

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 25 OF 2020

(Arising from the Resident Magistrate's Court of Geita at Geita Criminal Case No. 07/2020. Originating from Nyankumbu Primary Court Criminal Case No. 973/2019)

JOYCE NJELIAPPELLANT

VERSUS

PAULO ORERARESPONDENT

JUDGMENT

28/04 & 05/05/2021

RUMANYIKA, J

The 2nd appeal is, with respect to the concurrent factual findings of Nyankumbu primary and Geita district courts dated 21/2/2020 and 26/6/2020 respectively with respect to charges according to records amended on 1/10/2019. All the time Paulo Orera (the respondent) having had been acquitted from the charges of assault causing bodily injuries C/s 241 of the Penal Code Cap 16 RE. 2019. Not satisfied, Joyce Njeli (the appellant) is now here.

The 3 grounds of appeal revolve around two points essentially; **(1)** that the 1st appeal court improperly evaluated the evidence **(2)** the 1st

appeal court's failure to hold that actually the complainant's case was beyond reasonable doubts proved.

Messrs C. Ngailo and P.M. Rwechungura learned counsel appeared for the appellant and respondent respectively. I heard them by way of audio teleconferencing through mobile numbers 0782688757 and 0753420980.

Mr. C. Ngailo learned counsel submitted; **(a)** that at least through Sm1 – Sm4, the former's case was proved beyond reasonable doubts. Whether or not the appellant and respondent fought it was immaterial much as the respondent was the responsible assailant leave alone the PF3. That there may have had been some yes, but the contradictions never went to roots of the matter **(b)** that irrespective of the substituted charges yet, wrongly though with respect to particulars of the offence the trial court referred to the old charge sheet. In the alternative, we shall pray that the court nullify the entire proceedings. Submitted Mr. C. Ngailo, advocate.

Having had adopted contents of the supporting affidavit, Mr. P. Rwechungura learned counsel submitted; **(1)** that the 2nd appeal needed be on points of law only but this one it wasn't **(2)** that in fact the 1st appeal court properly evaluated the evidence **(3)** that having had marked

the old charge sheet substituted, contrary to the counsel's allegations the old charge sheet did not form basis of the two impugned judgments howsoever. That is all.

A summary of the evidence on record reads thus;

Sm1 Joyce Njeli stated that as she needed to join neighbors but they resisted, on 1/9/2019 they quarrel over a water supplying pipe network such that during the fracas, the respondent hit her with handle of a hand hoe, he slapped her and held her tight until such time they were separated by neighbor but due to injuries sustained through vagina the pregnant released some abnormal discharges then she referred the case to hospital and police.

Sm2 Matha James, assistant of Sm1 she stated almost materially the same as Sm1's.

Sm3 Rashid Luyisha a medical doctor he stated that following the incident he examined Sm1 (at the time 32 weeks pregnant) who complaining assaulted and she had abnormal and premature vaginal discharges and she had bruises on the right hind limb.

Sm4 Jesca Emmanuel, a neighbor and eye witness she testified materially the same as Sm1 and Sm2 did. That is all.

Paulo Orela stated that with regard to the appellant's desire and need also to join on the water pipe, but the follows refused because its size and capacity no longer allowed new members, yet against wishes of the respondent and company, but also in the back of the local water supply authorities, the appellant tapped water. It was no longer at ease because the appellant ran wild and confronted him such that during the fracas the pregnant appellant fell down and she reported injuries. Hence the charges and case that is all.

Su2 Kanizo Boniface stated that he was both neighbor and beneficiary of the water pipe /system and also he eye witnessed the fracas (as per Sm1).

Su3 Fortunata Oranjo also beneficiary of the material water pipe she stated that also she eye witnessed the incident (evidence as per Su1 and Su2).

Su4 Culard Johanes also neighbor he stated that as from his shamba he heard noises and rushed to the scene he found the parties quarreling over the water pipeline but shortly he quitted the place. That is all.

Su5 Daniel Stephano stated that too, he witnessed the fracas but actually the appellant wasn't beaten at all. That is it.

Su6 Ngeleja Amos also neighbor and eye witness, he stated that with regard to it the appellant having run wild the respondent and fellows just took low profile and quitted the place.

Su7 Andrea Kagusi (stated as Su6 did materially) but that he just left those quarreling there.

Su8 Dorica Lushani (as per fellows) but she did not tell whether or not the appellant and respondent they confronted each other physically leave alone confrontation. That is all.

The central issue may not be whether or not the pregnant Sm1 (now appellant) sustained injuries but rather who caused it much as it was undeniable fact that for the reason of scrambling for the water pipe the appellant and respondent confronted each other physically. As it was precisely so in my considered view reasoned by the trial magistrate, and the 1st appeal court accepted it, the charges lacked essential ingredient of the respondent's mens rea under the circumstances much as the offence didn't fall under strict liability. That with regard to the hand hoe, given the nature of confrontation struggles and all the probable consequences, however grievous might be the injuries were accidental more so where the appellant was the instigator therefore author of the injuries, and for that

reason the respondent wasn't to blame the Latin Maxim Volent Non Fit Injuria.

Whether or not, with respect to particulars of the offence two courts below they relied on the old/substituted charge it is immaterial because in any case the statement of offence remained the same.

Having said as herein above endeavored to, the appellant's learned counsel may wish to remember the long established principle that unless the peculiar circumstances required otherwise, very seldom than not appeal courts reversed concurrent factual findings of two courts bellow (case of **Felix Kichele V. Republic**, Criminal Appeal No. 159 of 2005 (CAT) (unreported). It is very unfortunate that Mr. C. Ngailo learned counsel did not even attempt to establish any such peculiar circumstances for this court to hold otherwise.

The devoid of merits appeal is dismissed. It is so ordered.

Right of appeal explained.



S. M. RUMANYIKA
JUDGE

03/05/2021

The judgment delivered under my hand and seal of the court in chambers this 05/05/2021 in the absence of the parties.



S. M. RUMANYIKA

JUDGE

05/05/2021