IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

(PC) CRIMINAL APPEAL NO. 8 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. 9 of 2019)

MASANJA DONGO ..... APPELLANT

VERSUS

ZACHARIA LAZARO ..... RESPONDENT

JUDGMENT OF THE COURT

20th May, & 22nd May, 2020

ISMAIL, J.

This is a second appeal from the decision of Nyankumbu Primary Court, in Geita, in respect of PC Criminal Case No. 1393 of 2018. In the said proceedings, the respondent was arraigned in court, charged with assault and causing bodily harm, contrary to the provisions of section 241 of the Penal Code, Cap. 16 R.E. 2002.

At the conclusion of proceedings, the trial court found that evidence led by the appellant was so insufficient to support the charge levelled

against the respondent. In consequence, the trial court acquitted him of the charges levelled against him. This decision did not amuse the appellant. He embarked on a journey that took him the District Court where his appeal nose-dived. Vide a decision delivered on 15th May, 2019, the District Court held the view that the appeal was barren of fruits and it dismissed it, upholding the trial court's decision. Still undaunted, the appellant took a ladder up, to this Court, with a trio of grounds of appeal, reproduced in verbatim 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 quick appreciation of the reasons behind this appeal, it is apt that brief material facts of the case, as deduced from the trial court's proceedings, be stated. It was alleged that at around 12.30 hours on 9th November, 2018, the appellant was grazing cattle at Kasota in Bugurula Ward, within Geita region. In the process, he met the respondent and his

colleagues, believed to be around ten, and attacked and assaulted the appellant, thereby inflicting bodily harm and multiple injuries in the arms and at the back. The respondent was singled out as the assailants' ring leader. After a scuffle that lasted for some time, the appellant scampered for safety and fled to his employer from whom he obtained an assistance that enabled him to report the matter to the police where at he was issued with a PF 3 which enabled him to access medical services. Investigation of the matter led to the respondent's arrest and arraignment in court where a charge of assault and inflicting bodily harm was read. He pleaded not guilty, culminating in a trial in which one witness for the appellant and three for the respondent testified in Court. The respondent's contention is that he was not at the scene of the crime on the date, meaning that he was not involved in the commission of the offence. The trial court drew a conclusion that a case had not been made out to warrant a conviction against the respondent. It acquitted him of any wrong doing. The appellant's effort to reverse the decision fell through when the first appellate court upheld the trial court's decision, holding that the prosecution's evidence was too weak to sustain any conviction. This

decision has sparked a rage that has seen the appellant institute the instant appeal.

At the hearing of the appeal, both of the disputants fended for themselves and, not unexpectedly, their submissions were laconic. The appellant was of the view that the courts below did not properly address issues raised in the appeal. He contended that the appellant was a leader of a gang of 12 assailants who attacked him. The appellant urged the Court to use the grounds of appeal and hold that the decision in the trial proceedings did not fairly determine the matter. He prayed that his appeal be allowed.

The respondent leapt to the defence of the trial court and the decision of the first appellate court. He was of the view that the appellant's testimony was disharmonious and unreliable. He held the view that he did not know the appellant and that they don't live in the same village. Pointing out the disharmony in the appellant's testimony, the respondent contended that while in the primary court, the appellant testified to the effect that there were 10 assailants, while the contention in this Court is that the assailants were 12. Terming the prosecution evidence as insufficient, the respondent held the view that the courts below were right

in dismissing the appellant's complaint. He prayed that the Court should be upheld the decision of the lower courts and dismiss the appeal with costs.

The appellant rejoined by submitting that the assailants were 10 and not 12 and that the rest of the assailants were not arrested and arraigned in court.

From these brief contending submissions, the question to be resolved is whether both of the lower courts were erroneous in their findings which eventually dismissed the appellant's complaint. In view of the fact that all of the grounds of appeal address the same thing i.e. failure to hold that the appellant's evidence was sufficient to prove the case, I will consider them in a combined fashion.

