

TANZANIA / JUDGMENT

john stephano and 5 others vs republic 2022 tzca 469 22 july 2022

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IN THE COURT OF APPEAL OF TANZANIA AT BUKOBA (CORAM: MWARIJA. J.A., SEHEL. J.A And MAIGE. J.A.n CRIMINAL APPEAL NO. 251 OF 2021 JOHN STEPHANO.....1st APPELLANT DOMERIUS JOHN.....2nd APPELLANT RICHARD BIKANYANGA..... 3rd APPELLANT KAMUGISHA EDWARD..... 4th APPELLANT BYARUGABA CRAVERY.....5th APPELLANT SELEMAN IBRAHIMU MRUNDI..... 6th APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the judgment of the Resident Magistrates Court of Bukoba at Bukoba) (Luambano, SRM Ext-Jur.) dated 29th day of March, 2021 in Criminal Appeal No. 22 of 2020 JUDGMENT OF THE COURT 15th & 22nd July, 2022. MAIGE, J.A: At the District Court of Karagwe, otherwise "the trial court", the appellants and one Methodius Clavery @ Mutashobya, who is not a party to this appeal, were jointly and together charged with a total of seven (7) counts namely; three counts of arson contrary to section 319 (a), three counts of malicious damage to properties contrary to section 326 (1) and one count of killing animals contrary to section 325 all of the Penal Code [Cap 16 R.E. 2002] now [R.E.2022]. i It was alleged that, on 21st July, 2019 at the village of Kitega within Kyerwa District in Kagera Region, the appellants wilfully and unlawfully set fire on the dwelling houses of Angelina Joseph (PW1), Mutungilei Kajugusi (PW3) and Lucas Kajugusi (PW2) thereby destroying various items therein belonging to the said victims, including three motorcycles and three goats. Upon a full trial, the appellants and that other person, were all convicted with the charged offences and sentenced each to life imprisonment for the first three counts and seven years imprisonment for the last four counts. The prosecution case was essentially based on the oral evidence of eight witnesses as substantiated by five exhibits. The crime is said to have been committed on 21st July, 2019 at night. The victims of the crime were PW1, PW2 and PW3. They are closely related in that, PW1 is the biological mother of PW2 and PW3. It is undeniable that, appellants and the victims knew each other in that, they stayed at the same village. PW2 testified that, on the material date at around 9:00 PM while on his way back home, the 2nd appellant attacked him and grabbed his neck tie. He managed to escape and run away but the 2nd appellant pursued him. The second appellant was afterwards joined by the 1st and 5th appellants in the process. The 1st appellant

threatened PW2 that, 2 "nitawahamisha hiki Kijiji au nitakufanya kilema kwa sababu mama yako ni mchawi". On arriving at the house of PW2, the 5th appellant brought a can of petrol fuel and set fire on PW2's house. The house and all properties therein including the motorcycle (exhibit PI), were destroyed. PW2 identified the three appellants by aid of electricity light and moonlight. PW4, the wife of PW2, was present when the 1st, 2nd and 5th appellants were chasing her husband. She was somewhere nearby hiding herself with her children. While there, she witnessed the appellants burning her husband's house. PW2's neighbour Buberwa Joseph (PW5) who went at the scene of the crime after hearing some noises coming therefrom, also witnessed the incident. PW2 testified further that, after burning his house, these three appellants committed a similar offence at the houses of PW1 and PW3. Testifying on this, PW3 stated that, after having heard some noises coming from the house of PW2, he went there to see what was up. He found the 1st, 2nd and 5th appellants threatening to deport PW2 or make him disabled if he did not leave the place. Assisted by a group of young persons who were attending marriage ceremony at the residence of the 1st appellant, the appellants attacked the house of PW2 using heavy stones. To rescue himself from the danger, PW3 ran away. He took a hide in a near farm. While there, he witnessed PW2's house being destroyed by fire and the appellants were there. On cross examination, PW3 told the trial court that, he identified the 1st, 2nd and 5th appellants through moonlight and electric light as his house was connected with solar power. PW1 testified that, on the material date and time, while at home, the 1st, 2nd and 5th appellants invaded her house and started throwing stones thereon. The first appellant was accusing her to be a witch. She managed to escape and hide herself in her farm. While there, she saw her house and all properties therein being destroyed by fire. She identified the first, second and fifth appellants through moonlight and solar light. The incident was reported to Focus Petro, the village chairperson (PW7). The latter confirmed in evidence to have been so informed and reported the matter to police. Further in his evidence was that, when he went at the scene of the crime, he found the three houses already destroyed by fire. F.5454 D/CPL Josiah (PW8), a police officer who investigated the crime testified that, after being informed of the incident, he went to Kitega village and witnessed the three houses burnt by fire. In their evidence, each of the appellants denied committing the offences. They denied presence at the scene of the crime at the material time too. 4 The trial court convicted the appellants basing on the visual identification of the first six prosecution witnesses. It found it to be credible and probable. It disbelieved the evidence of the appellants that, they were not at the scene of the crime at the material time, as an afterthought. It finally dismissed the defence for want of notice and particulars of alibi as per section 194 (4) of the Criminal Procedure Act, [Cap. 20 R.E. 2022], (the CPA). The first appellate court concurred with the factual findings of the trial court. The appellants are still displeased with the conviction and sentence of the trial court. On 6th April, 2022, the appellants filed a joint memorandum of appeal consisting 15 grounds whereas on 5th July, 2022 they lodged a supplementary memorandum of appeal consisting of two grounds. On our careful reading, the grounds of appeal in both the initial memorandum of appeal and the supplementary one can be summarised as follows:

