IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 7 OF 2020

(c/f the decision of the District Court of Karatu at Karatu in Criminal Case No. 118 of 2018 before Hon. E.E. Mbonamasabo RM)

THE DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

GITAR S/O TARMO ..... RESPONDENT

JUDGMENT

21/04/2021 & 03/06/2021

GWAE, J

On the 10th October 2018 the respondent, Gitar s/o Tarmo was arraigned in the District Court of Karatu at Karatu with an offence of grievous harm c/s 225 of the Penal Code Cap 16 Revised Edition, 2002. Initially, the prosecution side alleged that, on the 12th September 2018 at about 14 :00 hrs at Umbang village within Karatu District in Arusha Region the said respondent did assault one Paul s/o Geay oh his head and left hand by using weapons to wit; panga and stick and cause him to suffer grievous harm.

Having heard both sides, Karatu District court (hereinafter to be referred to as trial court (**Hon. Mbinamasabo-RM**) arrived at a conclusion that, though

the victim was assaulted but the prosecution side failed to prove the guilt of the accused now respondent. He thus acquitted the respondent and directed the prosecution to search for a person who grievously assaulted the victim. The decision of the trial court aggrieved the prosecution as a result the DPP opined to the filing of this appeal which is comprised of three grounds;

1. That, the trial magistrate erred in law and facts by acquitting without properly evaluating and analyzing the evidence of the prosecution witnesses
2. That, the trial magistrate erred in law and facts when he relied on the respondent's alibi which was tendered before the court without prior notice as required by law
3. That, the trial magistrate erred in law and facts by acquitting the respondent on the offence which was proved beyond reasonable doubt

When this appeal was called on for hearing, the appellant, Director of Public Prosecutions and respondent were represented by Mr. Ahmed Hatibu, the learned state attorney and Mr. Salehe Salehe, the learned advocate respectively. Nevertheless, the parties' representatives sought and obtained leave to argue this appeal by way of written submission. In arguing this appeal, the appellant's learned state attorney started with 2nd ground and he jointly argued ground 1 and 3. I shall therefore herein under do the same.

On the 2nd ground of appeal, the learned counsel for the appellant argued that the respondent's defence of alibi ought to be raised earlier by giving notice pursuant to section 194 (4) (5) of the Criminal Procedure Act, Cap 20 R.E. 2019 (CPA) and not the Penal Code as he wrongly and plainly cited adding that the respondent's assertion that, he left Umbang village where the offence was alleged to have occurred and went to Yaeda village was not supported by any evidence that he was not present at the scene of crime. He went on arguing that apart from the shortcomings on the respondent's defence of alibi, yet the prosecution evidence was credible to justify a conviction against the respondent.

As to the 1st and 3rd ground of appeal, the learned counsel for the appellant argued that, had the trial court magistrate properly evaluated the prosecution evidence he would have arrived at just and fair decision with effect that, it was the accused now respondent who assaulted the victim since the incidence occurred at 14:00 hours of the material date and that the victim and respondent were familiar to each other. Embracing his argument, the learned state attorney urged this court to make a reference to a decision of the Court of Appeal of Tanzania in **Maduhu Ng'abi and another v. Republic**, Criminal Appeal No. 556 of 2016 (2020) (unreported).

The counsel for the appellant also attacked the finding of the learned trial magistrate in that, the PW2, was a relative to the victim (PW1) while that was

not true. He added that even if PW2 would be a relative to the victim yet neither statutory law nor procedural law that bars a relative from testifying in favor of his or her relative. He bolstered his aspect of argument by a precedent in **Mustapha Ramadhani Kihiyo v. Republic** (2006) TLR 324.

Mr. Hatibu finally argued that, this appeal be allowed since the charge against the accused person was proved beyond reasonable doubt and that, the burden of proof by the prosecution does not mean disproving every allegation brought by an accused person.

Resisting ground 2, the learned counsel for the respondent argued that the omission to give notice of defence of alibi as required by the law does not mean that such defence should be absolutely ignored. Nevertheless, the respondent's advocate submitted that the trial court magistrate did not rely on the defence of alibi in his judgment.

The learned counsel for the respondent also responded to the 1st and ground by stating that the prosecution evidence left a lot to be desired as a material witness namely; Nichora was not summoned and that, PW2 gave a contradictory evidence. He also challenged the prosecution evidence on identification of the respondent since as no descriptions that were given by PW2. He urged this court to make a reference to the case of **Omary Iddi Mbezi and 3 ithers v. Republic,** Criminal Appeal No.227 of 2009 (unreported). It was

further the contention of the learned advocate for the respondent that, if as alleged by the victim, the alarm would be raised and some of villagers including local leaders would respond to the alarm.

Having briefly summarized the written submissions of the parties' counsel, I am now duty to determine the appellants' grounds of appeal. Starting with **2nd ground**. It is general law that if an accused person intends to rely on the defence of alibi, such accused has to give a requisite notice to the prosecution side so that the prosecution may be able to know particulars of the defence of alibi (See section 194 (4) & (5) CPA). However, whenever an accused has failed to furnish a notice of defence of alibi that alone does not bar a trial magistrate or judge from according or not according such defence while composing the judge as required under section 194 (6) of the Criminal Procedure Act, Cap 20 Revised Edition, 2019 and interpreted in a chain of precedents for example in **Mwita Mhere and Ibrahim Mhere vs. Republic** (2005) TLR 107 at page 108 where it was held that:

> "That the trial court is not authorized by the provision to treat the defence of alibi like as it was never made, the trial court has to take cognizance of that defence and it may exercise its discretion to accord no weight to the defence".

