

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 54 OF 2021

(Originating from DC Criminal Case No. 220 of 2019)

NELSON SEBASTIAN @ SANINGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Last Order: 2nd May, 2022

Date of Judgment: 17th June, 2022

JUDGMENT

MWENEMPAZI, J.

The appellant and another person who is not part of this appeal were charged in the District Court of Moshi with an offence of causing grievous harm to Jakob Ambrose @ Ngowi contrary to section 225 of the Penal Code, Cap. 16 R.E 2002. They were both found guilty, convicted and sentenced to 4 (four) years imprisonment. Aggrieved with the decision the appellant decided to appeal before this court on 7 grounds as follows:

1. That the learned trial magistrate grossly erred in both law and fact by failing to note that the victim of the alleged offence (PW1) never at

all recognized the Appellant at the scene of crime as a result (PW1) failed to identify/recognize the Appellant before the court as he only pointed to the second accused who is not part of this appeal.

2. That the learned trial magistrate failed to grasp the fact that, in matters of identification it is not enough merely to look for factors favouring accurate identification, equally important is the credibility of witness. That the victim (PW1) and (PW5) gave a very highly improbable and inconceivable evidence in one's mind. As PW1 stated that he was attacked for one hour by the Appellant and his co-accused and there were people who were only ten paces from where he was attacked but they never noticed anything PW5 said that she heard her uncle Jacob (PW1) calling and she responded where she found him being assaulted.
3. That the learned trial magistrate failed to note that PW1's evidence was laden with embellishments than facts as it demonstrates a manifest intention or desire to lie in order to achieve or attain certain ends. As PW1 stated that he fell unconscious for three days and all these three days he was admitted in hospital while PW4 (medical doctor) who received, examined and treated the victim never stated if PW1 fell unconscious.
4. That the learned trial magistrate grossly erred in both law and Fact in failing to note that the Prosecution witnesses gave very contradictory evidence.

5. That the learned trial magistrate grossly erred in both law and in fact in failing to note that PW1 never testified on the intensity of the alleged electricity light which aided him to recognize his assailants at the scene of the alleged crime.
6. That the learned trial magistrate grossly erred in both law and fact in treating and relying on the second Accused's evidence as an accomplice witness against the appellant here in but failed to note that this was a witness with an interest to serve as he thought by stating so he would be acquitted.
7. That the learned trial magistrate grossly erred both in law and in fact by failing to note that the charge was not proved beyond reasonable doubt against the Appellant and to the required standard by the law.

The hearing of appeal was done orally. The appellant was present in person and without legal representation while Ms. Mary Lucas learned State Attorney appeared for the respondent Republic.

Submitting on the 1st ground, the appellant stated that the honourable Magistrate convicted him without taking into consideration that the victim never identified him at the scene of crime or at the dock. He further submitted that the victim was only able to identify the 2nd accused.

Challenging the credibility of prosecution witnesses on the 2nd ground, the appellant submitted that based on PW1's testimony that he was attacked for one hour and that there were people about ten paces away from the scene, he questioned how those people could not hear anything. It was the

appellant's submission that from that testimony the credibility of PW1's was questionable. Still on the same point the Appellant also challenged the credibility of PW5. He submitted that according to PW5's testimony she heard PW1 screaming and went to the scene where she found him being assaulted and decided to call PW2. It was his submission that the statement meant that PW2 was far from the scene and if that was the case, then the Appellant questioned the credibility of PW5's statement by arguing that it was not possible for one to be attacked for one hour while there were people ten paces away but could not do anything. He also questioned as to why PW5 could not call for help from the people who were ten paces away instead she decided to call PW2 who was far from the scene. He submitted that all these statements were not true and that the Magistrate failed to note that the prosecution witnesses were staged.

Moving on to the 3rd ground regarding contradiction in prosecution evidence, the appellant submitted that PW1 testified that he lost consciousness for three days and that during these three days he was admitted at the Hospital. Pointing to the contradiction the appellant submitted that PW4 who was a doctor on the other hand testified that PW1 was treated on the same day he went for treatment. It was the Appellant's view therefore that PW1 lied to the court and that his evidence was not credible.

