IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 99 OF 2021

(Originated from Criminal Case No 4/2021 in the District Court of Mbulu at Mbulu)

YAMEE MARISHI @ EMMANUEL MARISHI .... APPLICANT

VERSUS

THE REPUBLIC .... RESPONDENT

JUDGMENT

03/08/2022 & 14/09/2022

KAMUZORA, J.

The Appellant herein is challenging the conviction and sentence of life imprisonment imposed to him by the District Court of Mbulu at Mbulu (the trial Court). The Appellant was charged with the two offences of Arson and malicious Damage to property Contrary to section 319(a) and 326(1) of the Penal Code Cap 16 R.E 2019. For the first count it was alleged that, on the incident, 30th Day of December 2020 at Qaloda Village within Mbulu District in Manyara Region, the Appellant wilfully and unlawfully did set fire to the dwelling house of one Selustian Musa valued at Tshs 170,000/=. On the second count it was alleged

that, the Appellant did set fire which destroyed 22 bags of maize valued at Tshs.1,100,000/=, 5 cans of beans valued at Tshs. 75,000/=, 1 bicycle valued Tshs. 220,000/= and it killed 3 goats valued at Tshs. 270,000/= all valued at Tshs. 1,895,000/=.

The Appellant pleaded guilty and he was convicted and sentenced to life imprisonment for the first count and 12 months forth second count. The Appellant was aggrieved by both conviction and sentence and brought three grounds of appeal which are rephrased as hereunder: -

1) *That, the learned trial Magistrate erred in law and fact to impose capital sentence of life imprisonment on equivocal plea.*
2) *That, the learned trial Magistrate erroneously in law and fact ignored the chance of the Appellant being unaware equivocal plea while making final consideration.*
3) *That, the learned trial Magistrate erroneously admitted primary evidence Exhibit PE1 (Caution Statement) and exhibit PE11 (Sketch map) in contravening of the provision of section 139, 148 and 169 of the Tanzania Evidence Act and in ignoring the verification of the Arson alleged from the police investigator.*

The Appellant also brought five more additional grounds of appeal that which are rephrased as hereunder: -

1) *That, the trial Magistrate erroneously in law and in fact for determination of equivocal plea of the accused.*

2) *That, the trial Magistrate erred in law and in fact as he was not acumen enough before the trial instigated to notice that the Appellant was a layman nor benighted, for the justice deed.*

3) *That, the trial Magistrate erred in law and in fact by failing to observe the irregularity in proceedings of the trial court as the Appellant herein stayed in custody before being taken to court for more than fifteen days which is contrary to the law.*

4) *That, the trial Magistrate erred by allowing the P.P to tender the exhibit in court while the Public Prosecutor is not a witness.*

5) *That, the trial Magistrate erroneously in law and in fact when he failed to comply with Rules 4 and 6 of the Accelerated Trial and Disposal of the case Rules, GN. No. 192 of 1988.*

When the appeal was called for hearing, the Appellant appeared in person with no legal representation and Ms. Riziki Mahanyu, learned State Attorney appeared for the Respondent Republic. Parties opted to argue the appeal by way of written submissions and they both complied to the submissions schedule.

The Appellant opted to start with the additional grounds of appeal. He submitted for the first ground that, the Appellant was not aware of

the charge and facts there to. That, the Appellant's plea raised doubt thus, the court could have not entered plea of guilty. Referring the statements recorded as Appellant's plea, the Appellant argued that, the same were professional statements which could not be made by a lay person like the Appellant. In support of the argument the counsel cited the case of **Mohamed Katindi and another Vs. Republic** [1986] TLR 134. It was the contention by the Appellant that the statements were mouth fed from the side which know very well about charge and penal laws thus, does not mean that the Appellant willingly pleaded guilty.

