IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 216 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

1. DAVID GAMATA ..... 1ST APPELLANT
2. AMOS WIGINA @ MWITANGO. ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

Dated 4th day of June, 2014
in
HC. Criminal Appeal No. 15 of 2014

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JUDGMENT OF THE COURT

3rd & 7th December, 2015

RUTAKANGWA, J.A.:

The appellants were convicted as charged by the District Court of Musoma ("the trial court") of three counts of Assault Causing Actual Bodily Harm. On each count they were sentenced to five years imprisonment, which sentences were ordered to run consecutively. Aggrieved by the convictions and sentences, they jointly appealed to the High Court. The High Court ("the 1st appellate court") sitting at Mwanza, dismissed their appeal, hence this appeal.

The facts of the case as found by the trial court, and confirmed by the first appellate court, were as follows:-

The victims of the assaults were Nyamatende s/o Nyamatende, Monica w/o Nyamatende and Warati s/o Nyamatende, who testified as PW1, PW2 and PW3 respectively at the trial of the appellants. Indeed, PW1 Nyamatende and PW2 Monica are husband and wife, while PW3 Warati is a sibling of PW1 Nyamatende.

On the night of 5th/6th November, 2011, unknown people stole one cow at the home of one Simon s/o Misigana (PW5) and one cow at the home of the 1st appellant. Upon discovering the theft, an alarm was raised to which people responded. While both PW5 Misigana and the 1st appellants are residents of Butiama Village, the three victims are residents of a different village of Butuguri.

Attempts were made to trace the stolen head of cattle that night. The search party went up to Buhemba village, but all was in vain. The search was halted.

On 11th November, 2011, at about 11.00hrs, while PW5 Misigana was at his farm, he received a telephone call from the 1st appellant informing

him that **his (PW5) stolen cow had been found at the** home of PW1 Nyamatende. PW5 Misigana was requested to follow the 1st appellant at the home of Nyamatende for the purpose of identifying his stolen cow.

On arrival at the scene, PW5 Misigana found the two appellants in the company of Nyamatende, Monica and Warati who were seriously injured. All the same, he never found any head of cattle there, let alone the stolen ones. As to what had happened to the three victims of the assault, before the arrival of PW5 Misigana, was best told by them.

Briefly, the three witnesses had told the trial court that on the material day, the couple had gone to their shamba at Kibubwa. At around 9.30 hrs, four armed persons arrived there and found them working at their shamba. The quartet included the two appellants, whereas the other two were unknown to the couple. The two witnesses were informed by the appellants that they were searching for their stolen cattle. The witnesses told the appellants that they were not aware of the theft and had not seen any stolen cow around. The two witnesses were put under arrest. The appellants and their colleagues, who were armed with machetes, began to physically assault the couple by hitting them repeatedly with the machetes, clubs and sticks on the basis that they (the victims) were cattle thieves. As

if the incessant beatings were not enough the appellants made a brutal sport of them by parading them naked.

PW1 Nyamatende was undressed, both his legs and arms were tied tightly with ropes and thrown onto the ground, while being pressed to disclose where the stolen cattle were. On failing to tell them what they wanted to hear from him, they roped his testicles and penis while he was crying in agony. From PW1 Nyamatende, the assailants went to PW2 Monica who, too, they stripped naked and made her walk a distance of 30 paces in that state. PW3 Warati was followed at his home and treated in like manner.

When PW5 Misigana arrived at the scene of the crime and found the three victims in a serious condition, he immediately phoned the police and arranged for transport to rush the victims of the assault to hospital. They were treated at Butiama hospital, as well as Musoma Government Hospital. PW1 Nyamatende was hospitalized there for twelve days before being referred to Bugando Consultant Hospital, as he became incontinent. At Bugando Hospital, PW1 Nyamatende was admitted for a further seven days. The appellants were subsequently charged accordingly.

The appellants denied the charges in their sworn evidence.

The 1st appellant, in his very brief evidence, told the trial court that one of his cows was stolen on the night of 6th/7th November, 2011. He reported the matter at Butiama police station. He was given written permits (exh. D1-2) to search for it. He never traced it and on the contrary he was arrested and charged with assaulting the complainants.

On his part, the 2nd appellant totally belied the 1st appellant. He testified that on 11th November, 2011, at about 11.00hrs, he was informed by PW5 Misigana that he had been informed by the 1st appellant that his (PW5) stolen cow had been recovered at Kibubwa village. The two proceeded to that village where they met the 1st appellant and a group of people. PW1 Nyamatende and PW3 Warati were also there. PW5 Misigana asked the 1st appellant to show him the recovered cow which he (1st appellant) failed, as, indeed, there was no single cow at the scene. He added, but without elaborating, that *"due to the sequence of events of many alarm men",* he advised PW5 Misigana to call the police. The 2nd appellant further tellingly said:

> *"Police came and two motorcyclists came, took the victims PW1 Nyamatende, PW2 Monica and PW3*

Warati, and they were sent to the police station given PF3 up to the hospital for treatment. Later on I was arrested and charged with my colleague the 1st accused . . ."

