IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA

(DC) CRIMINAL APPEAL NO. 4 OF 2020

(From Original Criminal Case No 36 of 2018 of the District Court of Iringa at Iringa – L. M. Chamshama, SRM)

MURSALI S/O ABDUL @ ALLY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: ***27th February,2020***
Date of Judgment: ***18th March, 2020***

NGWALA, J

This appeal originates from the decision of the District Court of Iringa at Iringa in Criminal Case No. 36 of 2018. The appellant, Mursali Abdul @Ally was charged with the two counts namely: Causing grievous harm contrary to section 225 of the **Penal Code. (Cap 16 R. E. 2002).** The second count was Attempt to procure abortion contrary to section 150 of the same code. The appellant was acquitted on the second count. On the first count of

Doing Grievous harm the appellant was convicted and sentenced to serve four (4) years imprisonment.

The chain of the prosecution evidence linking the appellant with the offence as reflected in the record may briefly summarized as follows:- On 12/3/2017 in the evening, Salma Sanga (PW1) was at the residence with their neighbors. The appellant arrived with the car and alight from it. He then dragged Furaha out from the car and assaulted her. PW1 asked the appellant why he was beating his wife Furaha? The appellant pushed PW1 to the ground and kicked her on the stomach. PW1 became unconscious. PW2 Mariam Mohamed who was at the scene of incidence with the assistance of Good Samaritan took PW1 and Furaha up to Police Station and thereafter to Hospital. PW1 was attended by DR.Christopher Ombata (PW3) who was on duty on that day the 12th March, 2017 at Iringa Referral Hospital. PW3 attended PW1 who was brought to him by the police officer. On examination PW3 saw bruises and a swollen face of PW1 who complained to have pain in her stomach. PW1 was given pain killers.

On 28th March, 2017 PW3 examined again PW1 who was bleeding blood that was oozing from her vagina. Upon examination by ultra sound PW3 discovered that PW3 was pregnant. PW3 filled a PF3 (exhibit P1) and referred PW1 to specialist, an Obstetrician and Gynecologist one Dr. Alfred Mwakalibela(MD, MMED). PW4 conducted a hysterectomy

because the fetus was macerated and the uterus was septic. In a simple language as testified by PW1, she ***"was operated because the fetus and her womb had decayed. The womb and fetus had to be removed"***. PW4 filled the PF3 (exhibit P2). The accused was arrested and sent to Iringa central police where PW5 No. F.3205 D/CPL Ally recorded the caution statement of the appellant (exhibit P3).

In his defence, the appellant denied to have committed the offence. The appellant, who testified as DW2, said he was falsely accused to have committed the offence because his wife (DW1) felt down in the trench. When he was assisting her his in law (PW1) emerged and started to insult him. He left the place only to be arrested by the Police on 15/3/2017 who asked him to sign on a paper exhibit P3. This evidence was supported by the evidence of DW1 Furaha and DW3 Abdul s/o Ally Mursal who testified on the same footing.

The appellant being aggrieved with both conviction and sentence brought this appeal through the services of Mr. Moses Ambindwile, learned counsel. Ten grounds have been raised in the Petition of Appeal. The **first, second and third grounds** faults the learned trial magistrate for admitting and relying on the cautioned statement of the appellant (exhibit P3), which was admitted without the conduct of an inquiry case after the appellant had objected its admissibility.

The fourth ground faults the trial magistrate to enter conviction and sentence based on defective charge. **The fifth ground** of appeal faults the trial magistrate for convicting and sentencing the appellant without taking into account the defence evidence. **The sixth ground** alleges that the prosecution failed to summon a material witness. **The seventh ground** of appeal faults the trial magistrate to convict the appellant without evaluating appropriately the evidence adduced by all witnesses. **The eighth ground** faults the trial magistrate to convict the appellant without considering that the victim contributed to her sustained harm**.** **The ninth** ground alleges that the prosecution did not prove its case beyond reasonable doubt. **The tenth ground** alleges that the proceedings and judgment of the trial court are a nullity ***"abinitio"*** for contravening laws governing administration of criminal justice.

