

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

PC CRIMINAL APPEAL NO. 4 OF 2021

CHACHA RANGE 1ST APPELLANT

MAHINDA RANGE 2ND APPELLANT

VERSUS

MATINDE NYABITE RESPONDENT

***(Arising from the decision of the District Court of Bunda
at Bunda in Criminal Appeal No. 10 of 2021)***

JUDGMENT

2nd and 24th August, 2021

KISANYA, J.:

The appellants were charged with the offence of assault causing actual bodily harm contrary to section 241 of the Penal Code [Cap 241 R.E 2019]. The particulars of offence charge were to the effect that on 1st October 2020 at 08:00hrs at Kihumbu area within Bunda District, they assaulted Matinde Nyabite (the respondent) by beating her with iron bar on different parties of her body.

Both appellants were convicted and sentenced to pay fine of one hundred thousand shillings (TZS 100,000/=) each or serve three (3) months imprisonment, in default. Further to that, each appellant was ordered to pay compensation to the tune of seventy five shillings (TZS 75,000/=) in favour of the respondent.

Aggrieved, the appellants unsuccessfully appealed to the District Court of Bunda and thus, this second appeal. In their joint petition of appeal lodged by Godfrey Marobhe Muroba (Advocate), the appellants fault the conviction, sentence and orders on the following grounds of appeal:

- 1. That, the Appellate Magistrate erred in law and in fact for holding that the Respondent and her witnesses proved the offence of grievous harm beyond reasonable doubt whilst expunged the PF3 tendered at the trial court following the irregularities in its admissibility.*
- 2. That, the Appellate Magistrate erred in law and in fact for holding that the offence of grievous harm against the appellants was proved from the evidence of the eye witnesses rather than the PF3 document.*

Before addressing the ground of appeal, I find it appropriate to state that, the first appellate court upheld the conviction, sentence and orders despite of expunging the Medical Examination Report (Exhibit P1) from the record. It was of the firm view that, the remaining oral evidence adduced by the prosecution witnesses was sufficient to prove the offence.

At the hearing of this appeal, Messrs Godfrey Marobhe Muroba and Emmanuel Paul Mngârwe, the learned advocates represented the appellants and respondent, respectively.

Mr. Muroba argued the first ground and dropped the second ground. He submitted that upon the first appellate court expunging Exhibit P1, there remained no evidence to prove the offence laid against the appellants. Referring to the case of **Mohamed Said Matula vs R (1995) TLR 3**, the learned

counsel urged this Court to acquit the appellants. He was of the firm view that the prosecution did not prove the charge.

On his part, Mr. Mngárwe, learned advocate supported the conviction, sentence and orders on the ground that the offence was proved beyond all reasonable doubts. Relying on the case of **R vs Samson Okiri @ Oyoko**, Criminal Session No. 90 of 2020 HC at Musoma (unreported), he was of the view that the role of PF3 was to prove the extent of the injury sustained by the victim and that the said evidence was given by PW1, PW2 and PW3. However, after second reflection, he conceded that the evidence on the extent of the injury was not adduced. Yet, the learned counsel prayed this Court to dismiss the appeal.

Rejoining, Mr. Muroba argued that the doctor who examined the appellant was not called to testify on the extent of the injury sustained by the respondent.

In the light of the foregoing, the issue for consideration is whether the offence assault causing actual bodily harm was proved against the appellants herein. My starting point is section 241 of the Penal Code (supra) which creates the said offence. It provides as follows:

*"Any person who commits **an assault occasioning actual bodily harm is guilty** of an offence and liable to imprisonment for five years."*(Emphasize supplied).

The bolded expression clearly displays that, occasioning bodily harm is indeed a vital element of the offence of assault causing bodily harm. Therefore, apart from proving the assault, the prosecution is required to prove that the extent of the injury resulting from the assault amounted to actual bodily harm. This position was also stated in **Khamis Juma @ Elia v R**, Criminal Appeal No. 238 of 2016 HCT Tabora (unreported), when this Court held as follows:-

"For the prosecution to prove an offence under these provisions, therefore, it must establish that the extent of the injury caused by the alleged assault amounts to actual bodily harm."

In this case, the evidence adduced by the respondent (PW1) and his two witnesses (PW2 and PW3) proved that the appellants assaulted the respondent on the material day. Thus, the prosecution witnesses gave evidence which corroborated each other that the respondent was assaulted by the appellants. This fact was not challenged by the appellants in this appeal.

However, that was not enough. As indicated earlier, the prosecution was also required to prove that the alleged assault amounted to actual bodily harm. The Medical Examination Report (PF3) which aimed at proving this fact was not read over in court after being admitted in evidence as Exhibit P1. Therefore, it was rightly expunged from the record by the first appellate court. In the absence of Exhibit P1, the remaining evidence is not sufficient to prove that the alleged assault by the appellants amounted to actual bodily harm. This is so because none of the prosecution witnesses who testified on the extent of the injuries

sustained by the respondent, let alone the contents of Exhibit P1. Further to that the doctor who examined the respondent and authored Exhibit P1 was not called to testify. As that was not enough, his whereabouts was not stated.

In view of the said finding, the offence of assault causing bodily harm was not proved. It is apparent that what was proved by the prosecution is the offence of common assault under section 240 of the Penal Code (*supra*) which is a minor offence to the offence of assault causing bodily harm.

On the way forward, I am persuaded by the recourse to be taken in **Khamis Juma @ Elia v R (*supra*)**, when this Court held as follows in a situation akin to the case at hand:-

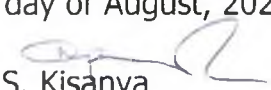
"Since there is no proof that the assault caused actual bodily harm, it cannot be said that the appellant committed the offence charged under section 241 of the Penal Code. At most, the evidence by PW1 proves the offence of common assault under section 240 of the Code, which provides that any person who unlawfully assaults another is guilty of an offence and, if the assault is not committed in circumstances for which a greater punishment is provided in the Code, is liable to imprisonment for one year. I consider the offence of common assault (under section 240) to be minor to the offence of assault causing actual bodily harm (under section 241) since the latter fetches a more severe sentence than the former as shown above. I, therefore, under the principle of alternative verdicts, provided for under section 302 (2) of the Criminal Procedure Code, convict the appellant of the minor offence of common assault though he was not charged with it"

I fully subscribe to the position stated in the above decision and find the appellants guilty of the offence of common assault contrary to section 240 of the Penal Code (supra).

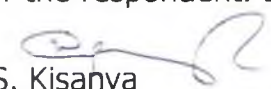
In view of what I have endeavoured to discuss, the conviction on the offence of assault causing bodily harm is hereby quashed and the sentence thereon set aside. In lieu thereof, the appellants are convicted of a minor offence of common assault contrary to section 240 of the Penal Code (supra). Since they have already served the custodial sentence imposed by the trial court on the offence of assault causing bodily harm, I find it not appropriate to pass another sentence. Having considered further that the evidence on the extent of injury sustained by the respondent is wanting, I quash the order for compensation. It is so ordered.

DATED at MUSOMA this 24th day of August, 2021.



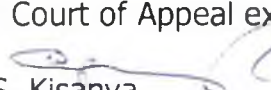

E.S. Kisanya
JUDGE

Court: Judgment delivered through video conference this 24th day of August, 2021 in the presence of Mr. Godfrey Muroba, advocate for the appellants and Mr. Emmanuel Mnga'rwe, counsel for the respondent. B/C Gidion present.


E. S. Kisanya
JUDGE
24/08/2021

Court: Right of further appeal to the Court of Appeal explained.




E. S. Kisanya
JUDGE
24/08/2021