**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**PC. CRIMINAL APPEAL NO. 02 OF 2021**

(From the decision of District Court of Nyamagana at Mwanza in Criminal Appeal No. 20 of 2020
Original Primary Court Urban Criminal Case No. 1261 of 2020)

**AUGUSTINE HENERY.....APPELLANT**

**VERSUS**

**ROBERT MARWA .....RESPONDENT**

**JUDGMENT**

**Date of last order: 29/07/2021**

**Date of Judgment:26/08/2021**

**F. K. MANYANDA, J.**

This judgement is in respect of an appeal originating from Urban Primary Court Mwanza where the Appellant, Augustine Henery successfully prosecuted the Respondent, Robert Marwa for the offence of assault causing actual bodily harm, contrary to section 241 of the **Penal Code**, [Cap. 16 R. E. 2019].

Briefly, the background of this matter may be summarized as follows. On 27/04/2020 by 18:00 Hours, the Respondent caused injuries to the Appellant. At that time, the Respondent was at the stand of motor tricycles commonly known as "bajaji" at Buzuruga Area within Nyamagana District in Mwanza Region. He was busy involved in hot

arguments with persons around him arguing about football matters; he was arguing and hurling his arms in the air. The Appellant while in his own businesses passed near the Respondent, he was hit by the hurling arms of the Respondent thereby piercing his left eye which got punctured and lost sight instantly.

The incident was reported to police who arrested the Respondent. He was subsequently charged with the said offence of assault causing actual bodily harm. After full trial the primary court convicted him, it ordered him to bear the treatment costs and a condition of not committing any criminal offence for a period of six months.

The conviction aggrieved the Respondent who chose to appeal to Nyamagana District Court which quashed both the conviction and the said orders. The Appellant got dissatisfied, hence the instant appeal. He lodged his petition of appeal on 05/11/2020 with five grounds, however, with leave of this Court the Appellant filed an amended petition of appeal which contain six grounds of appeal which may be summarized as follows: -

1. *The first appellate court erred in law and facts for quashing the judgement and orders of the trial court instead of substituting the*

*conviction with a minor and cognate offence of negligence, contrary to section 234 of the Penal Code*

2. *The first appellate court erred in law and facts in holding that the evidence adduced in the trial court was cooked.*

3. *The first appellate court erred in law and facts in holding that the Respondent's act was un-intentional while the negligent intent was proved.*

4. *The first appellate court erred in law and facts in holding that the trial court order for compensation was illegal been made without repute to treatment costs incurred by the Respondent.*

5. *The first appellate court erred in law and facts for quashing the trial court decision on ground that the author of PF3 didn't testify; and*

6. *The first appellate court failed to evaluate and analyse the evidence on record.*

At the hearing of the appeal, the Appellant was represented by Costantine Ramadhani, learned Advocate and the Respondent enjoyed the services of Mr. Frank Obeid Kabula, learned Advocate.

Mr. Costantine Ramadhani dropped ground two and argued grounds 1, 4 and 5 separately, then he argued the rest, that is ground 3 and 6 together.

In respect of ground one, the Counsel submitted that the evidence proved an offence of negligence contrary to section 234 of the Penal Code with which the first appellate Court ought to have convicted the Respondent in substituted conviction. He relied on the authority of this Court, Hon. Mkeha, J. in the case of **Chacha Luka vs. Republic**, Criminal Appeal No. 67 of 2017 (unreported) where this Court substituted a conviction of armed robbery with assault causing actual bodily harm because it was minor and cognate offence. It was the views of the Counsel that the offence of negligence is minor and cognate to that of assault causing actual bodily harm. He contended that since the Respondent was holding a key in one of his arm which pierced the Appellant's eye, then he knew that by hurling his arms into the air he could injure any person when he was hurling his arm holding a key

during the hot argument. This act according to the Counsel for the Appellant amounted to negligence offence. He argued that the first appellate court misapprehended the fact, therefore, this court can interfere.

In support of grounds 3 and 6, he argued that the first appellate court did not analyse properly the evidence adduced at the trial court which established the offence of negligence. He argued that the Respondent did not take enough caution on people surrounding him when he was arguing and hurling his hands in the air while he knew that he was holding a key, as a result he pierced the left eye of the Appellant. He had a duty of protecting others from harm which could result from his acts.

The Counsel argued further that the contradictions on page 2 and 4 of the proceedings found by the first appellate court were minor, the same could not affect the fact that the Respondent acted negligently.

The Counsel, in regard to ground 4, argued that compensation was wrongly quashed on reason that the Respondent assisted the Appellant in treatments. He contended that the reason by the first appellate court is not justifiable. He referred to the testimony of the Appellant that the

costs for replacement of the eye with a false one was TShs. 700,000/= while other costs including transport was TShs. 200,000/= while the Respondent assisted first aid services costs only. The Counsel submitted that the Respondent did not controvert the evidence of the said treatment costs.

