IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(Kigoma District Registry)

AT KIGOMA

(APPELLATE JURISDICTION)

(PC) CRIMINAL APPEAL NO. 45 OF 2019

(Arising from Criminal Appeal No. 42 of 2019 of the District Court of Kigoma at Kigoma before Hon. K.M. Mutembei – RM, Original Criminal Case No. 52/2019 of the Primary Court of Kigoma District at Mwandiga, before F.P. Ikorongo– RM)

CLAYTON S/O REVOCATUS @ BABA LEVO..... APPELLANT

VERSUS

F.8350 P.C. MSAFIRI PONERA..... RESPONDENT

J U D G M E N T

11/11/2019 & 21/11/2019

I.C. MUGETA, J.

The appellant was charged with and ultimately convicted of the offence of common assault contrary to section 240 of Penal Code [Cap 16 R.E 2002]. It was alleged that on 15th day of July 2019 at about 07:00 hours at the traffic light (kwa Bella filling station) within Kigoma municipality the appellant attacked one F.8350 PC. Msafiri who is a police officer by slapping and hitting him several punches on his chest. Upon conviction, he

was sentenced to five (5) months imprisonment. This was before the Primary Court of Kigoma District at Mwandiga.

The appellant was aggrieved by both the conviction and sentence. He appealed to the District Court. The first appellate court upheld the conviction and enhanced the sentence to imprisonment of twelve months and two days. He is dissatisfied with the decision of the first appellate court hence this appeal.

At the District Court the appellant enjoyed legal representation of Mr. Thomas Msasa assisted by Mr. Eliuta Kivyiro, learned advocates who also represent him at this court. The respondent obtained the legal service of the Director of Public Prosecution (DPP) from the first appeal stage where Masanja, learned State Attorney, appeared for him. At this court, Robert Magige, learned State Attorney, represents him.

On the hearing date, Thomas Msasa, started to argue the appeal before he invited his colleague. He combined grounds No. 1 and 5, grounds No. 6 and 7 and the rest grounds were argued separately.

The memorandum of appeal has eight grounds of appeal. I do not wish to reproduce them verbatim because they somewhat repeat themselves. I am settled in my mind that the complaints in those grounds of appeal centres on these issues:

> *1.That the first appellate court erred to uphold the judgment of the trial court which was prepared without obtaining accessors' opinion and for allowing accessors to examine and cross-examine witnesses.*

2. That the first appellate court erred to agree with the trial court on the finding that the offence was proved beyond reasonable doubts.

3. That the first appellate court erred to excessively enhance the sentence.

4. That the first appellate court erred to hold that the trial court had jurisdiction

These grounds are more or less similar to those raised at the first appellate court. Save for the second ground which is based on issues of fact, the rest grounds centre on points of law. This being a second appellate court, I am live to the principle that a second appellate court can hardly interfere with the concurrent finding of fact of two lower courts unless it is proved that the finding is based on misapprehension of evidence. (See **Isaya Renatus vs. R**, Criminal Appeal No. 542/2015, Court of Appeal, Tabora Registry (unreported). I shall, therefore, attend the second ground of appeal conscious of this principle.

Briefly, the facts of the case are that on 15/7/2019, the respondent who is a police man in the traffic department was at kwa Bela traffic light where there is also zebra crossing. As the traffic lights had been recently installed thereat for the first time, police officers had been stationed there to familiarise users with the new system. While thereat, around 19:00 hours, the appellant who is the Ward Councillor of that area, allegedly passed while on a motorcycle running the red light. Since pedestrian were crossing, and the appellant was not at a high speed due to navigating

through the motor vehicles waiting for the green light, the respondent got on to the road to stop him but in vain. The parties are not at issue on the foregoing facts. What followed is what puts them at loggerheads. The prosecution alleges that after the appellant passed the respondent and the pedestrian who were crossing, he (the appellant) made a U-turn, passed the respondent again, moved a bit ahead back, parked the motorcycle, came back to the respondent and assaulted him. The appellant's version is that after he passed for the first time and having survived a push from the respondent, he never came back. Three witnesses including the respondent testified for the prosecution and a similar number including the appellant testified for the defence.

The appeal was argued orally. I shall consider and determine the arguments presented by the rival sides seriatim.

