IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

(DC) CRIMINAL APPEAL NO. 21 OF 2023

(Originated from Sumbawanga District in Crim. Case No. 01 of 2022)

MAKASINIA LUSAMBO.....1ST APPELLANT

MICHAEL LUSAMBO.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Last order: March 21, 2024
Judgement: March 20, 2024

JUDGMENT

NANGELA, J.:

This appeal arises from the judgment of the District Court of Sumbawanga in criminal case number 01 of 2022. The facts of this case may briefly be stated as follows: The appellants were charged with the offence of arson contrary to section 319 of the Penal Code, Cap.16 R.E 2019.

It was the prosecution case that on the 06th day of November 2021 while at the Village of Kipoma, within Sumbawanga District in Rukwa Region, the two accused set fire to a dwelling house of one Vitalis Kapufi, causing loss to

the house and several other items within it, all amounting to TZS 12,110,000.

Upon being arrested and charged, the appellants were found guilty and sentenced to a lifetime imprisonment. The appellants are dissatisfied with both the conviction and sentence meted out against them. They have now appealed raising eight grounds of appeal, to wit, that:

1. the prosecution side failed to prove the charge against the appellants as required by the law;
2. the trial court erred in law and fact when she convicted and sentences the appellants relying on evidence of visual identification adduced by Pw-2 and Pw-3 while their evidence did not clarify on how they recognised names of the appellants and if they knew them before;
3. the trial court did not enter proper conviction contract to section 312 (2) of the CPA since any lawful sentence must proceed from proper conviction;
4. the trial court erred in law and fact when it convicted the appellants relying on the evidence of Pw-5 and Pw-6 without taking into consideration that the evidence of caution

statement should be documented and not just mere words;

5. the trial court erred in in law and fact when it convicted and sentenced the appellants based on the prosecution evidence and discounting the defence testimony;
6. the trial court erred in law and fact when it convicted and sentenced the appellants without considering that they were not caught at the scene of crime;
7. the no identification parade was conducted against the appellants to prove if the suspect mentioned by Pw-2 and Pw-3 were the appellants;
8. the evidence adduced by Pw-1, Pw-2, Pw-3, Pw-4, Pw-6 and Pw-7 was hearsay evidence.

When this appeal was called for hearing on February 21, 2024, the appellants appeared in court unrepresented. The Respondent enjoyed the legal services of Ms. Godliva Shio and Atupele Makoga, all State Attorneys. The appellants requested this court to consider their grounds of appeal and allow their appeal, quash their conviction, and set aside their sentences of life imprisonment.

Ms. Shio who argued the appeal on behalf of the Respondent did not support but totally opposed it. She chose to commence her submission by addressing grounds 3, 4, 5, first before turning to grounds 1, 6, and 7. Submitting on ground number 3 of the appeal, Ms. Shio argued that such a ground is baseless and must be dismissed because, looking on pages 11 and 13 of the trial court's judgement, the trial magistrate did find the accused guilty before she proceeded to sentence them. In view of that fact, she urged this court to dismiss that ground as it is without merit.

Concerning the fourth ground, Ms. Shio told this court that the same should be dismissed. The reasons for such argument were that this ground is also baseless since the prosecution did tender caution statements in court as an exhibit, and such caution statements were statements which the appellants had recorded at the police station when they were arrested and interrogated. Referring this court to page 47 of the typed proceedings Ms. Shio argued that the proceedings indicate that the caution statement of the 1st Appellant was received in court as **Exh.P-2 while that of the** 2nd appellant, as page 65 of the typed proceedings

indicate, was tendered, and admitted in court as **Exh.P-3**. In view of such a fact, she urged this court to dismiss the fourth ground as lacking merit.

As regard the fifth ground, Ms. Shio conceded that, indeed, going through the judgement of the trial court one will note that, after framing the issues, the trial court did not consider the defence testimony. However, she was quick to argue, that, since this is the first appellate court, it has the mandate to go through the entire record and can consider the evidence afresh and see what the proper decision would be.

To support that contention, she cited the case of Nyakwama **Ondare @ Okware vs. Republic**, Criminal Appeal No. 507 of 2019 (unreported. She therefore argued that, even though their fifth ground of appeal is valid, the anomaly pointed out by the appellant can still be cured by this court.

Concerning the 1st, 6th, 7th and the 8th grounds of appeal, Ms. Shio argue them together. She submitted that all these grounds could be responded to through the first ground which is about whether the prosecution failed to

prove the charge against the appellant to the required legal standards. She contended that the prosecution did prove the charges to the required standards, which is beyond reasonable doubt.