In respect of ground 5, the Counsel submitted that it was an error on the part of the first appellate court to quash the trial court decision only because the author of a PF3 did not testify. He argued that not in all cases such omission renders the evidence a nullity. He was of the views that even if the PF3 is expunged, still there was other evidence from oral evidence of the Appellant to support the offence. He prayed the appeal to be allowed.

On other hand, Mr. Frank Obeid Kabula, the Counsel for the Respondent submitted opposing the appeal. He adopted the reply to the amended petition of appeal and added that the Appellant is trying to bring in a new offence which the Respondent was not charged with. He argued that, there was no negligence on the part of the Respondent. He referred this Court to page 2 of the trial court's judgement where it found that it was the Appellant who was walking negligently and

bumped at the Respondent hence got injured. It was his views that the Appellant was injured out of an accident which he caused himself. He argued that that evidence is from the Appellant and his witnesses. The first appellate court rightly found the same as appearing at page 2 of its judgement.

He contended further that the Respondent could not have a look out at all sides all the time, it was also a duty of the Appellant to make look out for any danger likelihood to come to him when passing at a group involved in hot arguments. Hence intention was not proved. Moreover, the Respondent did not even know the Appellant hence, he could not have intended in any way.

Then the Counsel argued the rest of grounds of appeal number 3, 4, 5, and 6 together because all concern analysis of evidence.

It was his argument that the evidence by the prosecution left a loop hole that the Appellant was injured after bumping at the Respondent without considering his contribution to the treatment costs. He argued further that the first appellate court dully analysed the evidence and was correct to quash the decision of the trial court. He prayed the appeal to be dismissed.

In rejoinder, the Counsel for the Appellant basically reiterated his submission in chief and added that the issue of negligence is not new, it was discussed by the trial court.

I have heard and carefully dispassionately pondered on the competing urgings by the learned Counsel. I shall start with the first ground of appeal and then I will combine and determine together all the rest.

In this appeal I am called upon to fault the District Court in its appellate jurisdiction. The District Court overturned the decision of the trial court, quashed the conviction of the offence of assault causing actual bodily harm and set aside all the orders of conditional discharge and compensation for treatment costs incurred by the Appellant. In lieu, the Appellant urges this court to find a substituted conviction of the offence of negligence.

It is trite law that when a person is charged with an offence consisting of several particulars, a combination of only of some which constitutes a complete minor offence, and such combination is proved

but the remining particulars are not proved, he may be convicted of the minor offence although he was not charged with it. This is what in criminal law is known as "substituted conviction". For trials in primary courts substituted conviction is provided in Section 38 of the Primary Courts Criminal Procedure Code, under the Third Schedule to the **Magistrates' Courts Act**, [Cap. 11 R. E. 2019].

Judicially, the term "substituted conviction" had its meaning described in the case of **Robert Necho and Another vs. Republic** (1951) 18 EACA 171 at 174 as follows: -

> *"Where an accused is charged with an offence, he may be convicted of minor offence, although not charged with it, if that minor offence is of cognate character, to wit, of the same genus and species".*

It follows therefore that for a substituted conviction to be found, the offence to be substituted must be minor and cognate to the major offence. The term cognate is defined in the book, **Black's Law Dictionary**, by Bryan A. Garner, 8th Edition, at page 1111 as follows: -

> *"A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category."*

The test whether an offence is minor was set by this Court (Hon. Msumi, J. as he then was) in the case of **Christian Mbunda vs. Republic** [1983] TRL 340 (HC) where it was stated as follows: -

> *"Whether or not an offence is minor to the charged one is a question of law. The test in determining it was clearly stated by this court in* ***Ali Mohd vs. Republic*** *[1963] E.A at 296*
>
> > *'First whether the circumstances embodied in the major charge necessarily and according to the definition of the offence gives the accused notice of all circumstances going to constitute the minor offence intended to be substituted'".*

In that case, the accused was charged with an offence of stealing by agent but was convicted of the offence of stealing by servant quashing the decision, the judge stated as follows: -

> *"It is an elementary rule of law that in order to convict an accused of theft the prosecution must prove the existence of* ***actus reus*** *which is specifically termed as asportation and* ***mens rea*** *or* ***animus furandi;*** *in this case there was asportation but the appellant had no guilty mind or* ***animus furandi*** *when he used the money for the purpose other than buying millet from the village; it is not*

*necessary for one charged with stealing by servant contrary to section 271 of the **Penal Code** that the property stolen should belong to the accused's employer, but the section covers a situation where, though the stolen property does not belong to the employer, it came into possession of the employee or the accused on account of his employment; the offence of stealing by agent is neither minor nor cognate to stealing by servant, as proof of the latter does not necessarily notify the accused of the essential elements of the former."*

In the appeal at hand the Respondent was charged with the offence of assault causing actual bodily harm. This offence is found under section 241 of the **Penal Code**, which provides as follows: -

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

Under this offence for a conviction to be found, the prosecution has to prove three ingredients namely, there was an act or omission by the accused, that the said act or omission caused an actual harm to the body of the victim and that the act was intentional one.

