IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 158 OF 2020

(Arising from Criminal Case No. 84 of 2020 of the District Court of Sengerema, District at Sengerema before Hon. Salehe (RM))

SIWEMA JOHN..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last Order: 16/11/2020
Date of Judgement: 14/12/2020

F. K. MANYANDA, J.

The appellant was sent to live behind the bars for five years and ordered to pay compensation of TShs 500,000/= to the victim. This order followed her conviction of the offence of causing grievous harm, contrary to section 225 of the Penal Code, [Cap. 16 R. E. 2019] with which she was charged.

She is aggrieved by both the conviction and sentence, hence, she has come to this Court on appeal with five grounds of appeal namely: -

1. That, the conviction was wrongly based on the evidence which is too shaky, uncorroborated and unproved in contrast to the strong self

defence and that of provocation evidence, which portrays reality of the matter.

2. That, the trial Court erred in law and facts when analyzed the evidence in unfair manner and it thus ended up by turning blind eyed on the fact that neither PF3 (exhibit P1) nor the claimed (sic) confession statements (exhibit P2) were read over in Court before and/or after being introduced and admitted into evidence.

3. That, the trial Court erred in law and fact to convict the appellant basing on evidence which has incurable intricacies regarding the time of the alleged crime which reflects unreliable and concoction elements, thus unsafe to be relied upon.

4. That, the conviction and sentence was wrongly based on the victim's unlawful evidence as it was recorded without being subjected under solemn oath, or affirmation.

5. That, the purported appellant's admission, that is, confessional statement was involuntarily obtained out of the prescribed time limitation, worse enough the trial Court did not speculate (sic) about the unexplained delay to arraign the appellant.

Briefly, the facts of this matter are that on the fateful day 04/05/2020 at about 19.00 hours the Appellant while strolling down town at the center of Tabaruka Village in Sengerema District, Mwanza, arrived at a shop of one Lameck Marco where she decided to cool her thirst by drinking soda.

While thereat, the victim namely, Evarist Elias, arrived. He also bought apple punch juice for quenching his thirst. He stood where the Appellant was standing. Suddenly there develop a quarrel between them, that is, the Appellant, Siwema John and the victim, Evarist Elias which culminated into a fight. A multitude of people gathered some of whom started to belabor the victim. During that chaos, the victim was hit with a bottle of soda on his head and fell down.

It turned that a report made to police accused the victim as being a person who assaulted the victim. The police arrested both the appellant and the victim. On interrogation the appellant explained that the victim insulted her modest. That upon the victim arriving at the shop where she was standing, he too stood in front of her so close such that his stomach and chest touched hers and started to molest her while touching her breasts, waist and buttocks. The Appellant did not condone the victim's conduct, as a result a quarrel developed between them which culminated

into a fight. Neighbouring people helped her by belaboring the victim. However, as a result of the report made to police, they disbelieved her story and believed thao of the victim that it was the appellant who hit him with a bottle of soda thereby injuring him. She was arrested and charged with the offence of causing grievous harm. After prosecution, she was ultimately convicted and sentenced to imprisonment in jail. She was also ordered to pay compensation of TShs. 500,000/=to the victim. She is aggrieved by the said conviction and sentence, hence this appeal.

At the hearing of the appeal, the Appellant appeared in person and argued the appeal unrepresented. While the Republic enjoyed the services of Mr. Karumuna, learned State Attorney.

The Appellant, Siwema John, started arguing her appeal by adopting her grounds of appeal she presented in the petition of appeal.

She also added the following: - That on 04/05/2020 while at the shop she was invaded by the victim, a young man known as Evarist who started to molest her by touching her breasts, waist, buttocks. She did not consent and since the acts were done openly in public, she felt insulted, shamed and very uneasy. She pushed him onto the ground. When he got up, he started beating her and strangling her neck. People around got

angered, they gathered and started helping her in the course, the victim was hit with a bottle of soda on his head. When the police arrived, they arrested both the appellant and the victim. At the police station she was charged with the offence with which she was convicted.

She argued that the victim was assaulted by villagers. She added that the victim admitted to have indecently assaulted her. Further, she contended that the prosecution evidence is contradictory.

She prayed her appeal to be allowed.

On the other hand, Mr. Karumuna for the Republic supported the conviction, sentence and compensation order. He argued that the evidence was satisfactory and proved the offence through the testimonies of PW1, PW3 and PW4. He was of the view that PW1 is the victim who said that he was beaten by the appellant using a soda bottle on his head twice and got seriously injured. PW3 is an eye witness who saw the appellant hitting the victim.

PW4 is a doctor who examined the victim and observed serious injuries. He observed that since the trial Court disbelieved the defence evidence of

self defence by the Appellant Mr Karumuna called upon this Court to disbelieved the same.

Mr. Karumuna argued grounds two and five together which concern admission in evidence of the Appellant's cautioned statement and PF3. However, Mr. Karumuna conceded that since the two documents were not read loudly in Court after been admitted, then the same should be expunged. He was of the views that even if the two documents are expunged, still it does not weaken the prosecution evidence as there is oral evidence supporting the charge.

