IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 29 OF 2023

(Appeal from the conviction and sentence of the District Court of Simanjiro in Criminal Case No. 33 of 2022 Hon. C. S. Uiso-SRM dated 23rd February 2023)

AMANI SYLVESTER .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

12/7/2023 & 22/8/2023

BARTHY, J.

In the night of 3rd March 2022, PW1 and her fiancé (PW2) were enjoying their slumber. All over the sudden, PW1 heard a rattling sound. She thought it was a rat or cat, but through the clerk she saw a person outside the window whom she identified to be the appellant herein.

The appellant was said to have been seen pouring some petrol into the room the duo was sleeping. According to the records available, PW1 and the appellant were once wife and husband respectively, but later on they divorced.

PW1 and PW2 and claimed to have seen the appellant pouring petrol inside their room lit a match box and fire broke out. As the result PW2 sustained burning injuries on his legs and left hand. PW2 was attended by PW5 on injuries suffered. Also, the mattress on which PW1 and PW2 were sleeping was half burnt.

Following those events, the appellant was arrested and arraigned before the District Court of Simanjiro (hereinafter referred to as the trial court), where he was charged with one count of arson contrary to section 319(a) of the Penal Code, CAP 16 R.E. 2019 now R.E. 2022].

The appellant denied to have committed the offence he stood charged claiming that on the fateful night he was with his wife DW2, who had stomach pain due to 8 months pregnant. Thus, the appellant had to look for her.

Upon hearing the parties, the trial court was satisfied that the offence of arson was not proved against the appellant, but it was convinced that the lesser offence of attempted arson was established beyond reasonable doubt. Thus, the appellant was convicted and sentenced to serve seven years imprisonment.

The appellant aggrieved with the conviction and sentence meted out against him, he preferred the instant appeal marshalling six grounds of appeal as follows;

1. *That the trial magistrate erred in law and in fact not to be impartial when administering justice.*
2. *That the trial magistrate erred in law and in fact convicting an appellant on offence which was not preferred.*
3. *That the trial magistrate erred in law and in fact convicting an appellant without proper identification.*
4. *That the trial magistrate erred in law and in fact to convict the appellant while there was variance between the charge and evidence.*
5. *That the trial magistrate erred in law and in fact to convict on hearsay evidence.*
6. *That the trial magistrate erred in law and in fact convicting exaggerated evidence.*

The appellant therefore prayed for his appeal to be allowed, the conviction and sentence meted out against him be quashed and set aside.

When the appeal was called on for hearing, the appellant was represented by Mr. Samson Rumende learned advocate. The respondent was represented by Ms. Rhoida Kisinga learned stated attorney.

This being the first appellate court, it is charged with the duty to re-evaluate the evidence on record and where there is non-direction or misdirection of the same it can make its own findings. This position was succinctly underscored in the case of **Deemay Daati & 2 others v. Republic** [2005] TLR 132.

In expounding the grounds of appeal, Mr. Rumende argued jointly the first and second grounds. He argued that, the appellant was charged with the offence of arson contrary to section 319(a) of the Penal Code. He added that, both sides adduced their evidence and the trial court was satisfied that the offence was not proved.

Mr. Rumende went on stating, it was improper for the trial court to convict the appellant for the offence of attempted arson. He further submitted that; the learned trial magistrate was not impartial as he convicted the appellant for the offence he was not charged with. He argued the appellant was not afforded a fair trial.

On reply submission Ms. Kisinga conceded that the appellant was convicted with the offence which he was not charged with. However, she quickly pointed out that, the trial court assigned reasons for doing so. She argued that although the evidence of PW1, PW2, PW3 and PW4 did not prove the offence of arson, but it proved the offence of attempted arson.

She further argued that, PW1 and PW2 had seen the appellant lighting the match box and set fire which burnt their bed. She further contended that, the evidence of PW4 clearly proved he saw thefire which started from the window and subsequently it burned the mattress which also caused PW2 to sustain injuries on his hands and legs.

The learned state attorney argued that the law allows the court to convict the offender with the lesser/cognate offence if the evidence has been proved. To buttress her arguments, she referred to section 301 of the Criminal Procedure Act [CAP 20 RE 2022], (hereinafter referred to as the CPA).

She also cited the case of **John Madata v. Republic**, Criminal Appeal No. 453 of 2017, Court of Appeal at Mbeya (unreported), found that the offence

of armed robbery was not proved, but it went ahead to convict the appellant with the lesser offence of robbery with violence.

On rejoinder submission to these grounds, Mr. Rumende reiterated his submission in chief. He however pointed out that the basis of the charge is to inform the accused the case against him and allow him to prepare his defence. He made reference to the case of **Thabiti Bakari v. Republic** Criminal Appeal No. 73 Court of Appeal at Dar es Salaam (unreported).