On arguing the first, second and third grounds of appeal generally, the learned counsel stated that the cautioned statement admitted as exhibit P3 was wrongly admitted. Mr. Ambindwile contended that PW5 testified on the contents of the caution statement which was not yet admitted in evidence contrary to the laid down principles as held in the case of **Aneth Rwanda & three others v. DPP. Cr. Appeal No.16 of 2018 (Unreported)**. He argued further that the trial court illegally admitted the caution statement without following the procedure

of admitting a caution statement which was objected. There was no inquiry conducted before admission as required by the law. Mr. Ambindwile referred this court to the cases of **Aneth Sunke & others (supra)** and **Stephen Silomoni Mollel v. Republic Criminal Appeal No.248 of 2016(CAT).** Basing on that omission, the counsel submitted that the caution statement ought to be expunged from the prosecution evidence.

In elaborating the **fourth ground** that the charge sheet was defective on the account that the statement of offence did not create an offence of Doing grievous harm, it was argued that the cited section 225 of the Penal Code Cap. 16 R.E.2002 provides for punishment of grievous harm. This is contrary to section 135(a)(i)&(ii) of **Criminal Procedure Act Cap.20 R.E.2002** that requires the charge sheet to show the provision of the law that creates the offence. He contended further that the Republic was duty bond to use both section 5 of the Penal Code that gives the meaning of causing grievous harm and section 225 of the same Act. Mr. Ambindwile stressed that the failure or omission by the respondent to cite the two provision renders the charge incurable defective as it is a fatal omission, as held in the case of **Mussa Mwaikunda v. R [2006] TLR 387.**

Arguing the 5th, 6th, 7th, 8th and 9th grounds of Appeal Mr. Ambindwile submitted that the charge of causing grievous harm was not proved beyond reasonable doubt. The trial court failed to

evaluate properly the evidence that was adduced by both sides. He made reference to pages 10 up to page 13 of the typed judgment where it indicates that the victim testified to have been beaten by the appellant, when she was trying to stop appellant to fight with Furaha, the appellant started to beat her in the presences of Twaha, Furaha and Grandmother. Unfortunately, the so called Twaha who is a material witness was not summoned by the prosecution to testify. The learned counsel submitted further that according to the witness the incident took place at night. The source of light was not mentioned. In such circumstance, it was impossible for the witness to identify the accused in the mid of people as the one who had beaten the victim.

Apart from that, the counsel submitted that DW1 Furaha who was alleged to have been beaten by the appellant vehemently denied to have been beaten by the appellant. There was no fight between her and the appellant. The counsel insisted that DW1 and PW1 are close relatives, hence the trial court was duty bound to believe the testimony of DW1, because she had no quarrel with the victim.

Another complaint pointed out by the learned counsel was on the defense evidence. He submitted that the trial court did not take trouble to consider the evidence that was adduced by the defense side that would lead to the acquittal of the accused. The case of

Mapambano Michael@ Mayanga V R Cr. Appeal No. 268 of 2015 was referred to support the contention.

On her part, Ms. Mwangulumba the learned State Attorney who represented the respondent Republic submitted in support of the conviction and sentence of the trial court.

On the **1st,2nd and 3rd grounds** of Appeal, Ms. Mwangulumba conceded that the cautioned statement was wrongly admitted by the trial court without complying with the procedure that once the cautioned statement is objected, the court should conduct an inquiry as elaborated in the case of **Mazambi v. R [1990-1994] EALR 356** where it was held that;

> "Trial within trial is needed when the cautioned statement is objected"

She therefore prayed the said statement should be expunged from the record of the proceedings. She however argued that despite the removal of the statement, the remaining evidence in the record is still intact to justify the conviction of the appellant. The evidence of PW1, PW2 and PW3 is coherent to prove that the appellant committed the offence.

On submission in support of the 4th ground that failure of the prosecution to cite section 5 of the Penal Code, the learned State Attorney stated that the non- citation did not render any injustice to the appellant as the particulars of the charge sheet were clear

to make the appellant understand the charge and to enter the plea there to.

