IN THE HIGH COURT OF TANZANIA
(MUSOMA DISTRICT REGISTY)

AT MUSOMA

PC. CRIMINAL APPEAL NO. 26 OF 2019

(Arising from Criminal Appeal No. 14 of 2019 in the District Court of Bunda at Bunda, originating from the Criminal Case No. 222 of 2019 at Bunda Urban Primary Court)

ANASTAZIA KIJA.....APPELLANT

VERSUS

MNIKO MAGESA.....RESPONDENT

JUDGEMENT

Date of Last Order: 31/01/2020
Date of Judgment: 7/02//2020

KISANYA, J.

In the Primary Court of Bunda Urban at Bunda, the respondent was convicted of offence of assault causing actual bodily harm contrary to section 241 of the Penal Code (Cap. 16, RE. 2002). He was therefore sentenced to serve conditional discharge sentence for a period of six months. In addition, the respondent was ordered to pay Tanzania shillings four hundred thousand (TZS 400,000) for the injuries he caused to the appellant.

Aggrieved, the respondent successfully appealed to the District Court of Bunda at Bunda whereby his appeal was allowed and conviction, sentence and order quashed. The Appellant is dissatisfied by the decision of the first appellate court. She has preferred a second appeal with four grounds as follows:

1. *THAT, the Appellate District court erred both in law and fact for failing to hold that the appellant proved its case beyond reasonable doubt against the Respondent as the offence was committed during day time and both the appellant and PW2 Sylivester confirmed that it was the Respondent who assaulted the Respondent.*

2. *THAT, Appellate District court erred in law and in facts in deciding the case in favour of the Respondent on ground that the appellant in her testimony did not state what part of her body assaulted while in fact the appellant produced as exhibit PF3 to prove part of her bodily injured.*

3. *THAT, Appellate District Court erred in both in law and in fact in deciding the case in favour of the Respondent on allegation that record of the trial court does not show that PF3 was not produced before court as exhibit while in fact judgement of the trial court shows that PF3 was tendered before court and admitted as exhibit.*

4. *THAT, Appellate District court erred in law in deciding the case in favour of the Respondent on allegation that a ten cell*

leader was not called to testify while in fact it was not necessary as matter of law to call a ten cell leader to testify in order to register conviction.

When this appeal was called for hearing, both parties appeared in person, unrepresented. In addition to the above grounds, the Court suo motu, raised two issues namely, whether the respondent was convicted of offence which he was charged with; and whether the trial court was properly constituted due to change of set assessors.

Before disposing of the appeal, it is important to highlight briefly what culminated to the arraignment and conviction of the respondent from which this appeals arises.

On 17/6/2019 the respondent was charged with offence of common assault contrary to section 240 of the Penal Code (Cap. 16, R.E. 2002). The appellant (prosecution) paraded two witnesses to prove her case. It was the prosecution account that on 3/6/2019 at 4.00 p.m, the appellant detained the respondent's cows which were grazed in her farm. Thereafter, the respondent assaulted the appellant before taking the cows had been detained by the appellant. This incident was witnessed by Syliverster Mahemba (PW2).

The respondent denied the charge. He raised the defence of alibi which was supported by his two witnesses namely, Nyamganga Hegere (DW2) and Zai Chaura (DW3).

At the hearing before this Court, appellant requested to adopt the grounds of appeal as stated in the petition of appeal. She added that the ten cell leader was in the court only that she was not given time to call him as witness. She argued further that the PF3 which prove the sustained bodily harm was tendered as exhibit during trial. Therefore, she requested this Court to quash judgement of the first appellate court and confirm judgement of the trial court. Being a lay person, she did not address to the legal issue raised by this Court.

On the other side, apart from adopting his reply to petition of appeal, the respondent reiterated that the charge against him was not proved on the ground that the doctor who examined the appellant and the police officers who investigated the matter were not called as witnesses. He argued further that PF3 was not tendered as exhibit and hence not tested during trial. That said, he urged this Court to dismiss the appeal. Likewise, the respondent had nothing to say on the legal issues raised by this Court.

Let me start by stating that this being a second appeal, this Court can only interfere with findings of the lower courts if there is a misapprehension of evidence, violation principles of law or practice or miscarriage of justice. This position was also stated in the case of **Wankuru Mwita vs Republic, Criminal Appeal No.219 of 2012 (unreported)** where the Court of Appeal held:

> *"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court*

and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

Further, since the District Court was the first appellate court, I am aware of a principle of law that a first appeal is in the form of a re-hearing. Therefore, it has a duty to re-evaluate the entire trial evidence on record and subjecting it to a critical examination and if necessary arrive at its own decisions on the fact as held in the case of **Daniel Matiku vs Republic**, Criminal Appeal No. 450 of 2016, CAT at Mwanza (Unreported).

Lead by the stated principles and having judiciously considered the grounds of appeal, the evidence on record and the submission of parties, I wish to address the issues raised by this Court suo motu before considering the grounds of appeal.

The first issue is whether the respondent was convicted of the offence which he was charged with. It is on record that the respondent was charged with offence of common assault contrary to section 240 of the Penal Code (Cap. 16, R.E.2002). The said charge was not amended. However, both the trial court and first appellate court state that the accused person was charged with offence of assault causing actual bodily harm contrary to section 241 of the

Penal Code (Cap. 16. R.E.2002). Indeed, he was convicted with the offence of assault causing actual bodily harm.