Having gone through the rival submissions of the parties in respect to the first and second grounds of appeal, the sole issue for my determination is whether the trial was proper to substitute the offence of arson with that of attempted arson.

As pointed out by both sides and records of the trial court that, it is not in dispute that the appellant was charged with the offence of arson which substituted with the offence of attempted arson.

The position of the law is clear that the court may substitute the conviction to lesser offence, as rightly argued by Ms. Kisinga and spelled out under section 301 of the CPA which reads;

Where a person is charged with an offence, ***he may be convicted*** *of* ***having attempted*** *to commit that offence although he was not charged with the attempt.* [Emphasis added].

From the foregoing provision of the law, the court can legally convict a person for the offence as the lesser offence. This position was also underscored in numerous decisions such as in **Nathanael Nkulikiye v. Republic** [1982] TLR 196 in which this court amply stated that;

"the general rule applicable in substituting convictions is that the verdict sought to substitute the existing one must be one involving a ***minor and cognate offence*** *to the offence charged;* [Emphasis added].

In another case of **Mwita Magore v. Republic** [1984] 279, this court stated that;

a cognate minor offence is one that forms part of a series of lesser offences which must be committed in order to complete the major one;

In the case at hand, I am of the settled opinion that attempted arson is a minor or cognate offence to arson. Hence the trial court legally substituted the offence the appellant was charged with to lesser offence of an attempt. I therefore find that, the first and second grounds of appeal are without merits and are accordingly dismissed.

Turning to the third ground of appeal Mr. Rumende had argued that, the trial court had convicted the appellant without proper identification. He also added, the charge did not indicate the time when the offence was committed. Although the evidence on record indicates that it was committed during the night. As PW1 had informed the trial court there was moonlight and electric light from the neighboring house.

The offence clearly was committed during the night, Mr. Rumende stated it was crucial to have proper identification of the suspect. To this argument, he referred to the case of **Waziri Amani v. Republic** [1980] TLR 250, where factors for correct identification were stated.

He furthered his argument that, it was required to state the time the appellant was under observation, the distance between them, the condition

under such observation, whether it was night or day time, the source of light and whether the witness knew the appellant before.

He made further reference to various decisions such as **Samson Chacha @ Mwita Pius @ Kipepeo v. Republic** Criminal Appeal No. 16 of 2018 Court of Appeal of Tanzania at Mwanza, **John Jacob v. Republic** Criminal Appeal N. 92 of 2009 Court of Appeal of Tanzania at Arusha (both unreported).

He went on pointing out that, the house which was attempted to be set on fire had no electric light and depended on the light from neighboring houses. Also, the distance from the said house to the said source of light was never made clear. Considering the fact that in the village the houses are scattered.

He more stated, since the witnesses relied on the moonlight and the source of light from neighboring houses, then conditions prevailing were not favorable for correct identification.

He also stated there was no identification parade conducted by the police for the witnesses to correctly identify their assailant. He therefore urged the court to hold that the appellant was not properly identified.

Making reply to these grounds, Ms. Kisinga stated, the conditions were favourable for identification of the appellant at the scene. She argued PW1 was once married to the appellant and later divorced, therefore they were not strangers to each other. She further contended that PW1 saw the appellant through the crack of window poring petrol through the broken glass of the window.

Ms. Kisinga expounded further that; the crack was not minor as claimed by the appellant's counsel. Rather it was stated so due to the use of language by the court. It was stated, the broken window was covered by a part of a box which was removed to make the access clearly big and same was used to identify a suspect. It was further stated, in the manner PW1 had described the incident, it was clear she was able to identify the appellant.

She further argued that, although the distance from the source of light was not stated, but with the aid of moonlight PW1 was able to identify the appellant who was once her divorced husband whom she knew him very well. Also, the appellant had prior threatened PW2.

Regarding the argument that the charge did not state the time on which the offence was committed; Ms. Kisinga contended that, the offence

at hand did not require stating its time of commission. Since time is not one of the ingredients of the offence, Ms. Kisinga therefore urged the court to dismiss the third ground of appeal.

Having gone through the rival submissions of the parties regarding the third ground of appeal, the sole issue for my determination is whether the suspect was correct identified.

With respect to the records available, the charge before the trial court did not state time which the offence was committed. However, the evidence on record clearly indicates the offence was committed during night hours. Therefore, the prosecution side was duty bound to lead evidence which requires to prove the correct identification of the perpetrator of the offence.

I have keenly gone through the evidence on record, on the prosecution side PW1 and PW2 claimed to have identified the appellant at the scene. Whereas PW1 claimed that she was able to identify the appellant through a crack on the window with the aid of moonlight and electric light from neighboring houses.

