

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**HC. CRIMINAL APPEAL NO. 46/2017**

*(Arising from Karagwe District Court in Criminal Case No. 331/2016)*

1. BAHATI MATHIAS	}	----- APPELLANTS
2. ERICK EZKIAH		
3. ENOCK PERTO		

**VERSUS**

**REPUBLIC ----- RESPONDENT**

**JUDGMENT**

***19/7/2018 & 9/8/2018***

**Kairo, J.**

On 19/7/2018, the court allowed this appeal, quashed the conviction and set aside the imposed sentence on all the Appellants. The court further

ordered the Appellants be released from the prison forthwith unless held for other legal cause.

The court reached the said decision following the Respondent's support to the grounds of appeal. However before the oral submission from both parties, the court had the opportunity to go through the grounds of appeal and the court record as a whole and reached a settled mind that the prosecution failed to prove their case to the required standard, I thus joined hands with the parties and allowed the appeal accordingly forthwith. However the court reserved the reasons for the said decision which is now set to give as hereunder.

At the trial court, the Appellants together with other two accused were jointly charged with three different counts as follows:

1. Causing grievous harm contrary to section 225 of the Penal Code Cap 16 RE 2002 to one Novatus Kajoki by using a panga.
2. Preventing and obstructing service or execution process c/s 114 of the Penal Code (supra)
3. Aiding prisoners to escape c/s 177 (a) of the Penal Code (supra)

All of the accused pleaded not guilty to all of the counts. Upon adducement of evidence the trial court found four out of the five accused, among them the Appellants being guilty as charged thus convicted them accordingly. The court further acquitted one of the accused as the evidence failed to connect him with the charge. All of the four convicted accused were sentenced to

serve six years imprisonment. However one of the accused (2<sup>nd</sup>) jumped bail thus was sentenced in *absencia*. The Appellants were not satisfied with both the conviction and sentence thus decided to institute this appeal to challenge the trial court decision on the following grounds:-

1. That, the trial court erred in law and in fact to convict and sentence the Appellants without taking into account that the said offences were not proved beyond reasonable doubt by the respondent and his witnesses as required by the laws of the land.
2. That, the learned magistrate erred in law and in fact to convict the Appellants by relying on false evidence of the respondent's witnesses whose evidences were unreliable, insufficient and un-maintainable in law in the sense that it contradict itself as Pw1 said that he was beaten by the 2<sup>nd</sup> accused with the metal bar on his head and decided to run away while bleeding but on the other hand Pw3 said that Pw1 was cut with a panga on his head by the 2<sup>nd</sup> accused (Kato).
3. That, the trial court erred in law and in fact to convict the Appellants for the said offence without taking into account or consideration of their alibi defense.
4. That , the trial court erred in law and in fact to convict the Appellants basing on contradictory evidence produced by respondent's witnesses, that is to say the court failed to test the credibility of evidence adduced by respondent's witnesses which were contradictory.

5. That, the trial court erred in law and in fact to convict the appellants without affording them the right to call witnesses contrary to the laws of the land.

The Appellants were being represented by the Learned Counsel Advocate Danstan Mutagahywa while Mr. Uhagile, the Learned State Attorney was representing the Republic. When the appeal was scheduled for hearing, Advocate Mutagahywa informed the court that he will only argue on the first two grounds and abandon the rest. The State Attorney generally informed the court that he was supporting the appeal. He further told the court that after going through the records, he conceded that the two argued grounds were meritorious. On top of that he told the court that the trial court also failed to abide with section 312 (1) of the CPA Cap 20 RE 2002 when composing the judgment. As earlier stated, the court joined hands with the counsels for the reasons I will state shortly.

Starting with the first ground whereby the Appellants have faulted the trial court to enter conviction on the three counts charged with, arguing that the offences were not proved beyond reasonable doubt by the prosecution. According to record, all of the six prosecution witnesses didn't mention the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to have committed any of the charged offences. The 3<sup>rd</sup> Appellant was mentioned by the victim (Pw1) to have hit him with a stick at the scene of incidence. Pw1 further testified that it was one Kato Abdallah who cut him on his head with a metal bar. The said Kato Abdallah was a 2<sup>nd</sup> accused who later jumped bail and was convicted and sentenced in his

