

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO 115 OF 2020**

**FRANCIS s/o THOMAS @ THOMA**\_\_\_\_\_ **APPELLANT**

**VERSUS**

**THE REPUBLIC**\_\_\_\_\_ **RESPONDENT**

*(Arising from the decision and orders of the district court of Musoma at Musoma, Hon. Masala RM in criminal case no 68 of 2019 dated 20.07.2020)*

**JUDGEMENT**

*15<sup>th</sup> December 2020 & 15<sup>th</sup> January 2021*

**GALEBA, J.**

On 24.12.2018 around 22.00 hours **Mr. Francis Thomas Thoma (Francis)** along Majita road in Musoma Township while a passenger on **Mr. Mnubi Vincent's** motor bike, he stabbed the latter with a sharp object in the back and they entertained an accident. **Francis** took advantage of the confusion created by the attack on his victim coupled with the accident, to hold him on the ground with imminent threats of death with a knife if **Vincent** did not give him money. The aggressor managed go away with his Tshs 13,000/= and a mobile phone make **Techno 9**. Because he had threatened **Vincent** to the core and subdued him morally, **Francis** also gave the victim his telephone for the

latter to send him money whenever he got it and to keep the incidence to himself in strict confidence.

**Francis** was later arrested and charged with armed robbery in the district court at Musoma. In response, he denied the charge and following a full trial of the case he was convicted and sentenced to 30 years imprisonment. He was aggrieved with those orders hence this appeal in which he raised 5 grounds of appeal, complaining **firstly** that the trial magistrate erred for convicting him based on only the evidence of **PW1** without any evidence of any other person who saw him committing the offence. **Secondly** he complained that he was not properly identified by his victim because conditions of identification during the night were not met. **Thirdly** that the trial court erred in finding him guilty because, the alleged exhibits that were used in the commission of the offence were not tendered before the trial court. **Fourthly** that the trial court neither considered his defence nor gave him opportunity to call his witnesses and **finally** that the trial court convicted him without the prosecution proving the case beyond reasonable doubt.

In this appeal the issue for determination is whether the appellant's grounds of appeal have merit.

When this appeal came up for hearing on 15.12.2020, the appellant prayed to adopt his grounds as his submissions and prayed that the state attorney be the first to reply to his grounds.

As for the 1<sup>st</sup> ground of appeal, Mr. Isihaka Ibrahim learned state attorney who was appearing for the republic, submitted that at the time of the robbery there was only the victim and the appellant, which means there was no any other eye witness or witnesses. He added that there is no law in place that requires that there should be more witnesses in addition to the victim for a conviction to be valid. The learned state attorney added that the evidence of **Manyama Suguti, PW3** and **Marco Mwota Magesa, PW4** corroborated that of **Vincent**, the victim.

In this case one fact is not disputed; **Francis** and **Vincent** are acquaintances, they know each other. According to **Francis**, the case was fabricated because the two had fallen in love with a common girl friend called **Grace** in which case the competition over the girl is what must have prompted framing of the case against him.

Now back to the discussion in respect of the 1<sup>st</sup> and 5<sup>th</sup> grounds, as they both relate to the prosecution's failure, or otherwise, to prove the case beyond reasonable doubt. In this case according to the

evidence of **Vincent**, on that day he was riding his motor cycle from Musoma town and when he reached MUWASA area along Majita road he met **Francis**, who requested him to give him a ride to Taratibu Guest House which **Vincent** did and when they got there, **Francis** borrowed his telephone and called a person that **Vincent** did not know, but the call was not successful. Then the two decided to leave and still **Vincent** was riding **Francis**. After a short time of riding, **Francis** stabbed **Vincent** in the back and they had an accident. Then threats which resulted in the robbery followed as stated already above. After the robbery, **Francis** forced him to ride him to Nyasho where **Vincent** left his aggressor and went to report the robbery.

According to **PW3, Manyama Suguti** sometime after the incidence, **Francis** went to him with a need to borrow money and he gave him Tshs 50,000/= but he left him the telephone as a bond to bind **Francis** to repay the money before he could redeem the telephone. However when this witness searched through the telephone, he noted that there were **Vincent's** photos. He then called **Vincent**, who told him that the telephone was robbed from him by **Francis** who had injured him in the back.

