IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 58 OF 2020

(Original Lindi District Court Criminal Case no. 61 of 2019

before Hon.M.A. Batulaine, SRM)

MT 92665 CPL SHABAN YUSUPH MKONDYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

18 Nov. & 2 Dec. 2020

DYANSOBERA, J.:

The appellant herein was arraigned before the District Court of Lindi for the offence of grievous harm c/s 225 of the Penal Code [Cap.16 R.E.2002]. The particulars of the offence were as follows:

> *On 8th day of August, 2019 at Nyangao village within the District and Region of Lindi, unlawfully did grievous harm to one*

Ramadhan Issa Chijuni by punching and kicking him on various parts of his body.

After hearing five prosecution witnesses and the defence, the trial court convicted the appellant and sentenced him to 3 (three) years prison term.

The appellant now appeals to this court against conviction and sentence setting out, according to the additional grounds of appeal filed by Mr. Shadrack Rweikiza, learned Counsel, the following complaints:-

1. That, the trial court's proceedings are tainted with gross and incurable irregularities as reflected at page 53 and 54 of the proceedings upon first delivering of the judgment between the parties on 20.04.2020 and later on considering the aggravating and mitigating factors as reflected on page 54 of the proceedings, hence to have caused gross injustice to the appellant.
2. That, the trial court's proceedings are tainted with gross and incurable irregularities as reflected at page 20 of the proceedings by contravening rules of evidence upon admitting and marking the purported victim's PF3 as Exhibit P1 without first being tendered by the prosecution side.

3. That, the trial Magistrate erred in law and in fact by considering PW1's evidence as admissible and relevant to the purported fact in issue under section 47(1)(2) of the Evidence Act, Cap 6 R.E. 2002 as reflected at page 4 of the typed judgment, a section of which does not exist at all in the above cited law.
4. That, the Trial Magistrate erred in law and in fact by convicting and sentencing the appellant basing on contradictory testimonies by PW1 as reflected at page 4 and 5 of the typed judgment that the victim was referred to Muhimbili hospital for further checkup and that of PW2 as reflected at page 11 of the typed judgment that PW3 was transferred to DSM at Mzena hospital for further medication, hence the matter not proved beyond reasonable doubt.
5. That, the Trial Magistrate erred in law and fact by turning into a witness and adducing evidence as reflected at page 8 of the typed judgment that "in considering the above evidence it raised presumption that accused went at PW2 room that night with common intention of finding the man who was with PW2 after the break up and probably he knew that victim was inside",

allegations and testimonies of which were not adduced at trial by any prosecution witness.

6. That, the Trial Magistrate erred in law and in fact by convicting and sentencing the appellant without considering the fact that the Respondent failed to call material witnesses to wit PW2's father and mother who were allegedly present on the purported fateful date.

It was common cause at the trial that the appellant is a military soldier stationed at Nachingwea 843 KJ. The victim one Ramadhan Issa Chijuni (PW 3) is a driver by profession working with Nyangao Secondary School. Both the appellant and PW 3 had a love partner called Geruweda Hilarius John (PW 2). On 8th August, 2019, PW 2 and PW 3 were inside PW 2's room conversing after they had a session of sexual intercourse. The appellant made a visit at PW 2. He knocked at the door to PW 2's room. When PW 2 opened the door, the appellant wanted to enter inside but PW 2 resisted. An altercation ensued between the two. The appellant forcibly entered the room and found PW 3 lying on the bed stark naked. The former started assaulting the latter by punching and kicking him. PW 2 raised an alarm and her parents were the first persons to respond. Other neighbours converged as well. The appellant then took PW 3 outside the room in that naked state, tied him with a rope

and a pair of trousers and went on assaulting him around the street up to the market place. The hounds of justice got the wind and G.1212 DC Anthony Anord Tesha (PW 4) together with his fellows went to the market place where they found the appellant with PW 3. PW 4 assisted PW 3 by untying him, collected both the appellant and PW 3 together with the materials that had used to tie PW 3 namely a manila rope and a pair of trousers and took them to the police station. The appellant was locked up while PW 3 was issued with a PF 3 and taken to Nyangao Hospital. There, PW 3 was attended by Joel Abdul Msilimo (PW 1). PW 3, according to PW 1, was unable to talk, had his face, lips and eyes swollen and was bleeding from the nose and mouth. In his medical examination, PW 1 found that PW 3 had a fracture on the base of the skull; the fracture which was caused by a blunt object. Since the intracranial haemorrhage could only be diagnosed by CT scan and MRI, the medical devices which were not available at Nyangao Hospital, PW 3 had to be referred to Muhimbili National Hospital for further medical examination. PW 1, however, filled in the PF 3.