Pointing to pages 1, 2 and 3 of the trial court proceedings it is the Appellant submission that, the plea entered by the Appellant was equivocal plea for two reasons, one, that, it does not show how the Appellant knew the value of the dwelling house and whether the Appellant entered into that house before burning it for him to know the value of the said properties. Second, that, by reading the Appellant's plea and fact No. 7 the court will realise that the statements contradict each other that the Appellant pleaded guilty of burning the dwelling house and at the same time the Appellant accepted all facts including fact No. 7 which shows that the value of the properties damaged by fire was Tshs. 2,300,000/=.

For the second additional ground, it is the contention by the Appellant that, being a lay man, the trial court had to make sure that the Appellant understood the charge and the meaning of section 319 of the Penal Code Cap. 16 R.E 2019.

As for additional ground three, it is the submission by the Appellant that, pursuant to section 32(1)(4), 33, 50 and 51 of the CPA Cap 20. R.E 2019 which allows detention of a person arrested for a maximum period of 8 hours, it was wrong to keep the Appellant in police cell for 15 days without good reason. He referred the case of **Mashimba Dotto @ Lukubanija Vs. Republic** [2016] TLS 388.

In respect of the fourth additional ground the Appellant submitted that, the public prosecutor tendered exhibits in court which denied the Appellant the right to cross-examination as the public prosecutor was not a witness. In support of this argument the Appellant cited the cases of **Thomas Ernest Msungu @ Mkenya Vs. Republic,** Criminal Appeal No 78 of 2012 (Unreported), **Geophrey Jonathan @ Kitomari vs The Republic**, Criminal Appeal No 237 of 2017 (Unreported), **Robison Mwanjisi and 3 others Vs. Republic** [2003] TLR 218, **Joseph Maganga and Dotto Salum butwa Vs. Republic,** Criminal Appeal No 536 of 2015 (Unreported) and **Robert**

P. Mayunga and another Vs. Republic, Criminal Appeal No. 514 of 2006 (Unreported) and the case of **Geophrey Jonathan @ Kitimary Vs. The Republic,** Criminal Appeal No 237 of 2007 (Unreported).

Reverting to the original petition the Appellant submitted to the first ground of appeal that, the trial court passed a sentence contrary to section 170 (1)(a) of the Criminal Procedure Act Cap. 20 R.E 2019 and cemented his argument with the case of **Republic Vs. Farid Hadi Ahmed and 21 others,** Criminal Appeal No 59 of 2015 CAT at DSM (Unreported). As for the second ground the Appellant lamented that the trial magistrate only asked the Appellant once without affording the Appellant the chance of asking him for the second and third time in order to capture the tension of the Appellant. The Appellant therefore prays for the court to allow the appeal by quashing the proceedings and judgment of the trial court and set side the sentence and release the Appellant from prison.

Contesting the appeal, the learned state attorney for the Respondent argued for the first ground of appeal that, the plea was unequivocal. That, the Appellant pleaded guilty to both counts and the plea was very clear as he also pleaded to the facts constituting the offence. She insisted that, the trial magistrate complied with the

provision of section 228 (1) and (2) of the Criminal Procedure Act. She supported her argument with the case of **George Senga Mussa Vs. Republic**, Criminal Appeal No 108 of 2018.

On the argument that the Appellant is a layman and could not know the value of the dwelling, the learned state attorney submitted that, the charge was read in accused's language and he was informed of the value of the dwelling house. On the argument based on the contraction of the value under the charge sheet and facts read to the Appellant, the learned state attorney submitted that the same is immaterial as what matters is the commission of the offence.

On the third ground regarding the time spent by the accused in police custody she replied that, there is no where at the trial court records showing that the Appellant complained before the trial magistrate that he was under custody for more than 15 days hence claiming it at this stage is an afterthought. On the fourth ground that the public prosecutor tendered exhibits while he is not a witness, the counsel for the Respondent replied that, it is true that the public prosecutor did tender exhibits and the same were admitted without any objection from the Appellant. She referred the case of **Matial Barna Vs. Republic,** Criminal Appeal No 105 of 2015 and insisted that, it is

settled that tendering of exhibits after the accused person has pleaded guilty to the offence is not a legal requirement. That, even if the said exhibits were tendered by the public prosecutor and were not read it is not fatal as it is not the requirement of the law.

