IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 171 OF 2021

(Originating from Criminal case No. 46 of 2020 of the District Court of Ukerewe at Nansio before Honourable L. A Nyahega)

ALFRED S/O MABAGALA @

MUGETA AND ANOTHER----------APPELLANTS

VERSUS

THE REPUBLIC----------RESPONDENT

JUDGMENT

Last Order: 11.07.2022
Judgment: 25.07.2022

M.MNYUKWA, J.

The District Court of Ukerewe at Nansio convicted and sentenced the appellants herein, after they were being found guilty of the 1st count among the three counts which they were charged with, which is the offence of grievous harm contrary to section 225 of the Penal Code, Cap 16 R.E 2019. Dissatisfied with conviction and sentence, they have appealed to this court raising three grounds of appeal as follows;

1. *That, the trial magistrate erred in law to the extent that there were procedural irregularities both in proceedings which resulted into convicting the appellants basing on the PF3 tendered by the prosecutor.*
2. *That, the trial magistrate erred in law and fact by convicting the accused person basing on evidence adduced by the prosecution witnesses which was not sufficient to prove the case beyond reasonable doubt, the required standard.*
3. *That, the trial magistrate erred in law and fact by convicting the accused person basing on evidence adduced by the prosecution witnesses which was contradicting to each other.*

The appellants pray for their appeal to be allowed, conviction and sentence of Ukerewe District Court be set aside and to be released from jail, and any other relief this court may deem just and fit to grant.

At the trial court, the appellants (Alfred Mabagala Mugeta and Mateso Mgeta) were both charged with three counts. First count being grievous harm contrary to section 225 of the Penal Code Cap 16 R.E 2019, where it was alleged that, the appellants on 25th day of August, 2020 about 10:00 hrs at Nyamanga Village within Ukerewe District in Mwanza Region, they did hit with stones a Police officer Number J.2330 PC MOHAMED who suffered serious injuries.

The second count, Obstructing a Police Officer from execution of his duty contrary to section 243(b) of the Penal Code Cap 16 R.E 2019. It was alleged that, on the same day and at the same time at Nyamanga Village Within Ukerewe District in Mwanza Region, the appellants had resistance by throwing stone to one HALFAN SABAYA MGHAMBA, Assistant Superintendent of Police, who was in duty purposely to arrest an accused person namely HATARI S/O MABAGALA, whom was suspected to commit an offence of murder.

The third count, brawls contrary to section 89(1) b of the Penal Code Cap 16 R.E 2019. It was alleged that, the appellants on the same date and time at Nyamanga Village Within Ukerewe District in Mwanza Region, the appellants did throw stones in the manner that created disturbance in such a manner that was likely to cause a breach of peace. The appellants denied both counts.

At the trial, the prosecution had 5 witnesses who testified to the effect that; on 28th August, 2020, PW1(J2330 PC MOHAMED), PW3 (ALFAN SABAYA MGAMBA) and PW4 (H3699 PC ZAWADI), were among the police officers that were appointed to investigate and arrest the suspects of a murder that had occurred in Ukara, Nyamanga Village. That, the police officers together with the District Peace and Security committee headed to the scene of crime. That, on the scene of crime there was a lot

of people who were gathered and before they arrested the suspect, the District Commissioner addressed the mass about mob justice. The suspect was named Hatari Mabagala. It was alleged that, as they wanted to arrest him, the 1st appellant, who is the father of the suspect, refused and prevented the police officers to arrest his son. The 1st appellant together with the people started throwing stones to the police officers who left the suspect and started to run away to save their lives. While running, people pursued them by chasing them, including the appellants. That, while running the 1st appellant stoned PW1 on his knee. That, the 2nd appellant also stoned PW1 on his thigh. The 2nd appellant wanted to stone PW2 for the second time but he was shot by PW4, who was ordered by PW3 to shoot him before he could stone PW1 for the second time. The 2nd appellant fell down. The police officers used tearing gas to stop the people and saved PW1 as they took him and run away from the people. PW1 was taken to Busya for the first aid and then he was taken to Nansio District Hospital. He was then referred to Bugando Referral Hospital, where it was discovered that his leg was fractured and he was treated.