In our instant criminal case, it is clear that, the respondent neither raised defence of alibi as earlier as possible nor did he give particulars of defence of

alibi before a date fixed for his defence nevertheless at his defence he seriously contended to have been in a place other than the scene of crime (Umbang village) since 9/9/2018 to 23/09/2018. However, during composition of his judgment, the learned trial magistrate is vividly found to have not taken any recognizance of such defence. That was legally wrong on the part of the trial court. Nevertheless, as the 1st appellate court judge, when I carefully traverse in the respondent's defence of alibi, though the letter dated 8th September 2018 was received only for identification purposes yet, such defence to my firm view did not shaken the prosecution evidence. I am alive of the principle that the burden of proving an alibi does not lie on the prisoner but the prosecution however instantly, the prosecution evidence is found to be credible (See a decision Leonard **Aniseth v. Republic,** [1963] E.A. 206)

I am holding that view for an obvious reason that, there is a direct evidence of the victim (PW1) whose testimony is plainly supported by that of Godlize (PW2) who said to have witnessed the incidence and subsequently informed the victim's son, Isaya Paul who appeared as PW3 being the one who rushed to the scene of crime and the one who assisted the victim for medication at Karatu Lutheran Hospital.

Regarding the **1st and 3rd** ground, it is trite law that, the onus of proof in criminal cases lies on the shoulders of the prosecution side and that the

standard is proof of guilt of an accused person is beyond reasonable doubt (See **Jonas Nkize v. Republic** (1992) TLR 213).

In determining the above grounds of appeal, I would like to start with the issue of identification of the culprits, both PW1 and PW2 amply told the court that the identifying persons and the respondent and his son knew each other. I have also taken into account that the incidence occurred at day hours at 14: 00 hours at which it was not easier for the identifying person to unmistakenly identity the respondent. It is general principle that if the victim or an identifying person alleges to have known a suspect prior to the incidence and that at the time of commission of an offence there was enough light like in our case when it was day, therefore, time favouring proper identification. In **Marwa Wangiti Mwita and another v. Republic** (2002) TLR 39 where it was correctly that:

> "The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same ways as un-explained delay or complete failure to do so should a prudent court to inquire".

(See also a judicial decision of the Court of Appeal of Tanzania in **Jaribu Abdallah v. Republic**, (2003) TLR 271). In our instant case, the victim and PW2 knew the respondent by his name and appearance and the type of offensive weapons as well as mentioning of the culprit by PW2 to PW3.

I have further considered the complained holding of the trial court that all the prosecution witnesses were blood related but I have diligently and cautiously examined the evidence adduced by the prosecution side and come up with an observation that, I should not be persuaded if all prosecution witnesses who were independent persons save police officer (PW4) and a medical practitioner (PW5) were relatives. I am of that view for the simple reason that, PW2 was neither related to PW1 nor to PW3 ("I am residing to Emmanuel....My father is Safari). Nevertheless, I am of the view that, even if the PW2 was a relative to the victim yet his testimony would not be discarded merely because he is relative or son of the victim. Therefore, the evidence of PW2 could be relied and be accorded its weight notwithstanding that their relations provided that the same is credible unless established to the contrary. My holding is guided by a judicial decision in **Mustafa Ramadhani Kihiyo v. Republic** (2006) TLR 324 where among other things it was stated:

> "The evidence of related witnesses is credible and there is no rule of practice or law which requires the evidence of relatives to be discarded unless of course, there is ground of doing so".

In the Complaint that the trial court erred by holding that the offender was not yet arrested and brought before the court of law. It is true however that the prosecution witnesses particularly PW1 and PW2 testified to the effect that there were two suspects /wrong doers namely; the respondent and one Malkiyad

who was not arraigned before the trial court and no reason that was given by the prosecution. Failure to apprehend and charge the said Malkiyad, in my view, does not in itself exonerate the respondent from criminal liability provided that there is sufficient evidence that the respondent and his did assault the victim (PW1).

Also, the respondent's stance that, one Nichora who is alleged to have witnessed the incidence and the one who wanted to raise an alarm but refrained from doing so as he was threatened by the victim's assailants, was not called as witness, therefore affected the credibility of the prosecution evidence. I am not unsound of the principle that, the prosecution is at liberty to call a particular witness or not unless such witness is vitally important as was demonstrated in **Hemedi Saidi v Mohamedi Mbilu** (1984) TLR 113

> "In measuring the weight of evidence, it is not the number of witnesses that counts most but the quality of the evidence; where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests.

See also a judicial precedent cited by the respondent's counsel in **Azizi Abdallah vs. Republic** (1991) TLR 71 and **Republic v. Rugisha Kashinde and Sida Jibuge** (1991) TLR 178. In our case, PW2's testimony, in my opinion,

would be like of that of the said Nichora if as testified by PW1. I have also taken into account that the prosecution was not bound to call each and any witness particularly when the evidence adduced in court is sufficient. In our instant case, particularly by looking at the judgment of the trial court and evidence on record, I find the evidence of the victim (PW1) is highly credible and sufficiently corroborated by that of PW2 and that of a doctor (PW5)

Basing in the above discussions, I find this appeal is not without merit, the appellants' appeal is therefore allowed. The trial court's decision is therefore quashed and set aside. The respondent is now found guilty of the offence of grievous harm c/s 255 of the Penal Code Cap 16 Revised Edition, 2002.

It is so ordered

M. R. GWAE

JUDGE

03/06/2021

Right of appeal explained

M. R. GWAE

JUDGE

03/06/2021