THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 80 OF 2022

(Originating from the District Court of Kyela in Criminal Case No. 48 of 2020)

Between

GERALD ANTONY MWAKITALU @ MWANGULUKULU ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 17th August, 2022

Date of judgment: 7th October, 2022

NGUNYALE, J.

The appellant together with two others not party to this appeal were indicted in the District Court of Kyela with five counts, first conspiracy to commit the offence contrary to section 384, second arson contrary to section 319(a), three malicious damage to properties contrary to section 326(1) & (2)(a)(b) and two counts of causing grievous harm contrary to section 225 both of the Penal Code [Cap. 16 R: E 2019 now R: E 2022]. The accused persons denied the charge. To prove the charge the prosecution paraded eleven witnesses and eight (8) documentary and

physical exhibits. The accused defended themselves, the appellant called one witness in addition.

On the count of arson, it was alleged that the appellant and two others on 12th March, 2020 at Mkombozi area within Kyela District in Mbeya Region wilfully and unlawfully did set fire to the dwelling house of one Lutamyo Mwasipu.

On count of damage to properties, it was alleged that on the same date the appellant and two others after setting fire to the dwelling house did destroy various properties as listed in the charge being the property of Lutamyo Mwasipu and immediately before that damage they spread explosive petroleum fuel substance in the dwelling house the act actually endangers the life of the people who was in the house.

On the counts of grievous harm, it was alleged that on 12th March, 2020 the appellant and two others while at Mkombozi area within Kyela District and Mbeya region did unlawfully cause grievous harm to one Lutamyo Mwasipu and Lugusya Kimage after setting the fire on their dwelling house thus caused burn to their bodies.

After a full trial, the appellant was convicted on second, third, fourth and fifth count. The other accused were acquitted in respect of all counts with the appellant in only first count. Thus, upon being found guilty, the

appellant was convicted and sentenced in respect of second count for life imprisonment, third to fifth counts one year jail with option of fine of one million. Aggrieved the appellant filed petition of appeal consisting thirteen grounds of appeal which will not be reproduced here.

When the appeal was called on for hearing the appellant was represented by Emmanuel Richard Mwangasa learned advocate whereas the respondent Republic appeared and was represented by Zena James learned State Attorney.

When Mr. Mwangasa took the floor in first complaint he submitted that cautioned statement was recorded beyond the four hours, he cited the case of **Evaristo Nyamtemba vs Republic,** Criminal Appeal No. 196 of 2020. He also submitted that cautioned statements cannot be recorded under section 57 and 58 of the Criminal Procedure Act [Cap 20 R: E 2022] (hence forth "the CPA") together. He stressed that cautioned statements were obtained through torture which the court did not consider. He cited the case of **Godfrey William Matoke vs Republic**, Criminal Appeal No. 134 of 2022 to support the point.

Mr. Mwangasa further complained that although extra judicial statement of the appellant was recorded but it was not tendered in evidence.

In the second ground it was submitted that there was delay in arraigning the appellant before the court. Thought not clear but he complained, confession was done under undue influence and that identification parade was illegal contrary to PGO 232. Mr. Mwangasa attacked evidence of visual identification of PW5 for not being proper.

Regarding fifth ground it was Mr. Mwangasa's submission that evidence was not analysed and that of the defence not considered. He added that the judgment is invalid for not containing reasoning as required under section 321 of the CPA.

On sixth ground, he submitted that prosecution evidence contained inconsistencies and contradictions especially that of PW1 and PW5. He referred to the case of **Makonyo John@ Kibona vs Republic**, Criminal Appeal No. 305 of 2018 to bolster the argument.

Complaint number seven was that some exhibit was not read in court, here Mr. Mwangasa referred to sketch map and cautioned statement of the appellant. He cited the case of **Robert Mangungu vs Republic,** Criminal Appeal No. 514 of 2016 in support of the contention.

In eighth ground he complained that he was not supplied with witness statements by referring to section 9(3) of the CPA. He was of the view

that the right to fair hearing was denied for failure to be supplied with the same.

Procedure in declaring a witness as hostile formed the complaint number nine. He complained that the said witness was the accused but was subsequently turned into being a witness without following proper procedure. Here he cited the case of **Republic vs Donatus Dominic @ Ishengomo,** Criminal Appeal No. 282 of 2018 to support the position.