G.7635 DC Emmanuel went to the crime scene at Hilarius John Milanzi, PW 2's father, and drew a sketch plan.

In his defence, the appellant denied to have done grievous harm to PW 3 as alleged by the prosecution. Admitting that on 7th August, 2019 at 2330 hrs he went to PW 2 who was his fiancée without first having notified her, the appellant explained that on arrival at PW 2, he knocked at the door to her room. PW 2 opened the door but resisted his getting ingress in the room. An altercation ensued and the appellant then saw a man running from the room and the appellant ran after him and he got hold of him after the man fell down. The appellant then took him to Nyangao police station but he, the appellant, was locked up and in next day he had his statement recorded.

The learned Resident Magistrate analysed the evidence and relying on some provisions of the Law of Evidence and some case laws, found the evidence of PW 1 to PW 5 credible proving that the appellant had assaulted PW 3 and caused him grievous harm. She convicted the appellant and sentenced him accordingly.

At the hearing of this appeal, Mr. Shadrack Rweikiza, learned Advocate, represented the appellant; in the time, the respondent was represented by Mr. Paul Kimweri, learned Senior State Attorney.

As pointed out herein above, counsel for the appellant who had filed additional grounds of appeal, did, at the hearing of the appeal, abandon the previous petition of appeal which had been filed by the appellant and adopted the new filed additional grounds of appeal.

Arguing the first ground of appeal, Mr. Rweikiza submitted that there were irregularities which went to the root of the trial as a result the trial was not properly conducted. He explained that the irregularities are the violation of section 236 of the Criminal Procedure Act [Cap 20 R.E. 2019]. Referring this court to pages 53 and 54 of the typed proceedings, learned advocate complained that it was impossible for the judgment to be delivered before considering aggravating and mitigating factors and regarded this as an irregularity which prejudiced the appellant and amounted to unfair trial.

Submitting on the second ground of appeal, the learned counsel for the appellant challenged the admission of the PF 3 pointing out that it is settled principle of law that a document which has not been tendered as exhibit cannot be relied upon at the trial. He argued that the said PF 3 was not actually tendered in court but the public prosecutor just prayed to show PW 1 the PF 3 and the trial court recorded the PF 3 as admitted and marked as exhibit P 1. He maintained that the record does not show that the prosecution

prayed to tender the PF 3 as exhibit. He was of the view that the purported PF 3 was not part of the record and had no evidential value and hence wrongly acted upon by the trial magistrate. Counsel for the appellant cited the case of **Gladness Jackson Muninja v. Sospeter Chrispin Makene**, 217 TLS LR 2017 at pages 222 and 223 to support his argument and prayed the exhibit to be expunged from the record and its contents not to be considered.

With respect to the third ground of appeal, counsel for the appellant faulted the trial Magistrate for considering the evidence of PW 2 as admissible and relevant to the purported fact in issue under section 47 (1) and (2) of the Evidence Act, [Cap 6 R.E 2002] which section does not exist. He urged the court to find that the same evidence was a nullity and should be totally disregarded.

On the fourth ground of appeal on contradictory statements of witnesses, counsel submitted that it is a settled principle of law that the onus of proof in criminal proceedings lies on the prosecution and such proof must be beyond reasonable doubt as elucidated in the case of **Jonas Nkize v.R** [1992] TLR page 216. He contended that there is patent contradiction in the evidence of PW1 and PW2 which signifies that the prosecution did not prove the offence charged beyond reasonable doubt as required by law. He

supported his argument by citing the case of **Leonard Mwanashaka v. R**, [2016] TLS LR p.46. Elucidating his point, learned counsel for the appellant argued that there was a contradiction on whether PW 3 transferred to Dar es Salaam at Mzena Hospital or was referred to Muhimbili Hospital.