Submitting further on the issue of contradiction the Appellant stated that the date of the incidence differed from the witness testimonies. That PW1 said the event took place on 12/5/2019 while PW2 said it was on 13/5/2019.

Still on the same point of contradiction the appellant submitted that PW1 said he was the one who called PW2 who is his sister but PW2 said she was called by PW5. The Appellant argued that if these witnesses were talking about one and the same thing then it is obvious that the prosecution evidence was fabricated.

Submitting on the 5th ground the appellant stated that the magistrate also did not observe that PW1 did not testify on the intensity of light at the scene of crime. That PW1 only mentioned that at the scene of crime there was electric light but did not mention or testify on its intensity.

On the 6th ground the Appellant submitted that the magistrate erred by relying on the evidence of the second accused who had personal interest. The appellant stated that the second accused believed by testifying as he did, he would be released. It was the appellant's submission that the second accused's evidence against him was false. Lastly, the Appellant prayed for this court to allow his appeal and release him.

Responding to the submission Miss Mary Lucas, learned state attorney submitted that after reviewing the grounds of appeal and record of the court they support conviction and sentence on the ground that the Republic had proved the offence without any reasonable doubt.

The learned counsel submitted that the appellant was charged with the offence of causing Grievous harm C/s 225 of the Penal Code Cap. 16 R.E. 2019 and in order to prove the offence the victim must show that he/she had been injured and that it was the appellant who injured him. It was her further submission that at page 17 of the proceedings PW1 described how

he was injured by the appellant and how the event took place also he did describe the physical appearance of the appellant including the kind of clothes the appellant was wearing. That on the date the appellant was with Musa and the latter was holding the appellant's legs. That PW1 also explained that he knew the appellant before the event.

Ms. Mary submitted that it was wrong to argue that the identification was not proper because the event took place for one hour and that all the descriptions had met the criteria stated in the case of **Waziri Amani vs. R** [1980] T.L.R. 250.

Ms. Mary also submitted that with respect to the issue of identification of the Appellant, PW5 also explained in his testimony how the appellant was attacked as seen on page 34 of the proceedings. It was her submission that the assailants were known by the victim because they lived in one street. Ms. Mary further submitted that the Appellant admitted in his defence that he knew the victim and PW5 and that DW2 testified that he only intervened when the appellant was beating PW1. She submitted that the doctor who was PW4 only explained the kind of wounds inflicted on PW1, that the injuries were on the head, neck and on the chest. It was Ms. Mary submission that they objected that the evidence was contradicting because of the presence of injuries. She was of the view that the difference on the dates did not affect the fact that the Appellant attacked PW1 and cause grievous body harm.

Concluding the submission Ms. Mary maintained that they were supporting both conviction and sentence and thus prayed for the appeal to be dismissed for want of merit.

Now after going through the records of the trial court, grounds of appeal and submission for and against the appeal, the issue for determination is whether the appeal has merit. For purposes of determining this issue I will be examining each ground of appeal as raised by the appellant.

On the first ground the Appellant's complaint was that PW1 never recognized him at the crime scene and that he also failed to identify him before the court a fact which was denied by the State Attorney. I went through the trial court records to confirm Appellant's claim and in doing so I noted that the allegation was not true. I also noted that there is a typing error on the face of record that omitted part of the witness testimony which may have mislead the appellant. On the typed proceedings some words were left out in the witness testimony so it looks like the witness did not identify the appellant but I checked with the original record and confirmed that the appellant did properly identify the appellant by his name and also pointed at him during trial. In the circumstance, this ground lacks merit and is dismissed accordingly.

On the second ground the Appellant challenged the credibility of prosecution witnesses in particular PW1 and PW5. He contended that their evidence was highly improbable. The appellant questioned the fact that PW1 stated to have been attacked for about an hour and there were people ten paces away from the crime scene but could not notice anything. He

also questioned the fact that PW5 who said she witnessed the whole incident but failed to shout for help from people who were nearby instead she phoned PW2 the victim's sister who was not around the crime scene. The appellant was of the view that these witnesses' credibility had been greatly undermined and should be discredited.

