

IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 109 OF 2020

JAMES S/O MSAFIRI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the Resident Magistrate’s Court of Musoma
at Musoma)**

(Hon. K.A. Majinge, RM – Ext. Juris.)

dated the 13th day of December, 2019

in

Criminal Appeal No. 86 of 2019

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JUDGMENT OF THE COURT

30th May & 5th June, 2022

NDIKA, J.A.:

On appeal by the appellant, James s/o Msafiri, is the judgment of the Resident Magistrate’s Court of Musoma with extended powers (Hon. K.A. Majinge, RM – Ext. Juris.) dated 13th December, 2019 upholding his conviction by the District Court of Musoma for grievous harm as well as the consequential sentence of four years’ imprisonment and compensation order of TZS. 2,000,000.00 in favour of the victim for the injury sustained.

The essence of the charge, which was laid under section 225 of the Penal Code, Cap. 16 R.E. 2002, was the accusation that the appellant, on 29th June, 2018 at Mkendo area within the District and Municipality of Musoma in Mara Region, unlawfully caused grievous harm to one Renson s/o Emmanuel alias Mnyanga.

The case for the prosecution was primarily based on the testimonies of the victim (Renson s/o Emmanuel) and his friend, Nkwabi Joseph alias Mami, who adduced evidence as PW1 and PW2 respectively. Both witnesses testified that they were at a place known as *Chama la Wana* on 29th June, 2019 around 01:00 hours watching live football on television. All of a sudden, a fracas arose in the midst of which the appellant entered the fray and hit a bottle of beer on their table whereupon PW1 confronted him asking why he was causing chaos. In response, the appellant allegedly abused PW1 with insults in Swahili, "*We kuma unasemaje?*" and then repeatedly struck him with the now cracked bottle on his face until he fell down. Subsequently, police officers attended the scene after being alerted. They took PW1 to the Central Police Station at Musoma and later to the Regional Referral Hospital at Musoma where he was admitted for four days. By and large, PW2's testimony dovetailed with that of his friend.

Besides, he added a detail that the appellant was arrested by the police at the scene after certain motorcycle taxi operators popularly known as *bodaboda* riders had foiled his bid to bolt out.

PW3 Immaculate Benedict Ndawu, a Medical Doctor at the Regional Referral Hospital at Musoma, recalled to have attended PW1 from 29th June, 2018 when he was brought to the hospital. According to her, the victim was bleeding profusely on his face, his clothes fully soaked with blood. She tendered in evidence her medical examination report on the victim dated 9th July, 2018 (Exhibit P1) to the effect that the victim sustained a large wound on the face that was ten centimetres long and one centemetre deep. She portrayed the injury as so dangerous that it amounted to a grievous harm. For it necessitated stitching of the wound and that the victim received a life-saving blood transfusion following severe loss of blood.

In defence, the appellant flatly denied the accusation against him but admitted being at the scene of the crime at the material time. He adduced that the victim was injured by certain nasty young men with whom he was fighting over a woman. He added that he intervened to quell

the fight at some point but insisted that he was not the assailant that injured the victim.

In his judgment, the learned trial Resident Magistrate (Hon. J.O. Ndira, RM) found it common ground, on the evidence on record particularly PW3's testimony and Exhibit P1, that the victim suffered a grievous harm on his face following being struck repeatedly by a broken bottle of beer. Moreover, based on the eyewitness accounts of PW1 and PW2, which he found to be credible and reliable, he was satisfied that it was proven that the appellant was the perpetrator of the crime as he was positively identified at the scene, which was sufficiently illuminated by electric light. He also took into consideration the fact that the appellant was arrested at the scene after motorcycle taxi riders had prevailed over him and foiled his attempt to escape.

As hinted earlier, the appellant's first appeal was unrewarded, hence this second and final appeal, which rests on five grounds of complaint. The thrust of the said grounds is the general grievance that the charge against him was not proved beyond all reasonable doubt.

In his argument in support of the appeal, the appellant, who was self-represented, bemoaned that the cracked bottle of beer that was

allegedly used as a weapon against the victim was not tendered in evidence. He was unwavering that the testimonies of PW1 and PW2, who were friends, should not have been acted upon without corroboration. Moreover, he assailed the medical report (Exhibit P1) saying that it is contradictory and unreliable due to a number of aspects notably that it bears two conflicting dates. Elaborating, he claimed that the report indicated at the top 29th June, 2018, which was supposedly the date the victim was injured, but that it also bears 9th July, 2018 as another date, which was contradictory.

Mr. Frank Nchanila, learned State Attorney, who appeared for the respondent accompanied by Mr. Isihaka Ibrahim, also learned State Attorney, fervently opposed the appeal. In essence, he contended that PW1 and PW2 gave direct compelling evidence implicating the appellant with the charged offence. Citing our recent decision in **Daniel Malogo Makasi & Two Others v. Republic**, Consolidated Criminal Appeals No. 346 of 2020 and No. 475 and 476 of 2021 (unreported) for the principle that each witness deserves credence unless there are good and cogent reasons for not believing such witness, he submitted that the two witnesses were credible and reliable.