In the 5th ground of appeal, Mr. Rweikiza criticized the remarks by the learned trial Resident Magistrate made at page 8 of the typed judgment that; *"in considering the above evidence it raised presumption that accused went at PW 2 room that night with common intention of finding the man who was with PW 2 after the break up and probably he knew that victim was inside".* the allegations and testimonies which, according to learned counsel, were not adduced at trial by any prosecution witness and, therefore, the learned Resident Magistrate turned herself into a witness and adduced evidence.

I note that learned Counsel for the appellant argued the fifth ground of appeal by referring this court to page 9 of the judgment, last paragraph which ground is different from the one preferred in his additional ground of appeal. I will confine myself to what was the actual complaint in the fifth ground of appeal as indicated above.

Submitting on the last ground of appeal Mr. Rweikiza contended that when the alleged fight was taking place, PW2, PW3, and PW2's father and mother were present. The learned counsel argued that being eye witnesses of the incident and present at the scene of the crime PW 2's parents were not called to testify by the prosecution and no reasons were given. Counsel was of the view that the obvious reason is that the prosecution intended to hide the truth of the story. He urged this court to draw an adverse inference on the failure on part of the prosecution to call material witnesses. Counsel for the appellant placed reliance on the case of **Hemed Said v. Mohamed Mbiru [1984]** TLR 114 where at p. 116 the Court observed:

> "Where for undisclosed reasons a party fails to call a material witness on his side the court is entitled to draw an interference that if witnesses were called they could have given evidence contrary to the party's interest".

In light of such submission, Mr. Rweikiza was of the view that the witnesses who were present and were crucial witnesses had to be called but that since the prosecution did not call them and did not assign any reason for the failure, this ground should be allowed.

On the strength of that submission coupled with the cited authorities, Mr. Rweikiza prayed the appeal to be allowed, the trial court's proceeding, judgment, conviction and sentence to be nullified, quashed and set aside and the court to order immediate release of the appellant from prison. Counsel also prayed for other orders as the Court may deem fit to grant.

Resisting the appeal, Mr. Magesa, learned State Attorney for the respondent, supported both the conviction and sentence imposed on the appellant. He argued that the prosecution proved their case beyond reasonable doubt by establishing that the appellant unlawful did grievous harm to PW 3 on 8.8.2019, the day PW 3 will not forget in his life. In support of his argument that the prosecution had proved the case against the appellant beyond reasonable doubt, Mr. Magesa contended that that PW2 and PW3 were lovers but that PW2 who was formerly also the love partner with the appellant, had their relationship with him(appellant) put asunder after they separated since 26.7.2019 though on 8.8.2019 the appellant went to PW2 assaulted her and later on entered her room where he found PW3 lying on the bed naked and started assaulting him as well. When the assault was going on, PW2 raised an alarm as a result PW2's mother arrived and asked the appellant, "Shaban mbona unampiga mwenzio siku zote ulikuwa

wapi? There and then PW2's father also arrived and both identified well the appellant and mentioned him by the names. After the serious assault, PW3 was taken by the appellant towards the road and on arrival at the market place, the appellant made PW3 to sit down and had water poured on him. Nobody intervened as they knew the appellant was soldier. It was Mr. Magesa' s further argument that PW4 who knew well the appellant and when he arrived at the market place he found the victim naked and his hands were tied from behind and was blindfolded. The appellant told PW 4, "Hizi ni dharau haiwezekani nina mchumba halafu mtu ana kuja kufanya nae mapenzi". PW 3 could not see and talk as he was bleeding from the mouth. PW 4 tendered in court the materials the appellant had used to tie and blindfold PW 3 and the same was admitted as exhibit P. 2. The victim was taken to the hospital and treated by PW1, a medical doctor, who concluded that the injuries sustained by PW3 could lead to death and caused brain concussion. PF3 was filled in and admitted as an exhibit P 1. Learned State Attorney emphasized that there was ample evidence to prove that the appellant caused grievous harm to PW3, the offence which is defined under section 5 of the Penal Code.

In the light of that submission Mr. Magesa was of the view that there was misapprehension of the whole judgment on part of learned Counsel for the appellant and referred to section 235 of the CPA arguing that the section is clear that the court, after hearing the case, announces judgment and after conviction it takes evidence so as to assess which punishment is suitable as provided for under section 236 of the CPA. He told this court that a magistrate cannot hear the aggravating or mitigating factors before entering a conviction. He rested his submission on the first ground of appeal.

