IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB- REGISTRY

AT BUKOBA

CONSOLIDATED APPEALS NO.34 OF 2022 & 47 OF 2023

(Originating from Criminal case No. 04/2016 of Bukoba District Court.)

ALLYU DAUDA@ HASSAN.....1ST APPELLANT

RASHID MZEE@ ATHUMAN.....2ND APPELLANT

NGESELA S/O KEYA ISMAIL JOSEPH.....3RD APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

24/05/2024 & 31/05/2024
E.L. NGIGWANA, J

In 2016, the appellants were arraigned before the District Court of Bukoba at Bukoba for three counts as follows; 1st count; Conspiracy to commit an offence contrary to section 384 of the Penal Code Cap 16 R.2002, now R.E 2022 (The penal Code); 2nd count, Arson contrary to section 319 (a) of the Penal Code, and, 3rd count, Malicious injuries to properties contrary to section 326 (1) of the Penal Code. It was alleged at the trial court that, on the 30th day of October, 2015 during night hours at Kanazi village within Bukoba District in Kagera Region, the appellants conspired to commit an offence to wit Arson. It was further alleged that on the same date and the same place,

the appellants willfully and unlawfully did set on fire a Roman Catholic church located at Kanazi, and then destroyed various church properties including iron sheets, plastic containers, one door and one window. They pleaded not guilty to the charge.

To prove their case, the prosecution featured six (6) witnesses and tendered the sketch map of the crime scene (Exhibit P1), Cautioned statements of the 1st and 3rd appellants (Exhibit P2 collectively), Cautioned statement of the 2nd appellant (Exhibit P3), Extra judicial statement of the 3rd appellant (Exhibit P4 and, Extra Judicial statement of the 1st appellant (Exhibit P5). The appellants were the sole witnesses for the defence and tendered three exhibits (Exhibits D1, D2 and D3).

After a full trial, the trial court was satisfied that the 1st and 3rd counts were not proved beyond reasonable doubt. Consequently, the appellants were all acquitted of 1st and 3rd counts. However, on the 2nd count, the trial court was satisfied that the same was proved beyond reasonable doubt, and consequently, each appellant was convicted and sentenced to life imprisonment.

The appellants were disheartened by the trial court decision and therefore, they appealed to this court challenging both the conviction and sentence.

The 2nd appellant filed Criminal Appeal No.34 of 2022 while the 1st and 3rd appellants filed Criminal Appeal No.47 of 2023.

Prior to the hearing, parties agreed and the two appeals were consolidated into one because they emanate from the same trial proceedings and judgment. The memorandum of Appeal by the 2nd appellant comprised nine (9) grounds of appeal while the memorandum of appeal by the 1st and 3rd appellants comprised grounds five (5) of appeal. However, looking at the grounds of appeal, I found that they can conveniently merged into fiver (5) grounds of appeal

1. *That, trial magistrate grossly erred both in law and fact when convicted the appellants basing on caution statements which were un-procedurally recorded and un-procedurally admitted*
2. *That, the trial court erred in law to convict the appellant basing on uncorroborated evidence.*
3. *That, the trial magistrate erred in law and fact for reaching the decision without considering the defence evidence.*
4. *That, trial Magistrate erred in law and fact when convicted the appellants while the prosecution did not prove the charge beyond reasonable doubt.*

5. That, the trial Magistrate erred in law when imposed a sentence of life imprisonment while he had no jurisdiction to impose such a sentence

At the hearing of this appeal, the appellants appeared in person, unrepresented, whereas Ms. Evarester Kimaro and Ms. Gloria Lugeye both State Attorneys appeared for the Respondent/Republic.

Taking the floor, the 1st appellant submitted that his cautioned statement was recorded contrary to sections 50 (1) and 51(1) of the CPA, but also the same was procured through torture, yet the trial court relied upon such a statement to convict him. He went on submitting that the case against him was not proved beyond reasonable doubt. He added that, even the sentence which was imposed was beyond the sentencing jurisdiction of the trial Magistrate. He ended up his submission urging the court to quash the conviction and set aside the sentence of life imprisonment imposed against him.

