IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

PC CRIMINAL APPEAL NO. 11 OF 2021

(Originating from Criminal Appeal No. 09 of 2021 at the District Court of Bahi at Bahi, Original Criminal Case No. 106 of 2021)

NEEMA MWENDAA .....APPELLANT

VERSUS

ANGELINA GABRIEL..... RESPONDENT

JUDGMENT

22/6/2022 & 03/8/2022

KAGOMBA, J

This is a second appeal where the appellant, NEEMA MWENDAA, challenges the decision of the District Court of Bahi at Bahi (henceforth the "1st appellate court") which for the second time dismissed the appellant's allegation that she was assaulted by ANGELINA GABRIEL, the respondent, for lack of sufficient proof.

In Bahi Primary Court (henceforth "the trial court"), the respondent was charged with common assault contrary to section 240 of the Penal Code, [Cap 16 R.E 2019] having been alleged that on 27/8/2021 she assaulted the appellant by beating her with fists and kicked her on the stomach thereby

causing her bodily harm. The respondent denied the charges and claimed in her defence that she was the one who was actually assaulted by the appellant, at an incident that occurred at a water well where both had gone to fetch water. After a full trial, the trial court found that the prosecution evidence was not sufficient to convict the respondent. The same finding was made by the 1st appellate court on appeal, hence this further appeal.

The appeal at hand is founded on the following three grounds: -

1. That, the 1st appellate court erred in law by undervaluing the undisputed evidence of the appellant's witness, SM 2 who was an eyewitness to the incident and instead the court criticized his evidence solely on the basis that he was not present from the beginning of the incident.

2. That, the 1st appellate court erred in law by dismissing the appeal on the ground that since she had not called the children who were present during the incident, then she had not proved her case beyond reasonable doubt meanwhile the appellant and her witness, SM 2 had testified vividly.

3. That, the 1st appellate court erred in law by failing to consider that the appellant is a lay person thus could not be familiar with the procedure of tendering PF 3, as she assumed that it would have been presented in court by Police Officer; instead, the court stressed this as appellant's fault and held that she did not prove her case beyond reasonable doubt.

During hearing of the appeal both parties appeared unrepresented, accompanied by their respective husbands who are half-brothers. Being lay persons, both parties were rather brief and could not expound their respective cases well.

Submitting on her appeal, the appellant said she did not tender PF 3 and the 1st appellate court found that the evidence was not sufficient. She lamented that the 1st appellate court wanted her to bring to court the children who were around to adduce evidence while one of them was just one and a half years old.

The appellant further submitted that the respondent confessed to have assaulted her, adding that the respondent wanted to give her money for treatment, but she did not do so despite the local leaders pleading with her to pay the money. The appellant revealed that the aim of this appeal is to claim from the respondent the money she had spent for treatment so that she can resume her small businesses, close the matter and live peacefully. She prayed the court to allow the appeal.

The respondent, on her part, reiterated what she has been stating in the lower courts that she is the one who was beaten by the appellant. She said that there were children who were playing at the scene of the alleged crime and who came to set the parties apart, implying that those children were capable of being called as witnesses but were not called to testify.

Regarding the money, she said that she did not pay because the hamlet leaders are the ones who told her to pay the appellant despite the fact that she is the one who was beaten. She lamented that the hamlet leaders did not hear her evidence before imposing that unlawful decision on her. She was adamant that she is not supposed to pay that money which was Tshs. 100,000/= as demanded by the appellant for purposes of making a peaceful settlement.

On the other hand, the respondent submitted that the appellant wanted to pay her Tshs 69,000/= as compensation for the assault on her but she refused to accept that money. She added that, she is surprised to be summoned to this court for the appeal.

In her rejoinder, the appellant clarified that the she wanted to pay the respondent the said Tshs 69,000/= as a result of the decision of the village leadership who said she had wronged the respondent. She added that the respondent received the said money before the police officers. She questioned that if she had beaten the respondent, the respondent should have tendered a PF 3 as proof. This is all what the court could gather from the submissions of the lay parties.

The rest of the submissions were entirely new matters and irrelevant too. It is trite law that an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal. Such was the decision in Gandy **v. Gaspar Air Charters Ltd.** (1956) 23 EACA 139 and in **James**

Funke Gwagilo v. Attorney General (CAT) Civil Appeal No. 67 of 2001 (unreported). Accordingly, all the new allegations by parties, including witchcraft beliefs, intimated to the court off record, have not been considered.