It should be noted that there is no specific rule in determining credibility of a witness. In the case of **Goodluck Kyando Vs. Republic** [2006] TLR 363, it was stated there in that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. When determining the issue of credibility of a witness the Court of Appeal of Tanzania in the case of **Nyakuboga Boniface vs. Republic** (Criminal Appeal No. 434 of 2016) [2019] TZCA 461 (unreported) the court said that;

"There are no rules of thumb in determining the credibility, truthfulness or reliability of a witness. It all depends on how the demeanour of the witness, has been assessed by the presiding Judge/magistrate, and the assessment which is made to the evidence which he/she gives in court."

Based on the above, the credibility of a witness is determined by assessing the demeanour of a witness in relation to the evidence he gives in court. The issue of assessment of demeanour of a witness is totally in the authority of the trial magistrate since only he has the opportunity of seeing the witness when he testifies. Therefore, being an appellate court, I am not in a position to determine the credibility of the witnesses by this means.

However, there are other ways through which credibility of a witness may be determined. In the case of **Nyakuboga Boniface vs. Republic** (supra) the court stated that;

"Besides observing the appearance of the witness, in resolving as to whether the witness is trustworthy and telling the truth, the trial Judge/magistrate, is enjoined to correlate the demeanour of the witness, and the statements he/she makes during his/her testimony in court. If they are not consistent, then the credibility of the witness, becomes questionable."

The court went on stating that;

*"In view of the foregoing therefore, the monopoly of the trial court in assessing the credibility of a witness, is limited to the extent of the demeanour only. But there are other ways in which the credibility of the witness can also be assessed as the Court held in **Shabani Daud Vs. Republic**, Criminal Appeal No. 28 of 2001 that: - "The credibility of a witness can also be determined in other two ways that is, **one**, by assessing the coherence of the testimony of the witness, and **two**, when the testimony of the witness is considered in relation to the evidence of other witnesses"*

Now, coming back to the present case being led by the above cited authorities, we can determine the credibility of PW1 and PW5 by assessing coherence in their testimony and also by considering their testimonies in relation to the evidence of other witnesses. Based on the Appellant the

evidence of these two witnesses were false because he thought it was not possible for one to be attacked the way the victim said he was without people who were said to be nearby fail to know or without the victim or PW5 calling them for help.

While going through the entire evidence given by PW1 and PW5 I had no doubt the witnesses testified as to what actually happened due to the consistence in their testimony from examination in chief to cross examination there is no change in their testimonies, they insisted on what they testified earlier. The doubt that the Appellant was pointing out of the possibility of the people nearby not noticing the attack was cleared by PW1 during cross-examination when he said that the incident happened around 22:00 hours which was at night and that he did raise an alarm but there was also a radio which was playing in high volume. This explains the reason as to why it was not possible for the people who were about ten paces from the scene to hear or notice what was going on inside the grocery. In the testimony of PW5 she did not mention there being people near the grocery she only stated that she was outside with one person whom she was demanding money from after selling him a drink. The appellant did not question PW5 as to why she did not call people who were near, it is therefore irrelevant to pose the question at this stage challenging its truthfulness. Also considering the testimony of PW1 and PW5 in relation to other witnesses' testimonies there is a clear connection and one can make sense of the story that was being told. PW1 stated that he was attacked by the Appellant and another person who were charged together. That after they attacked him the Appellant beat him on his head using a bottle of beer

which he had smashed on a wall and he fell down and started bleeding. That the two accused continued beating him on different parts of his body. PW5 said while she was outside, she heard her uncle calling her from the front door and when she went inside, she found him being beaten by the two accused persons whom she knew as she described them by their names. PW5 decided to call PW2 and PW2 said she found her brother PW1 at Irene's grocery bleeding on his neck and his head. PW4, the doctor also stated that he attended PW1 who was injured after being assaulted by some people. He confirmed that the injuries were caused by both blunt and sharp objects. In their defence the Appellant denied the charge but his co-accused implicated him by stating that he found the victim (PW1) fighting with the Appellant and all he did was stopping them from fighting. Looking at the totality of this evidence it is so clear because what the victim (PW1) stated was collaborated by the testimonies from the rest of the prosecution witnesses including the defence from the Appellant's co-accused. In the circumstance, it is the finding of this court that PW1 and PW5 were credible witnesses who gave credible evidence. Therefore, I find the second ground of appeal lacking merit and it is accordingly dismissed.

