

**IN THE HIGH COURT OF TANZANIA**  
**DAR ES SALAAM DISTRICT REGISTRY**  
**AT DAR ES SALAAM**  
**CRIMINAL APPEAL NO.378 OF 2018**

(Originating from criminal case No.91 of Resident Magistrate Court  
of Coast Region at Kibaha)

**HUBA HASAN MAKIH.....APPELLANT**

**VERSUS**

**REPBLIC.....RESPONDENT**

**JUDGMENT**

*Date of last order 27/09/2019*

*Date of Judgment 11/10/2019*

**NGWALA, J.**

The accused was charged before the Resident Magistrate Court of Coast Region at Kibaha, with two counts. The first one being, Grievous harm contrary to section 225 of the Penal Code [cap 16 R:E 2002] and the second, Assault Causing actual bodily harm contrary to section 241 of the Penal code [Cap.16 R:E 2002]. The appellant pleaded not guilty on both counts.

The particulars of the charge on the first count allege, the accused did unlawfully cause grievous harm to Laida veso by splashing hot cooking oil into her various parts of her body, including face and arms.

On trial after hearing both the prosecution and defence testimonies, the trial Magistrates, (Hon. Mwailolo Resident Magistrate) convicted the accused on the first count and acquitted her on the second. She was sentenced to serve three years imprisonment and an order for payment of Tshs. 2,000,000/= as compensation to each of the two victims, including the one whose count, the accused was acquitted.

In order to appreciate the facts I find it imperative to quote the particulars on each charge in order to appreciate the facts.

*“GRIEVOUS HARM: contrary to section 225 of the Penal; Code [Cap. 16 R: E 20002]*

*1<sup>st</sup> COUNT*

*PARTICULARS OF THE OFFENCE*

*HUBA HASSAN MAKIH, on 27<sup>th</sup> day of April, 2018 at kiluvya kwa Komba area within Kisarawe District in Coast REGION DID UNLAWFULLY cause grievous harm to one*

*LAIDA VESSO by splashing hot oil into her various body including face and arms.*

*2<sup>ND</sup> COUNT*

*ASSAULT CAUSING ACTUAL BODILY HARM: contrary to section 241 of the Penal Code [Cap 16 R;E 2002]*

*PARICULARS OF THE OFFENCE*

*Huba Hassan Makih, on the 27<sup>th</sup> day of April, 2018 at Kiluvya kwa Komba area within Kisarawe District in Coast Region, did unlawfully assault one Sharifa Bakari by splashing hot cooking oil into her various parts of her body including hands, chest and abdomen”.*

The Memorandum of appeal raises two grounds which have been reduced into one. That, is the trial Magistrate failed to analyse the evidence which resulted into wrong conviction, sentence and an order to pay compensation to the tune of two Million shillings to Laida Vesso and Sharifa Bakari.

The facts of the case, are that, on 27<sup>th</sup> April, 2018 PW1 was at her premises with her husband PW3 preparing confectionary (maandazi) for sell. The appellant arrived at her place and greeted them. Her husband responded but the PW1 did not respond. The appellant insulted PW1. When PW1 was about to remove the hot cooking pan from the cooker. The appellant pushed off the pan and the hot

cooking Oil spilled on various parts of PW1's body. The oil also spread on the various parts of the body of PW2 when she was leaving the place. That hot cooking oil was spilled on the various parts of PW2 who did not see the person who committed that act.

At the hearing of the appeal, appellant was represented by Mr. Mluge Karoli Fabian, learned advocate. The respondent Republic was represented by Miss Doroth Masawe learned State Attorney.

Mr. Fabian submitted that the trial magistrate failed to identify who as between PW1 and the Appellant committed the *actusreus*. The evidence is not clear. According to him there were pararell truths about who poured the oil. The source of grievous harm was not considered by the trial Magistrate. The basis of conviction was based on the quarrels between PW1 and the appellant. The learned counsel continued arguing that there is an apparent contradiction on the prosecution evidence as to who poured hot oil. It was alleged that, it was the appellant who poured hot oil to PW1, but it then said it was PW2 who pushed the hot plate as a result PW1 and PW2 were burnt. The learned

counsel stressed further that, this being a criminal matter, the accused is not under obligation to prove his innocence.

On those grounds Mr. Fabian prayed the appeal be allowed.