Tenth ground was exhibits being admitted without clearing for admission being done, exhibits attacked here was exhibit P8 collectively T-shirt, match box and photos. He submitted that chain of custody was not established. He cited the case of **Jumanne Mpini vs Republic,** Criminal Appeal No. 195 of 2020, he prayed the said exhibits to be expunged.

Failure to recall witnesses after substituting the charge formed complaint in ground twelve, Mr. Mwangasa submitted that after the substituted charge was read witnesses were supposed to be recalled. He bolstered his argument by citing the case of **Maneno Musa vs Republic**, Criminal Appeal No. 543 of 2016 to the effect that appellant was not made aware of his rights.

Lastly it was submitted that the prosecution failed to prove the charge beyond all reasonable doubts as required. He brought in a complaint that

there are two different copies of proceedings which differed its contents from 1 to 46.

In rebuttal the State Attorney did not support the appeal, the first, second, seventh and tenth grounds were replied jointly. She asserted that cautioned statement were admitted in compliance with the law as it was after inquiry which intended to test its involuntariness. The case of **Godfrey Watson Matiko vs Republic,** Criminal Appeal No. 134 of 2022 was cited to support the position.

Regarding complaint that the cautioned statement was recorded out of time, it was submitted that the same was not raised in the trial court hence cannot crop at the appellate stage. She cited the case of **George Mail vs Republic,** Criminal Appeal No. 327 of 2013 in support of the argument.

Complaint on extra judicial statement it was submitted that the same was not tendered in the trial court.

The complaint that the appellant stayed for five days before being sent to court it was argued that there was no proof to substantiate the complaint.

Regarding admission of T-shirt, pictures and match box, the State Attorney conceded that it was admitted contrary to the law and sought

the court to expunge them from the record. But argued that oral evidence was capable of sustaining conviction.

On 3rd and 4th grounds of identification parade it was submitted that the same was unnecessary because the appellant was identified by PW5 using electricity bulb of 100V, the appellant was not stranger to PW5 and was mention immediately. She cited the case of **Karim vs Republic,** Criminal Appeal No. 161 of 2017 in support of the argument.

Regarding failure to consider defence evidence in fifth ground, the State Attorney submitted that it was considered but was quick to point that should the court find otherwise in terms of section 388 of the CPA being the first appellate court can re-evaluate the evidence afresh. She added that reference to section 312 of the CPA by the appellant's counsel was out of context.

On contradiction in sixth ground the State Attorney submitted that there were no any contradictions in evidence of PW1, PW2 and PW5. She added that in any case the contradiction is minor and do not go to the root of the case therefore it has no effect. She cited the case of **Makongo John & 2 Others vs Republic,** Criminal Appeal No. 305 of 2018 in support of the point.

On complaint that the appellant was not supplied with witness statement it was submitted that the omission did not prejudice the appellant as was well represented. The case of **Masamba Musiba vs Republic**, Criminal Appeal No. 138 of 2019 was cited to bolster the point.

On evidence of PW1 who was declared as hostile witness it was argued that it is the DPP who has to decide without being questioned. She was of the view that the said evidence was not considered by the trial court.

On hearsay evidence it was submitted that such evidence is useful in corroborating other evidence and in this case, it was not a standalone.

Regarding failure to call witness after the charge was substituted, it was the State Attorney reply that the same was not necessary because only a subsection in the charge was amended and particulars remained the same. She added that the substituted charge was read to the appellants and enter plea of not guilty. She cited the case of **Jamal Hallo vs Republic,** Criminal Appeal No. 52 of 2017 to support the position.

On variation of proceedings availed to the appellant it was submitted that the original record are the ones which prevails.

On whether the prosecution proved the case beyond reasonable doubts, the State Attorney replied that there was evidence that the fire was set in

the victims' house which affected PW2 and PW5 Who were injured and treated. She added that the appellant was identified by PW5 as he knew him before and was aided by electric light. She cited the case **Chacha Mwita vs Republic**, Criminal Appeal No. 302 of 2013 to bolster the point. She added that the appellant was mentioned immediately and arrested at the earliest possible opportunity and that in defence the appellant admitted to have been at the scene of crime. The case of **Ally Mohamed Mwaya vs Republic,** Criminal Appeal No. 214 of 2011 was referred in support of the position, she added that PW5's evidence was corroborated by the appellant's confession.

The State Attorney went on to submit that there was circumstantial evidence coming from PW3 where the appellant bought petrol which was supported by PW5 and appellant's cautioned statement. She therefore argued the court to dismiss the appeal.

In rejoinder Mr. Mwangasa almost repeated his submission in chief. He added that when there is a point of law can be raised even at the appellate stage. It was further submitted that exhibit procured illegally cannot be acted upon.

It was further rejoinder that PW5 did not state immediately that it was the appellant who set fire. He was of the view that the case was not

proved beyond reasonable doubt as required as the accused is not required to prove his innocence.

Having considered the record of appeal and rival argument, the appeal will be disposed in the manner the appellant counsel argued his grounds of appeal.

Starting with the issue of cautioned statement, the main complaint of the appellant is that it was admitted while recorded outside four hours required by section 58 of the CPA. In reply it was submitted that the same was not raised in the trial court.

The court has gone through the proceedings and found that cautioned statement of the appellants was objected during admission stages on the reason that the appellants were tortured and accordingly the court conducted an inquiry in which the statement of the appellant was found to have been voluntary made. The State Attorney is right when she submitted that the issue of time was not raised during objection to its admission and therefore this court is precluded from raising the same at this stage. Although the appellant's counsel was right to state that a point of law can be raised even during appeal stage, the court has found no evidence showing that the cautioned statement was recorded beyond time. PW11 clearly stated when the appellant was arrested and the time

he started to record the statement. Therefore, there is no scintilla of evidence to prove that appellant's cautioned statement was recorded out of the prescribed time.

However, there is an issue with exhibit P7 in its admission. Proceedings shows that it was admitted in the ruling of inquiry and not after reassembling in the main case. The procedures in admitting exhibit P7 was flawed in that it was not actually admitted into evidence. When PW11 wanted to tender it, objection was raised and rightly the Magistrate conducted inquiry, in his ruling overruled objection and admitted it although it is not marked but looking on sequence of marking exhibit in the trial court it was supposed to be exhibit P7. When main case resumed PW11 was not led to tender the statement rather he read the statements as if it had already been admitted. Guidance on admitting cautioned statement was stated in the case of **Seleman Abdallah & Two Other v Republic,** Criminal Appeal No. 384 of 2008 (Unreported) Dar es salaam, (CAT) to the effect that;

i. *When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.*
ii. *The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of voluntariness. The witnesses must be sworn*

or affirmed as mandated by section 198 of the Criminal Procedure Act, Cap 20.

iii. *Whenever a prosecution witness finishes his evidence the accused or his advocate should be given an opportunity to ask questions.*

iv. *Then the prosecution to re-examine the witness.*

v. *When all witnesses have testified, the prosecution shall close its case.*

vi. *Then the court is to call upon the accused to give his evidence and call witnesses, if any. They should be sworn or affirmed as the prosecution side.*

vii. *Whenever a witness finishes, the prosecution to be given an opportunity to ask questions.*

viii. *The accused or his advocate to be given an opportunity to re examine his witnesses.*

ix. *After all witnesses have testified, the accused or his advocate should close his case.*

x. *Then the ruling to follow.*

xi. ***In case the court finds out that the statement was voluntarily made (after reading the ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. Then should accept and mark it as an exhibit. The contents should then be read in court.*** *Emphasize added.*

xii. *In case the court finds out that the statement was not made involuntarily, it should reject it*

In this appeal after ruling on inquiry and resumption of proceedings PW11 was not led to tender cautioned statements of the appellants as such they were not admitted. That said I disassociate with the State Attorney that

cautioned statement was properly admitted. Consequently, P7 are expunged for not being part of evidence of the trial court and therefore the ground of has merits.

On extra judicial statements not being tendered it is the law that no particular number of witnesses is required to prove particular fact. Likewise, choice of calling witness was on party of the prosecution although there is a caveat to this general rule. In the same vein it is not always that when caution or extra judicial statements is recorded it must be tendered in evidence. To that end the complaint fails.