My unfleeting review of the record of the trial proceedings tell me that the appellant's case was, by and large, predicated on the PF3 which was tendered in court as exhibit P1. This testimony revealed the extent of injuries sustained and bodily harm suffered by the appellant allegedly at the hands of the respondent and other assailants. The trial court attached little weight to it, on the ground that the same was filled nine days after it was issued by the police and after the appellant was attended to by the hospital. The trial court took an issue, as well, with the fact that the

medical practitioner who filled it was not called to give his opinion on and description of what he filled. This position appeared to placate the first appellate Court, as well.

A scrupulous review at the said exhibit P1 confirms what the lower courts became wary of. It clearly shows that the wounds which were attended to by the doctor were 10 days old. This means that this testimony was filled nine days after it had been issued. This is in sharp contrast with what the appellant submitted at the hearing. He submitted that he was issued with the PF3 on 9th November, 2018, and took it to the hospital on the same day. He asserted that he was attended to on the same day and the PF3 was filled and handed to him on that same day. By his own reckoning, his subsequent visits did not require production of the PF3. This submission gives credence to the lower courts' suspicion on the veracity of this testimony. The contents are variant with what the appellant testified in court and submitted in subsequent appeal proceedings, including his submission before me. More glaring is the fact that, whereas the appellant consistently contends that exhibit P1 was issued on 9th November, 2018, the day he alleges he was attacked, as also stated in the charge sheet, the said exhibit shows that the same was issued on 10th November, 2018, a

day after he was attacked and taken to police and hospital. This casts a serious doubt on when exactly the appellant was assaulted and attended to. This justifies the call by the trial court for the presence of the medical practitioner who allegedly attended the appellant, as his/her presence would not only explain the gravity of the bodily harm suffered by the appellant, but also the date on which the appellant was attended to, and why so long a time elapsed between the date he was allegedly attacked and treated and the date of filling the said exhibit. He would also offer an explanation as to how wounds inflicted on the same day would be 10 days old.

What is also clear in respect of the appellant's testimony is the imprecise manner in which he linked the respondent with the charge. While he alleges that the respondent hit him with a stick, he did not say if the respondent was also wielding a panga that he says was used to stab him in the back and both of his arms. No explanation is given as to why he was not able to cause apprehension of other assailants and why he particularly remembered the respondent out of a dozen or so assailants. These gaps in the appellant's testimony cannot be said to be of no effect to his case. They perforated his case and the lower courts were quite in order when

they found that such testimony was too deficient to found a conviction. I find nothing faulty in the lower courts' reasoning.

It should remembered that an allegation of a serious nature such as this one can only sail through if evidence that it relies on is nothing short of impeccable and watertight. Allegations which are based on whimsical or fabricated set of facts cannot be allowed to sail. This is in keeping up with the stringent requirement set up by the law which requires 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 the spirit of sections 110 and 111 of the Evidence Act, Cap. 6 R.E 2002 which borrowed heavily from the Indian Evidence Act, 1872. The latter statute has been commented on by various authors, the epic among all being the commentaries by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by Lexis Nexis. At page 1896, the learned authors had the following observation:

> ***"... 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 draws a similarity with the remarks given by Lord Denning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372 (at p. 340), 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), in which the following passage was quoted:

> *"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 dispassionate review of the appellant's case has not given me any shred of feeling that the appellant fulfilled this obligation, and I find no justification for me to depart from the position taken by the lower courts. My humble conviction is that the decision of the trial court is spotless and it carries nothing that can justify departing from it.

I, therefore, find the appeal barren and lacking in merit. Accordingly, I dismiss it with no order as to costs.

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

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

Respondent: Present online – Mob. No. 0683 38 89 05

B/C: Leonard.

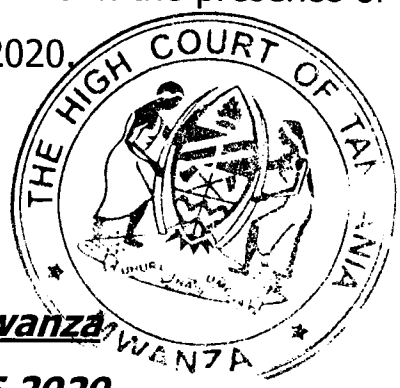
Court:

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 the virtual attendance of both parties and in the presence of Mr. Leonard Tibinula B/C, this 22nd day of May, 2020.



M. K. Ismail
JUDGE

At Mwanza
22,05,2029