

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 110 OF 2022

(Originated from Nkasi District Court in Criminal Case No. 187 of 2022)

SILVANUS SIWALOZA 1ST APPELLANT

WILBROAD EDWARD @MASENGA 2ND APPELLANT

HELENA MATENGO 3RD APPELLANT

RICHARD CHAKUPEWA 4TH APPELLANT

JOHN ANASTAZIO @SUMUNI 5TH APPELLANT

LINUS SANGU @SIKANDA 6TH APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

03rd January & 10th January, 2024

MRISHA, J.

Before the trial court which is the District Court of Nkasi at Namanyere, the appellants were jointly charged with two counts before the District Court of

Nkasi at Nkasi (the trial court) namely Arson contrary to section 319 (a) of the Penal Code [Cap 16 R.E. 2019] (now 2022) hereinafter to be referred to as the Penal Code, and Conspiracy to commit an offence contrary to section 384 of the Penal Code.

In the first count, the particulars of the offence were that on 04th day of November, 2022 at Mlambo village within Mkasi District in Rukwa Region, the appellants willfully and unlawfully did set fire to the house of one Deus Sebaso @Kalikish and cause damage to different properties to wit: one house valued at Tshs 2,000,000/=, the properties of one Deus Sebaso @Kalikish.

In the second count, the particulars of the offence were that on 04th day of November, 2022 at Mlambo village within Mkasi District in Rukwa Region, the appellants did conspire to commit an offence of practicing the witchcraft acts without permit.

Initially, in the Criminal Case No 187 of 2022 handled by the trial court, there were fifteen accused persons who were jointly and together charged with two counts described above. When the said case came for plea taking before the trial court on 08th day of November, 2022; the charge sheet was read over and explained to the accused persons whereupon the appellants

pleaded guilty to the second count and were accordingly convicted on their own pleas of guilty and consequently each of them was sentenced to serve a jail term of five (5) years in prison. The rest of the accused persons who pleaded not guilty which is why their names do not feature in this appeal.

The appellants were disgruntled with the said decision of the trial court; thus, appealed to this court armed with a total of four (4) of appeal. However, on account of the reasons to be put apparent shortly, I will not reproduce the said grounds of appeal. At the hearing of the instant appeal, the appellants appeared in person, unrepresented whereas the respondent Republic had the service of Mr. Mathias Joseph together with Ladislaus Akaro, both learned State Attorneys.

As a matter of practice, the appellants were required to start addressing the court in respect of their grounds of appeal, but because of being lay persons with no legal representation, they just let the counsel for the respondent Republic to start making their submissions.

Mr. Akaro, was the first to address the court regarding the present appeal and he did not mince words. He unhesitant supported the appeal on the ground that the trial court lacked jurisdiction to hear and determine the offence the appellants were charged with. He argued that the offence

appellants charged with needed consent to be issued by the Attorney General or the Zonal State Attorney In charge before hearing commenced. He referred section 5(3) of the Witchcraft Act, [Cap 18 R.E. 2022] (the Act) to support his argumentation.

He further argued that, the appellants were charged with the offence involving witchcraft acts. In the circumstance, he asserted that, since consent was not filed with the trial court, then the trial court proceedings became a nullity and the remedy thereto is to quash conviction and set aside sentences that were imposed upon the appellants. He further implored this court to acquit the appellants on two grounds; one, there was no evidence for the prosecution to prove their case against the appellants and two, the appellants pleaded guilty to the second count and were convicted on their own pleas; as a result, no evidence was adduced by the prosecution which could be re-evaluated by the court at this first appellate stage.

To cement his position, he cited the case of **Gaga Busalu and Dome Guenga @Numila v Republic**, Criminal Appeal No. 586 of 2020 where it was stated at page 6 of the Judgement of the Court that:

"This case presents a tricky scenario so we understand Ms. Sakafu's dilemma because the appellants pleaded guilty, therefore the prosecution had no opportunity to demonstrate whether they had enough evidence to prove the case or not. However, ordering a retrial in the peculiar circumstances of this case will be providing the prosecution with a blank cheque to recognize their case and fill in gaps, which may prejudice the appellants..."