On the third ground much of what was complained about by the appellant has already been addressed when discussing the second ground of appeal. In this ground the appellant has complained that the prosecution witness was staged specifically pointing at PW1's evidence and argued that his testimony was a lie and not credible. He specifically referred to PW1's statement where he testified that he lost consciousness for three days and that he was admitted in hospital. He compared the statement with the

statement of the Doctor (PW4) who stated that he treated him for one day only. The appellant argued that PW1's statement was not true. Having revisited all the evidence of PW1 and Pw4 I noted that the appellant had misinterpreted the evidence because PW4 only testified about what he observed from the patient (PW1) the day he examined him. His evidence was therefore an expert opinion given after he examined the patient, he was not supposed to go outside his expertise. It is therefore wrong to compare his testimony with the victim's. The appellant had an opportunity to cross examine his evidence in order to establish his point if he wanted but it is wrong for him to argue that the witnesses were staged just because the PW4's evidence was not similar with that of PW1. This ground is also meritless and it is accordingly dismissed.

On the fourth ground the Appellant alleged that the prosecution witnesses gave very contradictory evidence regarding the date the offence occurred. That according to PW1 and the charge sheet the incident occurred on 12/5/2019 while according to PW2 the incident occurred on 13/5/2019. Another contradiction was regarding the statement of PW1 who said that he is the one who phoned his sister (PW2) while PW2 said that she was phoned by Irene who is PW5. The appellant argued that the contradiction suggests that the evidence was fabricated. This ground just as the first ground is without any merit but it only came about due to typographical errors on the face of record. The record of proceedings which was typed had many errors and it seems the trial magistrate did not proof read the same before signing. Had the trial magistrate proof read the typed proceedings before signing all these grounds of appeal would not have

emerged. I have read the original record and discovered that all the contradictions pointed out by the appellant were a result of typing error. In the original records there is no difference on dates and even the statement that PW1 is the one who phoned PW2 is not true because it is written that PW2 was called by Irene (PW5). Thus, this ground of appeal is dismissed for lack of merit.

On the fifth ground the appellant complained that PW1 never testified on the intensity of the alleged electricity light which aided him to recognise his assailants at the crime scene. This ground relates to the first ground of appeal where the Appellant was challenging his identification by the victim. Having already discussed about how the appellant was properly identified by the victim who was PW1, I will not further discuss the same matter at this point. This ground lacks merit because the records show that the Appellant was properly identified by the victim. In this circumstance although he did not describe the intensity of the tube light, while assessing this evidence the trial court also took into account other witnesses' testimony which collaborated the evidence of PW1. Therefore, the fact that PW1 did not testify on the intensity of light alone does not mean the Appellant was not properly identified. Although failure to explain or describe the intensity of light may be fatal in some circumstances but not in this situation where there was strong evidence such as that of PW1, the victim and PW5, who were eye witnesses. Consequently, this ground of appeal is dismissed for lacking merit.

On the sixth ground the Appellant complained that the trial court erred by relying on the second accused's evidence as he failed to note that the

second accused had an interest to serve. This ground also lacks merit because the appellant was not convicted based on the evidence of the second accused only. The second accused's evidence only corroborated the evidence of other prosecution witness. Again, the evidence of the second accused cannot simply be left out for the reason that he had an interest to serve. This interest if at all was there it ought to be established by evidence for it to be given weight. This ground of appeal is also dismissed.

Finally, the 7th ground of appeal should not detain me much, based on my analysis of the trial court's record, I am satisfied that the charge against the appellant was proved on the required standard of law.

For theafore stated reasons, I find the appeal meritless and is hereby dismissed in its entirety. It is ordered accordingly.

Dated and delivered at Moshi this 17th day of June, 2022




T. M. MWENEMPAZI
JUDGE

Judgment delivered this 17th day of June, 2022 in Court in the presence of the appellant and Ms. Mary Lucas, State Attorney.


T. M. MWENEMPAZI
JUDGE

Right of further appeal explained to the appellant.