The first ground of appeal has two components. The first one is that accessors opinions were not recorded and that accessors examined and cross-examined witnesses. Mr. Msasa argued that in the entire proceedings, there is no any place which indicates that assessors recorded or gave their opinions before judgement was prepared and delivered. He referred to the last part of the proceedings of the trial court dated 30/7/2019 where it is recorded *"shauri linahailishwa (sic) hadi tarehe 1/8/2019".* Between this date and the judgment date, the learned counsel submitted, there is no indication that accessors opinions were obtained. For this reason, he forcefully argued, the subsequent judgement offends rule 3 of the Magistrates' Court (Primary Courts) Judgement of Court Rules,

(GN.2/1988). To buttress his argument, he cited the case of ***Swalehe Hassani vs. Amina*** **Ndata** (PC) Civil Appeal No. 14/2015, High Court, Tabora Registry (unreported) where it was held: -

> *"The trial court thus grossly misdirection itself in recording the judgement without firstly consulting the assessors and ultimately inviting them to rubberstamp the decision".*

It was further held:-

> *"...the magistrate did not consult the accessors and did not as well record their opinion ..."*

The learned counsel also cited the case of **Agness Maloda vs. Richard Mhando** [1995] TLR 137 where it was held that since the assessors are part of the court, the Magistrate has to consult with them and when a unanimous decision is reached, he prepares a judgement which all of them have to sign. Another case cited is **Mariam Ally Ponda vs. Kherry Kissiger Hassan** [1983] TLR 223**.** Therein, it was held that assessors in primary courts have equivalent and complimentary powers to those of the Magistrate. In this case, the learned counsel concluded, the Magistrate invited the accessors to rubber stamp the judgement by signing it without obtaining their opinions and record them which is a serious irregularity.

In reply, Mr. Magige, learned State Attorney, argued that there is no any law which prescribe a formula for consultation with the assessors in primary courts. That it is not a legal requirement that opinions of the assessors be reflected either in the proceedings or in the judgement. On

his part, he is of the view that accessors were consulted. To prove that assessors were consulted and their opinions were considered, he referred the court to pages 12, 14 and 15 of the judgement where it states that findings have been made upon consulting accessors.

I have considered the rival argument of the parties; I agree with the learned State Attorney that there is no any law that prescribe a mode of the consultation process in primary courts and how the assessors' opinion should be reflected on record.

Rule 3 of the Magistrates' Court (Primary Courts) Judgement of Court Rules (G.N. 2/1988) provides:

> *"Where in all proceedings the court has heard all the evidence or matter pertaining to the issue to be determine by the court, the Magistrate shall proceed to consult with the assessors present with the view of reaching the decision of the court. If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members".*

I see nothing in this rule which requires that accessors opinion ought to be recorded. In its judgement, at page 12 the trial court recorded:

> *"... Mahakama hii kwa pamoja (yaani hakimu pamoja na washauri wote wawili) baada ya majadiliano ya pamoja tumejiridhisha kuwa upande wa mashitaka umefanikiwa kuthibitisha shitaka lake dhidi ya mshitakiwa pasipo kuacha shaka lolote".*

The above paragraph proves that assessors were consulted. Similar sentiments are several in the impugned judgment particularly at pages 12, 14 and 15 as alluded to by Mr. Magige.

If the law is that accessors' opinions in primary courts ought not to be recorded, what is the precedent value of the cases cited by the appellant's counsel? I have read those cases it is my view that save for the **Swalehe Hassan** case (Supra), the cases of **Agness Richard** and **Mariam Ally Ponda** have been mis-applied to the fact in issue. They have no relation with the fact in issue. Indeed, the case of **Swalehe Hassan** (supra) held that accessors opinion ought to be recorded. However, it is my view that this High Court case decided on 27/9/2016, was decided per incuriam of the decision of the Court of Appeal in **Nelly Manase Foya Vs. Damian Mlingo** [2005] TLR 167 where it was held that accessors opinions in primary courts need not be recorded. The court held: -

> *"Since accessors are members of the court and sign the judgment as such and not for the purpose of authenticating it, they are neither required to give their opinion nor to have their opinions recorded by the magistrate"*

The foregoing disposes of the first part of the complaint. However, owing to the common mixing up or misapplication of the procedures of consulting and role of accessors obtaining in primary court and that in other courts, I deem it meet to further dwell on this issue with view of clarifying it.

Mr. Msasa's concern is that accessors' actual opinions are not reflected in the proceedings and in the judgment. As I have hereinabove held, this is

not a legal requirement for proceedings in primary courts where their role is bigger than when they sit in other courts. In primary courts they are a court and their opinions are binding while in other courts their opinion is advisory. This is the reason why the language used in G.N. 2/1988 differs with that used in other statutes. This law refers to a consultation process and it imposes no requirement that such opinion be in writing or ought to be recorded. To establish the difference, I shall examine the language used in a few laws which deal with accessors' opinions in courts other than primary courts, and compare it with that of rule 3 of G.N No. 2/1988 (supra).