[Emphasis is ours].

While under re-examination from their defence counsel he voluntarily said that victims who were seated on the ground were *"seriously assaulted and injured."*

Upon a proper appraisal of the entire evidence before him, the learned trial Senior District Magistrate *("the trial magistrate")* was satisfied with the veracity of PW1 Nyamatende, PW2 Monica, PW3 Warati and PW5 Misigana. It was his specific finding that these were credible witnesses who truthfully testified on what they witnessed on 11/11/2011 and experienced on that day and thereafter. He then found himself faced with two issues to resolve.

The two issues were:

(a) Whether or not the appellants did indeed participate in assaulting PW1 Nyamatende, PW2 Monica and PW3 Warati; and

(b) Whether, if indeed the two appellants did so, they had a common intention.

In a carefully analysed judgment the learned trial magistrate, while accepting theft of two cows to have taken place, answered the above two issues in the affirmative after accepting the evidence of the three victims, supported by their respective PF3s and the evidence of PW5 Misigana. He, therefore, held that:

> *"the contention of the accused persons to the effect that they did not assault them - the victims -cannot in my view be true."*

He accordingly found them guilty as charged and convicted them as alluded to earlier on in this judgment.

In their appeal to the High court, the appellants, through Mr. Benard Kabonde, learned advocate, tried to fault the learned trial magistrate from three fronts, namely:-

(a) that he did not accord their defence any weight;

(b) that he failed to find that the case was not proved beyond reasonable doubt; and

(c) that he erred in law in sentencing them to consecutive terms of imprisonment without assigning any reason.

In dismissing the first two grounds of appeal, the learned first appellate judge was of the view that *"the case against the appellants rested on visual identification evidence."* She found such evidence to have been watertight, as the circumstances prevailing at the scene of the crime were *"favourable for correct identification of the culprits."* She further observed:

> *"PW1, PW2 & PW3 who (sic) were at the scene of crime when it all happened. They both had the similar versions as to how the assailants attacked and did those inhuman acts against them. The testimonies of PW1, PW2 and PW3 as well as those of PW4 and PW5 were credible and reliable, highly consistent to implicate the Appellants. The entire evidence was pointing to no other than the said two accused persons now the Appellants . . ."*

Regarding the third ground of appeal, in our respectful opinion, she did not give it the serious attention it deserved. It had a lot of merit, since it was beyond the sentencing powers of the trial magistrate. Had she done

so, we are sure the appellants would not have found it worthwhile to lodge this second appeal. The learned judge casually dismissed this complaint simply because sentencing of offenders is within the discretion of the sentencing court. She did so despite, earlier on having correctly stated that an appellate court may interfere with the sentence where the same *"is plainly illegal."* It is no surprise to us, therefore, that the appellants found themselves constrained to lodge this appeal.

In this appeal, Ms. Kabonde and Magoiga Law Firm (Advocates), preferred three substantive grounds of appeal, namely that:-

> *1. the PF3s of the victims were received in evidence as exhibits P1, P2 and P3 in utter disregard of the mandatory provisions of s. 240 (3) of the Criminal Procedure Act, Cap. 20 ("the C.P.A.");*
>
> *2. the trial court and High Court did not properly analyse and evaluate the entire evidence on record in order to ascertain whether the prosecution case was proved beyond reasonable doubt; and*
>
> *3. the sentence imposed was illegal in terms of section 168 (3) (a) (ii) of the C.P.A.*

Mr. Steven Magoiga, learned advocate, appeared before us to prosecute the appeal. On behalf of the respondent Republic, was Ms. Ajuaye Bilishanga, learned Senior State Attorney.

On the first ground of appeal, Mr. Magoiga pointed out that it is plain from the record of proceedings that the learned trial magistrate did not inform the accused persons personally of their statutory right to require the person who filled in the PF3s to be summoned for purposes of cross-examination. This omission, he submitted, offended the mandatory provisions of s. 240 (3) of the CPA. He thus urged us to expunge the three exhibits from the record. Ms. Bilishanga resisted because counsel for the appellants had informed the trial court thus:

> *"Your honour after hearing the prosecution evidence I can see there is no reason to summon the person who made the PF3s for anything, let us proceed."*

After carefully reading the provisions of this statutory provision, we have found ourselves increasingly of the view that acceding to the stand of Ms. Bilishanga will be tantamount to paving an accelerated route to compromising accused persons' guaranteed rights at the altar of speed,

expedience and at times ineffective legal representation. The law is very clear. The trial court shall inform the accused person himself or herself, represented or unrepresented. If represented the advocate should consult his client and advise him/her in order to enable him or her to make an informed decision. After all, it is the accused who is always on trial and not his/her advocate. In order to satisfy the appellate court that this mandatory provision had been complied with, whatever response an accused gives must be recorded in his own words in the record of proceedings. These precautions do not rob the courts of their invaluable time. Even if we believe that speed is good, but definitely justice is better.