Coming to veracity of Exhibit P1, Mr. Nchanila refuted the claim that it was contradictory. He submitted that while "29th June, 2018" appearing at the top of the said document is the date on which the police officer at the Musoma Central Police Station filled out that document sending the victim to the hospital for medical examination, "9th July, 2018" is the date on which PW3 completed the form at the time he was discharging the victim by recording his findings following her examination on him.

The learned State Attorney added that the evidence on record was on the whole properly evaluated by the courts below and that the appellant's defence was duly rejected. He thus urged us to uphold the concurrent finding by the courts below that the charge against the appellant was established beyond reasonable doubt.

We have scrutinized the record of appeal and taken account of the contending arguments of the parties. To begin with, we wish to observe that the courts below rightly found it undoubted that the complainant suffered a grievous harm on his face following being struck repeatedly by a broken bottle of beer at the scene. Indeed, that finding was soundly based not only on the testimonies of PW1 and PW2 but also on the uncontroverted testimony of the medical witness and her report (Exhibit

P1). We should, therefore, express at once at this point that we find beside the point the appellant's complaint that the cracked bottle used as a weapon was not tendered in evidence. Equally untenable is the claim that Exhibit P1 was contradictory and unreliable. As rightly submitted by Mr. Nchanila, the said document clearly indicates that it was issued on 29th June, 2018 by an authorised police officer at the Musoma Central Police Station who sent out PW1 to the hospital after he had filled out the request for a medical examination and that the other date, that is 9th July, 2018, is the date on which PW3 completed the form at the time she was discharging the victim by recording her medical findings on him. The complaint at hand is clearly misconceived.

Given the circumstances, the sticking question in the instant case is whether it was proved that it is the appellant who inflicted the grievous harm upon the victim.

It is common cause that the victim was injured at the scene of the crime where the appellant was also present. The disparity is that while PW1 and PW2 cast the blame on the appellant, the appellant adduced that the victim was injured by certain nasty young men with whom the victim was fighting over a woman and that he only stepped in to quell the fight.

As hinted earlier, both courts below preferred the version of PW1 and PW2 to that of the appellant.

It is settled that when the credibility and reliability of a witness is a peremptory consideration, as in this case, the appraisal of the testimonies of the witnesses by the trial court, its assessment of the probative weight thereof, as well as its conclusions based on its findings, must be valued and respected, if not accorded conclusive effect. For the trial court was in the best position to determine whether the witnesses were telling the truth as it had the distinctive opportunity to observe and assess their comportment. Thus, when such trial court's findings have been affirmed by the first appellate court, as in the instant case, they are generally binding upon this Court – see, for instance, **Abdallah Mussa @ Banjoo v. Republic**, Criminal Appeal No. 31 of 2008; and **Karim Seif @ Slim v. Republic**, Criminal Appeal No. 161 of 2017 (both unreported). At this point, we wish also to recall what we stated in **Shabani Daud v. Republic**, Criminal Appeal No. 28 of 2000 (unreported) that beyond the demeanour of a witness, credibility can be determined on two other ways especially by an appellate court, which reads the transcript of the evidence only:

*"Maybe we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: **One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court. Our concern here is the coherence of the evidence of PW1.**" [Emphasis added]*

Guided by the above case, we reviewed the evidence on record. What is discernible from the record is clearly that both PW1 and PW2 gave coherent and consistent evidence implicating the appellant. Their claim that the appellant was the assailant was neither controverted in cross-examination nor rebutted in the appellant's defence. We find it significant that the appellant did not cross-examine either of the witnesses on his tale in defence that the injury on PW1 was caused by nasty young men with

whom the victim was fighting over a woman. That tale is unavoidably rendered an afterthought.

Moreover, as rightly found by the courts below, the question of mistaken identity did not arise because the scene of the crime was sufficiently illuminated by electric light and that the appellant was arrested right at the scene after motorcycle taxi riders had prevailed over him and foiled his attempt to escape.

We also find implausible and untenable the appellant's claim that the two prosecution witnesses were not credible because they were friends. Whether their evidence could ground a conviction, like any other evidence, depended on their credibility and reliability irrespective of the relationship or friendship between them – see **Khatibu Kanga v. Republic**, Criminal Appeal No. 290 of 2008 (unreported). We are, therefore, enjoined to give conclusive effect to the trial court's finding that they were credible and reliable, which was affirmed by the first appellate court.

We are also satisfied that the appellant's defence was weighed by the trial court against the prosecution case and that it was duly rejected. That finding was rightly affirmed by the first appellate court. That said, we find no merit in all the grounds of appeal. In the premises, we uphold the

concurrent finding by the courts below that the charged offence was proven to the hilt.

For the reasons we have given, we entertain no doubt that the appellant was rightly convicted of the charged offence. Accordingly, we dismiss the appeal in its entirety.

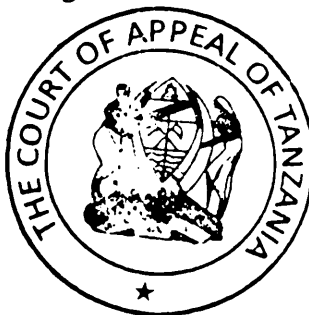
DATED at **MUSOMA** this 2nd day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 6th day of June, 2022 in the presence of the appellant in person and Mr. Isihaka Ibrahim learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. Magesa
C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL