on the four counts.

Before me, the appellant was represented by Mr. Victor Karumuna, learned Counsel while Mr. Dorcas Akyoo, learned State Attorney, stood for the respondent Republic.

Arguing in support of the appeal, learned Advocate gave clear and focused submission. Combining the two grounds of appeal and arguing them together, he submitted that the prosecution case was not proved to the required standard due to the insufficiency of evidence on visual identification. He contended that the prosecution witnesses did not mention the appellant to the police who went to inspect the crime scene. In fine, Counsel for the appellant argued that the prosecution witnesses did not mention who the culprits were. To buttress his argument, Counsel for the appellant cited the case of **Marwa Wangiti Mwita v. R**, [2002] TLR 39.

Further that the evidence adduced by the prosecution was not consonant with the charge sheet. The learned Advocate explained that PW 1 and PW 3 did not state to have seen the appellant setting fire to the houses but said that he saw the appellant pulling down the house.

Resisting the appeal, Mr. Dorcas Akyoo refuted the Counsel's argument that the evidence was inconsistent with the charge sheet. He explained that the prosecution witnesses were categorical in their testimonies that the houses in question were burnt. He urged the court to dismiss the appellant's contention that the appellant was not sufficiently identified at the crime scene. He pointed out that the incident took place at 1600 hrs, there was enough light and the appellant was well known to the witnesses as he was their hamlet chairperson.

Refuted also by learned State Attorney was the argument that the witnesses failed to mention the culprit at the earliest possible time. He argued that PW 3 at page 28 of the typed proceedings of the trial court said that police arrived at the scene of the crime, inspected it and gathered information which led to the appellant's apprehension. Reliance was placed on the testimony of PW 6 at page 40 of the typed proceedings. Mr. Dorcas concluded that there was cogent evidence against the appellant.

Rejoining, Counsel for the appellant expostulated that PW 1 did not mention who burnt his house with fire and the appellant was not mentioned either. He insisted that visual identification was not watertight and the informer PW 5 mentioned did not testify in court.

After carefully examining and evaluating the evidence in this case, I am satisfied that the evidence against the appellant was so strong and compelling and the appellant failed to raise any reasonable doubt in the prosecution on preponderance of probabilities. The reasons for my finding are not far to find.

One, there is no dispute the offence occurred at 1600 hrs. It was in a broad day light. The prosecution witnesses and the appellant well knew each other. There is no suggestion that the observation by these witnesses which was long was impeded anyhow. PW 1, PW 3 and PW 4 were clear in their evidence that they amply identified the appellant at the scene of the crime.

For clarity and ease of reference I can do not better than quoting some exerpts of the evidence of PW 1, PW 2, PW 3 and PW 4.

For instance, PW1Paschal Stephano testified as follows:-

'I reside at Isaka Nyamatomele I am a peasant. On. 03/08/2021 I was at my home Isaka Nyamatomele suddenly I heard a whistle, then I saw the hamlet Chairperson came at my place and said "kumbe wapo" while he was screaming, he started to stone my house while inviting other "njooni jamani". He was with about five persons who came at my place. They started attacking my house with clubs while stating that "wewe mke wako ni mchawi leo tunakuua". They burned my house with fire the house made by grasses valued Tshs. 5,000,000/=. I told my wife to run toward the Police Station which she did'.

Then PW 2 said:

'I reside at Isaka Nyamatemele, I am a peasant on 03/08/2021 I was at Nyehunge to buy medicine for my father. At about 19:30 hours I was informed by my son Bonipahce that they have been invaded by the hamlet Chairperson and his people who ordered him there to burn the house (witness pointing to the 1st accused). I visited the scene whereby I found the house under fire I met also the Police Officers from Nyehunge later on police from Sengerema came at the scene. Then the police officers put the hamlet

Chairperson under arrest then the chairperson started to show the police in searching other assailants who escaped after the incident. I was on that search. The next date I went to Nyehunge Police to start about the properties destroy my house that was burnt valued Tshs. 5,000,000/=, it is made by grasses. The hamlet chairperson is the first accused person (witnesses is pointing to the 1st accused). The hamlet chairperson know the other assailants'.

In his sworn testimony, PW 3 told the trial court thus:

'On 03/08/2021 at about 16:00 hours I was at my home Nyamatemele I heard the whistle which had alarm. I went there and found the chairperson who was ordering people to go and demolish the house of Paschal and Patrick. The Chairman is the Chairperson of hamlet. He was ordering the resides of Nyamatemele village. I don't know the reason of such order by the Chairman. I met them they were moving. They started by visiting the house of Mzee Paschal and then came to our house. When they went to the house of Paschal, I run to my place. When I went at home there was a grandmother inside the house who was sick. I failed to remove her outside. I went outside and beg the chairman Boniphace

Patrick that there was an old lady inside the house. He told me that if I don't give bring goat they will proceed. They set fire on the house made by glasses I informed my father who informed the police. My father was not present. Having informed him, he came and informed the police. When police came the investigated the scene and took information from us. When police came, they could not find the assailants there. Boniface Patrick is the 1st accused in this case (witnesses is pointing to the 1st accused person). I could not observe the other accused apart from the 1st accused during the incidence. I identified only the 1st accused other accused are also resident of Nyamitemile.'

There was also PW 4 who stated:

'On 03/08/2021 at 16:300 I was at home I heard an alarm I saw the hamlet in a frontline, at Nyamatemele village, he came at m home. He was carrying club and stones then he said then he said "wapo njooni" he started to attack the house of Paschal and set fire on the house built by glasses in that group of assailants there was the 1st accused and the 4th accused and the 5th accused were present during the incident). The 2nd and 3d accused were not present. Then my

husband Paschal Stephano told me to run to the police we would die.'

There is no doubt that PW 1, PW 3 and PW 4 eye witnessed the incident. With that evidence, I am satisfied that the appellant was unmistakably identified at the crime scene and the identification was watertight.

Two, with regard to the complaint on part of the appellant that there was failure by the prosecution witnesses to mention the suspect at the earliest possible opportunity, there is no dispute that the principle was well enunciated by the Court of Appeal in that case to be:-

'The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry'.

Having considered the two cases, I am in no doubt that the facts in that do not support the argument advanced by Counsel for the appellant. In the cited case, the exercise was an operation, the appellants' arrest apparently came in the wake of suspicious articles being found at the appellants' home and the search was general while in the case under

consideration, there was no operation, suspicious articles found at the appellant and there was no search. The hounds of justice in this case were informed, went to the crime scene and gathered information which led to the apprehension of the appellant and his fellows. The case of **Wangiti Marwa Mwita** referred to by Counsel for the appellant is distinguishable from the one under consideration.

Three, on the challenge of the evidence of PW 5 that he was told by the informer but that the informer did not testify in court, that is my view, that the failure did not dent the prosecution case, particularly where it was clear that the police officers went to the crime scene and gathered evidence with led to the apprehension and subsequent arraignment of the appellant and his fellows. Besides, the importance of the informer cannot be overemphasized. As was expressed the High Court of Kenya at Nairobi in the case of **Kigecha Njunga v Republic** [1965] 1 EA 773 (HCK) in which it was held:-

"Informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work their usefulness will diminish and their very lives may be in danger'.

With respect I subscribe to that wisdom.

Having so analysed, I am satisfied that the evidence against the appellant was so strong and compelling and the appellant failed to raise any reasonable doubt in the prosecution on preponderance of probabilities. The appeal against conviction is dismissed.

As regards the sentence, I think court's interference is needed. Two reasons are clear. First, there is no dispute that the appellant was convicted of two counts of arson, that is in the 3rd and 4th counts. In sentencing the appellant, the trial court did not indicate on which count the appellant was sentenced. In other words, the sentences in those two counts were lumped together to be life imprisonment. This was improper.

Second, the appellant was sentenced to life imprisonment. This sentence is the maximum penalty prescribed by section 319 of the Penal Code [Cap. 16 R.E.2019]. There was no compelling reasons why the trial court had to impose the maximum sentence for the appellant who was a first offender. Normally, in sentencing the appellant, the trial court had to take into account various factors including the type of property, the value of the property, the extent of damage and whether the bodily harm was caused.

The warning which was given by the Court of Appeal in the case of **Gaidon Nelson Mapunda v. R.** (1982) T.L.R. 318 is worth noting. It was stated in that case that:

> "a maximum sentence should rarely be imposed for a first offence as that will leave no margin for a subsequent or serious offence".

The imposition of a lumped sentence of life imprisonment on two counts and the sentence which was the maximum one prescribed by law occasioned miscarriage of justice. and custodial sentence with hard labour meted by the trial court was, in the circumstances, excessive and uncalled for.

Invoking revisionary powers vested in this court, I vary the sentence as follows. The sentence of Three (3) years in the Third Count and Three (3) years in the Fourth Count is substituted for the sentence of imprisonment of life imposed by the trial court. The sentences are ordered to run concurrently.

Since the value of the destroyed houses was not ascertained, the court cannot rely on the verbal assertions of PW 1 and PW 2 that their destroyed house were, respectively, valued at Tshs. 5,000,000/=. No order for compensation is, in the circumstances of the case, awarded.

The appeal against conviction is dismissed and the sentence of imprisonment for life is varied to the extent explained.

W.P. Dyansobera
Judge
1.8.2022

This judgment is delivered under my hand and the seal of this Court on this 1st day of August, 2022 in the presence of the appellant in person and in the presence of Mr. Deogratias Richard Rumanyika, learned State Attorney for the respondent.

THE HIGH COURT OF TANZANIA
MWANZA

W.P. Dyansobera
Judge