IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLANT JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 131 OF 2013

CRIMINAL CASE NO. 139 OF 2013

OF THE DISTRICT COURT OF KIGOMA

BEFORE;- O.F.J. BWEGOGE Esq. RESIDENT MAGISTRATE

HALFAN IBRAHIM .....:..APPELLANT
(Original Accused)

VERSUS

THE REPUBLIC .....RESPONDENT
(Original Prosecutor)

JUDGMENT

02nd & 16th May, 2014

S.M.RUMANYIKA, J

Halfan Ibrahim (the Appellant) is aggrieved by the conviction and sentence/meted out to him by the District Court Kigoma (the lower court) on 4/7/2013. For the charge of assault causing actual

bodily harm. Under section 241 of the Penal Code Cap. 16 RE 2002. Equally so, he's against the shs. 1,000,000/= order of compensation.

The eight (8) Kiswahili grounds of appeal, but translated, boil down to four (4), the Appellant, who appears in person contends:

(1) Error in law and infact by the lower court. Having failed to discredit the 1st three prosecution witnesses, contradicting materially with Prosecution witnesses 4 and 5. On part of the body really attacked. Leave alone ommission by the material medical practitioner to show the depth of the wound sustained by victim.

(2) Failure by the lower court to consider also, the defence evidence.

(3) Error in law by the lower court to impose such penalty alternative to custodial sentence.

(4) The lower court having not ruled that matter having been not reported immediately, the charge was a mere after thought.

Mr. Juma Masanja learned state attorney appears for the Republic respondents.

In his written submissions, the Appellant like contendis that the prosecution case had been not proved beyond reasonable doubts for 4 main reasons. Indeed, sort of reproducing the grounds of appeal.

A summary of evidence on record, but again, as per memorandum of matters not disputed during the preliminary hearing, will show that as the victim (Pw1)'s bother and Appellant were agreed that the former keep for some time, the Appellant's heads of cattle, but now before the term lapsed, the Appellant took the same back, hence breach of agreement, Pw1 and colleagues stormed into the former's home on the material date at about 11.30 pm. Upon Appellant raising alarms, the invaders took on their heels.

Outside the list of facts earlier on agreed upon by the parties, the testimonies tell that the victim (Pw1) and fellows did attempt to take the Appellant's cattle away, but the Appellant intercepted. The fracas resulted into Pw1 being injured in head/ear. Hence the material charge. However, the Appellant denies to have assaulted any. As the invaders run away before.

It appears the learned trial magistrate was satisfied beyond reasonable doubts, that the Appellant, without any colours of justification had assaulted Pw1. To be sincere, it can not be proper jumping into this conclusion before one looking into background to the fracas. It began like a gentleman's agreement, the evidence tells as said, that Pw1's little brother (Pw5), take care of the Appellant's two heads of cattle for three (3) years. Consideration being a head of cattle. Appellant breached the agreement in the 1st one and a half years. He took back the cattle. Pw1, Pw5 and fellows not satisfied,

went to the Appellant with a view it appears, to taking the same. It was no long at ease! The Appellant treated them like any other invaders. He confronted them and Pw1 got injured in the event. That is it.

Infact it is open secret, based on the evidence available, that it is breach of the contract that triggered the criminal charges. Who really breached it is not my concern. Whereas Pw5, not Pw1!, was only entitled to suing the Appellant, perhaps for order of specific performance or for damages, one simply took the risks. Say self executing the rights. This one, on the face of it was completely wrong. I am hasten to hold that whenever a person, however genuine the claims might be, opts to self execute the same, whereby assuming such risk, he cannot be heard screaming over injuries sustained in the cause. The Latin Maxim **"Volenti Non Fit Injuria".**

Nevertheless, the Appellant, though had right to defend property, he had no right to assault Pw1. Much as he admits in evidence to have identified them before, as being members of the village. He had all the reasons to realize them exercising the **bonafide claim of right**. Following alleged breach of the contract.

However, it can not be reasonably believed that the victim was hit by an axe in the head/ear. Given the nature of injuries demonstrated in the PF3 (exhibit K2) as being only "harm".

All said, and given all the circumstances surrounding the case, the conviction, (actually upheld) should have attracted such penalty alternative to a custodial sentence. Namely a year conditional discharge. Sentence substituted as such (w.e.f 04/07/2013). Order of compensation set aside. Appeal partly allowed.

R/A explained.

S.M.RUMANYIKA

JUDGE

14/05/2014

Delivered under my hand and seal of the court in chambers. This 16/5/2014. In the presence of the Appellant who is under custody and Miss Jane Mandago State Attorney for Respondent.

C.M.KISONGO

AG/DISTRICT REGISTRAR

16/05/2014