Submitting in reply on the second ground, Mr. Magesa admitted that the typed record of proceedings do not show if the prosecution prayed to tender the PF3. He, however, prayed this court to peruse the handwritten script so as to discern what actually took place in court. Mr. Magesa informed the court that the appellant was, at the trial, represented by an advocate but there was no complaint that the failure make a prayer to tender the document occasioned any miscarriage of justice. Nevertheless, the learned State Attorney was of the view that if, at all this court thinks that there was such a failure, then it should find that the evidence of PW1 which was cogent and unmistakable sufficiently proved all the elements of the offence of grievous harm. In support of his argument, learned State Attorney referred this court

to the case of **Issa Hassan Lila v.R**, Criminal Appeal No. 129 of 2017 (Mtwara) on the authority that even if the document for unprocedural manner finds a way in the admission, the witness evidence is sufficient.

Submitting in respect of the third ground on wrong citation of section 47 of the Evidence Act, Mr. Magesa argued that, that defect is curable since the section is there in statutory books but the problem was on the subsections. In his view, the magistrate was trying to show the relevancy of the expert evidence; but even then, the defect is curable under section 388 of CPA and the appellant was not prejudiced by the wrong citation, learned State Attorney argued.

Coming to the fourth ground on the contradiction of witnesses, Mr. Magesa pressed that the contradiction did not go to the root of the case as PW1 who is a Doctor who stated how he treated PW3 and after discovering that the victim was in a pathetic condition and could die, made a reference to a higher Hospital. According to the learned State Attorney, the evidence of PW3 was very clear where he was taken even if there was a discrepancy; it was slight as the witnesses are human being. Mr. Magesa was inspired by a quotation in the case of **Evarist Kachebeho and Others versus Republic** [1978] LRT No. 70 where the court stated:

"Human recollection is not fallible a witness is not expected to be right in minute details when he is telling his story".

Learned State Attorney was of the view that even if there was such a contradiction, he invited this court to find that the contradiction was minor. In support of this argument, he cited the case of **Issa Hassan Uki v.R** in which the Court of Appeal, while admitting the presence of the discrepancy, found it to be trivial.

Opposing the 5th ground of appeal, the learned State Attorney submitted that what the trial Magistrate did was a comment which was made after she had taken into account all the prevailing circumstances of the case and that the whole trend justified what she had observed according to the evidence in which PW 1 had revealed that the injuries could lead to the death. Further that as the record at page 34 of the trial court's proceedings reveals, the people knew that the appellant was a soldier and that the observation by the trial Magistrate was backed up by the prosecution witnesses, namely, PW 1, PW 3 and PW 4. Mr. Magesa argued that the case cited by Mr. Rweikiza is distinguishable.

As regards the sixth ground of appeal, the learned State Attorney started his submission by referring to S. 143 of Evidence Act on the authority

that there is no particular number of witnesses required to prove a particular fact. According to him, at page 29 of the proceedings, the Republic had called these witnesses and they had attended at court premises but after PW2 and PW3 who were eyewitnesses had testified and their testimonies were supported by that of PW 4, the prosecution saw no need of letting PW 2's parents give their testimonies. He said that the prosecution deemed it proper not to parade all the witnesses who could testify on the same evidence, a fact which is reflected at page 39 of the proceedings and the defence counsel did not complain. Mr. Magesa pressed that the move of dropping the said people as witnesses was to save time.

With regard to what the appellant did to PW 3, learned State Attorney submitted that every Tanzanian citizen has the right not to be subjected to torture of inhuman treatment as per Art. 13 (6) (e) of the Constitution. He urged this court, in its deliberation, to be guided by the Constitution and the International Covenant on Civil and Political Rights. In that spirit, he prayed the court to consider compensation to the victim due to inhuman treatments he suffered.