Submitting on the second ground counsel for the appellant did not stick to his ground of appeal, the court understood him to raise two compliant, delay in arraigning the appellants after five days. Section 32 (1) of the CPA governs detention of arrested person. It requires an arrested person to be arraigned before appropriate court within twenty-four (24) hours after he was so taken into custody or as soon as practicable or be released on bail depending on the nature of the offence committed and circumstances of the case. Akin situation was discussed in the case of **Paulo Machandi vs Republic**, Criminal Appeal No. 244 of 2019, **Jafari Salum @ Kikoti vs Republic,** Criminal Appeal No. 370 of 2017 and

Gabriel Lucas vs Republic, Criminal Appeal No 557 of 2017 (both unreported). In the case of **Paulo Machandi** the court sated;

> *'The question as to how soon is soon depends on the circumstances of each case and in our considered view, it cannot be answered with certainty in the current case where delay in arraigning the appellant was neither raised during preliminary hearing nor at the trial. We agree with Ms. Mathayo that the appellant's complaint in this ground did not vitiate trial proceedings because the trial was conducted accordingly from the moment he was arraigned.'*

Flowing from the above in this appeal the complaint was neither raised during preliminary hearing nor at the trial. The appellant has not asserted that he was in anyway prejudiced. Be that it may the complaint did not vitiate trial proceedings because the trial was conducted accordingly from the moment he was arraigned. Therefore, this ground of appeal is without merits and I proceed to dismiss it.

The third complaint was on identification parade. In circumstance of this case the State Attorney rightly stated it was uncalled because the accused was named and known to PW5. The law is clear that identification parades serve no meaningful purpose when the witness alleges that he or she is familiar with the suspect. See the case of **Mbaruku Deogratias vs Republic**, Criminal Appeal No. 279 of 2019.

Moving to analysis and considering defence evidence in fifth ground. It was submitted by Mr. Mwangasa that defence evidence was not considered and evaluated especially on torture and that of DW4. In reply State Attorney replied that it was considered and evaluated. She added that in case the court find otherwise under section 388 of the CPA being the first appellate court has power to re-evaluate evidence.

Having considered the argument the court has found that indeed the trial court did not consider defence evidence in line with the prosecution. It is the law that failure to analyse and consider evidence of both the prosecution and defence abrogated from the proper judgment in terms of section 312 of the CPA. Going through the evidence of the appellant he raised the defence of *alibi* which as not dealt by the trial court. Other piece of evidence was just a narration to what happened after being arrested. All this evidence was not evaluated by the Magistrate visa viz the prosecution. That said it is no doubt that findings on guilty of the appellant was reached without to evaluate the evidence for both the prosecution and defence.

Having so held, the next issue for consideration and determination is the consequences arising from the error. The appellant pressed to nullify the judgment. That prayer was resisted by the learned State Attorney who

invited the Court to step into the shoes of the trial court by doing what it omitted to do. The court is inclined to accept the learned State Attorney's invitation being satisfied that the infraction did not vitiate the judgment. Under the circumstances, the court shall step into the shoes of the trial court and do what it omitted to do. See the case of **Abdallah Seif vs Republic,** Criminal Appeal No. 122 Of 2020. The court shall revert later on to a discussion on whether had the appellant's defence been considered, it raised any reasonable doubt in the case for the prosecution.

The seventh complaint is failure to read out the exhibits P8 collectively which are pictures and T-shit of the appellant after being admitted at the trial, the State Attorney conceded that indeed it was not read in court. Therefore, exhibit P8 collectively is expunged from the records.

Eighth ground is failure to supply the appellants with witness statements. It was submitted by Mr. Mwangasa that it denied the appellant right to prepare their defence while in reply State Attorney right so submitted that only complainant statements are those to be supplied. Under section 9(3) of the CPA the accused if so, request may be supplied with complainant statement. The complaint in this case is not on complainant statement rather witness statement which the law does not require to be supplied

to the accused. Nonetheless, the appellants did not say if they were prejudiced.

Be it as it may, the record shows clearly that notwithstanding the failure to avail the with a copy of the relevant statement, the appellants were represented and participated in asking questions in cross examination to all prosecution witnesses. Besides, the appellants marshalled his defence against the charge. That being the case, the court cannot, but agree with the learned State Attorney that the failure to supply the appellant with a copy of the relevant statement was not prejudicial to their defence, failure did not occasion any failure of justice to the appellants.

Next is consideration of procedure of declaring witness as hostile in ground nine. The issue will not take much time of the court as after being declare a hostile witness the court did not proceed to take his evidence. It proceeded with another witness who now was renumbered as PW1. More important such portion of evidence was not considered in the judgment. Therefore, dealing with such point will only be an academic exercise.

The next complaint is failure to recall witnesses after substituting the charge contained in twelfth ground, it was submitted that although charge can be amended at any time under section 234(2)(b) of the CPA witnesses

were not recalled to testify. Mr. Mwangasa was of the view that failure to comply makes the proceeding a nullity.