**PW4 Marko Mwota Magesa**, testified that **Vincent** had an injury in the back and he tendered a **PF3** as **EXHIBIT PE3** showing that the victim was injured with a sharp object at the upper side of his back. Before concluding these two grounds it is worthy to note that crime fall in a class of illegal human activities whose participants prefer secrecy and privacy. In other words there cannot be an offender who would wish to commit the offence in the open. The appellant's argument that because there was no third party who witnessed the attack on the victim, then he is innocent of the offence or that the offence was not proved beyond reasonable doubt is not an argument with any force in the face of the evidence of **PW1**, **PW3** and **PW4**. Those witnesses proved that the victim was injured with a sharp object at upper part of the back and his telephone was forcefully taken from him. It is the holding of this court, based on the above evidence that the case was proved beyond reasonable doubt and accordingly the 1<sup>st</sup> and 5<sup>th</sup> grounds of appeal are dismissed.

In respect of the 2<sup>nd</sup> ground, Mr. Isihaka Ibrahim submitted that although visual identification could have issues but identifying that the person who committed the offence was the appellant was not prone to any mistake. He submitted that the evidence of **Vincent** was

corroborated by that of **PW2, 5877 PC Nicolous** who seized **Francis'** telephone from **Vincent** when he went to the Police while bleeding on 25.12.2018. At the police he said **Francis** had injured him, taken his phone and had given him his. **Vincent's** telephone was tendered by **PC Nicolous** as **EXHIBIT PE2** without objection. He submitted also that **PW3** testified that it was **Francis** who gave him **Vincent's** telephone and borrowed Tshs 50,000/= from him.

I have considered the complaint of the appellant and reviewed the arguments of counsel for the republic and to me, the submissions of the learned state attorney make a lot of sense, and I will demonstrate why. **Francis, Vincent** and **PW3 Manyama Suguti** are all neighbours and they know each other well. On the fateful day **Francis** met and requested **Vincent** to give him a ride to Taratibu Guest House, which the latter did. When they got there, **Francis** requested for **Vincent's** telephone and made a call for some time without success and handed back the telephone to **Vincent**, and they boarded the same motor bike to the scene of crime, from which point the victim further transported his aggressor to Nyasho. All these things cannot have happened in total darkness all the time to the extent that the victim would not have identified **Francis** who was not only his neighbour, but also a person he

knows well and even with whom they were sharing a girlfriend according to **Francis** himself. In other words, even the evidence of **Vincent** itself was enough to establish the full identity of the appellant for conviction purposes. The other pieces of evidence like that of **Manyama Suguti** and others had a corroborating effect. That said, this court dismisses the complaint that the appellant's identity had any legal issues.

As for the 3<sup>rd</sup> ground of appeal, Mr. Ibrahim submitted that it was not necessary to tender the weapon which was used to assault the victim referring this court at page 12 of the typed decision in the case of the **Republic v Richard Benjamin Mngulwi**, Criminal Appeal no 46 of 1997 HC as per Kimaro J (as she then was) unreported. In respect of this ground, to force or to expect the prosecution or the victim to tender the knife or any object which was used to attack him is to require too much from them. The difficulty which is in the vicinity of impossibility with that expectation is that in most of the cases, the weapon used to injure the victim is always in the hands and custody of the assailant. I am convinced with the reasoning of this court in the case of **Republic v Richard Benjamin Mngulwi (supra)** that in order to achieve a conviction, it is not a legal requirement to tender the weapon which was

used to attack the victim, which leads to the conclusion that the 3<sup>rd</sup> ground of appeal has no merit.

In respect of the 4<sup>th</sup> ground of appeal that the appellant was not given a right to call his witnesses and that his defence was not considered, Mr. Ibrahim agreed with him on one part of the ground but disagreed with him on the other. On the issue that the appellant was not afforded an opportunity to call his witnesses, Mr. Ibrahim submitted that that complaint has no basis because he was afforded every right to call witnesses but he did not desire to call any. I will first deal with this aspect of the complaint. On 11.06.2020, upon the appellant being advised of his rights under **section 231 of the Criminal Procedure Act, [Cap 20 RE 2020] (the CPA)** he stated as follows;

***'I will give out my evidence under oath and will call one witness.'***

On that date, the case was adjourned to 18.06.2020 so that the appellant could procure presence of his witness. On the latter date the appellant appeared and stated as follows;