In his rejoinder Mr. Rweikiza briefly reiterated his submission in chief and admitted that in Criminal cases conviction precedes the sentence and

aggravating and mitigating factors but explained that the Magistrate delivered the judgment and that a conviction alone is not a judgment. He insisted that it was a gross error. Further, he prayed that all the evidence related to PF3 and, therefore, such if the exhibit is expunged, all evidence should go as well. Counsel for the appellant also laid emphasis that the cited section 47(1) and (2)of the Evidence Act was used to analyse the evidence which led to the appellant's conviction, the fact which adversely affected the whole trial.

On the witnesses' contradiction, Mr Rweikiza insisted that the contradiction went to the seriousness of the harm allegedly sustained by the victim and that is why they referred him to Muhimbili Hospital but did not go there and instead went to another hospital and made no report on the extent of the victim's injuries. He argued that the case of **Kachembeho** is not applicable and contended that it was not a human error but an apparent error. Learned counsel also emphasized that the learned Magistrate inserted her own words which was not reflected in the evidence of the witnesses. Admitting that no number is required to prove a certain fact, learned Counsel explained, however, that their concern was that there were material witnesses but they were not called and no reason was given for the failure. He argued that since PW 2 and PW 3 were lovers, they could not give evidence which was favourable to the appellant.

In conclusion, Mr. Rweikiza, admitting that the Constitution and the international instruments are good law, stated that they are applicable where the case is proved to the required standard. Counsel for the appellant opposed the respondent's request on payment of compensation arguing that the grant of an order would amount to double jeopardy.

I have carefully perused the record of the trial court. likewise, I have, with great circumspection, taken into account the submissions by learned counsel for the appellant and the learned State Attorney. Having done so, I am now in a position to determine the appeal.

As far as the first ground is concerned, the appellant's complaint was that the judgment was delivered before considering aggravating and mitigating factors hence an irregularity which prejudiced the appellant and amounted to unfair trial.

I have taken ample time to study the trial court's record and in the end I am satisfied that the impugned judgment does not bear out the appellant's complaint. According to the judgment of the trial court, the learned Resident Magistrate, after analysing the evidence of both the prosecution and the defence, observed at pages 26 and 27 of the typed judgment thus:-

"basing to the above analysis of the prosecution and defence case I am of the opinion that the prosecution had proved their case beyond reasonable doubt as provided under section 3 (2) (a) of the Evidence Act, Cap. 6 R.E.2002.

Hence I find the accused person MT 92665 CPL Shabani Yusuph Mkondya guilty for the offence of grievous harm contrary to section 225 of the Penal Code [Cap 16 R.E.2002]. I proceed to convict the accused persons one MT 92665 CPL Shabani Yusuph Mkondya for the offence of Grievous harm contrary to section 225 of the Penal Code [Cap 16 R.E.2002]

Sgd: M.A. BATULAINE-SRM

20/04/2020

PREVIOUS RECORD

S/A: Nil. But I pray the accused person to be given severe sentence so as to be a lesson to him and to other people with behaviour like that of accused person and I pray the victim be given compensation.

Sgd: M.A. BATULAINE-SRM

20/04/2020

MITIGATION

ACCUSED: I am the first offender and I have family depending on me. I pray lenient sentence.

Sgd: M.A. BATULAINE-SRM

20/04/2020

SENTENCE

This court has considered the accused mitigating factors. Hence, I sentence the accused person to serve 3 (three) years imprisonment.

Sgd: M.A. BATULAINE-SRM

20/04/2020

CRT: R/A explained.

Sgd: M.A. BATULAINE-SRM

20/04/2020

According to the above excerpt, the learned Resident Magistrate did not deliver judgment before considering the aggravating and mitigating factors and did not contravene any law. It is true that the typed trial proceedings shows that judgment was delivered and then aggravating and mitigating

factors received and sentence passed but, as the record above shows, the judgment was in strict compliance with the dictates of the law. There was neither prejudice nor unfair trial. The first ground of appeal falls away.

In the second ground of appeal, the learned Magistrate is being faulted for contravening the rules of evidence upon admitting and marking the purported victim's PF 3 as exhibit P 1 without first being tendered by the prosecution side. Mr. Rweikiza insisted that there is nowhere the prosecution prayed to tender the PF 3 as exhibit. Reference was made to page 20 of the trial court's proceedings. Mr. Magesa, on the other hand, admitted that the typed record of proceedings do not show if the prosecution prayed to tender the PF 3 but learned State Attorney asked the court to peruse the handwritten script.