In the case of **ALFEO VALENTINO v. R.,** Criminal Appeal No. 92 of 2006 (unreported), this Court unequivocally stated:

> *"The Court has consistently held that once the medical report, as the PF3, is received in evidence, it becomes imperative on the trial court to inform the accused of his right of cross-examination . . . if such a report is received in evidence without complying with the mandatory provisions of section 240 (3), such a report must not be acted upon."*

We accordingly uphold Mr. Magoiga on his submission and order exhibits P1, P2 and P3 to be expunged from the record.

The short submission of Mr. Magoiga in respect of the second ground of appeal, we have learnt, lack the personal conviction he had exhibited while on the first ground of appeal. It was his contention that the evidence of PW1 Nyamatende, PW2 Monica, PW3 Warati and PW5 Misigana, lacked cogency and should not have been relied on by the two courts below to find the appellants guilty as charged. To him, the three victims might have been casualties of mob violence. In the alternative, he argued that if we are inclined to hold that the culprits were the appelants, then they should be found guilty of the offence of common assault once exhibits P1, P2, and P3 are expunged.

Ms. Bilishanga thinks otherwise. She is of a strong view that the charges of causing actual bodily harm stand, with or without exhibits P1, P2 and P3. She predicates her stance on the evidence of PW1 Nyamatende, PW2 Monica, PW3 Warati and PW5 Misigana. We entirely agree with her and we shall show why.

A cursory look at the entire evidence on record reveals that the fact that these three victim witnesses were brutally assaulted and humiliated on 11th November, 2011 was not disputed at all. The three witnesses claimed so in their detailed evidence. PW5 Misigana lent unchallenged credence to their evidence. The 1st appellant never disputed this particular piece of evidence. Of course, he could not risk doing so because, his defence was that he was not anywhere near the scene of the crimes on that day.

Further to that, there is one other piece of vital evidence supporting the three victim witnesses, which escaped the minds of both Ms. Bilishanga and Mr. Magoiga. This is the evidence of the 2nd appellant. In his apparent efforts to save his neck, he unwittingly incriminated the 1st appellant and strengthened the prosecution case. His evidence did not only bear out PW5 Misigana, but it proved that the three victim witnesses were assaulted and sustained actual bodily injuries on the material day. He said:-

> *"I found the victims were put on the ground by the alarm men and were seriously assaulted and injured."*
>
> *[Emphasis is ours].*

This 2nd appellant's piece of evidence is consistent with the evidence of PW5 Misigana who said several times in his evidence that the victims *"were severely beaten . . . and injured seriously"* and that he found them in a *"critical condition"*, etc.

We take it to be one of the settled principles of law that if an accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding on the question of his guilt: See, **MOHAMED HARUNA @ MTUPENI & MAJALIWA SEIF MTUPENI v. R.,** Criminal Appeal No. 259 of 2007 (unreported).

The next pertinent question we have to contend with now is whether the three victims sustained bodily harm. On this, we have found it apposite to resort to the definition provided in the Penal Code. The word *"harm"* is defined thus in s. 5 of the Penal Code:

> *"harm: means **any** bodily hurt, disease or disorder whether permanent or temporary."*

Such harm, in our considered opinion, may be external and therefore visible to a naked eye of any lay person or internal. In this case, all

prosecution witnesses testified that the three victim witnesses sustained visible bodily injuries which led all of them to be hospitalized for a number of days to undergo medical treatment. In view of the unambiguous definition of the word *"harm"*, therefore, we are of the settled minds that regardless of who caused them, the victim witnesses, PW1 Nyamatende, PW2 Monica and PW3 Warati, suffered actual bodily harm. But, who was the author of these harms?

The answer to the above posed question, hinges on the credibility of the three victims and PW5 Misigana. It is trite law that the assessment of a witness's credibility is more often than not the function of the trial court. It is also common knowledge that credibility is an issue of fact. Accordingly, on a second appeal like this one this Court can only interfere with concurrent findings of facts of the two courts below under strictly restricted conditions. This is only where *"it is satisfied that the trial court has misapprehended the evidence in a such a manner as to make it clear that its conclusions are based on incorrect premises"* **[SALUM BUGU v. MARIAM KIBWANA,** Civil Appeal No. 29 of 1992 (unreported). It will also do so where it is shown that there was a miscarriage of justice or a manifest violation of a principle of law: See, **D.P.P. v. J.M. KAWAWA**

[1981] T.L.R., **MUSSA MWAIKUNDA v. R.** [2006] T.L.R. 387, **ALFEO VALENTINO** (supra), etc. In the case under scrutiny, no such instances have been established. We shall, therefore, stand by the concurrent findings of fact by the two courts below to the effect that the three victims and PW5 Misigana were credible witnesses.