1. The charge was defective for want of the time of the commission of the offence as per section 135 (f) of the Criminal Procedure Act.
2. The judgment of the trial court was defective for the reason of improper succession of trial magistrates.
3. The appellants were denied a fair hearing in that they were not supplied with a statement of the complainant and a copy of the proceedings.
4. The judgment is defective for contravening section 312 (2) of the CPA.
5. The trial court sustained conviction based on improperly admitted exhibits.
6. The motorcycle registration cards were not tendered to prove that they were the victims' properties.
7. The court erred in law to reject the appellants' evidence of alibi.
8. The trial court erroneously relied on the evidence PW1, PW2, PW3, PW4 and PW5 without caution despite the witnesses being family members.
9. The appellants were not properly identified by the witnesses at the scene of crime.
10. The sentence imposed against the appellants was improper. At the hearing, the appellants appeared in person without representation. The respondent was represented by Mr. Hezron Mwasimba, learned Senior State Attorney and Mr. Joseph Mwakasege, learned State Attorney. The fourth appellants made a brief oral submission in support of the appeal which were supported by all the remaining appellants. For the respondent, it was Mr. Mwakasege who presented the oral submissions. We have given the rival submissions due consideration and we shall hereafter consider the substance of the appeal. We start with the first ground wherein the validity of the charge sheet is doubted for not disclosing the time in which the offence was committed. In his submission, Mr. Mwakasege while admitting that, indeed time of the commission of the offence was not disclosed in the charge sheet, he was of the contention that, the omission was curable under section 388 of the CPA. Section 135 (f) of the CPA upon which the ground is raised provides; "(f) subject to any other provision of this section, it shall be sufficient to describe any place, time, thing, matter, act or omission of any kind to which it is necessary to refer in any charge or information in ordinary language in such manner as to indicate with reasonable clarity the place, time, thing, matter, or act or omission referred to;" (emphasis is ours) In our view, the clause "to which it is necessary to refer in any charge or information" in the above provision connotes that, the necessity to describe time in the charge sheet or information arises where time is of essence in proving the offence. Construing the provision otherwise would render all charges and information pertaining to offences whose time of commission is unknown, defective. In the offences of arson and malicious damage to property, we do not think that time is of essence. It is a question of evidence whose foundation can be raised at the preliminary hearing. In here, the time of commission of the offence was addressed in the prosecution evidence and