In answer to the appellants' counsel submission, Miss Doroth Massawe the learned State Attorney supported the conviction and sentence. She maintained that the prosecution proved the case beyond reasonable doubt. It was the appellant who pushed the hot cooking oil to PW1. She urged that, it is the appellant who went to the house of PW1 and started to use abusive language on PW1. PW2 and PW3 were eye witnesses. Arguing on the question of compensation, the learned state Attorney said it was fair based on the nature of the offence, and the injuries sustained by PW1 and PW2.

This being the first appellate court, therefore it is under duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of facts, to facilitate its coming to its own conclusion, as to whether or not, the decision of the trial court can be sustained.

This is based on the fact that, an appellate court on a first appeal is entitled to scrutinize the evidence as a whole, to a fresh and exhaustive examination and appellate court's own decision on evidence. (see. **Pandya v. Republic (1957) E.A 336** also **Shantilal M. Ruwala v. Republic (1957) E.A 570** it was held that, the first appellate Court must itself weigh conflicting evidence and draw its own conclusion.

Having referred to the cited authorities, I will address on the ingredients of the offence of grievous harm according to section 225 of the Penal Code (Cap 16 R:E 2002).

For the appellant to be convicted of the offence of causing grievous harm, the prosecution had to prove each of the following ingredients beyond reasonable doubts;

1. The victim sustained grievous harm.
2. The harm was caused unlawfully.
3. The accused caused or participated in causing the grievous harm.

To show that grievous harm occurred the evidence depends on victims' testimony or medical records. In the instant case, the evidence to that effect is well established and

there is no doubt that the medical records as per the PF3 are clear on the first element.

The second and third elements according to the evidence adduced and tendered before the trial court is not clear as to who committed the *actus reus*. PW1 and PW2 allege that it is the Appellant. But the appellant on her part denies to have committed the act. On the other hand, it was alleged it was PW2 who pushed the hot cooking oil which caused injuries to all of them. PW2 testified that when she was leaving she felt hot liquid on her body and could not realize who did the act. The appellant denies to have committed the act. There were two versions of the incident. The prosecution failed to show who actually committed the incident. The others four prosecution witness, out of the six witnesses, who were called in a bid to prove the prosecution case established nothing material to this point. With these apparent contradictions, it is uncertain who actually committed the act. For that reason, and failure to identify the one who caused the harm, it is hard even to know the motive behind. The second and third ingredients were not proved beyond reasonable doubt.

The trial Magistrate based his conviction on the surrounding circumstances of the case and not on the offence committed. The basis of conviction by the trial Court were mere assumptions, as it is shown on the extract of the Judgment. At page 9 of the typed judgment the Magistrate stated that *“since what caused the harm was cooking was burning oil (sic) and PW1 was at her home continuing with her business, the accused is the one to be blamed for the incident.”*

With that quoted reasoning of the trial Magistrate, I am of the settled view that, the source of grievous harm was not considered. The entire defence evidence was also not considered by the trial magistrate. In fact the conviction was based on mere suspicious which in law, however grave the suspicion cannot be the basis of conviction.

In order to establish this offence, the prosecution evidence must show a volitional act done for the purpose of causing harmful act. The prosecution evidence is silent on this aspect. This can properly be seen when the evidence clearly point irresistibly that the accused caused the act.

I find it worth to note that, the trial court acquitted the accused on the second count, strange as it may seem, the



accused was ordered to compensate the victim on the acquitted count. I could not find justification for the trial court's order.

The Trial Magistrate substituted his own impressions for the real evidence in order to justify the guilty verdict, while he was not a witness. For that reason, I find myself constrained to hold that, the appellant's conviction was bad in law.

For the reasons stated above, this appeal is allowed. Accordingly, I hereby quash the trial court's conviction; set aside the sentence and order for compensation. The accused should be released from custody forthwith unless lawful held.



**A.F. Ngwala**

**JUDGE**

**15/10/201**

15/10/2019

Coram: Dr. A. F. Ngwala, J.

Appellant - Present

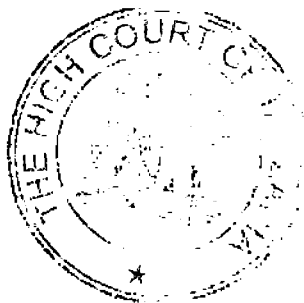
For the Appellant - Absent

For Respondent - Miss Doroth Massawe (Senior State Attorney)

B/C Miss Msuya:

**Court:** Judgment is delivered in court.

**Court:** Right of appeal to Court of Appeal of Tanzania explained.



  
**A.F. Ngwala**

**JUDGE**

**15/10/201**