Once we accept the fact that these witnesses were witnesses of truth, as we hereby do, we have no other option but to concur with the findings of the trial court and the first appellate court that the two appellants were the persons who assaulted and caused bodily injuries on the three victims. We have found the evidence of the 2nd appellant to be a mere after-thought, re-echoing the evidence of PW5 Misigana. Otherwise, he would not have failed to cross-examine him (PW5) on this. We accordingly find no merit in the second ground of appeal and we dismiss it and with that we sustain the convictions.

All the same, it cannot be gainsaid here, that the efforts of the appellants were all in vain. The third ground of appeal is full of merit and the respondent Republic has so conceded. This is in view of the clear provisions of s. 168 (2) and (3) (a) (i) of the CPA which read as follows:-

"168 – (2) Where a person is convicted at one trial of two or more offences by a subordinate court the court may, subject to the provisions of subsection (3), sentence him for those offences to the several punishments prescribed for them and which the court is competent to impose; and those punishments when consisting of imprisonment, shall commence the one after the expiration of the other in such order as the court may direct, unless the court directs that the punishments shall run concurrently.

"(3) – Notwithstanding the provisions of subsection (2), a subordinate court ***shall not****, in any case in which it has convicted a person at one trial of two or more offences, be competent:-*

(a) Where the court imposes substantive sentences of imprisonment only, to impose consecutive sentences of imprisonment which exceed in the aggregate:-

i. In any case in which of any of the offences of which the offender has been convicted is an offence in respect of which a subordinate court may lawfully pass a sentence of imprisonment for a term exceeding ***five years****, a term of imprisonment for* ***ten years****; or*

ii. In any other case, a term of imprisonment for ***eight years."***

[Emphasis is ours].

Furthermore, s.170 (1) (a) of the CPA prescribes as follows;-

"170 – (1) A subordinate court may in the cases in which such sentences are authorized by law, pass any of the following sentences;-

(a) imprisonment for a term not exceeding five years."

We understand that the appellants were convicted of the offence of Assault Causing Actual bodily harm, whose maximum sentence is five years imprisonment. They were on each count sentenced to such maximum sentence.

We are aware of the legendary principle of law to the effect that a maximum punishment should be reserved for the worst offence of the class of which the punishment is provided: See, **JUMA MNIKO MUHERE V.R** Criminal Appeal No. 211 of 2014 (unreported). Here, we are convinced as were the two courts below that these were one of the worst offences in the class of assault causing actual bodily harm.

As correctly observed by the learned trial Magistrate, the:

> *"Accused persons took the law into their own hands and what they did to the victim was completely inhuman . . ."*

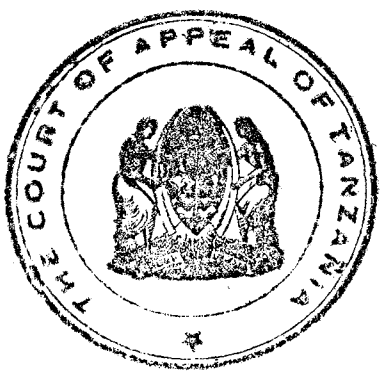
Even if they had any reasonable grounds to suspect the victims as cattle thieves, which grounds are wanting here, that would not have been a licence for such cruelty and degrading treatment. They, indeed, deserved a severe punishment. However, such a punishment had to be within the four corners of the sentencing powers of the trial court, however, abhorrent their conduct was. As correctly observed by one Queensland judge:

> *"The essence of sentencing is the balancing of interests within the framework of law. The interests to be balanced are the community, the accused, the accused's family, the victim, and the victim's family. The balance is easier said than done. It is constrained by the framework of law-this is the public misconception of the process; it is more difficult than the public thinks."*

It is unfortunate that the learned trial magistrate acted over-zealously and in the process imposed an illegal sentence. We have no option here, but to re-visit it and quash it, as we hereby to.

Having quashed and set aside the illegal sentence, given the seriousness of the assaults and the degrading manner they were carried out, we substitute therefor a sentence of two and half (2½) years imprisonment on each appellant in each count. The prison sentences to run consecutively. As no compensation was awarded by the trial court, the victims are at liberty to institute civil proceedings to claim compensation for the injuries sustained.

DATED at MWANZA this 7th day of December, 2015.



E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL