IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUNUO, J.A., MASSATI, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 272 OF 2008

KATO PAULO ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Bukoba
(Lyimo, J.)
Dated 18th day of June, 2008
in
Criminal appeal No.101 of 2007

JUDGMENT OF THE COURT

3rd & 9th November, 2011

MASSATI, J.A.:

The appellant was charged with the offence of Assault Causing Actual Bodily Harm contrary to section 241 of the Penal Code Cap 16. RE 2002. The District Court of Biharamulo, convicted him as charged and sentenced him to three years imprisonment. His appeal to the High Court at Bukoba (Lyimo J) was unsuccessful. This is now his second appeal.

It was alleged before the trial court that on the 8th day of July, 2006 at 9.30 hours at Chato Village, the appellant willfully and unlawfully caused

actual bodily harm, to one WANZITA D/O MANASE by beating her with his hands on her face and causing her harm. The appellant denied the charge.

The only witness for the prosecution was the complainant herself. According to her, she was a nurse at Chato hospital where the appellant also worked as a clinical officer. On the material day and time both were on duty. The appellant called her and asked her about the attendance register. She told him it was with the watchman. The appellant started to assault her on her back with his fists which caused her pain. To substantiate it, she produced a PF3 as exhibit PI. But the appellant told the trial court that there was a mere verbal misunderstanding between them about a patient's file in which exchange the complainant just pushed and passed him, and thereafter proceeded to report to the police about the alleged assault. He went on to call **ROBERT KIPALA MANAMBA** as his witness. The witness told the trial court that on that day and time he was at Chato hospital for medical treatment of his child. Pw1 was the nurse on duty. When he asked her about the child's patient card, she referred him to the appellant who was the doctor on duty. When the appellant came to PW1 to ask about the card, they started quarrelling, and he, DW2 had to

reconcile the two. It is on this evidence that the trial court convicted the appellant, and the High Court dismissed his appeal.

Before this Court, the appellant, who appeared in person, filed two grounds of appeal namely:-

1. That, the first appellate court erred in law and fact by not evaluating the grounds of appeal in relation to the evidence adduced in the trial court.
2. That the first appellant court erred in law and in fact by upholding the conviction and sentence of the trial court by basing on mere assumption and not on the required, test of proof in criminal cases.

The appellant did not elaborate any of the grounds, understandably so, being a layman.

But Mr. Edgar Luoga, the learned Senior State Attorney, who represented the Respondent/Republic declined to support the conviction. It was the learned counsel's view that, since the only prosecution evidence was that of PW1 (the complainant) and the PF3 (Exh PI), and since the PF3

was irregularly received in evidence (contrary to section 240 (3) of the Criminal Procedure Act (Cap 20 RE 2002) ("the CPA") (which must lead to the expulsion of the PF3 from the record) the remaining evidence is insufficient to sustain the appellant's conviction. Mr Luoga, therefore urged us to allow the appeal.

This is a second appeal. The Court derives its jurisdiction from section 6(7)(a) of the Appellate Jurisdiction Act Cap 141 – (RE 2002) which confines it to appeals only on matters of law; but not on matters of fact. So, normally, in such cases, the Court would be very cautious or rather slow in disturbing concurrent findings of facts by the courts below. But, we may, however, interfere with those findings where there are misdirections, non directions, or misapprehensions on the evidence (See **FRANCIS MAJALIWA AND TWO OTHERS v R** Criminal Appeal No. 139 of 2005 (unreported). The question whether there is any evidence at all to support a certain finding is a matter of law but whether such evidence is sufficient is a question of fact (See **R v TAIBALI MOHAMEDBHAI,** (1943) 10 EACA 60) So, the test to be applied in a second appeal, is whether there

was any evidence on which the trial court could find as it did (See **REUBEN KARARI s/o KARANJA vR** (1950) 17 EACA 146.

