IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO 52 OF 2019

(Originating from the District Court of Longido, Criminal Case No. 65 of 2018)

ANANIA MOHAMED .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

K.N. ROBERT, J;

The Appellant Anania Mohamed was charged in the District Court of Longido with the offence of Causing Grievous Harm contrary to section 225 of the Penal Code Cap. 16 R.E. 2002. After a full trial he was convicted and sentenced to serve five years (5) imprisonment and to pay compensation to the victim of crime at a tune of Tanzania Shillings Five Hundred Thousands (Tshs.500,000/=). Aggrieved with the Judgment of the trial court, he appealed to this court against the conviction and sentence.

The factual background to this appeal reveals that on 19th December, 2017 at 22hrs PW1 Rabeni Philipo was at Ngereyani area within Longido

District together with the Appellant. The Appellant had a quarrel with another person which resulted into a fight. PW1 intervened in their fight and managed to settle the fight. After 30 minutes the Appellant appeared with an axe and a "panga" and started to cut PW1 on different parts of his body including his arm and backbone. He also broke his leg with an axe and shouted for help. As PW1 was severely bleeding he lost consciousness and he regained his memory the following morning. He was later informed that the Appellant had reported that they were invaded by the thugs. PW1 was issued with the PF3 at Sanya Juu police station and brought to Kibong'oto hospital and later referred to KCMC Hospital. The Appellant was captured.

PW2 Kakaa Nyorona recounted that on 20th December, 2017 at 03 hrs while asleep the Appellant woke him up and told him that they were invaded by the thugs at the farm. Since it was night, PW2 told the Appellant to stay in his house until the following morning. He asked the Appellant about the whereabouts of PW1 but the Appellant replied that he didn't know where he was. At 05:45 hrs, PW1 and the Appellant went to the scene and found PW1 sleeping down, his body had big bleeding wounds. PW1 informed PW2 at the scene that he was injured by the Appellant. PW2 decided to call Kitongoji Chairman who went to the scene. PW1 was given first aid and then taken to

Ngereyan dispensary and later to Kibong'oto hospital. The Appellant was later apprehended.

On 20th December, 2017 at 06 hrs PW3 Oleitay Kipara received a call from PW2 informing him about the incident. He was informed that the Appellant had beaten and injured PW1 and that PW1 had suffered big cut wounds on his hand and leg. PW3 communicated this information to the Village chairperson and they arranged to arrest the Appellant.

PW4 G3231 PC Wilfred was at Sanya juu police station on 20th December, 2017 as Charge Room Officer, he received the chairperson of Ngereyan Village together with the Appellant and PW1 who had cut wounds on different parts of his body. His left leg was broken with an axe. He said that all that was done by the Appellant. PW4 issued PF3 to PW1 and opened a temporary case file. Thereafter he transferred the case file to Longido Police station.

PW5 H4605 D/C Londo investigated this matter. He narrated that on 18th June, 2018 at 8HRS he was assigned to investigate the matter with IR 03/2018. By that time the accused person was in the lock up and he was already interrogated. Two witnesses had not yet given their statements. He

interrogated them and recorded their statements. On 20th June, 2018 he charged the accused persons before the court.

On 26th January, 2018 at 13 hrs PW6, Dr. Faiton Mandari, was in his office at KCMC Moshi Orthopaedic and Trauma Surgery Department when PW1 was brought to hospital as a patient. He had injuries on his arms and legs, a broken left femur and scars on his face and arms. He attended PW1 who was then hospitalized. He stitched scars on his right hand and dressed wounds on his face. His right femur was stretched for six weeks. He observed that the nature of the wounds and scars and the fracture was a result of being cut with a sharp weapon. The patient was confined in hospital for more than six months. He filled the PF3 and signed it. The PF3 was received by the trial court as exhibit P1.

In his defence in affirmation, the Appellant (DW1), recounted that on 19th December, 2017 at 22:00hrs while at Sanya Juu police station he was suspected of committing the offence of murder. That on that day PW2 who is also his partner in their daily activities begged him to accompany him to Sanya Juu police station. They used PW2's motorbike to the police station. Having reached there he remained outside while PW2 went inside the police station and came out with a police officer who told him that he was a killer,

he was thereafter arrested and restrained inside the police station for two weeks. After two weeks he was taken to Kamwaga police station and detained for 5 days. Afterwards he was taken to Longido Police station where he refused to be interrogated. He was taken to Justice of peace where he made an extra-judicial statement and then charged with murder and later with the offence of causing grievous bodily harm to PW1.