To support her contention, Ms. Shio submitted that, there was direct evidence about the commission of the offence and a confession made by the appellants. Concerning the available direct evidence, Ms. Shio argued that such came from two witnesses, who are Pw-2 and Pw-3. According to Ms. Shio, Pw-2 who is the wife of Pw-1 was present at the scene of crime on the fateful day.

Ms. Shio submitted that, Pw-2 was able to clearly narrate how the two appellants came to her house, how they had long conversation with her and how they proceeded to set her house on fire. She told this court that Pw-2 was able to identify the two appellants correctly on the eventful date as it was still daylight at 5pm, there was enough light and more so, she had prior knowledge of the appellants, a fact which she stated at page 18 of the typed proceedings.

Thirdly, it was her submission that, Pw-2 had a long period of observing the two appellants who came to her

grocery in need of buying beer to drink but since Pw-2 had no beer they bought cold drinks (Soda) and did have time to drink while at her place of business. Ms. Shi was also of the submission that, it was the 1st Appellant who started to accuse Pw-2 and her husband saying that they used to kill people and did also kill the 1st appellant's brother. For that matter, Ms. Shio told this court that Pw-2 had ample time to observe the appellants in such a manner that there could not have been a mistaken identity.

Ms. Shio submitted that, Pw-2's testimony was sufficient and meet the tenets of proper identification as per the decision of **Waziri Amani vs. Republic**, [1980] TLR 6. Moreover, she submitted that, Pw-2 was also a credible witness because she immediately named the two appellants after the incident as the culprits, a fact which is evident on page 15 of the typed proceedings.

According to Ms. Shio, Pw-1 told the trial court that it was his wife (Pw-2) who phone-called him telling him that the appellants had set Pw-1's house on fire, and that, it was Pw-2 who immediately reported the incident to Pw-4, the

Village Chairman and named the appellants as the culprits as shown on page 25 of the proceedings.

Referring to the case of **Marwa Wangiti and Another vs. Republic,** Criminal Appeal No.6 of 1995 (unreported), Ms. Shio argued that the witness's ability to immediately mention the suspect of the crime lend to her credibility. As such, she contended that Pw-2 being the main witness who managed to prove that it was the appellants who committed the arson is a credible witness.

Ms. Shio argued as well that, the testimony of Pw-2 was further corroborated by the testimony of Pw-3. She told the court that on page 20 of the typed proceedings, it is shown that Pw-2 testified that she saw the two appellants setting Pw-1's house on fire on the material day, and this was also direct evidence, which the trial court relied on.

Concerning the evidence in the form of confessions made by the two appellants, Ms. Shio submitted that that was also a relevant fact to consider. She submitted that, when the appellants were interrogated at Laela Police Station each, in his cautioned statement confessed to have committed the offence of arson and their cautioned

statements were tendered in court and received as **Exh.P-2** and **Exh.P3** respectively.

Ms. Shio submitted, therefore, that, through that kind of evidence, the prosecution's case was watertight and left no doubt that it was the appellants who committed the arson and no one else. For such reasons she urged this court to dismiss the appeal and uphold the appellant's conviction and sentence.

I have considered the grounds of appeal; the submissions made by the respondent's attorney and examined the entire record. As correctly submitted by Ms. Shio, this court being the first appellate court, it is duty bound to reassess the whole record and may scrutinise and re-evaluate the evidence on record to come out with own independent conclusions, not only on the issues of fact but also those of the law. See the cases **of Deemay Daat, Hawa Burbai & Nada Daati** (Criminal Appeal 80 of 1994) [2004] TZCA 63 (5 October 2004), and **Leopold Mutembei vs. Principle Assistant Registrar of Titles, Ministry of Lands Housing and Urban Development & Another**

(Civil Appeal 57 of 2017) [2018] TZCA 213 (11 October 2018).

The freedom which this court enjoys as the first appellate court, however, is only subject to limitations stated, in **D. R. Pandya vs. R.** [1957] EA 336; and **Jamal A. Tamim vs. Felix Francis Mkosamali & The Attorney General**, Civil Appeal No. 110 of 2012 (unreported). Such limitations are in relation to the issue of demeanour evidence of any of the witnesses who testified before the trial court, since this court lacks the first-hand encounter with such witnesses, i.e., it neither saw nor heard the witnesses. (See **Selle vs. Associated MotorBoat Co** [1968] EA 123, and **Zubeda Kiminda vs. Michael Mushi,** Civil Appeal No.98 of 2018 (HC) (Unreported)).