Regulation 19(2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulation (G.N. 174/2003) requires that accessors opinion should be in writing. It reads:

> *"(2) – Notwithstanding sub-regulation (1) the chairman shall, before making his judgment, require every accessor present at the conclusion of the hearing to give his opinion in writing ..."*

Section 198(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] provides:

> *"When the case on both sides is closed, the Judge may sum up the evidence of the prosecution and the defence and shall then require each of the accessors to state his opinion orally as to the case generally and as to any specific question of facts addressed to him by the judge, and record the opinion"*

Comparing the wording of the two above cited laws with that of rule 3 of G.N No. 2/1988, the conclusion that this law (G.N. 2/1988) never intended

opinion of accessors in Primary Courts to be recorded down is inevitable. The rationale is simple and obvious; accessors in primary court and the magistrate, together constitute the court so their opinion on matters to be decided is part of the court's judgement unless one dissents. If this is the legal position, I am of the view that the contention by Mr. Msasa, learned counsel, might have been influenced by the practice in other courts.

I move to the second part of the complaint in the first ground of appeal which is that assessors examined in chief and cross-examined witnesses which is un-procedural. To buttress his argument, Mr. Msasa cited the case of **Fatuma Nasoro V. Ally Gonza,** (PC) Civil appeal No.77/2017, High Court, Dar es Salaam (unreported) where it was held: -

> *"The role of accessors is prefixed by the symbol "XD" to imply that they were conducting examination in chief and in some cases, this came immediately after cross-examination, which is prefixed by the symbol "XXD". All these imply that, throughout the trial the accessors were a continuation of the examination in chief, the fact which vitiated the procedural justice in terms of fair trial".*

Mr. Magige, learned State Attorney agreed with the learned advocate for the appellant that assessors are not allowed to cross examine the parties. He cited the case of **Yusufu Sylvester v The Republic,** Criminal Appeal No. 126/2014, Court of Appeal, Bukoba, (unreported) where it was held that the assessors are not entitled to cross-examine. Their role is to ask questions for clarification and not to contradict witnesses. However, the

learned State Attorney is of the view that at the trial of this case accessors neither cross-examined nor contradicted witnesses.

In rejoinder, Mr. Msasa argued that the nature of answers by the appellant and witnesses to questions put by the accessors suggest that they were geared to incriminating the appellant or contradicting the witnesses which is the role of the adverse party not accessors. Without showing how those answers are incriminating or contradicting, the learned counsel cited two examples of answers to questions by accessors; one by the appellant and another one by SM3 which in his opinion was intended to incriminate or contradict. The concerned answer by SM3 reads:-

> "SU1 ndiye alikuwa na makosa kwani waendesha vyombo vya moto walikuwa wamezuiwa"

The cited answer by the appellant whose question, according to the learned advocate, was intended to incriminate is;

> "Mimi ninashitakiwa kwa kushambulia SM1"

I shall start with the question on if assessors in primary court can cross-examine and whether at the trial they examined and or cross-examined witnesses. Thereafter, I shall consider if they asked incriminating or contradicting questions.

I have read the case of **Yusuph Sylvester** (Supra), indeed, it held that accessors cannot cross-examine witnesses. It also referred to other same court cases namely **Mathayo Mwalimu and Another v. R,** Criminal Appeal No. 174 of 2008, Dodoma Registry and **R. v. Crospery Ntagalinda @ Koro**, Criminal Appeal No. 73/2014, Bukoba Registry (both

unreported). I have found that those cases dealt with the role of accessors within the ambit of section 177 of the Evidence Act. It is common knowledge that this law does not apply in primary courts. The holding in those cases, therefore, cannot be applied to cases originating in primary courts.

Coming back to the complaint, the relevant part of the impugned district court judgment reads:

> *"there is no law which bars the accessors to cross examine the parties if they are intending to do so"*

Put in proper perspective, the learned Resident magistrate was referring to accessors in primary courts. If the cited cases dealt with and interpreted a provision of law which does not apply in Primary Courts, was the first appellate court correct to so hold?

Examination of witnesses in criminal trials in Primary Courts is governed by section 35 (3), (4) and (5) of the Primary Courts Criminal Procedure Code which is a third schedule to the Magistrates Court Act [Cap. 11 R.E 2002]. It reads: -

> *"35 – (3). The court and the accused person may put relevant questions to the complainant and his witnesses.*
>
> *(4). The court and the complainant may put relevant questions to the accused's witnesses and if he gives evidence, to the accused person.*

(5). The accused person and the complainant may, with consent of the court, put questions to witnesses called by the court".

Here the word "court" includes accessors. The phrase cross-examination is not used in this law.

