IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

(PC) CRIMINAL APPEAL NO. 7 OF 2020

(Appeal from the Judgment of the District Court of Geita at Geita (Bigirwa, RM dated 15th of May, 2019 in Criminal Appeal No. 8 of 2019)

MASHAKA RWEJELA ..... APPELLANT

VERSUS

FAIDA STEPHANO ..... RESPONDENT

JUDGMENT OF THE COURT

20th May, & 22nd May, 2020

ISMAIL, J.

The appellant in the instant matter is a victim of a back to back defeats in two lower courts. His quest for justice commenced in at Nyankumbu Primary Court, in Geita, where he instituted a criminal case which was registered as PC Criminal Case No. 1396 of 2018. His allegation is that the respondent, the accused person then, assaulted him with kicks and blows, thereby causing him pain and bodily harm. As a result, the appellant reported the matter to police who investigated the

matter and arraigned the appellant in court facing the charge of with assault and causing bodily injuries, contrary to section 241 of the Penal Code, Cap. 16 R.E. 2002.

Having heard the case, the trial court gave a verdict that vindicated the respondent. The court was of the view that the appellant had not proved the case at the required standard of proof. It acquitted the respondent. The respondent's acquittal was hotly contested by appellant who chose to take his battles to the District Court which upheld the not guilty finding made by the trial court. In a decision delivered on 15th May, 2019, the trial court found that evidence adduced during trial did not meet the requisite threshold to found a conviction against the respondent and that the trial court was right to hold so. The first appellate court's decision did not go well with the appellant. He made a bold move of enlisting this Court's services through an appeal. The petition of appeal filed in this Court on 24th May, 2019 has three grounds of appeal, reproduced in verbatim, with all their grammatical challenges, as follows:

1. *That, the trial Court erred in law and fact by holding that the appellant failed to prove his case beyond reasonable doubt while there were enough and sufficient evidence to prove the case.*

2. *That, the trial court erred in law and fact for failure to take into account the evidence of PF3 adduced by the appellant.*
3. *That, the trial court erred in law and fact for failure to evaluate the evidence which was watertight in the appellant's side.*

For a better understanding of the instant appeal, it is significant that brief facts which bred the appeal, as gathered from the proceedings, be stated. On 12th November, 2018, the appellant, along with police officers, was following up on suspected assailants of his herdsman. This tracing mission took him to Kisota village in Buguluba Ward, within Geita district and region. It is alleged further that on getting to the village office, the appellant met the respondent and a host of other village leaders. On enquiry about the suspects, the respondent who was serving as the village chairman took the appellant out of the office, strangled and felled him down and ordered that he should be put in custody as the respondent was talking to the police officers who came with the appellant. The assault resulted in multiple injuries sustained in the waist, chest and arm. The appellant was taken to the police station where he lodged a complaint and was issued with a PF3 which enabled him to get medical services from Geita Regional Hospital. On 19th November, 2018, the respondent was arrested and arraigned in court, facing assault charges to which he pleaded

not guilty. The respondent's defence is that the respondent was not assaulted. Instead, he was put in custody for his own safety as enraged people who were baying for his blood following destruction of their crops by the appellant's cattle which were left to wander and graze on their farmlands. He denied ever administering an assault on him or at all. At the conclusion of the trial proceedings, the trial court held the view that the appellant had not proved his case beyond reasonable doubt. Consequently, it acquitted the respondent of the offence with which he was charged. The appellant's effort to reverse the decision fell through when the first appellate court found no fault with the trial court's decision. It upheld the decision and dismissed the appeal. Undaunted, the appellant has preferred the present appeal.

Hearing of the appeal pitted the parties who were unrepresented. In his brief address and arguing in no particular order and reference to the grounds of appeal, the appellant's gravamen of his complaint is that the trial court and the first appellate court ignored his evidence which was to the effect that he was attacked and put under restraint. He took exception to the trial court's failure to consider the PF3 which was tendered to prove that he was attacked and injured. While admitting that he did not procure

attendance of the doctor who attended him, he submitted that the PF3 which appears to have been filled on 19th November, 2018, was actually filled on 12th November, 2018, and handed to him on the same day it was filled. He also decried the trial court's failure to properly evaluate evidence. He takes the view that, had the evidence been evaluated properly, the trial court would come to the conclusion that the PF3 was filled on 12th November, 2018 and not otherwise.

On his part, the respondent was equally concise in his address. He defended the first appellate court's endorsement of the trial court's findings and satisfaction that the PF3's authenticity was wanting. The respondent also contended that the trial court's decision was informed by the fact that the maker of the PF 3 was not called upon to testify and authenticate it. Overall, the respondent was of the view that evidence in support of the appellant's case was neither watertight nor was it impeccable to sustain a conviction. He prayed that the appeal be dismissed.

