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**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA
(Criminal Jurisdiction)**

HNS/40/2017

THE PEOPLE

V

MWIKA KANG'ONGO

Before the Hon. Mr. Justice Davies C. Mumba in Open Court this 19th day of July, 2017.

For the State: Mr. M. Lupiya, State Advocate
Mr. S. Zulu, State Advocate
Ms. B. Sangwa, State Advocate

For the Convict: Ms. K. Chitupila, Senior Legal Aid Counsel
Ms. E.I. Banda, Senior Legal Aid Counsel

JUDGMENT

CASES REFERRED TO:

1. Nondo v The Director of Public Prosecutions (1968) Z.R. 106.
2. The People v Kanguya (1979) Z.R. 381 (reprint).
3. Shampeta and Another v The People (1967) Z.R. 214 (reprint)

LEGISLATION REFERRED TO:

1. The Penal Code, Cap. 87 – s.328
2. The Criminal Procedure Code, Cap. 88 – s. 217

MWIKA KANG'ONGO, the convict herein, was charged with two counts. In Count 1, he was charged with the offence of ARSON, contrary to section 328 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence

alleged that the convict on the 1st day of January, 2017, at Luanshya in the Luanshya District of the Copperbelt Province of the Republic of Zambia, did set fire to the dwelling house to Precious Ngosa valued at K10, 840.00 the property of the said **PRECIOUS NGOSA**.

In Count 2, arising from the same facts, the convict was charged with the offence of Assault Occasioning Actual Bodily Harm. On his own plea of guilty, he was convicted and sentenced to two years imprisonment with hard labour, the sentence which he is still serving with effect from 4th January, 2017.

According to the record, the convict also purportedly pleaded guilty to Count 1 and was convicted of the subject offence. As the trial magistrate lacked jurisdiction to impose the mandatory minimum sentence of 10 years that the offence carries, the convict was committed to the High Court for sentence pursuant to section 217 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

I have perused the record of proceedings. What has struck my mind, with regard to Count 1, is the manner in which the charge was framed and the plea taking that followed.

When the convict was called upon to re-take plea he stated that:

"I understand the charge, I only burnt the clothes which were inside the house. I was annoyed that she was not at home at midnight. The value of the home is not K10,000.00 its below that."

On the basis of the above answers, the trial Magistrate entered a plea of guilty. Later, the following statement of facts was prepared by the prosecutor and read to the convict:

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STATEMENT OF FACTS

The now accused person stands charged with one count of ARSON, contrary to section 328 of the Penal Code, chapter 87 of the Laws of Zambia. Prosecution evidence reveals that on the 1st day of January, 2017 the complainant in this matter PRECIOUS NGOSA went to Mikonfwa to visit her relatives. When she returned home she found her house on fire and the goods inside the house were burnt as well. She sked people who were present and they told her that your former husband Mwika Kang'ongo is the one who has set fire to your house and he has even left. Then complainant made a follow-up and found him by the road side few metres away from the house. Then she confronted him as to why he had set fire to the house. Accused never answered but instead just started beating her. She shouted for help and people came to her rescue and they apprehended the now accused person, and took him to Luanshya Central Police Station for assistance. Police acting on the report opened up a docket, charged and arrested him for the subject offence he stands charged before this Court. Under warn and caution statement in Bemba the language he seemed to understand better, he gave a free and voluntary reply admitting the charge. He was searched and detained in police custody. However, he had no right to set fire to the complainant's house.”

The convict admitted the facts to be true and correct whereupon he was found guilty and convicted of the subject offence for which he appears before this Court for sentence.