***'My witness is absent I pray for an adjournment'***

The case was then adjourned to 19.06.2020 on which day the appellant testified as DW1 and finally he prayed;



***'I pray for another date so that I can bring my witness.'***

The case was adjourned to 25.06.2020 and was given a summons to call his witness all to accommodate the above prayer of the appellant. The case was adjourned to 02.07.2020 on which day the appellant appeared without his witness and reported;

***'I have no witness to day; I pray to close my case.'***

Following that prayer the trial court closed the case and composed its judgement, which **Francis** is now challenging on grounds that he was not afforded a right to call his witness. This court cannot accommodate the appellant's complaint as an authentic ground of grievance as the same has no merit. He was given more than ample time to call his witness if he wished to call her, but he failed, which means this limb of the 4<sup>th</sup> ground of appeal has no merit.

As for the second limb of ground 4, Mr. Ibrahim agreed with the appellant that the latter's defence was not considered but he submitted that this court being the 1<sup>st</sup> appellate court has mandate to consider the defence and come up with its independent decision. Although that is the law as per the decision in **Hassan Mzee Mfaume v R [1981] TLR 167**, but it is not true that the trial court did not analyse the defence.

This aspect of the appeal needs some kind of understanding of what it means for the court to consider and analyse evidence. To consider and analyse evidence, means, to recapture a witness's precise account of events or facts relevant to the issue or crime as he narrated it when on oath. After having the material evidence of a particular witness captured in the judgement as above, the other part of considering and analysing a witness's evidence, is for the court to state why it believes or it does not believe the truthfulness of the evidence as captured in the judgement. That, to me, means consideration and analysis of evidence of a given witness. The complaint of the appellant in this appeal is that his evidence was neither considered nor analysed. This is the issue this court is called upon to resolve as we draw closer to the end of this judgment.

Scanning through the judgment of the trial court it is clear that both the appellant and Mr. Ibrahim are not right in complaining that the trial court did not consider and analyse the evidence of the appellant. Paragraphs 3, 4 and 5 at page 5 of the judgment recapture the summary of the appellant's defence as narrated by him to the court on 19.06.2020. That is the first part I stated above that consideration and analysing of evidence includes summarizing the witness's evidence. As

for the other part, that is stating why is the summarized evidence be taken to be credible or not, the trial court at pages 8 to 9 of the judgment stated;

***'The contention of the accused that, he was sharing one woman with PW1 and PW1 decided to implicate him in this case cannot in my view be true. This love relation allegation was not for example specifically raised by the accused when PW1 testified. He came to raise it only in his defence, knowing very well that PW1 would have no opportunity to deny it.'***

The above passage in the judgement of the trial court shows that the court considered the defence of the appellant, because looking at the defence as recorded in the proceedings, his major and substantive complaint was that, the case had been fabricated because, **Vincent** and himself were competing over one female lover. In the circumstances, the evidence of the appellant was not only considered but the same was even analysed and the reason for why the same was not believable was given. To this court, the complaint that the appellant's evidence was not considered and analysed has no merit.

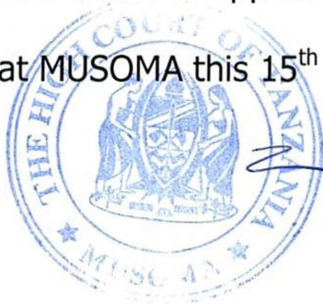
Finally, since all the 5 grounds of appeal have failed for want of merit, this court makes the following orders;

1. The findings and the judgment of the district court of Musoma in Criminal Case no 68 of 2019 is hereby confirmed and the sentence

of thirty (30) years imprisonment imposed upon **Mr. Francis Thomas Thoma** shall be served by him as passed by the trial court.

2. This appeal is dismissed and the appellant has a right of appealing to the Court of Appeal of Tanzania.

DATED at MUSOMA this 15<sup>th</sup> January 2021



Z. N. Galeba  
**JUDGE**  
**15.01.2021**

**Court;** Since the appellant is in prison and was not present today when I was delivering the judgment, I direct Hon. the Deputy Registrar to ensure that a scanned copy of this judgement via electronic mail reaches the incharge of the prison in which the appellant is held followed by a formal letter attaching the judgment to the same prison as evidence that we sent the judgment to the prisoner.



Z. N. Galeba  
**JUDGE**  
**15.01.2021**