the appellants had time in their evidence to address it. In any event, variance between the charge and evidence in respect to the time at which the offence was committed is immaterial. See for instance, Said Mususa v. R., Criminal Appeal No. 268 of 2013 (unreported). The ground is thus dismissed. The second ground is on succession of magistrates. The appellants contended that, the same was irregularly made as reasons for succession were not disclosed. Their contention is seemingly based on the provision of section 214 of the CPA which provides as follows; ss214-(1) When any magistrate, after having heard and recorded the whole or any part any committal proceedings or he is unable to complete the trial, or the committal proceedings within a reasonable time, another magistrate who has and who exercise jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceedings recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resubmit the witnesses and recommence the trial or committal proceedings" 8 On that, Mr. Mwakasege submitted that because the succession was made during pre-trial stage, no provision of law has been violated. With respect, we are in agreement with him. The requirement of the above provision applies where the succession is made either during trial or committal proceedings. In this matter, the record is clear that, the trial was conducted by a single magistrate and it is him who composed the judgment. The successions happened before the trial had commenced. It does not, therefore, violate the requirement under the provision in question. The second ground is thus, dismissed. We turn to the third ground as to denial of a fair hearing. On this ground, the appellants are lamenting that, they were denied the statement of the complainant and a copy of the proceedings necessary for preparation of their defence. Mr. Mwakasege did not comment on this issue in his submissions. On our part, having examined the record, we find that the complaint is baseless as there is nothing therein to suggest that either of the appellants requested for the said documents and denied. Neither did they raise the issue at the first appeal. The claim is therefore, an afterthought and it is hereby dismissed. We proceed with the fourth ground wherein the judgment of the trial court is questioned for being procured in violation of the mandatory requirement of section 312 (2) of the CPA which provides as follows; "In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced" Without spending much time, we are in agreement with the learned State Attorney that, the above provision was substantially complied with. The statement convicting the appellants with the offence is found at page 96 of the record of appeal where the trial magistrate stated; "...I do find all the seven accused persons guilty on all seven counts they stand charged. The 1st 2nd and 3rd counts being arson c/s 319 (a) of the Penal Code Cap 16 and on the 4th, 5th and 6th counts of malicious damages to property contrary to section 326 (1) of the Penal Code Cap 16 and I do convict them forthwith" It is clear from the above excerpt that, the trial court specified the offence and the provision of the Penal Code under which the appellants were convicted. Besides, at page 97, the punishment for each count was pronounced. The complaint is thus without merit. In any event, neither of the appellants has shown how he has been prejudiced by the omission. The

omission, if any, could not, in terms of section 388 of the CPA, affect the substantial validity of the judgment. See *Magobo Njige and Another vs The Republic*, Criminal Appeal No. 442 of 2017, *Abiola 10 Mohamed @ Simba vs The Republic*, Criminal Appeal No. 291 of 2017 (both unreported). The fourth ground of appeal is therefore, dismissed. In the fifth ground, the appellants complain that exhibits P1, P2, P3, P4 and P5 were irregularly admitted. On the first three exhibits, the complaint is that they were admitted without certificate of seizure. The complaint is totally misplaced as the said objects were not seized from any of the appellants but collected at the locus in quo. As to exhibits P4 and P5, the complaint is irrelevant because as rightly submitted for the respondent, the same were expunged from the record in the first appeal. The fifth ground is thus dismissed. In the sixth ground, the appellants complain that the motorcycles in exhibits P2 and P3 were admitted without proof of ownership. For the reason of the ground being not raised at the first appeal, we agree with Mr. Mwakasege that, it cannot be raised in the second appeal. See for instance, *Samwel Sawe v. R.*, Criminal Appeal No. 135 of 2004, *Athumani Rashidi v. R.*, Criminal Appeal No. 26 of 2016 and *Felix Kichele and Another vs R.*, Criminal Appeal No. 159 of 2015 (all unreported). We accordingly dismiss the ground. We proceed with the seventh ground as to omission to consider the appellants' defence. It is on record that, the appellants raised a defence of alibi. They claimed that they were not at the scene of crime at the material time. The first to fifth appellants said that they were at their respective homes sleeping while the sixth appellant was at Migina Village. We have gone through the record and satisfied ourselves that, the trial court considered the said defence at page 95 of the record of appeal and rejected it. In our view, the mere fact that it was rejected, does not mean that it was not considered. Thus, in *Issa Saidi v. R.*, Criminal Appeal No. 10 of 2014 (unreported), it was stated; "We are satisfied that the appellant defence was considered but was rejected. The fact that his defence was rejected, does not mean that the same was not considered..." (Emphasis is ours) Besides, at the first appeal, the said ground was raised as the 6th ground. Nevertheless, as it can be seen at page 127 of the record, the appellants, through their counsel abandoned the same. Having abandoned it in the first appeal, it was improper for the appellants to raise the same in the second appeal. The seventh ground has thus no merit and it is dismissed. The complaint in the 8th ground of appeal is that, the trial court relied on the evidence of relatives without taking precaution. The complaint though relates to assessment of evidence was not raised in the first appeal. It can, therefore, not be dealt with in the second appeal. The ground is henceforth dismissed. 12 We now pass to the 9th ground in which the appellants complain that they were not correctly identified at the scene of the crime. As we said earlier on, the two courts below having considered and evaluated the evidence, accepted the evidence of the prosecution to be credible and probable. The position of law in such kind of a situation is settled. The second appellate court does rarely interfere with such concurrent factual findings of the lower courts. It can only do so where there are mis- directions or non- directions on the evidence, a miscarriage of justice or violation of some principle of law or justice. See for instance, *Mafuru Manyama & Two Others v. R.*, Criminal Appeal No. 256 of 2007 (unreported). The conviction of the appellants was based on visual identification evidence of the first six prosecution witnesses. It is trite law that, such type of evidence is of