On their part, the appellants being lay persons, they had nothing to say. Having heard the submissions of both parties to the case and gone through the authority referred to me by the counsel for the prosecution Republic, I will delve into considering whether the trial court had jurisdiction to try the Criminal Case No. 110 of 2022 against the appellants herein.

As a general rule, the law bars a person convicted on his own plea of guilty to appeal against conviction. A person can only appeal against the sentence. This is stated under section 360 of the Criminal Procedure Act [Cap 20 R.E. 2022], in which it is provided that:

"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence."

Therefore, a person convicted upon his own plea of guilty can only appeal against the extent or legality of the sentence imposed by the trial court. However, there are circumstances where the person convicted upon his own plea of guilty may appeal against conviction; *See Josephat James vs Republic*, Criminal Appeal No. 316 of 2020.

In the present appeal, the appellants have appealed against the whole judgment, proceedings of the trial court and sentence; however, concerning the provisions of section 360 of the Criminal Procedure Act, the appellants were entitled to appeal against their sentences and not convictions.

The respondent Republic has supported the appeal on the ground that the trial court had no jurisdiction to hear and determine the offence to which the appellants were charged with. It is on record that the appellants were charged with the offence involving witchcraft acts; they were convicted upon their own pleas of guilty. According to section 5(3) of the Witchcraft Act, [Cap 18 R.E. 2022], the law requires the Attorney General or Zonal State Attorney In charge to issue a consent to trial court before beginning with the trial. For easy of reference, I would reproduce section 5(3) of the Witchcraft Act, as follows: -

"The trial of a person for an offence punishable under subsection 2 shall not begin unless the consent of the Attorney-General or Zonal State Attorney in-charge is obtained."

In this appeal, neither the consent of Attorney-General nor Zonal State Attorney In charge was obtained by the trial court before beginning of the trial of the appellants in respect of the charged offence which involved witchcraft acts. The consent of the Attorney General is a prerequisite requirement to be obtained before trial begins especially where the charged offence involve witchcraft acts.

I therefore, subscribe to the submission of the counsel for the respondent Republic that the trial court lacked jurisdiction to hear and determine the case involving witchcraft against the appellants due to lack of consent of the Attorney General or the Zonal Attorney In charge.

Since, the consent of the Attorney is a prerequisite requirement to be complied with before the trial begins and the trial court proceeded with the hearing and determination of the appellants' case in the absence of the consent of the Attorney or the Zonal State Attorney In charge, as prescribed under section 5(3) of the Act, it is my considered opinion that the trial court could not assume jurisdiction of trying the offence involving

witchcraft without obtaining such consent because by doing so, the proceedings of the trial court were nullity.

I have reached to a similar conclusion based on the decision of the Court of Appeal in the case of **Gaga Busalu and Dome Gunga @Ngumila v Republic** (supra) cited by Mr. Akaro, learned State Attorney; See also the cases of **William Pius v Republic**, Criminal Appeal No. 30 of 2021 HCT Sumbawanga and **Malegi Shenye @Lusinga v Republic**, Criminal Appeal No. 152 of 2020 (both unreported).

Standing with those above-mentioned authorities; I nullify the entire proceedings before the trial court, quash the convictions and set aside sentences passed thereto by the trial court. I also concur with the submission of learned State Attorney, that the way forward is to acquit the appellants because subsequent to their pleas of guilty and convictions, the prosecution had no opportunity to demonstrate whether they had enough evidence to prove the case or not.

For the above-mentioned reasons, I allow the appeal on the basis of the legal issue raised by the counsel for the respondent Republic. Having nullified the proceedings of the trial court, quashed convictions and set

aside sentences, I now order for the appellants' immediate release from the prison custody if they are not otherwise being lawfully held.

It is so ordered.



A.A. MRISHA
JUDGE
10.01.2024

DATED at **SUMBAWANGA** this 10th day of January, 2024.



A.A. MRISHA
JUDGE
10.01.2024