In the case of **Materu Leison& J Foya vs R. Sospeter** [1988] TLR 102, this court was also of the view that:

> "it is only in rare circumstances that an appellate court would interfere with the trial court's findings of fact, and it would interfere, for instance, where the trial court had omitted to consider or had

misconstrued some material evidence, or had acted on a wrong principle, or had erred in its approach in evaluation of the evidence."

As I stated earlier herein above and considering what the appellants raised in the fifth grounds of appeal, there is no doubt, as rightly conceded by Ms. Shio, that, the learned trial magistrate failed to consider the appellants' defence when she composed the decisions. However, since this court has a duty and mandate to re-evaluate the entire evidence, that anomaly can rightly be cured.

Having stated that, did the appellant's evidence tilt the balances of justice? I think not. I have looked at their defence which they offered before the trial court. Apart from denying the charges and they testified that they were tortured to confess, and that Pw-1 and Pw-2 were telling lies. But as the record shows on pages 63-65 of the proceedings, the allegations of torture were addressed by the trial court and were cleared. As such, even by considering the appellants defences, I find nothing which could have titled the balances of justice in their favour.

As regards the rest of the grounds of appeal, I do agree with Ms. Shio's submission that all remaining grounds of appeal are without merit where one considers the testimonies of Pw-2 and Pw-3 as well as Pw-5 and **Exh.P-1** and **Exh.P-2** (the caution statements of the appellants). To me the testimony Pw-2 who was an eyewitness cannot be faulted. As correctly argued, she was able to immediately point out to Pw-4 where he went to report the incident that, it was the appellants who were the culprits who set the house of Pw-1 on fire.

That fact supports the version that she is a credible witness and the cited case of **Marwa Wangiti and Another vs. Republic,** (supra), is relevant to that point. In the case of **Joseph Kashindye vs. Republic**, (Dc) Criminal Appeal No. 7 of 2023 (unreported), this court made a point that in essence:

> "immediate reporting and arrest of an accused person is an important aspect which assists in not only preventing other possible criminal conducts from being perpetrated by the same offender by it is also safe to the victim of the crime. It helps the

> investigating machinery to switch its gears on immediately and if the criminals are found, the police will make arrests."

The noted as well, and citing the case of Court are even more inclined to believe the evidence relating to prompt reporting of crime and immediate arrest of the culprit, citing the case of **Jafari Mohamed vs Republic** (Criminal Appeal 112 of 2006) [2013] TZCA 344 (15 March 2013) where the Court of Appeal observed as follows:

> "Thirdly, from the evidence of both PW2 Victoria and PW3 Insp. Abubakar, PW2 Victoria **reported the incident to the police immediately and mentioned the appellant, leading to his instant arrest that night**. For these reasons, we have no hesitation in dismissing these grounds of appeal." (Emphasis added).

From that analogy, I do agree with the submission of Ms. Shio that the testimony of Pw-2 who was the eye witness and which constituted a direct evidence cannot be brushed aside as she promptly reported the incident to Pw-4 and named the appellants as the culprits, a fact which she also

made know to Pw-1 immediately as the house was on fire and named the same culprits as being the appellants.

Moreover, as correctly stated, there could have been a mistaken identity since Pw-2 had ample time with the appellants as they sat and drunk in her immediate presence, being served by none other than Pw-2. The testimony of Pw-2 was also supported by that of Pw-3. Above all, the appellants were no strangers to Pw-2. As such, the issue of identification parade and the like nature cannot be material where a culprit is known to the witness.

In view of my own assessment of the evidence on record and having as well looked at the proceedings and how the accused were found guilty and convicted, there can be no argument that the trial magistrate failed to properly convict the appellants as the appellants seem to insinuate in their third ground. The record is clear, as argued by Ms. Shio that, the trial court rightly convicted the appellants and after conviction did follow the appropriate procedure to sentence them.

From the foregoing discussion, and save for the fifth ground of appeal, which nevertheless cannot tilt the scales of

justice in this case, I find that the appeal is devoid of merits, and I hereby dismiss it and uphold the conviction and sentence of the trial court.

Order accordingly.

DATED ON THIS 20th DAY OF MARCH 2024

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DEO JOHN NANGELA

JUDGE