For completeness, I shall examine the procedure in civil cases too. The governing law with civil cases is the Magistrates' Courts (Civil Procedure in Primary Court) Rules and the relevant rule is rule 47 which reads: -

"47 – (1). A witness shall first be questioned by a party who summoned him

(2). Each party shall be entitled to cross-examine the witness called by the other party

(3). The court may question any witness at any time

At least the word cross-examination appears in the law governing trial of civil cases in primary courts. However, it relates to the parties not to the court (magistrate and accessors). It follows, therefore, that like in other courts, accessors in primary courts are not entitled to cross-examine witnesses. They are allowed to ask questions only.

The question which follows is what is the timing of the questions. From the laws above cited, unlike in criminal trials, the court in civil cases can put questions at any time. However, the practice has been that the court puts questions to witnesses after the adverse party has completed putting its questions. In criminal trials sub-section (1) of Section 35 of the Primary

Court Criminal Procedure Code provides for the order of giving evidence. That the complainant starts followed by his witnesses. Then the accused person with his witnesses. The law is silent on when the magistrate and accessors can put questions to witnesses.

For other courts the question on when accessors can put question was discussed by the Court of Appeal in **Mathayo Mwalimu** (Supra) and held:-

> *"As at what stages in the trial can accessors ask questions, we think that this depends on the trial judge. In our respectful opinion, however, we think that accessors can safely ask questions after the re-examination of witnesses"*

This decision was followed in **Yusuph Sylvester** (Supra). It was also discussed in **Crospery Ntagalinda** (Supra). The above holding however does not apply in primary courts where there is no re-examination process.

Unlike the Evidence Act which under section 147 provides for order and direction of examination of witnesses, the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulation, G.N. 22 of 1964 is silent on this aspect. It is therefore, not right to judge proceedings in primary courts in light of procedure and practice obtaining in other courts. Considering the scheme of taking witnesses' testimony in the two sections of the above cited laws applicable in primary courts, I hastate to set a precedent on when accessors in primary courts can put questions to witnesses.

Now let us see what transpired at the trial court. The record of the trial court shows that accessors put questions to each witness last following the

questioning by the adverse party. Mr. Msasa complained that the trial court used the symbol **"xd"** which means examination in chief, therefore, accessors examined witnesses in chief. With respect this cannot be correct as I shall hereunder establish.

Mr. Msasa cited to me the case of **Fatuma Nasoro v. Ally Gonza,** (Supra) where the High Court nullified the primary court's proceedings for the use of the symbol "**xd**" for a reason that it implied that accessor did examination in chief and **"xxd"** meaning they cross-examined. Going by the principle of **"stare decisis"**, this decision is of persuasive value to me. However, this case is distinguishable because the decision was reached in consideration of the order of examination of witnesses under section 147 of the Evidence Act [Cap. 6 R.E 2002] instead of the scheme under the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, G.N. 310/1964 which under rule 47 (quoted above) provides the procedure of examination of witnesses in civil case in Primary Courts. Further, the guide book titled "**Primary Courts Manual**" published in 1964 to provide guidance to Magistrates in Primary Courts when dispensing justice directs that questions by the court which include accessors are indicated by the symbol "**XD**". This, to my understanding, has been the practice. In primary courts, therefore, questions asked after the adverse party has put questions to a witness cannot amount to examination in chief whatever the symbol used. It shall be a travesty of justice to judge cases by mere symbols without considering their common use and context. Admittedly, in other courts the above symbol if used in the proceedings represents examination in chief. This is not true with primary court. In the context of

this case, I am convinced the learned trial magistrate used it to indicate accessors' and magistrate's questions. In conclusion, I hold that accessors in this case neither examined in chief nor cross examined witnesses.

Lastly, let me consider if the questions asked by accessors at the trial were incriminating or contradicting? As I have said the learned counsel did not state the facts to which the incrimination and the contradictions related. Therefore, dealing with these arguments amounts to engaging into guess work on what the complaint intended to cover. I have no reason to take that course. On account of the foregoing, I ignore the complaint for want of details. Finally, I find and hold that the complaints in the first ground of appeal are without merits.