Moving next to **grounds no 5,6,7,8 and 9** the learned State Attorney argued that the trial court considered the defense evidence but the said evidence did not shake the prosecution case. She urged this court to revisit page 7 of the typed judgment where the trial court referred to the evidence of PW1, PW2, DW1 and DW2. Ms Mwangulumba was however quick to point out that since this is the first appellate court it has power to re - evaluate the evidence of the trial subordinate court as held in the case of **Jogoo v. Republic (2010) EALR.** that;

> "As the first appellate court has duty to consider and re-evaluate it and arrive at its own independent conclusion"

On the complaint that the prosecution failed to call Twaha who was the material witness, Ms. Mwangulumba stated that the prosecution is not bound to call all the witnesses who recorded their statements before the Police Officers as per the case of **Yohanes Msigwa v. R [1990] TLR 150** and section **143 of the Evidence Act [Cap.6 R.E 2002].** She insisted that PW2 was an eye witness, who testified that she saw the appellant kicking the victim on the stomach.

In response to the identification, Ms. Mwangulumba asserted that the issue of identification was not a problem in their case since all

prosecution witnesses and the appellant are close relatives. There is no mistake on the identification of the accused person. She concluded by stating that the case against the appellant was proved beyond reasonable doubt.

I have carefully read the proceedings and judgment of the trial court as well as the grounds of appeal. Upon hearing the eloquent submission made by Mr. Moses Ambindwile the learned counsel for the appellant and Ms. Mwangulumba learned State Attorney the main issues for determination by this court are; **First,** whether the cautioned statement was wrongly and improperly admitted by the trial court; **second** whether the charge against the appellant was defective and if so whether the defect was incurable and **third** whether the case against the appellant was proved to the required standard, that is, beyond reasonable doubt.

Coming to the first question paused concerning the cautioned statement. The complaint in this case is that the trial court admitted the cautioned statement (exhibit P3) without conducting an inquiry. I have perused the trial court proceedings and found the trial magistrate omitted to conduct an inquiry after the appellant had objected the same to be admitted. It is now settled principle that when an objection is raised as to the voluntariness of the statement intended to be tendered as exhibit the trial court must stay proceedings and commence a trial within

a trial or an inquiry in case of a subordinate court.[see also **SELEMAN ABDALLAH & 2 OTHERS v. R, Criminal Appeal No. 384 of 2008 CAT at Dar-es-salaam(unreported)** and In the case of **Aneth Furaha & 3 others (supra)** as cited by Mr. Ambindwile.

It was therefore improper for the trial court to admit exhibit P3. As the State Attorney conceded with the submission made by the counsel for the appellant and she prayed that caution statement be expunged from the record; accordingly the caution statement (exhibit P3) is hereby expunged and discounted from the evidence.

On the issue of the charge sheet, the appellant claims that the charge was defective for it offended the provision of **Section 135(a)(i)&(ii) of Criminal Procedure Act, Cap 20 R.E.2002**. I have read the section, it is clear from the wording of provision that a statement of offence shall contain a reference to the section of the enactment creating the offence. In the instant case, the statement of the charge stated only **section 225 of the Penal Code** and the particulars of the offence, read;- ***"Mursali s/o Abdul @ Ally,*** *on 6th day of March, 2017 at Makorongoni area within the District and Region of Iringa Unlawful did grievous harm to one* ***Salma d/o Ayubu Sanga".***

Section 5 of the Penal Code provides the meaning of grievous harm which is reproduced as here under;

> **"Grievous harm"** means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense".

Regarding the argument by the counsel for the appellant that section 225 of Penal code (supra) does not create the offence of grievous harm; upon reflection of the two quoted provisions of the Penal Code, I am not in agreement with the learned counsel's assertion. It is settled view of this court that section 225 of Penal code does create the offence of grievous harm and section 5 of the same Code provides for the meaning of the term.

Though I agree with the learned counsel for the appellant that section 5 of the Penal Code ought to have been mentioned in the charge but the omission or non - citation of it could not render the charge to be defective. Even if I would agree with the learned counsel that the charge was defective, still the same is curable. It has been held by the Court of Appeal of Tanzania that the non –citation or citation of inapplicable provisions on the charge sheets occasioned no injustice when the particulars of the offence sufficiently disclosed the charged offence and the prosecution's evidence on record gave a detailed account of the incident to enable the appellant appreciate the case against him and defend himself effectively as held in **OSWARD**

MOKIWA@SUDI v. REPUBLIC Cr. App. NO, 190 of 2014 (CAT) at Dar es salaam. (Unreported).

In this particular case, it is my considered opinion that the particulars of the offence in this case are very clear and they disclose the offence of grievous harm. Apart from the particulars, the testimonies of PW1, PW2, PW3 and PW4 narrated the details of the offence of grievous harm and the appellant defended himself, hence the appellant was not prejudiced by the alleged defect on the charge sheet.