On defence side, DW1 and DW2 who are the respective appellants alleged that, on 25th August 2020, the District Commissioner together with his team, including the Police officers, gathered the people and addressed them about the campaign and election and telling them to vote for CCM

and not CHADEMA as there is only one political party, that is CCM. That, the misunderstanding arose between members of the two political parties. Police officers started firing tearing gases and shooting in the air. That, the appellants started running. The 2nd appellant was shot on his right leg and he fell down. The 2nd appellant was taken to the bush by DW3 (FIKIRI MUGETA), who was running behind him before he was shot. DW3 took DW2 to the District Hospital, where they were referred to Seketoure Hospital and later on referred to Bugando Referral Hospital where DW2 was operated. DW2 was later on arrested and both appellants were charged with three counts as stated above. After the full trial, the appellants were found guilty of the 1st count and they were both convicted and sentenced to five years imprisonment.

Dissatisfied with the conviction and sentence, they filed the present appeal. During the hearing of this appeal, the appellants were represented by Erick Muta, learned Counsel, while the respondent was represented by Sabina Chogogwe, learned State Attorney. The appeal was argued orally.

In support of the appeal, the appellant's counsel started by adopting the grounds of appeal as part of his submission. He prayed to start with the 2nd ground of appeal where he submitted that, the trial court based its decision on identification of the appellants, on the reason that the appellants were properly identified at the time of the commission of crime

as it is shown on page 17 of the judgement. The appellant's counsel holds an opposite view that, the date and day when the incident occurred, it was in the public meeting which involved the entire public. That, all the witnesses on the prosecution side testified before the trial court that there was a lot of people in that public gathering and its number was not established. It was further stated that in the middle of the meeting, there was unknown event that led to a commotion.

He further submitted that, PW3 admitted that in the said commotion 23 tearing gases and 6 bullets were used. Therefore, in the circumstance where all people ran away, it was difficult to have exactly identified the persons involved, taking into consideration that identification parade was not conducted. He went on that, on page 22 and 23 of the typed proceedings, the victim stated that, he did not see the stone which injured him as many people threw stones towards them, but he suspected that he was hit by a stone.

Appellant's counsel further submitted that, the victim testified to have bruises as per page 22 of the proceedings, however he denied to have bruises on page 23 of the proceedings. That, on page 17 of the judgement the trial court convicted the 2nd appellant based on prosecution evidence. For that reason, his view on the area in which the 2nd appellant was injured on the legs and not in other place, it is evidence that he was

attacking the policeman. Appellants' counsel cited the case of **Andrea Zabron and Florian Kamambete v R**, Criminal Appeal No. 480 of 2016, that at page 19 it tries to explain about visual identification.

It is appellants' counsel view that, the appellants were not properly identified as the 1st appellant was arrested on 14/9/2020, which was two weeks after the incidence and the 2nd appellant was arrested when he was receiving treatment after he had followed the procedure which included taking PF3, and therefore identification was an afterthought.

Submitting on the third ground of appeal the appellants' counsel pointed out that, there was contradiction on prosecution evidence. That the victim stated to have bruises and PF3 stated that there were no bruises as testified by the medical doctor. He further submitted that, the victim testified to have got treatment from Busya, while the doctor stated that he referred the victim to Bugando. He went on that, the victim said he was bleeding while the doctor said there was no bleeding. That, the nature of offence which is grievous harm but PF3 suggest that it was harm and not grievous harm. That, the effect of harm or grievous harm is to result either in less or severe sentence. He then prays the court to look into records and take into consideration the elements of grievous harm which is different from harm. Appellants' counsel retires his submission in chief by abandoning the 1st ground of appeal.

Responding to the appellant's submission, Ms. Chogogwe submitted that, they oppose the appeal and support the conviction and sentence imposed to the appellants. Regarding the second ground of appeal, she submitted that, since the incident happened at day time, it cannot be said that there was mistaken identity. That, identification parade cannot be done in incidents that has occurred in day time. That, it is their submission that PW1 arrested the 1st appellant's child and in executing his duty the 1st appellant resisted as shown on page 21 of the proceedings, that the 1st appellant throws a stone to him.

Ms. Chogogwe went on to referrer to page 22 of the trial court's proceedings that, the distance was about 4 to 5 metres from where the 1st appellant was. That, PW1 shows that, he knew the 1st appellant and his son very well. Respondent's counsel cited the case of **Kennedy Ivan vs R,** Criminal Appeal No. 178 of 2007 where the Court of Appeal stated that the case of Waziri Amani was not exhaustive and each case has to be decided on its facts. That the incident happened in the day time and the offence was not committed at night which is distinguishable with the case cited by the appellants.

She further submitted that, the appellants were convicted based on the strong evidence of PW1, PW3 and PW4 which was corroborated with PW5. She states that, it is the position of the law that every witness is

entitled to credence and his evidence should be admitted as referred in the case of **Goodluck Kyando v R** [2006] 363. That, all witnesses were trusted by the court as Exhibit P1 shows that the victim was injured. She prays for the ground to be dismissed.

On the third ground of appeal, the respondent's counsel avers that, there is no contradictions that goes to the root of the case. It is their strong submission that, PW1 was injured as corroborated by exhibit P1 from Busya and Bugando Hospital as a referral. The appellants did not say where the victim was before he was referred to Bugando. She went on that, Exhibit P1 which is PF3 shows that PW1 went to Busya and got treatment. She prayed for the ground to be dismissed and this court to upheld the decision of the trial court.

In his rejoinder, the appellant's counsel submitted that, the argument that the 1st appellant was identified because the one who was arrested was his son was not proved in the trial court as the 1st appellant did not state if he was his child and therefore the person was unknown. That, the law does not state at what time the identification parade is of essence and the mere argument that the incident happened in the day time and so no need of identification is baseless. He insisted that, all witnesses stated that there was commotion and the victim and all

witnesses did not state at what time they were injured, either before, during or after the commotion, and therefore identification was important.

He finalised his argument that, the distance of 4 to 5 metres between the victim and the 1st appellant is affected by the absence of civil unrest since all the witnesses stated that, people were running away after the commotion. He further prayed this court to set aside the conviction and sentence against the appellants.

I have taken into consideration the records available, grounds of appeal raised, and both parties' submissions. In this appeal, the issue for determination will be whether this appeal has merit. In determination of this appeal, I am mindful that, this is the first appeal, and therefore as a 1st appellate court, I am not bound by the findings of the trial courts and I am duty bound to put the evidence given into strict scrutiny and re-evaluate the evidence in record and if desirable to make my own findings. (See the case of **Leopold Mutembei Vs Principal Assistant Registrar Of Titles, Ministry Of Lands, Housing And Urban Development And The Attorney General,** Civil Appeal No. 57 Of 2017)

The appellants second ground of appeal faults the trial court's judgement that the prosecution evidence was not sufficient to prove the case on the required standard. Submitting on that ground, the appellants' counsel based his submission on the point that, the appellants were not

properly identified. It is appellants' submission that they were not properly identified taking into consideration that there was a lot of people at the incident.

First of all, the evidence given by the prosecution regarding the genesis of the incident was that, they went to Ukara Nyamanga after being informed of the murder incident. And that, they wanted to arrest a person known as Hatari who was named as a culprit for the murder committed there, in which the appellants resisted. On the other side, the defence case says, there was a campaign going on, and the said Hatari was one of the contesters under CHADEMA party and the District Commissioner wanted the people to vote for CCM only, and that was the reason for all the commotion. However, during cross examination PW1 and PW3 all admitted that there was campaign and Hatari was one among the contesters.

Venturing into whether the appellants were properly identified; it is a long-established principle of the law that, visual identification is one of the weakest and unreliable evidence to be relied upon as it was said in the case of **Waziri Amani v R** [1980] LRT 250. The case also outlined the conditions to be taken into consideration in determining if the accused person was properly identified, the court said

"The time the witnesses had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, it was day or night time; whether there was good or poor lighting at the scene; whether the witness knew or had seen the accused before or not"

Furthermore, in the case of **Raymond Francis v R** [1994] TLR 100. The Court of Appeal held that:

"It is elementary that in a criminal case whose identification depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost important."

In our case at hand, the incident occurred at day time as the prosecution witnesses testified the incident to have occurred on 10: 00 am. The defence witnesses did not state the time, however they did not dispute the time stated by the prosecution side and so I am concluding that the incident occurred during day time and so the issue of lighting is unquestionable.

From the prosecution evidence among PW1, PW3 and PW4 who were at the scene of crime, no one testified to have known the appellants before, therefore the appellants were strangers to them. In those circumstances, it is my view that the evidence to clear all possibilities of

mistaken identity of the appellants was not watertight taking into consideration that the appellants were the strangers to them.