I have considered the argument by learned counsel for the appellant and the prayer by learned State Attorney. It is true that at page 20 of the typed judgment, the record shows that when PW 1 was giving his testimony and during examination in chief, he is recorded to have said:-

"Then we referred the patient to Muhimbili Hospital for further check-up.

I thereafter full patient PF 3. I can identify the PF 3 as it has my handwriting, my name, signature my ID No.

State Attorney: I pray to show PW 1 the PF 3 for identification

Advocate Deudedit: No objection

Court: the victim's PF 3 is admitted and marked as Exhibit P. 1..."

The hand written script, however, does not bear out the appellant's complaint on this second ground. It is recorded thus:-

"....Then we referred the patient to Muhimbili Hospital for further checkup. I thereafter fill patient PF 3. I can identify the PF 3 as it has my handwriting, my name, signature, my ID No.

S/A: I pray to show PW 1 the PF 3 for identification.

Adv. Deusdedit: I have no objection

CRT: Witness shown the document and identify the same.

Witness: I pray to tender this PF 3 as Exh.

S/A: We pray to tender the PF 3 as Exh.

CRT: Adv. Deusdedit for Accd is asked if he has any objection

Adv. Deusdedit: no objection

CRT: the victim's PF 3 is admitted and marked as Exh. P 1.

CRT: PW 1 reads Exh. P 1 before the Court.

The PF 3 reads that ....."

With that recorded proceeding, the trial court complied fully with the law as not only was the PF 3 sought to be tendered by the Prosecutor but also it was prayed to be so tendered by the testifying witness (PW 1) and the defence counsel Mr. Deusdedit did not raise any objection and the said document was tendered, admitted and marked as exhibit P 1. Its contents were later read out in court. I find that there was neither gross nor incurable irregularities in the admission of and reliance on the PF 3 which is exhibit P 1. The appellant's second ground of appeal has no merit.

In the third ground of appeal, it is contended that the trial Magistrate erred in law and in fact by considering PW 1's evidence as admissible and relevant to the purported fact in issue under section 47 (1) (2) of the Evidence Act as reflected at page 4 of the typed proceedings, a section which does not exist at all in the above cited law.

It is true as pointed out by Mr. Rweikiza that the learned Resident Magistrate at page 4 of the typed judgment purported to admit the evidence of PW 1 as relevant to the fact in issue as observed that:

"PW 1 justified that his remarks were that the patient eyes and lips were swollen bleeding from nose and mouth. Patient had traumatic

blunt of the heard with possible concussion of the brain (mtikisiko wa ubongo).

The above evidence by PW 1 was admitted as relevant to the fact in issue as per section 47 (1) (2) of the Evidence Act, Cap. 6 R.E.2002".

Section 47 of the Evidence Act which is on opinion evidence provides:

'47.-When a court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger or other impressions, the opinion, upon that point of persons (generally called experts) possessing special knowledge, skill, experience or training in such foreign law, science or art or question as to identity of handwriting or finger or other impressions are relevant facts".

Counsel for the appellant argued that all evidence received under a non-existent law was a nullity and should be totally disregarded. Learned State Attorney did not buy the appellant's contention that the section does not exist. He said that there is such a section only that it has no the said subsections. He contended that here, the Magistrate was trying to show the relevancy of expert evidence. In the alternative, Mr. Magesa argued that even if there was such an irregularity the same is curable under section 388 of the

Criminal Procedure Act and that the appellant did not show how he was prejudiced.

With due respect, I align myself with what Mr. Magesa stated with regard to the complaint in the third ground of appeal. In the first place, there is no dispute that section 47 exists in our law that is the Evidence Act. The problem with the learned Resident Magistrate was on the cited sub-sections (1) and (2) which do not exist. This irregularity did not prejudice the appellant and is curable under section 388 of the CPA. Second, section 47 of the Evidence Act is on opinion evidence. Admittedly, opinion rule states that evidence of an opinion is not admissible to prove subject matter of the opinion. However, there is an exception which is that opinion evidence from an expert witness is admissible if it is wholly or substantially based on specialized knowledge that the witness has obtained from training, study or experience. There is no gainsaying that PW 1 was an expert and his opinion was, therefore, admissible and the trial court was justified to form an opinion of science upon PW 1 who possessed knowledge, skill, experience or training in science as to the relevant fact. This is, I think, the gist of section 47 of the Evidence Act.