The offence of arson is provided for in section 328(1) of the Penal Code, as amended by Act No. 17 of 2007. The said section 328(1) enacts as follows (only the relevant part is quoted):

**“328. (1) Any person who wilfully and unlawfully sets fire to-
 (a) Any building or structure whatever, whether completed or not;..... is guilty of a felony and is liable, on conviction, to imprisonment for a term of not less than ten years and may be liable to imprisonment for life.”**

From the reading of the above section, it is clear that the essential ingredients of the offence are that: the accused wilfully; and unlawfully; set fire to the house of the complainant. It is my considered view that the charge in the present case was wrongly drawn. It omitted the essential ingredients of “wilfully and unlawfully”. Such an omission resulted in the failure by the convict to address his mind to what was at stake in terms of his purported admission or the possible defence to the alleged offence. The convict was not asked by the trial Court whether he wilfully set fire to the house, and whether he had any legal justification for doing so. From the answers, it is clear that he admitted having set fire to the clothes, presumably the complainant's, and not the house in issue.

In the case of *Nondo v The Director ^{of} Public Prosecutions*¹, the Court of Appeal guided that it was upon the State to prove that the house had been burned by an intentional and malicious act. The Court decided that it was the duty of the State to disprove any possibility of accidental fire. In that case, the Court of Appeal allowed the appeal and quashed the conviction and sentence.

In the case in *casu*, the answers that are contained in the short statement that the convict gave when he was called upon to plead to the charge did not address the essential ingredients of the offence and the subject property that was burned. In the circumstances of the present case, I am, therefore, unable to conclude that the plea that was taken was unequivocal. It is my view that the State failed to bring out the

essential ingredients of the charge, and subsequently, the trial magistrate did not pay attention to such ingredients, and as such the plea that was taken was defective. I am satisfied that the plea was equivocal and that the convict's admitting of the facts did not validate an equivocal or imperfect plea. In the case of **The People v John Kapalu Kanguya²**, it was held that:

"The plea was equivocal, the accused being unrepresented, the magistrate before accepting a plea of guilty should have satisfied himself that the accused admitted each and every ingredient of the offence with which he was charged. Admitting the facts does not validate an equivocal or imperfect plea."

In another case of **Shampeta and Another v The People³**, it was held that:

"For a plea of guilty to be effective, the accused must appreciate the nature of the charge, he must intend to plead guilty, and he must admit sufficient facts to enable him to be convicted of the offence charged."

I fully adopt the decisions in the above cited cases as applying to the present case.

~~However~~, I must add that it should be appreciated that taking a plea is the most important stage in the administration of justice. The prosecution have a duty to present to the magistrate a correctly and properly framed charge(s) in accordance with the legal provisions in the Penal Code. At the time of arraigning the accused, the trial magistrate in verifying the correctness of the charge ought to take into account the essential ingredients of the offence based on the provisions of the law; the facts disclosed in the indictment; and consider any possible defences available to the accused.


At plea stage, an accused ought to be accorded an opportunity to state his/her mind in a clear and concise manner after appreciating the nature of the charge, its

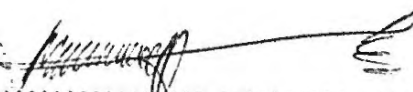
constituent elements and any defences available. Thereafter, an accused can be said to have given either unequivocal plea of guilty or indeed deny being involved in the commission of the offence charged.

From the written statement of facts in this case, I have noted that at the time of the alleged fire the complainant was not at home and did not have an opportunity to see who set the fire to her house or confirm whether the alleged fire was accidental. Secondly, the convict was only apprehended by members of the public when he was seen beating the complainant who shouted for help. The convict was not apprehended for setting fire to the complainant's house.

The charge in Count 1 having not been properly framed by the omission of the essential ingredients of the offence and resulting in an equivocal plea of guilty for a serious offence, it is my considered view that this is not an appropriate case for me to order a re-trial. Accordingly, I direct that the conviction in Count 1 be quashed and the accused be set at liberty after he has served his sentence in Count 2.

Delivered at Ndola in Open Court this ^{19TH} 19.... day of July, 2017.




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DAVIES C. MUMBA
HIGH COURT JUDGE