IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 33 OF 2017

MWALIM S/O RASHID@TEACHER .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

MURUKE, J.

The appellant, Mwalim s/o Rashid @ Teacher, was charged and convicted with the offence of grievous harm contrary to section 225 of the Penal Code, [Cap 16, R.E. 2002]. He was sentenced for seven (7) years imprisonment, and condemned to pay compensation of Tshs. 5,000,000/=to the victim and fine of five. Being dissatisfied with the decision of the district court, appealed to this court advancing seven (7) grounds as listed in the petition of appeal.

During hearing, the appellant who was not represented, requested the court, to adopt his seven grounds of appeal, as his submission in support of the appeal. Having received no

objection from respondent counsel, court adopted appellant grounds of appeal as submission in support of his appeal.

Learned State Attorney, Debora Mushi submitted that: Grounds one, two, and three are based on the issue of identification. The incidence took place during night at around 3 am. The source of light used by complainant to identify the accused now appellant was not disclosed. The victim state that, he was at Manzese-Uzuri area and there was a celebration of Mr. Magufuli after winning the election in 2015. He was on his way home where the accused attacked him. Later he found himself in the hospital. On the other side DW1, the appellant in this case at page 16 of proceeding stated that, on that day there was gang of youth who caused chaos on the celebration, some had mapanga and other weapon. He called the police, who came and found the complainant lying on the floor. Therefore there was no any witness who saw, the act of complainant being cut by the accused at night. PW2 is an investigator who found PW1 in the hospital.

On the fourth ground, the appellant had triple punishment, ie, compensation of five million (5,000,000/=), sentence of four years imprisonment, and fine of five hundred thousands.

500,000/=. It is true the laws require for the offence of Grievous harm the accused should be punished for sentence and compensation but not fine as in this case. The offence fall under second schedule of the Criminal Procedure Act, as stipulated in the Minimum Sentencing Act section 5(2)(ii)(b).

Regarding ground five, the prosecution failed to tender before the trial court PF3 of the victim or a Doctor's medical report. This is contrary to the law. For the offence of grievous bodily harm, PF3 must be given to the victim before taken to hospital. To prove the offence of grievous bodily harm as section 225 of the Pena Code provide, PF3 is a must. Medical Doctor who treated the victim must testify to that effect. None of these was done.

Ground six and seven, the investigation officer was not summoned. At page 11 of the proceedings PW2 CPL. Michael stated as follows; "I told complainant to take picture as evidence. At first I saw the accused Mabatini Police Station." Investigation officer was not summoned. The appellant was convicted relaying on weak defence case of the appellant. Lastly the learned State Attorney requested the court to allow the appeal and quash the conviction and set aside the sentence.

As correctly, submitted by the respondent counsel in this case, there is no account of how the witnesses identified the appellant during night at 03.am hours. The incident took place at the time where condition for identification were unfavourable. The law requires that, the witness stating that he was able to identify the culprit by the aid of the light, must state the type of light and its intensity. In the case of **Harod Sekache @ Salehe Kombo Vs R, Criminal App. No. 13 of 2007 (CAT) Dodoma Registry (unreported)** it was held that and I quote hereunder;

> ***"We think that where a witness is testifying about the identifying another person in an unfavorable circumstance like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, the length of time the person being identified was within the view and also whether he is familiar or a stranger"***

Also in the landmark case on evidence of visual identification in unfavorable condition, the case of **Waziri Amani vs. Republic (1980) T.L.R. 250,** among other things, the court stated that, the witness must explain whether *there was good or poor lighting at the scene.*

According to the records there was no description by PW1 on how the accused was when he was attacked. When a witness submits to have identified the accused must go further and describe him or her as seen at the scene of crime. In the case of **VITALIS BERNARD KITALE VERSUS REPUBLIC Criminal Appeal No. 263 Of 2007, (CAT) Arusha, (unreported)** the court was of the view that;

> ***"We do not think that knowing the appellant alone is sufficient. There should be more concrete detailed description of the appellant. The witness should have given a description of the appellant as he saw him at the time of the incident"***

The record shows that, the appellant acted as a good Samaritan, when found the victim laying down injured and suffering called the police for the assistance. Therefore, he cannot be incriminated for his explanation on attempt to help.

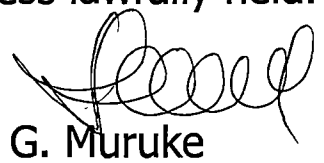
The punishment under this offence (section 225 of the Penal Code (supra)) attract seven years' imprisonment. This is the maximum punishment as held in the case of **Nyamhanga s/o Magesa Criminal Appeal No. 470 of 2015,** Court of Appeal, (Mwanza)(unreported). Therefore, there was no need of imposing compensation and fine.

There is nowhere in the record showing that, PF3 was tendered in court. Being assaulted and sustained grievous harm this Court would expected the victim to tender in Court the Medical reports including the PF3 which essentially would require the doctor filled the same to be summon to testify. As submitted by the learned State Attorney, for the offence of grievous harm PF3 must be given before one has been taken to the hospital. In the case of **HAJI BAKARI HASSANI vs Republic, Criminal Appeal No. 365 of 2014(CAT) Dodoma** it was held that;

> **"That adverse inference ought to have been drawn on the prosecution side for its failure to tender in evidence the PF3 of the victim who claimed to have been injured in the course of the robbery.**

Although **section 143 of the Evidence Act, [Cap 6, R.E. 2002]** provide that there is no particular number of the witnesses required for proof of any fact, the exception can be drawn in circumstances where key witness is not summoned like in the case at hand where the author of PF 3 was not called. Failure to call the author of PF3 and produce the same leaves doubt on the prosecution case, in the circumstance of this case.

In this premise, I allow the appeal, I quash the conviction, and set aside part of un served sentence against the appellant. Appellant is set at liberty unless lawfully held.

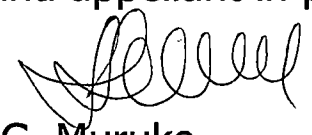


Z. G. Muruke

JUDGE

03/04/2018

Judgment delivered in the presence of Honorina Munishi, State Attorney for the respondent and appellant in person.



Z. G. Muruke

JUDGE

03/04/2018