The third ground of appeal collapses.

The appellant's complaint in the fourth ground of appeal is on the alleged contradictory testimonies of PW 1 and PW 3. Reference was made to pages 4 and 5 (PW 1) and page 11 (PW 3) of the trial court's judgment.

Going by the record of the trial court, the learned Resident Magistrate is recorded to have stated:

> "at Nyangao Hospital they don't have CT Scan and MRI machines that is why they transferred the viction to Muhimbili "

The same Magistrate is recorded to have stated at page 11 thus:

> "They took PW 3 to Nyangao Hospital, he was examined by X-ray and admitted. On 8.8.2019 at 1100 am PW 3 was transferred to DSM at Mzena Hospital for further medication."

According to the proceedings, PW 1 is recorded to have testified at page 21 that:

> "After examining the patient preparations were done by the Doctor in charge to take the victim to Muhimbili Hospital the same day"

The same PW 1 gave reasons why it was resolved that PW 3 be referred to Muhimbili Hospital. When cross examined by Mr. Deusdedit, he is recorded to have stated at page 22 that:

> "At Nyangao Hospital we don't have CT Scan and MRI that is why we transferred the victim to Muhimbili"

Was the transfer effected as directed? Again, PW 1 provided an answer when he said that:

> "I don't know if the CT Scan and MRI examination was done at Muhimbili Hospital".

With respect to PW 3, the record speaks at pages 32 and 33 of the typed proceedings thus:

> "They took me from Police Station to Nyangao Hospital. At Nyangao Hospital got examination by X-ray and admitted. On 8.8.2019 at 11:00 am I was transferred to Dar es Salaam at Mzena Hospital for further medication".

On cross examination, PW 3 told the trial court that:

> "I was taken to Mzena Hospital in Dar.....I was not taken to Muhimbili Hospital only Mzena Hospital".

With regard to PW 4 who was involved in the investigation of the case, his evidence was clear at page 38 of the typed proceedings that:

> "The victim was admitted at Nyangao Hospital and transferred to another hospital at Dar which I don't know it."

In my evaluation of the evidence of PW 1, PW 3 and PW 4 and the observation by the learned trial Resident Magistrate, I have found no any contradiction whatsoever in the testimonies of these prosecution witnesses as counsel for the appellant wanted the court to believe. According to the evidence on record, PW 3 was taken from Police Station to Nyangao Hospital where he underwent full blood picture and X ray diagnosis and then admitted. Since PW 1 and the in charge of Nyangao Hospital were of the opinion that PW 3 had sustained fracture on the base of the skull and such wounds causing intracranial bleeding could lead to the death, they resolved to refer PW 3 to Muhimbili Hospital as at Nyangao Hospital the CT Scan and MRI which are essential medical devices to diagnose such problems were missing. As the evidence reveals, PW 3 was not transferred to Muhimbili Hospital as had been directed by PW 1 and the in charge of Nyangao Hospital, instead, he was taken Mzena Hospital which is also in Dar es Salaam and was admitted for a week. This narration by PW 1 and PW 3 cannot by any stretch

of imagination, be termed as a contradiction. Both PW 1 and PW 3 were talking on the actual events which occurred.

Even if, for the sake of argument, there was such a contradiction, I am far from being convinced that it affected the truthfulness of the testimonies of PW 1 and PW 3 whose credibility was not shaken. This fourth ground fails as well.

I now turn to the fifth ground of appeal. It is true as submitted by Mr. Rweikiza that the learned Resident Magistrate observed at page 8 of the typed judgment that:

> *"in considering the above evidence it raised presumption that accused went at PW 2 room that night with common intention of finding the man who was with PW 2 after the break up and probably he knew that victim was inside".*

It is contended by Mr. Shadrack Rweikiza that such allegations and testimonies were not adduced in trial by any prosecution witness and, therefore, the magistrate turned herself into a witness and adduced evidence. Mr. Magesa challenged this argument and submitted that the comment by the learned Resident Magistrate was made after taking into account all the

prevailing circumstances during the assault and such observation was backed up by the evidence of PW1, PW 3 and PW 4.