It is trite law that a person can only be convicted of minor offence though, not initially charged with it in the original charge. However, this should not be done at the detriment of the accused person. In the case of the case of **Richard Estomihi Kimei and Another vs Republic**, Criminal Appeal No. 375 of 2016, CAT at Arusha (Unreported), the Court of Appeal quoted with approval decision in the case of **Yusufu v.Rex**, T.L.R (R) 298 where it held as follows.

> *"Though a magistrate [or Judge] has power ... to convict the accused of a different offence from what he was originally accused of, still this must be done only in circumstance where the accused is not in any way prejudiced by the conviction on the new charge. The accused is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence."*

In the present case, I am of the considered opinion that offence assault causing actual bodily harm is not a minor or lesser offence to the offence of common assault. This is because the ingredients for the two offences are different and the punishment for offence causing actual bodily harm is higher than offence of common assault. While offence of assault causing actual bodily harm is punishable to imprisonment for five years, the punishment for offence of common

assault is imprisonment for one year. Therefore, it was wrong for the trial court to convict the respondent of the offence which he was not charged with and that seriously prejudiced the respondent. Likewise, the first appellate court erred in holding that the offence of assault causing bodily harm was not proved while that offence was not preferred in the trial.

The second issue is whether the trial court was properly constituted due to change of set assessors. Pursuant to section 7 of the Magistrates' Courts Act (Cap. 11, R.E. 2002), primary court is properly constituted if it sits with not less than two assessors. As held in the case of **Emmanuel Mollel vs Republic** (1985) TLR 199, the law does not allow the substitution of a fresh set of assessors for the original set in the same case. The Court held further that substitution of assessors renders the court which finally disposed of the case not properly constituted.

In the matter at hand, the record shows that on 19th June 2019 when the trial court heard the prosecution case, assessors were G. Ndaro and V. Songoma. However, during defence hearing held on 5th July, 2019, the quorum indicates that assessors were J. Shilinde and C. Peter. However, G. Ndaro and V. Songoma are recorded to have asked questions to the defence witnesses on the same date while they were not in quorum. As held by this Court (Kazimoto J) in the case of **Alexander Killian v Linus Kinunda** (1988) TLR 71, it is irregular to change assessors during trial. Therefore, change of set of

assessors in the case at hand vitiated the proceeding before trial court. This is when it is considered that assessors take part making decisions of cases filed in the primary courts. Assessors can exercise such duty effectively and give their opinion as to whether the accused is guilty or not if they are present at the hearing of the prosecution and defence case.

In addition to the above irregularities, irregularity on admission of the medical report (PF3) as submitted by the respondent. As rightly held by the first appellate court, PF3 was not admitted in evidence. However, it is referred to in the trial court's judgment as Exhibit A-1. Pursuant to regulations 6 (c) and 11(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1964, GN. No. 22 of 1964, facts are proved by evidence which may be the production of documents by witnesses. It follows therefore that the said PF3 was required to be produced by the prosecution witnesses. Although PW1 mentions PF3 in her testimony, it is not shown as to whether she requested to tender it as exhibit.

Further, it is a procedural requirement that any document should be tested before its admission. This enables the accused person to state whether he object or not and or asking questions related to that document. That said, I find that failure by the trial court to admit PF3 as evidence in accordance with established procedure occasioned to injustice.

It is my considered opinion that the above cited irregularities vitiated the proceedings in the trial court. As the trial court proceedings were vitiated, the proceedings before the first appellate court were also nullity as they were originated from null proceedings. Exercising the powers conferred on me under section 29(b) of the Magistrate Court Act (Cap. 11, R.E. 2002), I quash the proceedings and judgement before the District Court. Likewise, I quash the proceeding before the trial court, its judgement, sentence and order.

Ordinarily, after the proceedings have been nullified, there follow an order for retrial. However, this is not always the case. It depends on the circumstances of each case. For instance, an order for trial de novo cannot be issued if that order will benefit the prosecution to work on gaps identified in its case as held in the case of **Ferehali Manji vs Republic** (1966) EA 344 that:

> *"In general a retrial may be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill gaps in its evidence at the first trial --- each case must depend on its own facts and an order for retrial should only be made where the interest of justice require it."*

In the case hand, the respondent was acquitted by the first appellate court due to insufficient evidence on the prosecution case. As stated herein, it is the first appellate court which is duty bound to re-evaluate and re-examine evidence of the trial court. Therefore,

after due consideration of evidence tendered in the trial court, the first appellate court noted contradictions on the prosecution evidence in that while PW1 states that the respondent assaulted her by using a cane and fists, PW2 states that the respondent used a cane.

Further, the first appellate court was satisfied that PF3 which was relied upon in convicting the respondent was not tendered as exhibit by the prosecution. It was stated further by the first appellate court that PW1 did not state which part of her body was assaulted. I have also gone through the PF3 which was relied upon by the trial court, the medical practitioner who attended PW1 states that the "the patient has no any bruises or swelling but complains of painfull..." Moreover, oral evidence was not given by the prosecution to connect PF3 with the case as required under regulation 11(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations (*supra*).

Therefore, since the charge was not proved beyond reasonable doubt due to insufficient evidence, I find it in appropriate to order re-trial.

It is so ordered.

DATED at **MUSOMA** this **10th** day of **February, 2020.**

E.S. Kisanya
JUDGE
10/2/2020