Lastly, on the issue whether the charge of grievous harm was proved by the prosecution against the appellant? After discounting the cautioned statement (exhibit P3) that was tendered by (PW5); we remain with the evidence of PW1, PW2, PW3, PW4, and exhibit P1 and P2 the PF3. There is no dispute that the victim sustained grievous harm as per exhibit P1 and P2 which were not challenged at trial court and in this court. The Exhibits P1 and P2 prove the fact that the victim had to undergo hysterectomy because the fetus was macerated and the uterus was septic. The key question, therefore, on this ground of Appeal is whether the offence of grievous harm was proved? The provision of **section 225 of the Penal Code, Cap 16 [R. E 2002]** establishes the offence of Grievous harm as it reads;

"Any person who unlawfully does grievous harm to another is guilty of an offence and is liable to imprisonment for seven years"

To convict of Doing or causing Grievous Harm, the prosecution side must prove each element of the offence beyond reasonable doubt that is; the accused committed an unlawful act. Those elements or matters that had to be proved then and now in this Appeal are;-

1. Whether it is the accused who caused the grievous harm?
2. Whether the victim sustained an injury that amounted to grievous harm.
3. Whether there was intention, and or recklessness in causing grievous harm.

In this case, as submitted by the learned counsel, the accused maintained and still maintains that he didn't commit the offence and that he is innocent.

In my reflection of the judgment of the trial court, specifically at page 7 of the typed Judgment, and the Proceedings on the testimonies of all the witness in this case from both the prosecution, and Defence side, With respect to the learned counsel for the appellant, I am of the considered opinion that looking at the totality of evidence in this case, the evidence of PW1 and PW2 connects the appellant with this case. There is no dispute that PW2 was at the scene of incident at the material

time.PW2 testified to the effect that she saw the appellant at the time he was beating the victim on her stomach. Her evidence support the testimony of PW1 (victim). The appellant was identified at the scene of crime by PW2. It is in the record that the appellant and PW2 who are relatives could not have mistaken the accused as rightly submitted by State Attorney that there was no mistake on identification.

I am also satisfied that the trial court properly considered the defence side and accorded no weight of any kind to the defence case. I hold so because Mr. Ambindwile submitted that, the case was not proved and the trial court didn`t consider the defence evidence

Having so found, I have no doubt that the act or actions by the accused of beating with fists and kicking the victim PW1 on the stomach shows that he intended to cause serious injury or harm to the victim. Much as the accused DW2 said that he was not aware if Salma PW1 was pregnant, but the issue here that must be understood is that any assault on any part of the body is unlawful as it endangers human life or Health. It really does not matter whether it is done consciously or unconsciously, voluntarily or otherwise. The accused act of kicking PW1 on the stomach, and in this respect any act of kicking someone else on any part of the body is unlawful. Such violent acts like kicking

someone on the stomach may lead to rapture of the spleen, kidney and all the organs on that part of the body.

In fact this is one of the serious cases of assault falling under both the Grievous Bodily Harm (**GBH**) and Gender Based Violence (**GBV**). The kicks inflicted upon PW1 resulted into serious permanent disfiguring of a person and in this aspect of **PW1 a pregnant woman, that resulted into loss of uterus or womb and serious harm to the pregnancy,** as clearly explained by PW4, who examined PW1 and found that she had purses in her stomach and the dead fetus in the *"mid"* between the stomach and vagina.

When further cross examined by the counsel for the accused, now appellant. PW4 replied that it was a result of the said assault as there was a relation between the miscarriage and the beatings. PW4 replied that **"the fetus had already died in ten days".** PW4 said the woman PW1 managed to survive after that incident which had occurred about two weeks after the patient one Salma Sanga PW1 was beaten by a blunt object and treated thereafter as aforesaid.