Replying on the fifth ground that the trial magistrate failed to comply with Rule No 4 and 6 of the Accelerated Trial and Disposal of the case GN No. 192 of 1998, the counsel for the Respondent stated that, in the present case the Appellant pleaded guilty hence there was no any need to conduct Preliminary hearing under section 192 of the CPA.

Regarding the issue of non-consideration of the jury pardon she stated that, the Appellant was given a chance to plea and he pleaded guilty and the facts were read over to him and he admitted the allegation. That, it is evident that the Appellant had a chance to plea otherwise as he was asked to plea to each count and to the facts.

In a brief rejoinder the Appellant reiterated his submission in chief and added that, the responsibility of the prosecution was to adduce facts supporting the charge to which the Appellant was required to admit or deny them. That, the trial court did not direct itself properly to satisfy itself whether the plea was equivocal or unequivocal.

Regarding the time spent in custody the Appellant added that, the burden of proof lies on who alleges and no duty is casted on the Appellant to establish his innocence. He cemented this with the case of **Amos Jonathan Vs. J.S Masuka and others** [1983] TLR 201 and insisted that, there was no any explanation made as to why the Appellant stayed for all those days in police custody before being taken to the court. The Appellant prays for this court to make sure that the law takes proper direction and reference was made to the case of **John Mwombeki Byombalirwa Vs. The Rigional Commissioner and Regional Police Commander Bukoba** [1986] TLR 73.

On the tendering of exhibits by the public prosecutor the Appellant insisted that, the public prosecutor cannot wear two shoes at the same time as he is not capable of tendering exhibits before the trial court. Regarding the jury pardon the Appellant re-joined that the Appellant was charged with two counts and each count had its own particulars of offence and the Appellant pleaded only once hence there was no any consideration of the jury pardon. It is the prayer by the Appellant for this court to find merit in the appeal and set aside the conviction and sentence imposed to him.

Having carefully considered the trial court records, grounds of appeal, the additional grounds of appeal and the submissions made for and against the appeal, I find prudent that I go to the merit of this appeal. I will start by looking into the position of the law with regard to appeals against conviction on plea of guilty. Section 360 (1) of the Criminal Procedure Act Cap 20 R.E 2019 bars appeals against conviction where such conviction was a result of accused's plea of guilty. The said provision read as hereunder": -

> *"360 (1) No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted of such plea by a subordinate court except as to the extent or legality of the sentence."*

Notwithstanding the above provision, an appeal against conviction can be preferred where it is shown that the plea was equivocal. This court and the Court of Appeal has in different occasions highlighted circumstances under which an appeal on plea of guilty against conviction may be allowed.

In **Lawrence Mpinga Vs. Republic** (1980) TLR 166 Samatta, J. as he then was, held that: -

> *"An accused person who had been convicted by any court of an offence on his own plea of guilty may appeal against the conviction to a higher court on the following grounds:*

1. That taking into consideration the admitted facts his plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty;

2. That he pleaded guilty as a result of a mistake or misapprehension;

3. That the charge laid at his door disclosed an offence not known to law; and that upon the admitted facts, he could not in law have been convicted of the offence charged.

In this appeal the Appellant is challenging his conviction on account that his plea was equivocal on account that the words recorded as accused's plea do not reflect the correct plea of the accused. I understand that, the law requires the accused's plea to be recorded in accused's own words. I took time to go through the trial court proceedings to see if the accused's plea was clear and unambiguous to warrant conviction on plea of guilty. I opt to reproduce the charge read to the accused/Appellant and the plea recorded for each count.