Besides, PW1, PW2 and PW3 both testified that the 1st appellant refused for his son to be arrested before the people had started to throw stones towards them. That the 2nd appellant also objected for the arresting of the 1st appellants son. From both prosecution evidence there is no evidence that the resistance took how long as said by PW1 when cross examined.

I agree with the respondent's counsel that, identification parade was necessary taking into consideration that, there was a lot of people at the commission of the crime and the appellants were arrested a month later. That is to say, the appellants were identified at the dock in which the dock identification is valueless one as it was said in the case of **Baligola Lupelo vs R,** Criminal Appeal No. 517 of 2017, where the court of appeal said,

> *"propounding on the significance of an identification parade where the identifying witness is a stranger to the suspect/accused, this Court in the case of* ***Musa Elias and Two Others v. R,*** *Criminal appeal No. 172 of 1993, (unreported) stated that;-*
>
> *Furthermore, PW3's dock identification of the 3rd appellant is valueless. It is well established rule that dock*

identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successful identified the accused before the witness was called to give evidence at the trial"

In addition to the above, in the case of **Maulid Hamis@ Mrisho v R,** Criminal Appeal No 216 of 2016. CAT at Tabora, among other things the Court held that:

" *...Besides, in the absence of PW1 being taken to the identification parade to identify the appellant, he identified the appellant in the dock which was worthless as it was not preceded by the identification parade."*

That is to say the witness's identification of the accused person through identification parade before trial, add credence to the witness evidence that the accused were properly identified he properly. Thus, lack of identification parade to identify the appellants, whom they were strangers to the prosecution witnesses leaves a question as to whether the appellants were properly identified.

Lastly on second ground of appeal, I would like to observe the circumstances of when the act of grievous harm had occurred, as I have doubts as to whether the prosecution was able to establish that the appellants indeed stoned PW1. From the prosecution evidence, PW1

testified to the effect that, after the 1st appellant had objected for his son to be arrested, there was a commotion and people started to throw stones at them and they started to run away to save themselves. PW1 went on that, he saw the 1st appellant throwing stone at him, however he did not state, the position of the 1st appellant for him to see him while he was running for his life. Likewise, the testimony of PW3 and PW4 testified to have seen the 1st appellant stoning PW1. From the trial court's judgement (page 16) the trial court' magistrate held that it was indeed the appellants who stoned PW1 as PW3 and PW4 stated to have seen the appellants stoning PW1. However, throughout their evidence (PW1, PW3 and PW4), there is no explanation as to how they saw the appellants throwing stones as there was a lot of people chasing them, and if they were being chased it is obvious that the people were behind them and so it is disturbing to know exactly how the witnesses managed to saw the appellants throwing stones.

It is PW1's evidence that after he was stoned two times, he fell down and saw the 2nd appellant taking another stone to throw at PW1 and that is when he was shot. But still, the prosecution failed to state the distance from where PW1 was lying and where PW3 and PW4 were situted to see clearly and taking into consideration the evidence that, people were running toward them and there was tearing gases and firing

of the bullets. It is not disputed that the 2nd appellant was shot, what is disputed is the circumstance that surrounds his shooting as the evidence shows that, the police officers were also running and it is not clear when did they stop and turn back to save PW1 and shot the 2nd appellant as he wanted to throw another stone.

The Court of Appeal in the case of **Maulid Hamis@ Mrisho** (supra) it states that:

> *"The law on visual identification is settled before relying on it the court should not act on such evidence unless all the possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight."*

Guided by the above decision and in the circumstances of our case at hand, I am not convinced that the appellants were clearly identified as the one who stoned PW1. That being the case I hold that; identification was not water tight taking into consideration the circumstances surrounding the incident. Thus, the identification of the appellants at the trial court was contradictory and therefore the trial court ought not to have acted on such evidence to convict the appellants.

On the foregoing I allow this ground and I will not determine the third ground as this ground suffice to dispose the entire appeal. I proceed

trial court was contradictory and therefore the trial court ought not to have acted on such evidence to convict the appellants.

On the foregoing I allow this ground and I will not determine the third ground as this ground suffice to dispose the entire appeal. I proceed to quash the conviction and set aside the sentence imposed, I consequently set free the appellants, unless lawful held.

It is so ordered.

M.MNYUKWA

JUDGE

25/07/2022

Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

25/07/2022

Court: Judgement delivered this 25th July, 2022 in the presence of parties.

M.MNYUKWA

JUDGE

25/07/2022