In convicting the Appellant of the offence charged, the Honourable Magistrate was satisfied that the evidence presented by the prosecution was sufficient to prove that the victim was injured and suffered grievous harm. She observed that the evidence was neither controverted nor displaced. On that basis, she decided that the issue for determination is who injured the victim and caused him to suffer grievous harm. To answer this question she relied on the evidence of PW1 who saw the Appellant assaulting him before he lost conscious and mentioned Appellant's name to PW2 when he regained consciousness. She also considered that PW1 knew the Appellant before. Based on that she accepted that the Appellant was well identified by the victim and the circumstances of his identification were favourable for a proper identification. She stated further that although the incident had taken place at night the circumstances for positive recognition were favourable

especially as the Appellant was a person well known to the victim. She rejected the defence of alibi raised by the Appellant and went on to convict and sentence him to five years imprisonment.

Dissatisfied by his conviction and sentence, the appellant appealed to this court armed with five grounds of appeal which are hereby alluded to as follows: **One**, That the trial Court erred in law and fact for failure to scrutinize the evidence tendered before it consequently holding the appellant criminally liable. **Two**, the trial court erred in law and in fact in holding that the appellant was properly identified by PW1. **Three**, the trial court erroneously admitted exhibit P1 as the same was not read over in court. **Four**, the trial court convicted the appellant notwithstanding contradictory evidence on the part of prosecution. **Five**, the trial court erred in law and fact by basing the appellant's conviction on appellant's defence rather than on the strength of the prosecution evidence on record.

When the appeal was called for hearing on 27th March 2020, the appellant was present in person while the respondent was represented by Miss. Cecilia Foka, State Attorney.

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When the appeal was called for hearing on 27th March 2020, the appellant was present in person while the respondent was represented by Miss. Cecilia Foka, State Attorney.

In his short submission to the court, the appellant adopted all his grounds of appeal but explicated on the first to the fourth grounds without specifically addressing the fifth ground of appeal.

Arguing his first and second grounds of appeal jointly, the appellant submitted that, the court failed to analyze that PW1 did not indicate the source of light which enabled him to identify the appellant. He argued that if the trial magistrate could have analyzed the evidence carefully, he would have not been convicted.

On the third ground, he submitted that the trial court wrongly received Exhibit P1 (PF3) without reading it out before the court for the parties to understand its content.

On the fourth ground, he stated that PW1 and the PW6 were not trustworthy as the evidence adduced by them was full of contradictions. PW1 said that, he was cut in various parts of the body while PW6, the doctor said, the victim was injured in the hand, leg, left finger broken and he has a scar on the face and hand.

He argued that the other contradiction is found on the day which is referred to as the fateful date. While PW1 said the event took place on

19/12/2017, the PW2 said it was on 22nd December 2017. He submitted that the magistrate should have seen these contradictions, and for those reasons he prays for the appeal to be allowed.

Opposing the appeal, the Respondent's counsel started by observing that in her views the appellant's first ground of appeal carries all other grounds. Submitting on the issue of identification of the appellant by PW1, the learned counsel argued that page 4 of the proceedings shows that the appellant and PW1 were known to each other and they were living on the same village. On the fateful day (19.12.2017) the Appellant and PW1 were together when the Appellant was in a fight with another person and it was PW1 who was trying to stop the fight. The Appellant was not happy he therefore took a "Panga" and an axe and cut PW1 in the leg and hand and he became unconscious.

She argued further that, the testimony of PW2 shows that, it was the Appellant who approached him at night while he was asleep and informed him that he was together with PW1 when they were invaded by a bandit. Pw2 told him to wait until morning to find the whereabouts of the Pw1. In the morning they went to find Pw1 and when they found him, he mentioned that the Appellant is the one who injured him.

On the fourth ground, she submitted that, there is no contradiction between the use of the word "cut" and the word "injure" used by the witnesses, it was a matter of semantics which do not affect the substance of the testimony. There was no contradiction between the evidenced adduced by Pw1 and the one of Pw6. There was also no contradiction regarding the fateful day. Pw1 said it was 19.12.2017 and Pw2 was approached by the appellant on 03:00 Hrs which was already another day of 20.12.2017 according to the 24 Hrs system.

Finally, the learned counsel submitted that, the trial magistrate made a thorough analysis of both the prosecution evidence as well the defense evidence and accorded deserving weight to the evidence adduced by both parties. She prayed for the appeal to be dismissed in its entirety, conviction and sentence be upheld.

Having gone through the submissions of both parties, I will now probe into the grounds of appeal in succession. In view of the contending submissions by parties, I think the issues to be determined are: Whether there was a proper Identification of the accused person (appellant); whether the PF3 (Exh.P1) was not read out after being received by the court; whether there was a contradiction on the testimony adduced by Pw1 and Pw6

regarding the injuries of Pw1 and whether there was a contradiction concerning the fateful day as to when the event took place.