On his side, the 2nd appellant argued that his cautioned statement which was admitted as Exhibit P3 was recorded contrary to sections 50 (1) and 51(1) of the CPA but also he repudiated it. He added that, during the inquiry to determine the question of voluntariness, the prosecution witness gave

unsworn evidence. He prayed to this court to expunge the same from the record.

According to him, if the cautioned statement is expunged from the record, there will be no evidence linking him with the offence of arson. He added that, reading the evidence adduced in the trial court, it goes without saying that the prosecution had not proved their case beyond reasonable doubt. He added that even the sentence which was imposed was beyond the sentencing jurisdiction of the trial Magistrate. He concluded his submission urging the court to quash the conviction and set aside the sentence of life imprisonment imposed against him.

On his side, the 3rd appellant submitted that the case against him was not proved beyond reasonable doubt. He added that it was not proper for the trial court to rely upon his cautioned statement while the same was repudiated, recorded contrary to law and wrongly admitted. He further added that even the sentence which was imposed was beyond the sentencing jurisdiction of the trial Magistrate. He finalized his submission urging the court to quash the conviction and set aside the sentence of life imprisonment imposed against him.

Opposing the appeal, Ms. Gloria Lugeye argued that the prosecution side had proved the case against the appellants beyond reasonable doubt. She added that the appellants were arrested on 21/11/2015 for other allegations as revealed on page 23 of the trial court's typed proceedings whereby in the course of interrogation, they revealed to have burnt the church, and thereafter, their statements were recorded. Therefore, the complaint that sections 50 (1) and 51(1) of the CPA were contravened cannot arise.

On the complaint that the defence evidence was not considered, Ms. Rugeye admitted that there was such an anomaly however, according to her, this court being a first appellate court has the mandate to re-evaluate the evidence on record and arrive to the same conclusion or its own conclusion.

On her side, Ms. Evarester Kimaro added that the cautioned statements were admitted in the inquiry proceedings, and later read out in the main case; hence the anomaly is curable because it has not occasioned any miscarriage of justice to the appellants. She made reference to section 169 of the CPA, and the case of **Shabani Morondo versus Republic,** Criminal Appeal N.282 of 2010 CAT (unreported).

On the issue of sentence, Ms. Kimaro conceded that reading section 170 of the CPA, it is obvious that the trial Magistrate who by then was of the rank

of "RM" had no jurisdiction to impose a sentence of life imprisonment. She prayed to the court to impose a proper sentence if it will be satisfied basing on the evidence on record that the prosecution had proved the charge beyond reasonable doubt.

Having carefully considered the grounds of appeal, and submissions made by the parties the issue for determination is whether this appeal is meritorious. It is a cardinal principle that in criminal cases, Arson being among them, the burden of proof lies on the prosecution and the standard of proof as per section 3 (2) (a) of the Evidence Act, [Cap.6 R.E 2022] is beyond reasonable doubt. The section 3 (2) (a) of the Act, provides that;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

This standard was insisted in the case of **Furaha Michael versus Republic,** Criminal Appeal No. 326 of 2010 (Unreported) where the Court of Appeal had this to say;

"The cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt".

Similarly, in the land mark case of **Jonas Nkize v. R [1992] TLR 213** this court through Katiti, J. (as he then was) had this to say on the standard of proof in criminal cases;

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking"

Principally, the guilty of the accused can be proved either by direct evidence, circumstantial or through confessional statements of the accused. Direct evidence is what a witness says he/she saw or heard or did while circumstantial evidence is the evidence of surrounding circumstances which by un-designed coincidence is capable of proving a proposition with accuracy. The absence of direct evidence is indeed the very essence of resort to circumstantial evidence.

In the instant case, the trial court relied entirely on confessional statements to convict the appellants. It is trite law that an accused who freely confesses to his guilty is the best witness. See **Mohamed Haruna & Another versus Republic,** Criminal Appeal No.259 of 2007 CAT (unreported).

On the complaint by all appellants in this case is that their statements were recorded contrary to sections 50 (1) and 51(1) of the CPA but the complaint should not detain me because the reasons recording their statements out of time were assigned by the prosecution as correctly stated by Ms. Evarester Kimaro learned State Attorney.