the weakest character and most unreliable. It can only be acted upon, if all possibilities of mistaken identity and/ or fabrication are eliminated. There are many authorities in support of this proposition. See for instance, Philimon Jumanne Agala @ J4 v. R., Criminal Appeal No. 187 of 2015, where it was held that:- "Eyewitnesses visual identification evidence though relevant and admissible, should be acted upon cautiously after the court has first satisfied itself that 13 such evidence is watertight and all possibilities of mistaken identity or fabrication have been eliminated. The offence under discussion was apparently committed at night. In law therefore, for the trial court to rely on visual identification evidence, it must satisfy itself, after assessment of the credibility of the witnesses that, the evidence is watertight enough to eliminate all possibilities of mistaken identities. As to what factors should be taken into account in testing if evidence does not leave any room of mistaken identity, this Court stated in Waziri Amani v R. [1980] TLR 250 as follows; "The time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time, whether there was poor lighting at the scene; and further whether the witness knew or had seen the accused before or not" The appellants and the three first prosecution witnesses, it is common ground, were familiar to each other in that; they were living in the same village. In the circumstance, the identification involved is by recognition. Though such kind of identification may be more reliable than identification by a stranger, yet the trial court is obliged, before relying on the same, to take precaution of the possibility of the victim being incorrectly recognised or the evidence being fabricated. Therefore, in Philimon Jumanne Agala @ J4 v. R. {supra} the Court said; "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made" With the above observations, the question which we have to resolve, is whether the prosecution evidence on recognition of the appellants was credible, plausible, cogent and convincing as to leave no room for reasonable doubt. For obvious reason, we shall first consider the issue in relation to the 1st, 2nd and 5th appellants and thereafter in relation to the rest of the appellants. The key witnesses who identified the 1st, 2nd and 5th appellants in our careful reading, were PW1, PW2 and PW3 (the victims of the crime). They mentioned them to be the persons who invaded their homes and destroy their houses. There is no dispute that, these three appellants and the victims were familiar to each other in that; they were living in the same village. Their evidence suggests that soon before and during commission of the offence, these appellants uttered some words. In their evidence, they each disclosed to the trial court that, they were able to recognise the said appellants by aid of solar and moon light as all three 15 houses were connected with solar power. PW2 clarified further that, "there was a plenty of light and the accused were standing to place where the bulb was lighting". Moreover, the evidence of PW4 on cross examination suggests that the incident continued for hardly four hours. PW2 stated that, when the second appellant grabbed his neck and managed to escape and run to his house, the first and fifth appellants also joined forces to chase him. PW4 who is PW2's wife gave an account which tallies with that of PW2 that, he

saw him running and forcefully getting into the house and that; upon inquiry, PW2 revealed that, he was being chased by the 1st, 2nd and 5th appellants. On top of that, the evidence of these three prosecution witnesses was consistent that it was the 1st appellant who sent the 5th appellant to pick up petrol which was in turn used to burn the houses. More to the point, the record reveals that, the incident was reported to PW7 while the appellants were still committing the offence. This was irrefutably confirmed by PW7 who said that, after so informed, he reported the incident to the Police and, on the next day early in the 7^h/0 and arrested the appellants. As held morning, he went at the locus in < in *Marwa Wangiti Mwita and Another v. R.* TLR [2002] 39, naming the suspects at the earliest possible opportunity time ensures reliability of the witness 16 I Therefore, having critically analysed the evidence on record, we are inclined to hold, just as the two courts below that, the 1st, 2nd and 5th appellants were correctly identified at the scene of crime and were the ones who burnt the victims' houses on the fateful night. We proceed to consider the issue in relation to the rest of the appellants. In accordance with the prosecution case, the offence was committed first at the residence of PW2. From there, it was committed at the residence of PW1 and then PW3. The prosecution evidence suggests that, the offence was committed by the same persons. The evidence of PW2 appearing at pages 25 to 26 of the record shows that, he identified the persons who attacked his house and set fire thereon as the 1st, 2nd and 5th appellants. The rest of the appellants were not mentioned. PW1 made a similar account in her evidence appearing at page 21 of the record when she said, "the 1st, 2nd and 5th accused persons are the ones who burnt my house, two mattress, 2 beds, 1 solar panel and buttry, 1 bag o f maize, 1 bag o f beans, and other households were completely destroyed" She did not mention the rest of the appellants. We noted that, the evidence of PW3 suggests that, the 1st, 2nd and 5th appellants were subsequently joined by other persons in the process. Conversely, the names of those persons are not in his evidence. He just described them at page 31 of the record of appeal as "a group of youth". 17 As that is not enough, in his evidence on cross examination appearing at page 34 of the record, PW3 was very specific that, it was only the 1st, 2nd and 5th appellants whom he identified at the scene of the crime. He testified as follows; "It was around 9:00 hours and I identified the 1st, 2nd and 5th accused through moon light and through electricity lights and also my house has solar power and so/ar lights were on." While it is a fact that, PW5 (Buberwa Joseph) and PW6 (Rehema Ibrahim) (PW6) mentioned in their evidence all the appellants, their evidence is absolutely silent as how were they able to identify them. The distance they were in from the appellants and the source of light through which they identified them is not in their evidence. We noted that, PW5 claimed in re-examination to have identified one of them by voice. The evidence was however not founded on his testimony in chief. Obviously, therefore, the appellants were denied an opportunity to rebut it by way of cross examination. The assertion can thus not be given weight. In the circumstance, we agree with the appellants that, the prosecution evidence on visual identification of the third, fourth and sixth appellants much as it was for the other convict who is not a party to this appeal, did not pass the test in *Amani Waziri* case. There was thus reasonable possibility of 18 mistaken identity. We hold that, their case was not proved beyond reasonable doubt. We

shall now proceed with the last ground of appeal as to validity of the sentence. The appellants complain that, it did not comply with the provision of section 319 of the Penal Code under which the appellants were charged. In the said provision, it provides that, whoever is convicted of the offence of arson "is liable to imprisonment for life". In his submission, Mr. Mwakasege, while admitting that, the sentence of life imprisonment is a maximum sentence, he argued that, the trial court was right, in view of the gravity of the offence and the properties destroyed, to impose the maximum sentence. With deepest respect to the counsel, we cannot agree with him. It is an elementary position of law and we need not cite an authority that; in imposing sentence, the trial court, apart from considering the sentence stated in the penal statute, must consider mitigating and aggregating factors. In this case, it is on record that, the appellants were first offenders. That is one of the acceptable mitigating factors. It was not considered at all. It should have in our view. We therefore, agree with the appellants that, in imposing maximum sentence to the appellants despite being first offenders, the trial court misdirected itself on the pertinent principle of law. We thus quash and set aside the sentence and substitute it with a sentence of 15 years imprisonment. 19 In the final result and for the reasons as afore stated, the appeal partly succeeds to the extent of the conviction of the 3rd, 4th and 6th appellants which is set aside and the sentence thereof quashed. The sentence of the 1st, 2nd and 5th appellants is substituted with a shorter sentence of 15 years imprisonment each. The appeal against their conviction fails. It is hereby upheld. DATED at BUKOBA this 21st day of July, 2022. A. G. MWARIJA JUSTICE OF APPEAL B. M. A. SEHEL JUSTICE OF APPEAL I. J. MAIGE JUSTICE OF APPEAL The Judgment delivered this 22nd day of July, 2022 in the presence of both appellants in person and Mr. Juma Mahona, learned State Attorney for the Respondent/ Republic, is hereby certified as a true copy of the

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