Starting with the first and second grounds of appeal, the appellant is faulting the trial court for failure to scrutinize the evidence tendered before it consequently holding that the appellant was properly identified by PW1.

In the case of **RAYMOND FRANCIS vs. REPUBLIC (1994) TLR 1994** it was held that;-

> "it is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance"

It was also decided in the case of **REX vs MOHAMED BIN ALLUI (1942) 1** that;-

> "in every case in which there is a question as to the identity of the accused, the fact of there having been a description giver and the terms of that description given are matters of the highest importance of which evidence ought to be given, first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."

In the instant case, Pw1 (at page 4 of the proceedings) stated that, he knows the appellant and they are living in the same village. On the fateful day they were together and the appellant injured him after he intervened in the fight between the Appellant and another person. The trial magistrate when deciding on who injured the victim and caused him to suffer grievous harm relied on the evidence of PW1 who saw the Appellant assaulting him before he lost conscious and mentioned the Appellant's name to PW2 when he regained consciousness. She also considered that PW1 knew the Appellant before the alleged incident, based on this she accepted that the Appellant was well identified by the victim and the circumstances were favourable for a proper identification and free from danger of mistaken identity. She also considered that although the incident took place at night the circumstances for positive recognition were favourable especially as the Appellant was a person well known to the victim. I am satisfied with the trial magistrate's analysis on identification of the Appellant and I find that the Appellant was properly and correctly identified. Based on this I find no merit on the first and second grounds of appeal.

In respect of the third ground, the appellant submitted that the PF3 was not read out after being received and admitted by the court as an exhibit.

The respondent's counsel did not submit anything regarding this ground. In the case of **BASHIRI S/O JOHN vs THE REPUBLIC, Criminal Appeal no. 486 of 2016(Unreported)** where the same issue was raised it was decided that:-

> "The CAT agrees with the appellant to expunge PF3 from record as it was improperly acted on for having not been read out after its admission as exhibit. After being expunged from record it's become not worth being considered."

In the case at hand, there is no evidence to prove that exhibit P1 (PF3) was read out after its admission as exhibit in order for the parties to understand its contents.

In **ROBINSON MWANJISI & THREE OTHERS vs REPUBLIC, Criminal Appeal No. 154 0f 1994, (2003) TLR NO. 218**, the Court decided that;-

> "Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the court to be seen not to have been influenced by the same."

In the instant case, these procedures were not followed by the trial court, the court at page 14 of the proceedings admitted the exhibit but after admitting it the contents of the exhibit were not read out for the parties to hear. I will therefore, on the basis of the reasons given, expunge PF3 from records of this case.

On the fourth ground, with respect to the contradiction raised by the Appellant on the evidence adduced by Pw1 (at page 4 of the proceedings) and Pw6 (at page 15 of the proceedings) regarding the injuries of Pw1, after perusal of the proceedings of the trial court, I am in agreement with the learned State Attorney that there is no contradiction in the testimony of the two witnesses. It is obvious that what is perceived to be a contradiction by the Appellant was just a difference in the use of the terms "cut" and "injure" but both of them meant the same, that PW1 was injured by the appellant.

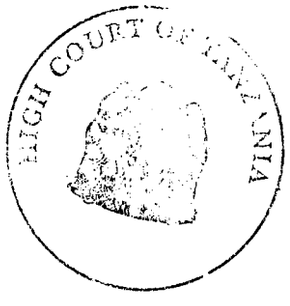
On the contradiction regarding the day of the event, having gone through the records I have found out that, Pw2 mentioned the time and the date when the appellant visited him at his house, he never mentioned that the event occurred on 22nd December 2017 as mentioned by the Appellant. The incident occurred on 19th of December 2017 and the Appellant went to Pw2 at 3:00 hours which was past midnight and obviously considered as

another day of 20th December 2017 as per 24 hours system. I think the Appellant is the one who contradicts himself on this issue and not Pw1 or Pw2. On that basis, I find no merit on this ground.

Finally, on the last ground, the appellant stated that the trial court erred in law and fact by basing his conviction on the strength of his defence rather than on the strength of the prosecution evidence on record. Having considered the analysis of evidence done by the trial court, this court is satisfied that the trial magistrate made a thorough analysis of both the prosecution evidence as well the defense evidence and accorded deserving weight to the evidence adduced by both parties. I therefore find no merit on this ground.

In the end, I am satisfied that, considering all the circumstances of the case, the charge against the appellant was proved without any scintilla of doubt even without the PF3 which is expunged from records of this case for procedural flops. In the result, the conviction and sentence were justified and I find no reason to disturb the decision of the trial court. Accordingly, the appeal is dismissed in its entirety.

It is so ordered.



K.N ROBERT

JUDGE

29.05.2020