On the other hand, PW2 stated he approached the window where he even asked the appellant what he was doing there but the appellant suddenly lit a match stick and threw it inside the house.

The trial court was satisfied with the testimony of PW1 and PW2 to have been able to identify the appellant through the crack on the window by the aid of moonlight and electric lights from neighboring houses.

The law is well settled on the import of visual identification and conditions underlying it in order to eliminate mistaken identity. There is plethora of decisions to the effect. See cases of **Waziri Amani v. Republic** (supra), **Emmanuel Luka and others v. Republic**, Criminal Appeal No. 325 of 2010 and **Omari Iddi Mbezi and 3 others v. Republic**, Criminal Appeal No. 227 of 2009 and **Taiko Lengei v. Republic**, Criminal Appeal No. 131 of 2014 (unreported)

In the case of **Waziri Amani vs Republic** (supra), the Court of Appeal laid down some guidelines for consideration in establishing whether the evidence of identification is impeccable. These include;

i. The time the culprit was under the witness observation,

ii. *Witness's proximity to the culprit when the observation was made, the duration the offence was committed,*

iii. *If the offence was committed in the night time, sufficiency of the lighting to facilitate positive identification,*

iv. *Whether the witness knew or had seen the culprit before the incident and description of the culprit.*

v. *Furthermore, mention of the culprit's peculiar features to the next person the witness comes across after the incident further solidifies the evidence on identification of the culprit, especially when repeated at his first report to the police officer who interrogates him.*

Guided by the above factors, it is not in dispute that PW1 and PW2 knew well the appellant. As stated before, PW1 was once married to the appellant but they later divorced. Similarly, PW2 testified that he knew the appellant for about one year. Also, he had once threatened to harm him. Hence, they were familiar to each other.

However, familiarity alone is not enough. This was underscored in the decisions of **Boniface Siwingwa v. Republic**, Criminal Appeal No. 421 of 2007

and **Mabula Makoye and another v. Republic**, Criminal Appeal No. 227 of 2017 (both of which are unreported);

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown that the conditions for identification were not conducive, then familiarity alone is not enough to rely on to ground a conviction. The* ***witness must give details as to how he identified the assailant at the scene of the crime as the witness might be honest but mistaken.****"*
>
> *[Emphasis is supplied].*

PW1 stated during the trial there was moon light as well as electric light from neighboring houses. However, it was not clear as to the distance from the neighbor house to the complainant's house where the offence was committed. Ms. Kisinga readily admitted to this fact, but she pointed out there was moonlight which aided identification of the appellant.

I have taken in account the argument by the learned state attorney but the intensity of the moon was not established in order to eliminate any mistaken identity. In the case of **Said Chally Scania v. Republic**, Criminal

Appeal No. 69 of 2005, Court of Appeal at Mwanza (unreported) the court emphasized the following;

> *"We think that where a witness is testifying about another in unfavourable circumstances 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 aids to unmistaken identification like proximity to the person being identified, the* ***source of light****,* ***its intensity****, the length of time the person being identified was within view and also whether the person is familiar or a stranger."*

In the case of **Pontian Joseph v. Republic**, Criminal Appeal No. 200 of 2015 (unreported), the Court of Appeal had this to say regarding identification with the aid of moonlight:

> *"Though under certain circumstances identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 merely said there was moonlight, the*

complainant said there was " enough moon light: It is our considered view that it does not suffice to say there was moonlight or enough moonlight. Its brightness had to be explained."

In the instant matter the intensity of the moon light was not described rather PW1 gave a general statement that there was moonlight.

I have also considered the argument stating that PW1 was able to see the appellant through a crack on window. It is unfortunate that the size of the crack could not be properly described. Ms. Kisinga argued that the size of the crack was not that small. She was emphatic that the box was removed from the broken glass window and the view was clear.

However, that piece of evidence did not feature the size of the broken glass window in the testimony of PW1 and PW2. Therefore, the arguments made by Ms. Kisinga was an attempt to fill gapes into the prosecution case.

Failure to described the intensity of the light and the size of the crack, leaves a lot of doubt with respect to correct identification of the appellant. In those circumstances I find that in the present case, the evidence available

did not eliminate doubts as to the identification of the suspect in the alleged attempt arson to be the appellant. Therefore, the third ground has the merit.

Determination of the third ground of appeal sufficiently disposes of the appeal before me. Addressing remaining grounds will just be an academic task.

Consequently, the appeal is allowed, the conviction and sentence meted out against the appellant are quashed and set aside. I further order the appellant be forthwith set to liberty unless he is lawful held.

It is so ordered.

Dated at **Babati** this 22nd August 2023.

G. N. BARTHY

JUDGE

Delivered in the presence of the appellant in person and state attorney Ms. Mbilike Mangweha and in the absence of the appellant's counsel.