In reply the State Attorney stated that it is only subsection of the law that is from section 319(1)(2) to 319(a) both of penal code which was amended and the appellant were asked to plead thereto. She added that recalling witnesses was not necessary as particulars of the offence remained unchanged.

Based on rival argument this court has gone through the proceedings and found that the substituted charge was filed on 09/03/2021 while hearing of prosecution case commenced on 01/04/2020. Rightly so as submitted by the State Attorney it is only the subsection of the law which was substituted while the particulars of offence remained intact. On those circumstance the need to recall witness did not arise because no particulars of the offence were changed for the witness to adduce further evidence. See the case of **Masamba Musiba @ Musiba Masai Masamba vs Republic,** Criminal Appeal No. 138 of 2019 also referred to the court by the State Attorney. Even if that was the case the appellants have not asserted that they were prejudiced which is a basic test in case there is any procedural law. Therefore, this ground fails.

The last consideration is whether the prosecution proved the case as required by the law which forms the basis in fourth, tenth and eleventh

grounds. Mr. Mwangasa submitted on a different issue he did not raise. His submission was on authenticity of the court records on ground that there is two version of proceedings, the one stamped on 31/5/2022 having 269 paged and the one in court having 273 pages. He added that from page 1 through 46 the contents are different. In reply it was that the original record

I have considered the argument but found that the appellant's counsel did not tell the court what differed. He ought to have gone further and expounded the issue. Be that it may he was supplied with record found in the court file which are the ones to be considered. On that account the court has failed to understand the complaint of the appellant.

On whether the charge was proved beyond reasonable doubts Mr. Mwangasa just made a statement that the offence was not proved. In reply the learned stated attorney argued that there was enough evidence that fire occurred which affected PW2 and PW5 and that several properties were bunt. He added that PW5 identified the appellant as a person who set house on fire who she identified through the window as there was electricity light and the appellant was familiar to her. It was further contended that PW5 mentioned the appellant at the earliest possible opportunity and the appellant were arrested instantly. It was her

identification of the suspect are favourable. For instance, in the case of **Said Chally Scania v. R, Criminal Appeal No. 69 of 2005** (unreported) the Court stated;

> *'We wish to stress that even in recognition cases, dear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when a witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of dose relatives and friends are often made.'*

Having considered the evidence on record, I have found the evidence of visual identification at the scene of crime wanting for the following reasons: **One;** no distance from which the appellant was illuminated with the electricity light was given. PW5 testified that she saw and recognised the appellant but did not testify how was she able while she was inside the bed room. Furthermore, PW5 did not mention how far was the electricity bulb from where the appellant passed. **Two**, PW5 did not state the time spent in the encounter with the appellant, this is true because during cross examination she stated it was through a window with mesh wire. In my opinion mesh wire was an impediment to proper identification of the appellant. **Three**, PW5 did not say she mentioned the appellant's name to the people who came to rescue her at the scene. She did not even disclose to the villagers including PW4 who came at the scene, PW2 never testified that PW5 mentioned the appellant as the one involved.

Four, no prior description of the appellant including the cloth he wore was given to police, PW5 only gave description while in court. The Court of Appeal for Eastern Africa in the case of **Mohamed Alhui vs Rex** [1942] 9 EACA 72 held that: -

> *'In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of ail, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.'*

Since PW5 did not describe the attire of the appellant on the eventful date and her failure to give the description to the neighbours including PW4, her husband PW2 and the police officers, her evidence of visual identification leaves a lot to be desired and the appellant's defence of alibi to the effect that he was at home at the material time which was supported by DW4 cannot be taken for granted.

It is elementary law that in criminal case, the burden of proof is on the prosecution to prove the case against the appellant and it never shifts to the accused person as per section 3(2) of the Evidence Act [CAP. 6 R.E. 2022]. Therefore, from what I have discussed in the last ground, it is clear that the prosecution did not prove the case against the appellant as required in law. Consequently, the appeal has merit and do hereby allow

it, quash the conviction and set aside the sentences meted out against the appellant. Thus, order immediate release of the appellantt one **Gerald Antony Mwakitalu@ Mwangulukulu** from custody unless lawful held with another lawful cause. Order accordingly.

DATED at MBEAYA this 7th Day of October, 2022.

D.P. Ngunyale
Judge