In rejoinder, the appellant reiterated what he stated in his submission in chief and urged the Court to allow his appeal.

From the parties' rival submissions the profound question for determination is whether the decisions of the lower courts were tainted

with any flaws that make them irregular and liable to reversal. While I choose to deal with the three grounds in no distinct manner, let me preface by stating that, in dealing with cases, courts of law are guided by a canon of justice as emphasized in ***Hemed Said v. Mohamed Mbiiu*** [1984] TLR 113 to the effect that ***"the person whose evidence is heavier than that of the other is the one who must win***. This implies that courts should be moved to decide this or that way by the weight of evidence adduced by the parties and after a thorough evaluation of such evidence in its totality. In assessing the evidence adduced by the disputants, a trial court ought to take cognizance of the key principle in the rules of evidence to the effect that, he who alleges as to the existence of a certain fact must actually prove it and the standard of proof is beyond reasonable doubt. This is truer in cases of serious legal consequences such as criminal cases, where evidence to be relied upon in founding a conviction must be nothing short of unimpeachable and impermeable. Thus, where allegations are based on capricious or fictional set of facts the trial court should attach no weight to it. This conventional principle of evidence is in consonance with the provisions sections 110 and 111 of

Evidence Act, Cap. 6 R.E 2002, which is, by and large, a replication of what obtains in the Indian Evidence Act, 1872.

Commenting on the provisions of the latter statute, the legendary authors of Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by Lexis Nexis, posted the following commentaries at page 1896:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof****. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

The foregoing position is in sync with the reasoning of Lord Denning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372 (at p. 340), which was cited with approval in the Court of Appeal of Tanzania's decision in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (Mwanza-unreported). The renowned Lord Justice was quoted as saying:

"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."

My scrupulous review of the record of the trial proceedings reveals that the appellant's case was, to a great extent, premised on the evidence of the PF3 which was tendered in court as exhibit P1. It is the testimony which was heavily relied on by the appellant in pursuit of his complaints. It reveals the gravity of the injuries sustained as a result of the assault administered on him. It is why its reduced consideration by the lower courts drew the appellant's fury. As the appellant rightly contended, the trial court attached no weight to it on the ground that its authenticity was suspect, it having been filled a week after it was allegedly issued by the police, and after the appellant had been treated. The trial court was also of the firm view that in the absence of the doctor who allegedly attended the

appellant and filled exhibit P1, the appellant's case had not been pushed to a notch that would be said to amount to a proof beyond reasonable doubt. This is the position which is also shared by the first appellate court much to the appellant's utter dismay.

A closer look at exhibit P1 paints a gloomy picture that validates worries expressed by the lower courts. Whereas the appellant contends that he was assaulted on 12th November, 2018 and was issued with the said exhibit on the same day, attended to by the doctor that same day, what is gathered from the said exhibit is that the same was issued on 13th November, 2018 and was filled by the medical practitioner on 19th November, 2018. This is a stark contrast which has not been explained out and the appropriate person in that respect would be the medical practitioner who was not procured by the appellant. Left unexplained, the loose ends in the testimony had the effect of diminishing its probative value and letting the case become weak and unsupportable. It is not comprehensible that the appellant would be attended to by a medical practitioner on 12th November, 2018 using a PF3 which was issued a day later. It is not comprehensible, either, that the said PF3 which was filled on 12th November, 2018 and handed to the appellant on the same day would

subsequently have a date that indicates that it was filled a week later i.e. 19th November, 2018. These pregnant disharmonies would not go unnoticed by the lower courts and when they were put under scrutiny, they were found to beg for answers which were never provided by the appellant. Presence of the medical practitioner would, in the right view of the lower courts, shed some more light. I subscribe to that line of thinking.

In view of these unbridgeable gaps in the appellant's testimony I am convinced as did the lower courts, that the appellant's case was utterly underwhelming and one that deserved nothing but a dismissal. I find no justification to fault the decisions of the lower courts. I uphold them.

In the upshot, I find the appeal barren of fruits and I dismiss it.

Right of appeal explained.

It is so ordered.

DATED **at MWANZA** this 22nd day of May, 2020.

M.K. ISMAIL

JUDGE

Date: 20/05/2020

Coram: Hon. M. K. Ismail, J

Plaintiff: Present online – Mob. No. 0683 388 905

Defendant: Present online – Mob. No. 0744 074 495

B/C: Leonard

Court:

In view of the COVID 19 pandemic, and pursuant to the order (if any) parties are present online; the appeal is heard by way of Audio Teleconference.

Sgd: M. K. Ismail

JUDGE

20.05.2020

Court:

Judgment delivered in chamber, in virtual attendance of the parties and in the presence of Mr. Leonard B/C, this 22nd May, 2020.

THE HIGH COURT OF TANZANIA

M. K. Ismail

JUDGE

At Mwanza

22.05.2020