I think Mr. Rweikiza is wrong in his argument. The reasons for this is not far-fetching. In the first place, there is no dispute that the appellant admitted that when he went to PW 2 in that night he had not given her any prior notice. The appellant, at page 49 of the proceedings is recorded to have said:

"I did not notify my fiancée that I will visit her that day."

PW 2 is at page 28 of the trial court's proceedings is recorded to have said:

"Shaban came with a motor cycle for adultery, kufumania", further, "I am not the source of that fighting because I did not have any more relationship with Shaban before the incident. As me and Shaban did break up on 26/07/2019.

With that glaring evidence, the trial court's observation complained of above was a reflection of what both the appellant and PW 2 had told the trial court in their testimonies. There was nothing new the Magistrate can be said to have invented. This ground lacks merit.

The sixth ground of appeal need not detain me. In **Seperatus Theonest@ Alex v. R**, Criminal Appeal No. 135 of 2003, the Court of Appeal had this to say:

> "the prosecution does not have the obligation to produce witnesses irrespective of the consideration of number and reliability, for, "the evidence has to be weighed and not counted"

In his submission, Mr. Magesa stated that PW 2's parents were called and attended the court but after PW 2 and PW 3 who were eye witnessed had testified and since their evidence was corroborated by that of PW 4, the prosecution saw no need of letting them to give their testimonies and to avert wastage of time, they sought them to be released. Although Mr. Rweikiza contended that these witnesses were material, he did not go further and explain which material evidence they could have offered if they had testified. In my view, what PW 2's parents could have testified on was achieved through PW 2 and PW 3 who were eyewitnesses to the incident and whose credibility was not substantively impeached, rather, their evidence was supported in material particular by the evidence of PW 4, a police officer who

investigated the case and tendered in court exhibit P. 2. The sixth ground of appeal collapses.

With the above deliberations, I am satisfied that the cases cited by the learned Counsel for the appellant in support of the appeal are distinguishable and hence inapplicable in the circumstances of this case.

Was there evidence to implicate the appellant with the commission of the offence? I think the answer must be in the positive. As correctly argued by Mr. Magesa, the evidence of PW 2 and PW 3 clearly indicated that the appellant, on that material day assaulted PW 3 by kicking, punching, tying and pouring water on him while stark naked. They were supported in this by the evidence of PW 4 who investigated the case and was well known to the appellant. PW 5 who also drew the sketch plan supported the evidence of these witnesses. In his evidence, PW 1 who medically examined PW 3 testified that PW 3 had a fracture on the base of the skull causing intracannial haemorrhage whose wounds could lead to death. PW 1 was supported in this by the PF 3 he filled in and which was tendered and admitted in evidence as exhibit P 1. According to exhibit P 1, on medical practioner's remarks, the patient (PW 3) presented with bilateral swollen upper lip, bleeding per nostrils, with diagnosis of traumatic blunt trauma of head with possible

concussion of the brain. The offence of grievous harm is created under section 225 and defined under section 5 both of the Penal Code [Cap. 1 R.E.2002, now 2019]. As to its proof, this court is satisfied as was the trial court that the victim's testimony and the medical evidence proved the commission of the offence. Further, it was amply proved that PW 3 sustained grievous harm, the harm was caused unlawfully that is it was not authorised or justified and the culprit was not excused. PW 2, PW 3 and PW 4 were clear that the culprit was the appellant. Further, the appellant admitted to have not only been present at the crime scene but also to have ran after and got hold the victim, took him to the police station after which he was locked up.

With this evidence, I am satisfied and hereby find that the prosecution had proved the case against the appellant beyond reasonable doubt. The custodial sentence of three years prison term was, in the circumstances of the case, justified.

The appeal is dismissed in its entirety

W.P. Dyansobera

Judge

2.12.2020

This judgment is delivered under my hand and the seal of this Court on this 2nd day of December, 2020 in the presence of Mr. Shadrack Rweikiza, learned Advocate for the appellant, the appellant and Mr. Paul Kimweri, learned Senior State Attorney for the respondent.

Rights of appeal to the Court of Appeal of Tanzania explained.

W.P. Dyansobera

Judge

2.11.2020