The second ground of appeal is that the offence was not proved beyond reasonable doubts. This ground has three complaints which were argued by counsels for the appellant to support the assertion. Firstly, that the trial court did not consider the defence evidence. Secondly, that there are discrepancies in the prosecution's evidence as witnesses contradicted each other. Thirdly, that the torn shirt of the respondent was irregularly admitted. On the first issue, the learned counsel cited several cases regarding the effect of failure to consider defence case in a judgment. These are **DPP vs. Jofrey Mfaume Kawawa** (1981) TLR 149 whose holding I find irrelevant to the fact in issue. Another case cited is **Semeni Mgonela Chiwanza vs. the Republic** Criminal Appeal No. 49/2019 Court of Appeal, Dodoma (unreported) at page 11 paragraph 3 where it was held that non-consideration of defence evidence is violation of the right to be heard and vitiates the conviction. He also cited the case of **Charles**

Samson v Republic [1990] TLR 39 in which the court held that the court is not exempted from the requirement to take into account the defence of alibi where such defence has not been disclosed by an accused person before the prosecution side closes its case. The court was also referred to the case of **Hussein Idd vs. The Republic** [1986] TLR 166 in which it was held that it was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at conclusion, it was true and credible without considering the defence evidence. The learned advocate concluded with the submission that the evidence of defence side was neither considered nor evaluate by both the trial and first appellate court in their respective judgements.

Mr. Magige, learned State Attorney, responded, without details, that the trial court properly analysed the evidence on record.

Besides citing cases on consequences of failure to consider the defence case, counsel for the appellant did not point out a specific evidence of the defence which had the two lower courts considered would have arrived at a different conclusion. I have read the trial court decision and found that at page 14 the defence witnesses' testimony was generally considered and the court chose to believe the prosecution's case. In my view, considering the evidence without accepting it for reasons stated does not amount to none consideration of that evidence. However, it is not desirable to make general statement about the defence case where specific issues have been raised. The first appellate court fell into the same error of making general

statements in addressing the complaint before it. On first appeal, the learned magistrate held:

> *"To be specific, upon passing through the primary court's judgement at page 11, 12 13 and 14 I find defence witnesses' testimony considered hence the allegation seen worthless and fabrication"*

It is my view that by a blanket statement as above, the first appellate court failed in its role to review the trial court's judgement to make its own finding. The relevant evidence ought to have been mentioned and analysed. Failure to do so is, indeed, an irregularity.

I have already stated herein above that counsels for the appellant did not mention specific pieces of evidence which were not considered. I can, however, still identify some aspects of the defence which were not adequately considered and review them to determine whether if properly considered, raise a reasonable doubt sufficient to fault the concurrent finding and holding of the two lower courts. As a second appellate court, I am entitled to do so because the issue was raised at the first appellate court too.

I have examined the trial court's record and it is my view that the defence put forward by the appellant is two faceted. Firstly, that he has bad blood with traffic police officers after he cut down the trees along the road which gave them shadow during hot seasons, therefore, this case is their efforts to fix him. Secondly, that the alleged incident did not occur.

The trial court considered the first line of defence, the only defence which was considered at the trial and held: -

> *"Utetezi huu hauna mashiko na hautoshi kuibua shaka la kawaida"*

This means the trial court rejected this defence. No reason was assigned for the rejection though. Besides failure to assign reasons it is my view that the defence was rightly rejected. I hold this view because it relates to a specific incident whose existence must be proved by he who alleges in line with regulation 22 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulation which reads:-

> *"Where a person is accused of an offence, ... the burden of proving any fact especially within his knowledge, is upon accused".*

It was upon the appellant to prove this specific fact which is within his knowledge but in my view he failed to discharge this duty. His relevant evidence reads:

> *"Kumekuwa na matatizo makubwa sana kati yangu na askari wa usalama barabarani kwani nilishawakatia miti ya miembe pale shule ya mwenge hivyo wanafanya kazi juani katika mazingira magumu na miongoni mwa askari waliokuwa wanalalamika ni SM1. Pia nimekuwa nikisimama mstali wa mbele kutetea bodaboda na waendesha bajaji pale ninapoona traffic wanawafanyia ndivyo sivyo. Matendo hayo yamejenga chuki kati yangu na traffic akiwemo SM1 na alinitamkia wazi kwamba atanionyesha, siku nilipokamatwa askari walionikamata waliniambia kwamba watanionyesha kwamba wao ni jeshi la polisi".*

I have considered the alleged incidents in the totality of the evidence I have no reason to doubt the appellant to have done the acts he boasts to do against traffic police officers. This notwithstanding, I hold a firm view that it is not such acts which have resulted into this case. The allegation, even though possible, is highly improbable. The allegation seems to be based on perception and not hard fact firstly, because it is unclear if the respondent promised to fix him before, during or after the incident leading to this case. Secondly, the statement by the police men who arrested him if any, does not necessarily refer to his cutting down the tree or being a defender of "bodabodas". As I shall hereunder shortly demonstrate when dealing with the appellant's next line of defence, there is a real incident which led to this case.