The question is therefore, whether there was any evidence before the trial court to find as it did, and for the first appellate court to confirm it. The trial court found that the complainant gave a detailed account of what transpired at the scene, ".... and taking into considerations the medical examination report dated 8/7/2006 in respect of the complainant to the effect that a blunt object was used and PW1 sustained harm; and that PW1 was a witness of truth." Furthermore, the trial court apparently also drew adverse inference against the appellant for failing to call the second nurse on duty to tell the court as to what transpired, and that the court could see no "logical cause that prevented him to call that nurse". These findings were more or less confirmed by the first appellate court. The courts also relied on Exh PI to establish the seriousness of the assault. The High Court almost branded DW2 as an interested witness because the appellant was treating his child. It also drew adverse inference against the appellant for not calling the Dr in Charge "to shed light on what transpired;" and so reverted to the axiomatic rule of procedure that since

the matter was decided on the basis of credibility the trial court was best suited to determine such questions.

So, as Mr. Luoga, has submitted, the bottom line, is that, the prosecution's case rested on the evidence of PW1 and Exh PI. We also agree with the learned Senior State Attorney that, Exh PI (ie) the PF3, was admitted without first advising the accused person of his right to call the author of the report for cross examination. This was wrong even if the appellant did not object to its admissibility (See **THOMAS MLAMBIVU VR** Criminal Appeal No. 134 of 2009. (unreported) And the consequences of non compliance with section 240 (3) of the CPA are now legendary. If there was any need for any authority, we would only refer to **ALFEO VALENTINO VR** Criminal Appeal No. 92 of 2006 and **WILBARD KIMANGANO VR** Criminal Appeal No. 235 of 2007 (both unreported) What follows is obvious. The PF (Exh PI) must be expunged from the record. So, once stripped bare of the PF3, we remain with the bare assertions of PW1 that:

> *" the accused than hold (sic) me and started (sic) to assault he (sic) by first (sic) on back of my body"*

First it must be pointed out that this evidence is slightly at variance with the particulars of the charge, which allege that the assault was on the face, but in her testimony, she claims it was on the back.

But against this assertion, there is on record the testimony of the appellant and his witness, DW2. It was therefore her word against those of the defence witnesses.

It is unfortunate that the two courts below decided to overcome this hurdle by drawing adverse inferences against the appellant's failure to call certain witnesses, (like the other nurse on duty, and the Doctor In-Charge) The first appellate judge went even further to make some caustic remarks about the appellant's witness (DW2), to the effect that he had his own interests to serve in giving evidence for the appellant. This was wrong. First, taken as a whole, this amounted to shifting the burden of proof to the appellant to prove his innocence which is contrary to our criminal jurisprudence. An accused person has no burden of proof; and even where, in exceptional cases, it shifts to him his duty is only to raise a reasonable doubt in the prosecution case Secondly as a matter of principle, where an accused gives his defence, it is wrong to reject it simply because

it is not supported by independent evidence. As Onyiuke J (as he then was) once said, in **MASHIMBA AND ANOTHER VR** (1971) HCD 56, the rule as to corroboration does not apply to the defence. Thirdly, if it was necessary to draw an adverse inferences, then the two courts below should have applied the same standards to both the prosecution and the defence cases. For instance, why didn't the courts draw adverse inferences against the prosecution case for not calling those same witnesses, or even the watchman or the doctor who examined PW1? In our view this approach, was a violation of the principle of impartiality which is based on the assumption that the same standards should be applied to all people, without any subjective bias.

Although the case appears to be a simple one on the face of it, its trial has been beset by serious violations of some basic principles of administration of criminal justice. We are certain in our minds that had the courts below properly directed their minds on questions like the burden and standard of proof and the nature and quality of evidence on record they would certainly have come to a different conclusion. In our

considered view, without the PF3 the defence case has created some very serious and reasonable doubts in the prosecution case.

For the above reasons, we think that the appellant's conviction is not safe. We accordingly allow the appeal. We quash the conviction and set aside the sentence. Since the appellant was sentenced to 3 years imprisonment in July, 2007 we assume that he has already served that term and so do not see the need to make an order for his release from prison.

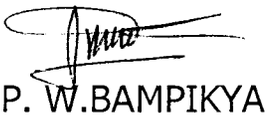
DATED at **MWANZA** this 7th day of November, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



P. W.BAMPIKYA
SENIOR DEPUTY REGISTRAR