However, it is trite that in the trial court the appellants repudiated their confessional statements, therefore an inquiry was conducted to determine the question of voluntariness in respect each statement be it cautioned statement or extra judicial statement.

The procedure to be followed when a subordinate court conduct an inquiry or the High Court conduct a trial within trial was clearly stated in the case of **Selemani Abdallah and Two others v. The Republic,** Criminal Appeal No. 384 of 2008, (unreported). The procedure entails the following:

(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 that aspect 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 opportunity to ask questions.

(iv) Then the prosecution to re-examine its witness.

(v) When all witnesses had testified, the prosecution shall dose 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 in the prosecution side.

(vii) Whenever a witness finishes, the prosecution to be given opportunity to ask questions.

(viii) The accused or his advocate to be given opportunity to re-examine his witnesses.

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

(x) Then a 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. The court should accept and mark it as an exhibit

(xii) The contents should then be read in court.

(xiii) *xii) In case the court find out that the statement was not made voluntarily, it should reject it.*

As far as the matter at hand is concerned, the herein above procedure was not observed. I am saying so because in the course of the hearing, the prosecution side through PW4 prayed to tender the cautioned statements of the 1st, 2nd and 3rd accused persons, now 1st, 2nd and 3rd appellants, and having been repudiated, an inquiry was conducted whereby E.2649D/CPL Simon (PW4) testified in the inquiry proceedings testing the voluntariness of

the cautioned statements of 1st and 3rd appellants as PW1 but he was not sworn or affirmed as per the law.

Again, in the inquiry proceedings testing voluntariness of the cautioned statement of the 2nd appellant, he testified as PW4 instead of testifying as PW1, but also he was not sworn or affirmed to testify in that particular inquiry proceedings.

It is an elementary principle of law that, evidence to be acted upon by any court must come from a competent witness and unless a witness is exempted under written law such as section 127 (1) of the Evidence Act, [Cap 6 R.E 2022], any other witness in any judicial proceedings must be sworn or affirmed as section 198 (1) of the Criminal Procedure Act, [Cap.20 R.E 2022] which states that:

"Every witness in a criminal cause or matter shall, subject to the provisions of any other law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act."

The compliance section 198(1) of the CPA was emphasized by the Court of Appeal in the case of **Mwazo Mohamed Nyoni @Pengo and 2 others**

versus Republic, Criminal Appeal No.2018 CAT (Unreported) where it was held that;

"The spirit of the above provision is to the effect that no witness in any criminal case or matter will be examined without oath or affirmation and that any evidence recorded without oath or affirmation will have no value before any court of law and therefore will be disregarded"

In the case of **Christian Ugbechi versus Republic,** Criminal Appeal No.274 of 2019 CAT at Dsm, the evidence of the witness recorded under inquiry proceedings was found to be of no evidential value and therefore, it was expunged from the record owing to reason that it was not given under oath or affirmation.

Guided by the herein above authorities, the evidence led by G.2649 D/CPL Simon alleging to prove that the cautioned statement of the 1st, 2nd and 3rd appellants were voluntarily made is hereby expunged from the record.

Considering that G. 2649 D/CPL Simon he was the only witness who was featured in the said inquiries, it is good as the prosecution had failed to discharge their duty of proving that the cautioned statements of the 1st and 3rd appellants were voluntarily made. See Paulo **Maduka and 4 Others**

versus Republic, Criminal Appeal No. 110 of 2007 CAT on the duty of the prosecution to prove not only that the cautioned statement was made but also that it was voluntarily made.

As regards the extra judicial statement (Exhibit P4) of the 3rd appellant, the same was tendered in the inquiry proceedings as Exhibit P4. It was never tendered as per the law when the trial court resumed the proceedings. Furthermore, the same discloses that the appellant had swollen hands and legs, but also it has no verification clause of the justice of peace. In the premise, I disagree with Ms. Evarester Kimaro on her stance that the anomaly is curable. Therefore, I proceed to expunge the Exhibit P4 from the record.