The Counsel of both sides concede that the three ingredients of this offence were not proved, the intention was not proved. It is on

this reason the Counsel for the Appellant contend that a minor and cognate offence of negligence under section 234 of the **Penal Code** was proved, hence the District Court ought to have substituted the conviction to that of negligence.

Section 234 of the **Penal Code** provides as follows: -

> *"234. Any person who unlawfully does any act or omits to do any act which it is his duty to do, not being an act or omission specified in section 233, by which act or omission harm is caused to any person, is guilty of an offence and liable to imprisonment for six months."*

As it can be gleaned from the provisions above, to prove this offence, the prosecution is required to lead evidence that the accused did or omitted to do an act which is his duty to do and that harm resulted from his failure to do or omission to do that act.

A question is whether the offence under section 234 is minor and cognate to the offence under section 241 both of the **Penal Code**. My answer is in negative. I say so because the ingredients of this offences, to use the wording in the **Robert Necho's case (supra),** are not of the same genus and specie. While there is a requirement of proving 'a duty' in the latter offence there is no requirement of proving 'a duty' in the

former. Therefore, the definition of the offence under section 234 of the **Penal Code**, fails to meet the circumstances embodied in the major charge necessarily and according to the definition of the offence gives the accused notice of all circumstances going to constitute the minor offence intended to be substitute as held in **Ali Mohd's case,** cited in **Christian Mbunda (supra).**

In the result, I find that the first ground of appeal lacks merit. I will combine and determine together the rest of grounds namely, grounds 3, 4, 5, and 6 because all concern analysis of evidence.

It has been argued by the Counsel for the Appellant that the first appellate court did not analyse properly the evidence adduced at the trial court which established the offence of negligence. The reason is that the evidence shows that the Respondent did not take enough caution on people surrounding him when he was arguing and hurling his hands in the air while he knew that he was holding a key, as a result he pierced the left eye of the Appellant. He had a duty of protecting others from harm which could result from his acts.

The Counsel argued further that the contradictions on page 2 and 4 of the proceedings found by the first appellate court were minor, the same could not affect the fact that the Respondent acted negligently.

The Counsel in regard to ground 4 argued that compensation was wrongly quashed on reason that the Respondent assisted the Appellant in treatments. He contended that the reason by the first appellate court is not justifiable. He referred to the testimony of the Appellant that the costs for replacement of the eye with a false one was TShs. 700,000/= while other costs including transport was TShs. 200,000/= while the Respondent assisted first aid services costs only. The Counsel submitted that the Respondent did not controvert the evidence of the said treatment costs.

On other hand, the Counsel for the Respondent argued that, there was no negligence on the part of the Respondent instead it was the Appellant who was walking negligently and bumped at the Respondent hence got injured. It was his views that this act was an accident *per se*.

I agree with the Respondent, he could not have a look out at all sides all the time, it was also a duty of the Appellant to make look out for any likelihood of danger. It is on record that the Appellant when

approaching the Respondent and his gang saw then arguing loudly and hotly, he also saw the Respondent acts of hurling his hand in the air. On the other hand there is no evidence that the Respondent saw the Appellant approaching him as he approached him from behind. Moreover, the evidence does not reveal any duty of care which the Respondent failed to discharge or show how he was negligent.

This is a criminal case in which the prosecution was required to prove all the ingredients of the offence under section 241 of the **Penal Code**, of unlawfully causing harm to a person by unlawful act or omission which is a duty to do.

I have gone through the decision of the District Court in its appellate jurisdiction and the records generally, I am of a firm opinion that it adequately evaluated the evidence adduced at the trial court. I agree with the Counsel for the Respondent that District Court rightly expunged the evidence of the PF3 of which did not testify in court. I equally agree with the Counsel for the Appellant that, even if the PF3 is expunged, there is another evidence from the Appellant which show that he was injured in his left eye. However, I have already held above that

the District Court was right in holding that the injury was a result of an accident. The evidence falls short of proving the offence of assault causing actual bodily harm the Respondent was charged with and the offence of negligence suggested by the Counsel for the Appellant is not cognate to it.

In the result, I find that ground 3, 4, 5 and 6 of the appeal also are non-meritorious. I find that there is no need of discussing the orders for compensation because the offence was not proved.

In the upshot and for reasons stated above I find that the appeal has no merit. Consequently, I do hereby dismiss it in its entirety for want of merits. It is so ordered.


**F. K. MANYANDA**
**JUDGE**
**26/08/2021**