Another piece of evidence given by the appellant relates to the incident itself. He testified:

> "Nilisimamisha pikipiki kwa ajili ya kwenda nyumbani ndipo nilipofika mwanga kwa bela nikiwa nimepandishwa pikipiki ndipo alitokea SM1 nakutusukuma lakini hatukuanguka dereva alipunguza mwendo kwa kutaka kusimama ndipo nilimwambia yule bodaboda usisimame kwani askari ananitafuta mimi siyo wewe ndipo tukaondoka alipofika mbele alinishusha na mimi nikaenda nyumbani".

Indeed, this piece of evidence was not referred to either in the judgement of the trial court or the first appellate court. The same seems to suggests that the incident complained of did not take place. The two other witnesses who testified for the appellant gave a similar story. These are "bodaboda"

riders who at the incident time, parked nearby the incident place waiting for customers. They are Musa Yasini (SU3) who testified that he saw the appellant after he had passed the zebra crossing. His evidence in chief does not refer to having seen the respondent pushing the appellant as he passed. When answering questions from one of the accessors is when he said:

> *"Wakati SM1 anawasukuma kina baba Levo wakiwa kwenye pikipiki alisogea"*

The other witness, Ramadhan Seleman (SU2), said he saw the respondent pushing the appellant who was a passenger on a motorcycle but the push did not cause those riding on it to fall down. Both SU2 and SU3 said the appellant proceeded with his journey and no fracas ensued thereafter. While SU2 did not testify on what he did thereafter, SU3 said he left immediately after the respondent pushing the appellant incident.

The respondent and his witnesses do not dispute the appellant being pushed for interfering with the pedestrian crossing the road after he ran the red lights. Their evidence, and this is the most important part of evidence on the fact in issue, is that after surviving the push, the appellant went further, made a U-turn, crossed the traffic light again, at a certain distance he parked the motorcycle and came back to challenge the respondent. It is at this point when the appellant, allegedly, assaulted the respondent. This being the case SU3 who left after the push is incompetent to testify on what followed. On his part, besides being familiar with the appellant, SU2 who was about 10 metres from the incident place, per his

testimony, never saw the appellant returning back. Since he had no reason to follow what the appellant did thereafter, he can hardly testify on incidents after the appellant's return. At this juncture it is important to make a finding of fact on whether the appellant indeed returned to challenge the respondent, a fact which he disputes. An affirmative answer to this question depends on the credibility of the respondent and his witnesses' testimony. To this end it is important to first determine who the respondent's witnesses are.

The first witness who supported the respondent is Karume Rashid (SM2). The second one is Musa Lukomati (SM3). The duo were pedestrians who were being assisted by the respondent to cross the road at the incident time. Both of them testified having seen the appellant running the red lights, the respondent having attempted in vain to stop him, making a U-turn, parking the motorcycle and coming back to challenge the respondent. The respondent testified that having seen a motorcycle running the red lights towards the zebra crossing where pedestrian were crossing, he went into the middle of the road to unsuccessfully stop him. Even if all the prosecution witnesses avoided using the word "push", I am of a settled view that the effort made by respondent to stop the motorcycle running the red light must have involved the pushing alleged by the defence. It follows, therefore, that SM1 and SM2 who were crossing the road were would be victims of the motorcycle that ran the red light. For this cause, unlike SU2 and SU3 who were on their "bodaboda" businesses, they had every reason to pay more attention on events to know the fate of the respondent who had come to their rescue and the motorcycle which

endangered their lives. This considered, I have no reason to doubt their evidence about the appellant turning back and what he did thereafter. I find them witnesses of truth and their evidence is credible. Under the circumstances, I consider the denial by the appellant that he never returned back as untrue story in light of the credible evidence of the prosecution witnesses. All evidence considered, I hold a firm view that even if I have to assume, without accepting, that indeed all the traffic policemen in Kigoma town have bad blood with the appellant, I see no reason at all as to why SM1 and SM2 should lie against him. For the foregoing, I hold that even if they failed, had the trial court and the first appellate court considered all the defence raised, they would not have arrived at a different conclusion.

I move to the last but one complaint in the second ground of appeal: Discrepancies in the prosecution's evidence. On this aspect Mr. Msasa cited page 10 of proceedings of the primary court in which SM1 said that "*alipopita pale kwenye pundamilia lakini alipofika mbele aligeuza piklpıki yake nakunifuata ndipo na mimi nikamsogelea lakini alinipita na nikarudi kwenye point na kuendelea na kazi yangu ndipo nilishangaa kuona SU1 anakuja pale nilipokuwa na kunishika shingo na kunipiga vibao maeneo ya kifuani upande wa kushoto na kunirushia ngumi kofia yangu ilitaka kudondoka lakini nilifanikiwa kuidaka na kwamba raia waliingilia kati na kuamua".* He also cited the contents of page 13 of proceedings of the primary court when 2nd assessor (Ephrahim) questioned SM1, who replied

"SU1 alinipiga hadi shati nililo kuwa nimevaa likachanika kwani alianza kwa kunikaba shingoni naomba kulitoa kama kielelezo".