In principle the prosecution is bound to prove two important elements in discharging its duty of proving the case beyond reasonable doubt as was observed by the Court of Appeal in the case of **Maliki George Ngendakumana v. Republic,** Criminal Appeal No. 353 of 2014 (Unreported) that:

*"It is the principle of law that in criminal cases the duty of the prosecution is two folds, **one**, to prove that the offence was committed and **two,** that it was the accused who committed it".*

Having Expunged Exhibits P2, P3 and P4, I entirely agree with the appellants that the remaining oral direct evidence of PW1, PW2, PW3, PW4, PW5 and PW6 is insufficient to sustain the conviction because the witnesses did not witness the appellants committing the offence of Arson. The evidence of PW1, PW2 and PW3 proves only that the offence was committed, but it does not go far to prove that it was committed by the appellants. Exhibit P5 (extra-judicial statement of the 1st appellant) therefore, cannot stand alone without being corroborated.

In that premise, the appellants deserve to be acquitted taking also into account that when the charge was read over to them, they denied the accusations and during defence, each of them denied to have involved himself in the commission of the offences. Had the trial Magistrate considered the defence evidence, probably he would have reached to a different decision.

I now turn to the issue sentence. Even if we assume for the sake of argument that the offence of Arson was proved, still the trial Magistrate had no sentencing jurisdiction to impose a sentence of life imprisonment. According to section **319 (a) of the Penal Code** any person who willfully and unlawfully sets fire to any building or structure whatever, whether completed

or not, upon conviction, is liable to imprisonment for life. Indeed, the provision as it reads does not create a mandatory sentence of life imprisonment. In the case of in **Opoya v. Uganda** [1967] E.A. 752 the court interpreted the phrase "shall be liable to "as follows:

"It seems to us beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed a t the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might ***not see fit to impose it"***

In the case of Sokoine Mtahali @Chimongwa versus Republic, Criminal Appeal No. 459 of 2018 the Court of Appeal stressed that the term "shall be liable to" gives discretion to the trial court, subject to its sentencing jurisdiction.

It is common understanding that where a Resident Magistrate is presiding over the District Court his/her sentencing power is subject to section 170 (1) of the CPA, that is imposing a sentence not exceeding five years of imprisonment. This section was considered in the case of **Abdi Masoud**

@Iboma & 3 others v Republic, Criminal Appeal No. 116 of 2015 where the court held that;

"under section 170 (1) and (3) of the CPA, a magistrate of the rank below a Senior Resident Magistrate cannot impose a sentence of imprisonment of more than five (5) years, unless such sentence is confirmed by the High Court or falls under the Minimum Sentences Act"

In the case of **Nyamhanga Magesa versus Republic,** Criminal Appeal No. 470 of 2015, the Court of Appeal was confronted with a similar situation in which a resident Magistrate sentenced the accused to life imprisonment for Arson. The Court had this to say;

"We also wish to point out that, since section 319 (a) of the Penal Code does not prescribe the minimum sentence, the trial magistrate was duty bound to observe the dictates of section 170 (1) and (a) of the CPA under which, a magistrate of the rank below a Senior Resident Magistrate cannot impose a sentence of imprisonment of more than five (5) years, unless it is indicated that such sentence is subject to confirmation by the High Court, or falls under the Minimum Sentences Act. In the present case, the sentencing magistrate was a mere Resident Magistrate. The offence of arson is not a scheduled

offence under the Minimum Sentences Act. It follows therefore that the sentence under consideration was illegal"

Now, considering that the presiding Resident Magistrate was sitting in the District Court which is a subordinate court under the parameters of section 170(1) of the CPA, the sentence of life imprisonment imposed to each appellant was illegal.

That said and done, I find the appeal meritorious and accordingly allow it, quash the conviction and set aside the sentence meted out against the appellants. Finally, I order the immediate release of the 1st, 2nd and 3rd appellants from custody unless they are otherwise held for other lawful cause. It is so ordered.

Dated at Bukoba this 31st day of May 2024.

E. L. NGIGWANA,

JUDGE

31/05/2024.

Court: Judgment delivered this 31st day of May 2024 in the presence of the appellants in person, Ms. Matilda Assey learned State Attorney for the respondent / republic, Hon A.A. Madulu, JLA and Ms. Queen Koba B/C.

E. L. NGIGWANA,

JUDGE

31/05/2024.