Indeed this is a **GBH case** or specifically a Gender Based Violence **(GBV) case**, as PW1, the relative of the wife of the accused person, fell a victim of the accused person as testified, in his testimony (DW2) that PW1 threatened him that *"she will show me because I normally beat her young sister and insulted me".*

It is also in the testimony of DW1 the relative of the wife of the accused that she fell a victim of the **GBH** by the accused, who is the husband of DW1 due to wife battery as she was protecting DW1 from his husband who failed to control his emotions, as he was suspecting the wife DW1 had love affairs with another man and following up allegations of adultery against his wife to her grandmother's house one PW2 Mariam Rajab. This evidence is in the defence testimony in support of the accused that was analyzed by the trial Magistrate, that it did not shake or raise any doubts to the Prosecution case as found by the trial court. The defence evidence recorded in the proceeding as narrated by DW1 Furaha d/o Ayub the cousin of PW1 Salma d/o Sanga reveals the following;-

> *"My husband came back. He didn't tell me why he was outside but he was not normal, I asked him, he said that, I had a man at my grandmother's place. He asked me to go with him to my grandmother's place to ask her about the allegations. We then went together in a car. We used my husband's car, in the car he continued asking me, if it was true, I insisted that, it was not true. But we failed to reach to my grandmother's place, he stopped the car. He continued asking me, but I denied.* ***The distance from where we stopped to my grandmother was almost 5 paces. The place was dark.*** *We then got outside the car and asked me to walk close. At my grandmother's there was no parking. When I got outside I fell on the trench. He then came to assist me. Suddenly came Salma Ayubu Sanga. When she came there she started insulting my husband. She said* ***you idiot you have started beating your wife, what kind of a man are you she said that, she will show my husband****. Then my husband was quite, he entered in the car and left. I then asked and* ***told her that my husband had never beaten me.*** *She then continued to insult my husband. She tried to prevent my husband to enter in*

the car. Then Salma picked the stone throw it and broken the window. She then fallen down on the trench she made noises, that I am dying then ***my grandmother called Mariam came****. She is our grandmother.* ***She assisted Salma and went inside. Salma continue to complain about her stomach, we then hire a car, we first went to police station, at police, she made a statement that, Mursal made violence at home****. Mursal never attacked me or Salma.* ***I was not aware if she was pregnant.*** *The allegations are not true"*

Regarding the complaint in the 8th ground of Appeal that in sentencing the accused the trial Magistrate did not consider the fact that the victim contributed to her sustained injury; with respect, I am of the firm view that the sentence of four (4) years imprisonment was proper because it is within the ambits of the law as the maximum sentence prescribed under Section 225 of the Penal Code, Cap 16 is seven years imprisonment.

The trial Magistrate imposed that reasonable minimum sentence that was within the scope of the law establishing the punishment for the offence committed.

In this respect, therefore, I see nothing compelling to warrant the interference of the lenient sentence that was imposed by the trial Magistrate who properly exercised his jurisdiction in assessing the sentence.

The appellant should take note of the fact that in other jurisdictions the maximum penalty for a charge of causing **GBH** is five years imprisonment. Intentionally inflicting **GBH** and

Recklessly inflicting **GBH** carries a maximum of 13 years or 15 years imprisonment if it is on a pregnant woman. (Sydney Australia, https://www.aftlegal accessed on 15/03/2020). The maximum penalty for a **GBH** Case is 14 years in Queensland (see **GBH** Penalties and Sentencing – Anderson/ Fredrick/ Turner. Kerri Fredrick 2019 - Grievous Bodily Harm, Proof, Defences and Trials).

This offence of Causing Grievous Bodily Harm therefore carries a severe sentence of up to a maximum prison term of twenty (20) years extendable to twenty five (25) years if the victim is a pregnant woman. In the circumstances therefore the appellant shall continue to serve the four (4) years imprisonment in jail.

For the foregoing, I find that the case against the appellant was proved beyond reasonable doubt. This Appeal therefore has no merit. Accordingly the decision of the District Court of Iringa is up held. The Appeal is dismissed.

A. F. Ngwala,

JUDGE

18/03/2020

Date	**:**	**18/03/2020**
Coram	**:**	Hon Dr. A. Ngwala, Judge
Appellant	**:**	Present
For Appellant	**:**	Mr. Ambindwile (Advocate)
Respondent	**:**	Miss Jackline Nungu (State Attorney)
CC	**:**	Hildagarda

Court: Judgment delivered in court in the presence of the Appellant, his Advocate Mr. Ambindwile and Miss Jackline Nungu State Attorney for Republic.

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

THE HIGH COURT OF TANZANIA

A. F. Ngwala,

Judge

18/03/2020