offences. This omission by itself renders the charge to be defective. But even if we assume that the Appellants were charged with all of the subsections under section 14A, no evidence was adduced to show which order the victims were implementing as rightly submitted by the Advocate for the Appellants and supported by the State Attorney. The said argument also applies to the 3<sup>rd</sup> count whereby the Appellants were charged for aiding prisoners to escape c/s 117 (a) of Cap 16 (supra). However the evidence doesn't show that, the person aided or assisted to escape were in lawful custody. The records shows that the alleged escapees were in the mines and to the best of my understanding the said mines were not declared by a responsible Minister to be a prison [Refer section 23(1) of the Prisons Act 1967 Cap 34 [1967]]. Thus it was incorrect to charge the Appellant with the said offence, as a result the prosecution failed to prove the case in the required standard which is beyond reasonable doubt as per requirement in the case of **Hemed vrs R [1987] TLR 117**].

In the circumstances therefore, I agree with the arguments by the Appellants as well as the support by the Learned State Attorney that the 1<sup>st</sup> ground of appeal has merit.

I am alive that the 1<sup>st</sup> ground alone is enough to dispose off this appeal. However, I also feel obliged to point out the non compliance with section 312 (1) of Cap 20 RE 2002 with regards to the contents of the judgment under attack in this appeal. The State Attorney has correctly submitted that the said judgment lacked point for determination and reasons for the

absence. Thus, not among the Appellants herein. It is was further testified by Pw6;the Doctor who attended the victim (Pw1), that the victim had a cut wound on his head and thus the attended wound related to Pw1's testimony that he was hit or cut on the head with a metal bar which wound was inflicted by the person who is not among the Appellants.

I am aware that Pw1 testified to have been bitten by a stick by the 3<sup>rd</sup> Appellant. I paused to ask whether the said stick caused the grievous harm which the court grounded its conviction. The answer is definitely no. In the case of **Kisaru Mtaki vrs R [1982] TLR 195**, the court observed. *"In cases of grievous bodily harm, apart from the dangerous nature or appearance of harm, the weapon must be related to the bodily harm done or caused"*.

In the case at hand, the evidence adduced shows no relationship of the wound inflicted (cut wound) with the weapon used (a stick). Besides even Pw1 mentioned Kato Abdallah to be the one who inflicted him the wound which lead to the conviction of the 3<sup>rd</sup> Appellant. Thus it is the finding of this court that the conviction of the 3<sup>rd</sup> Appellant for the first count was not correct. And also the conviction of the 1<sup>st</sup> and 2<sup>nd</sup> Appellant was not correct as well with regards to the first count having not been mentioned by any of the prosecution witnesses.


In the second count the Appellants were convicted of obstructing service or execution process of his duty c/s 114A of Cap 16 (supra). According to the section charged with, the same has several subsections and it was not specified which subsection specifically since the provision caters for various

reached decision which is contrary to the requirement of section 312. Going through it, I observed that the magistrate summarized the evidence but no analysis was done, the points for determination were not spelt out instead went ahead to convict and sentence the Appellants. I thus agree that even the said judgment falls short of the requirement stipulated in the said provision.

For the reasons above given, this appeal is bound to succeed as is based on founded grounds. I accordingly allow it. As earlier ordered the conviction and sentence by the trial court is hereby quashed and set aside. I further order, unless they are otherwise held on other lawful grounds the following be set at liberty forthwith;

1. Bahati Mathias
2. Erick Ezkiah and
3. Enock Petro

It is so ordered.

  
L.G. Kairo  
Judge



Date: 9/8/2018

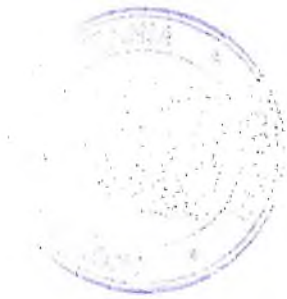
Coram: Hon. L.G. Kairo, J.

1 <sup>st</sup> Appellant: Reported sick	}	Adv. Mutagahywa
2 <sup>nd</sup> Respondent: Present in person		
3 <sup>rd</sup> Respondent: Reported sick		

Respondent: Mr. Uhagile – State Attorney

B/C: Peace M.

**Court:** The matter is scheduled to give reason for the decision reached on 19/7/2018 which was reserved. The same is ready and is read over before the parties as per today's coram in open court.



L.G. Kairo  
  
**Judge**

9/08/2018