"1ST COUNT

STATEMENT OF OFFENCE

ARSON: *Contrary to section 319 (a) of the Penal Code, [Cap 16 R.E 2019]*

PARTICULARS OF OFFENCE

YAMEE S/O MARISH @ MARISHI, *on 30th Day of December, 2020 at Qaloda Village within Mbulu District in Manyara Region, WILLFULLY AND UNLAWFULLY did set fire to the to the dwelling house of one SELUSTIAN S/O MUSA valued at Tshs. 170,000/=.*

2ND COUNT

STATEMENT OF OFFENCE

MALICIOUS DAMAGE TO PROPERTY; *Contrary to Sections 326(1) of the Penal Code, [Cap 16 R.E 2019].*

PARTICULARS OF OFFENCE

YAMEE S/O MARISHI @ EMANUEL S/O MARISHI, *On the 30th day of December, 2020 at Qaloda Village within Mbulu District in Manyara Region, wilfully and unlawfully did set fire and destroy twenty-two "22" bags of maize valued at Tsh. 1,100,100/=, five cans of beans valued at Tsh 75,000/=, one bicycle make Phonex valued at Tshs, 220,000/= three goat dead valued at Tsh. 230,000/= and five sheep dead valued at Tsh. 270,000/= all total valued a t Tsh. 1,895,000/= the properties of one* ***SELUSTIAN S/O MUSA."***

The typed proceedings of the trial court from page 1 to 2 show that, after the charge was read to the accused, he pleaded as follows: -

"Accused; *1st Count*

It is true on 30/12/2020 at Qaroda village I did wilfully and unlawfully burn down the residential house of one Selustian Musa.

2nd Count

It is true on the material date after burning the dwelling house properties valuing a total of Tshs 1,895,000/= perished and such properties belong to one Selustian Musa."

One can see that the accused's plea is mostly the reproduction of the particular of offence. In that regard I agree that the same does not reflect if they were accused's words on plea to the charge. This court is not convinced to agree that, words used like '*wilfully and unlawfully, dwelling house properties valuing a total of Tshs. 1,895,000/=* were the accused's words on plea. They are more technical and which, it needed accused's prior knowledge for him to plea so. The argument by the learned state Attorney that the accused was so informed of the particulars forming offence is unacceptable. Apart from hearing the particulars in court, it is not shown if the accused had a prior undisputed knowledge of the value of the said damaged properties for him to directly agree that the value mentioned to him was true and correct.

Apart from the plea, I also assessed the facts in support of the offence. It is in records that, the facts were also read to the accused as per page 2 of the typed proceedings of the trial court. Part of those facts show that the total value of the damaged properties was Tshs.

2,300,000/=. The records also indicate that, the accused admitted to all facts read to him as forming the offence.

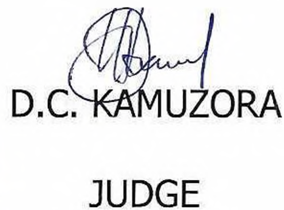
However, looking into the charge sheet, the accused was charged for burning a dwelling house valued at Tshs. 170,000/= and other different properties valued at Tshs. 1,895,000/=. If you sum up the value of the house and other properties, the amount will be Tshs. 2,065,000/= but the facts revel the total amount to be Tshs. 2,300,000/=. It was argued by the learned State Attorney that such variance is immaterial since what matter is that the accused committed the offence.

It is my view that, accused's plea is a very important aspect in determining the commission of offence. If the accused admitted the facts not supporting the offence charged, it cannot be said that the accused admitted to committing the offence. To me the variance in the value of the damaged properties in the charge sheet and that read in the facts supporting the charge is a material variance as it needed explanation through evidence to justify the same. The same cannot be taken as fact supporting the charge in a plea of guilty and in that regard, it cannot be considered that the accused's plea was unequivocal.

Having considered that the accused's plea was equivocal, the remedy is to nullify the trial court's proceedings which I do. Having nullified the proceedings, I find no reason to labour much in deliberating the rest of the grounds of appeal. This court therefore direct the trial court case file to be remitted back to the trial court for another magistrate with competent jurisdiction to properly record the accused's plea. The appeal is allowed to the extent above explained.

Order accordingly.

DATED at **ARUSHA** this 14th day of September, 2022.



D.C. KAMUZORA

JUDGE