It is at this point of questions from accessors when the said shirt was admitted as exhibit A1.

The learned counsel further cited page 15 of the primary court proceeding quoting what SM2 said that *"SU1 hakufika mbali aligeuza pikipiki nakurudi pale alipokuwa askari ndipo alianza kumuuliza unanisimamishaje nikiwa kwenye chombo cha moto? Ndipo askari akamjibu, wewe huoni umevunja sheria? SU1 alianza kufoka sisi tulibaki tunashangaa kwani kiongozi ndipo SU1 alimpiga SM1 kofi na kumrushia ngumi kofia ya askari ilitaka kudondoka ndipo askari akaidaka*".

The learned counsel further referred to page 18 of the primary court proceedings this time quoting SM3's testimony that *"ndipo SU1 alifika na kumfanyia askari vurugu askari na alimsukuma kwa nguvu kifuani ndipo tukaenda kuamua".*

Mr. Msasa submitted that while the quotations above are from witnesses who were at the scene of crime, their evidence contradicts on how the incident occurred. In his considered view, these witnesses are not truthful. According to him, it was not expected the witnesses to give different accounts of the incident. That one witness testified that the complainant was held by the neck, another one on being pushed on the chest and another one on being slaped. He cited the case of **Jeremiah Shemweta v. Republic** [1985] TLR 22 in which it was held that the discrepancies in various accounts of the story by the prosecution witnesses give rise to

some reasonable doubts about the guilt of the appellant. Regarding exhibit A1 he prayed the same to be expunged from record because it was admitted when one of the accessors was putting questions to the respondent which is procedurally irregular.

Responding to these arguments, Mr. Magige submitted that indeed, there is variation in words used but the difference is minor to affect the veracity of the evidence consider as a whole. That it is common when witnesses testify, they are not required to use similar words. He cited the case of **Chrisant John v. Republic**, Criminal Appeal No. 313/2015 Court of Appeal, Bukoba, (unreported) where it was held that contradiction by any particular witness or among witnesses cannot be escaped or avoided in any particular case. He submitted that minor discrepancies cannot discredit witnesses. He also cited the case of **Goodluck Kyando v. Republic** [2006] TLR 363 where it was held that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. Finally, he referred the court to the case of **Magando Paulo and another v. the Republic** [1993] TLR 221 where it was held that the law will fail to protect the community if the court will allow minor differences to take the position of justice. On exhibit A1, he conceded it ought to be expunged from the record as it was irregularly admitted.

The disputed key phrases in the prosecution evidence are *"piga vibao maeneo ya kifuani"* used by the complainant, *"piga kofi na kumrushia ngumi"* used by SM2 and *"sukuma kwa nguvu kifuani"* used by SM3. It is my view that whatever the meaning of each phrase, they refer to the same

fact: **assault**. What was at issue is whether the respondent was assaulted and if yes, whether it is the appellant who assaulted him. Assault is about attacking another person involving physical contact with that other person's body by any body part or object. The description of what happened by the prosecution, in my view, is a typical act of assault. In the circumstances, I hold that the discrepancies among the witnesses of the prosecution side are minor which do not affect the reliability of the prosecution's evidence. Regarding exhibit A1, I agree it was irregularly admitted. Nevertheless, it was neither referred to in the trial court's judgement nor it influenced its decision. This notwithstanding and for the sanity of the court record, I accordingly expunge it from the record. In the final analysis, I find no merits in the second ground of appeal.

At this juncture, Mr. Msasa invited his colleague Mr. Eliuta to argue the remaining grounds of complaint which concern enhancement of sentence by the District Court and whether the trial court had jurisdiction.

Mr. Eliuta argued the third ground of appeal by submitting that the first appellate court enhanced the sentence beyond that provided by section 240 of the Penal Code [Cap 16 RE 2002] which creates the offence the appellant was charged with. That the maximum punishment provided by that section is one year. That the 1st appellate court illegally extended it to one year and two days. He referred the court to the case of **Kabwe Salumu v. Republic** (DC) Criminal Appeal No. 80/2018, High Court, Tabora (unreported)at page 7 where it was held:

"...having convicted the appellant under section 299(a) of the Penal Code, the trial court sentenced the appellant to serve 13 months imprisonment. This was manifest of a highest degree of miscarriage of justice as the sentence provided for under the cited section is not more than 3 months".