In ground three which challenges the trial Court for failure to resolve contradictions as to time of the incident between 17.00 and 19.00 hours as lead by the prosecution, Mr. Karumuna conceded existence of the contradictions. However, he pointed that the said contradictions are minor and do not go to the root of the case. He contended that the same many be ignored, because the act of the appellant beating the victim exists.

Lastly Mr. Karumuna submitted admitting that the testimony of PW1 was received without oath or affirmation. However, he quickly pointed out that even if PW1 was not sworn, his evidence cannot be expunged. Instead, Mr. Karumuna suggested that the same needs corroboration. He

was of the view that PW3 corroborates PW1. He added that the same is valid and it is as good as unsworn evidence which when corroborated, may be acted upon. He did not cite any authority to support his position. He called upon this Court to dismiss the appeal.

I will start with ground four which was argued by Mr. Karumuna as a last ground.

In this ground the complaint is that the testimony of the complainant PW1 was taken without oath. Mr. Karumuna admits the truth of this complaint.

However, he takes refuge in argument that unsworn testimony is only reduced to evidence taken without oath which can, if corroborated, be acted upon. This Court is not ready to sail with him in that boat. Taking of evidence by Courts is controlled by statutes. In criminal cases section 198 (i) of the Criminal Procedure Act, [Cap. 20 R. E. 2019] mandatorily provides that every witness shall be examined upon oath or affirmation unless is exempted or permitted by any written law to testify without oath. It reads:-

> *"198(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the*

contrary, be examined upon oath or affirmation in accordance with the provisions of the Oath and Statutory Declaration Act."

This provision of the law was interpreted by the Court of Appeal of Tanzania in the case of **Juma Isamil and Another vs Republic**, Criminal Appeal No. 501 of 2015 in the following words: -

"Two, the record also shows that all five prosecution witness who were adult, gave their evidence without being sworn or affirmed as mandatorily required by section 198 of the Act. Indeed, there is nothing on record to suggest that they were exempted by any other law from taking oath/affirmation before they gave evidence. The taking of their evidence without oath/affirmation is contrary to the law".

The Court of Appeal of Tanzania quoted the provisions of section 198(1) of the CPA already reproduced above. Then it went on clarifying as follows, that: -

"The section is couched is mandatory terms, it must be complied with. Since the law was not complied with, ***the evidence of all five prosecution witnesses which was given without oath or affirmation has no evidential value****. (emphasis is added)".*

The Court of appeal added that: -

"since the entire prosecution evidence was not taken on oath or affirmation contrary to the dictates of the law there was no evidence upon which a prima facies case could be established against the appellants."

See also the case of **Mwita Sigora @ Ogora vs Republic**, Criminal Appeal No. 54 of 2008 (CAT – unreported).

To this end, the evidence of PW1 which was not taken upon oath or affirmation and there is no any reason or law which exempted him from taking oath or affirmation, is as good as no evidence against the appellant.

Now in the absence of the evidence of PW1, there remains no any other evidence to support the charge against the appellant.

Turning to ground one, where the complaint is on unsatisfactory evidence, assuming the evidence of PW1 is on record, this Court after going through the testimony of PW1 and that of the appellant, fails see what the reason for disbelieving the evidence of the appellant that there was a fight between them. While PW1 admitted to molest the appellant, the appellant said she was molested without her consent.

A misunderstanding developed between them in which the appellant pushed PW1 who fell in the ground. When he got up, he took hold of her, assaulting and strangulating her until people arrived to rescue her. PW1 says it was the appellant who assaulted him and the appellant says it was the people who had come to her rescue who assaulted him.

Here there are two versions. PW3 says he saw the appellant assaulting PW1, why didn't he also say that he saw the people who came to her rescue. I say so because the fact that there were persons other than PW1 and the appellant is not challenged nor objected.

In criminal cases the accused's duty is only to raise doubt while the prosecution is always required to prove the case beyond all reasonable doubts.

Mr. Karumuna submitted that since the trial Court disbelieved the defence case, he also disbelieved the same without giving any reason. Analysis and evaluation of the evidence is important in circumstances of a case like this one, where the appellant raised reasonable doubt that PW1 was attacked by other persons who came to rescue her.

In my opinion the conducts of PW would not have been tolerated by any prudent person, hence, likelihood of any other person to rescue her from the laws of PW1 was high. It was not right and correct in law for the trial Court to disbelieve the appellant's evidence without assigning sufficient reasons.

These being the main areas of complaint, this Court finds that the appeal has merit. There is no need of dealing with other grounds of appeal.

Basing on the reasons above, I do hereby allow the appeal. I quash the conviction of the offence of causing grievous harm contrary to section 225 of the Penal Code, which the appellant was charged with. I also set aside the sentence of five years imprisonment and set aside the order for compensation of TShs. 500,000/=, to pay the complainant Evarist Elias.

In lieu thereof I order the appellant to be released at liberty forth with unless otherwise withheld in connection with other lawful matters. It is so ordered.

F. K. MANYANDA
JUDGE
14/12/2020