He also cited the case of **Republic v. Abdala *Seleman*** [1983] TLR 215 where it was held that enhancement of sentence should not be awarded to the prejudice of the accused person for example when not given an opportunity to be heard.

Mr. Magige, State Attorney, agreed that the sentence was enhanced excessively. However, he submitted that it was too lenient so it deserves enhancement to the maximum sentence provided by just removing the excessive two days.

I am of a settled view that the first appellate court enhancement of sentence from five months to twelve months and two days was illegal for exceeding the prescribed punishment. It cannot be allowed to stand. In enhancing the sentence, the first appellate court had this to say:

"... having considered that the appellant is a leader/prominent figure who should be a role model to others and in order to avoid a future fighting leader/nation, I hereby alter the lenient sentence of five months to one year and two days imprisonment".

With respect to the learned magistrate this factor was for consideration by the trial not the appellate court. Factors to be considered for enhancement of sentence was discussed in the case of **Rajab Daud v. the Republic,**

Criminal Appeal No 106/201, Court of Appeal (unreported). These are where the sentence is:

a) manifestly excessive, or;
b) based upon a wrong principle, or;
c) manifestly inadequate, or;
d) plainly illegal, or;
e) the trial court failed or overlooked a material consideration, and;
f) the trial court allowed an irrelevant or extraneous matter to affect the sentencing decision.

Once any of these factors exist, the appellate court can interfere with the sentence. Doing so does not amount to condemning the convict unheard as Mr. Kivyiro suggested because the appellate court like the trial court limits its consideration to the aggravating and mitigating factors on record. The reason advanced by the learned first appellate magistrate, even though might be a material consideration since leaders must, indeed, be held to higher standards of accountability, by itself cannot override other factors like that the appellant is a first offender who is not advisable to suffer jail imprisonment. Further, the trial court had to bear in mind its sentencing powers in case of imprisonment which is six months beyond which the sentence would require confirmation of the district court. So, the trial court acted according to the law and I see no reason to fault the sentence it imposed. This ground of complaint has merits. I allow it.

Lastly, the question of jurisdiction. The learned advocate for the appellant argued that the district court erred in law to hold that the trial court had local limit territorial jurisdiction. He is of the view that the primary court at Mwandiga had no jurisdiction to try the case because the offence did not occur within its jurisdiction. He cited regulation 19(1)(a)(b) of the Primary Courts (Criminal Procedure Code) Regulation which provides that subject to the provision of the Act, an offence shall be tried by the court of the place where the offence was committed or where the accused was apprehended or kept in custody. Regarding this case, Mr. Eliuta Kivyiro argued that the crime was committed within Kigoma Ujiji Municipal at "*kwa Bela area*" and the appellant was arrested at "One Lounge" area which is within Kigoma Ujiji Municipal. Later, he was taken to Central Police Station within Kigoma Ujiji Municipal. However, the charge sheet was drawn at Mwandiga police station. He concluded that the proper court was Ujiji Primary Court which is within Kigoma Ujiji Municipal Council and not Mwandiga primary court which is within Kigoma District Council.

Mr. Magige, the learned State Attorney, replied and cited section 3 of the Magistrate Court Act [Cap 11 R.E.2002] which establishes primary courts per each district and their jurisdiction is within the whole district for which they are established. He submitted that Kigoma district has two primary courts located at Ujiji and Mwandiga and have concurrent jurisdiction within Kigoma District.

In my understanding, it is common knowledge that the structure of the Local Government Authorities is divided into urban authorities and rural

authorities. Urban authorities are made of municipal councils, while rural authorities are composed of district councils. In such cases, both the urban and rural authorities are within the same administrative authority boundaries and for the purpose of this case, the district which constitutes the Kigoma Ujiji Municipal Council and the Kigoma District Council is Kigoma District.

The Magistrates Court Act [Cap. 11 R.E 2002], section 3(2) provide that the designation of a primary court shall be the primary court of the district in which it is established. This law knows no councils, being municipal or district councils. It follows, therefore, that since the cited regulation 19 is subjected to the provisions of the Act, then section 3 of the MCA prevails. The two courts, I hold, have concurrent jurisdiction. It is however, advisable that cases should be filed at the nearest court. In case of violations complaints can be lodged with higher authorities for interventions. The fourth ground of appeal also has no merits.

Finally, the appeal is partly allowed to the extent that the enhanced sentence by the District Court is set aside. The sentence of the trial court is restored. Conviction is upheld.

I.C. MUGETA

JUDGE

21/11/2019

Delivered in open court before Robert Magige, State Attorney, for the respondent and Thomas Msasa and Eliuta Kivyiro, advocates for the appellant and the appellant present in person under custody.

Sgd: I.C. MUGETA

JUDGE

21/11/2019