From the grounds of appeal, the submission by the parties and records of the lower courts, it is evident that the main issue for determination in this appeal is whether the appellant's side, which prosecuted the case during trial, was able to prove the charge against the respondent beyond reasonable doubt.

In determining the above stated issue, the court is alive to the fact that this is the second appeal, whereby there is a concurrent finding by both lower courts that the case against the respondent was not proved beyond reasonable doubt. (See the case of **Director of Public Prosecutions V Jaffari Mfaume Kawawa (1981) T.L.R. 149,** for the stated legal position).

According to trial proceedings, the prosecution case relied on the testimonies of SM1 – Neema Mwendaa (the appellant); SM2-Festo Yona and SM3- Mayombe Nkhangala. The third prosecution witness (SM3) is on record testifying that she was not at the scene of crime on the alleged date of the commission of the crime. He only testified to the effect that the parties went to the Hamlet office where they were told to cooperate for treatment of each other. He also testified that the respondent confessed that she had beaten

the appellant whereby she was ordered refund Tshs. 69,000/= to the appellant and she did refund the same immediately.

SM 2 testified to the effect that he heard an emergence voice call coming from the water well site. He followed the voice and was told by children who were around that there was a fight. He later found SM1 was lying down and the respondent was on top of her squeezing her neck. A lady came and they helped out to remove the respondent. He further testified that, the respondent was heard saying that she wanted to kill the appellant because she had refused to return greetings.

Then, SM1, the appellant, had testified to the effect that the respondent found her at the well, she greeted her and she responded. However, the respondent lamented that she did not respond to her greeting, whereupon the appellant insisted that she had responded but the respondent insulted her by telling her that she had been delivering babies who later died and threatened her. That after such exchanges the respondent assaulted her until when they were separated by SM2.

The Respondent's defence was marshalled by the SU1 – Angelina Gabriel (The respondent) who partially confessed about the source of their fight. SU1 said she greeted the appellant but she could not hear her response. That is when she told the appellant again that she greeting her, whereupon the appellant started to insult her. She said she did not beat the

appellant but the appellant was the one who punched her and did bite her finger until when she shouted for help.

SU1 also confessed to pay the compensation so as to settle the matter amicably as relatives, but the appellant demanded more money, that is why the same was given back to her. She categorically denied beating the appellant. She confessed to have agreed with the appellant for payment of Tshs 69,000/= as costs for treatment, and that she did accompany the appellant to hospital once but the appellant afterwards demanded to be paid Tshs. 5,820,000/= plus one cow. As she had no that huge amount of money, the Tshs 69,000/= she had intended to give was returned her and the matter was taken to the trial court.

SU 2- Tano Njelwa, testified as an eye witness who saw the appellant as the person who assaulted the respondent after an abortive greeting. She testified along the evidence by other witnesses regarding the greeting which was not reciprocated by the appellant. She said it was the respondent who was about to be killed by the appellant.

With such type of evidence, the trial court found that the prosecution evidence was not strong enough to convict the respondent and held doubts that the fight occurred on 27/8/2021 at 15:00hrs but appellant went to report to the village office on 28/8/2021, which couldn't be the case if she was so much injured as she had testified. The trial court found that the evidence of SU2 that the appellant was not harmed was true. The trial court

further found the prosecution evidence wanting by not calling the children who were playing around when the incident occurred. The same negative inference was drawn by the 1st appellate court.

I have considered the way the trial court analyzed the evidence. Two reasons given for finding that the case was not proved are supportable. Firstly, the fact that it is the duty of prosecution to prove the case beyond reasonable doubts and there were doubts in this case. Secondly; the negative inference by not calling the children who were around to testify.

While the appellant says that one of her children was one and half (1½) years old, she didn't talk about the age of the other children who were at the scene of crime. Furthermore, according to the testimonies of SM2 Festo Yona and SU2- Tano Njelwa, there were children who witnessed the fight. SM2 whose testimony the appellant has banked on, was not at the scene of crime when the fight begun. He could not tell who started the fight. He was informed of the fight by the children he met near the scene of the alleged crime. SM2's testimony shows that those children were capable of stating what they saw. Evidence further showed that there were more than two children. By not calling them to testify for prosecution, a negative inference could be drawn against the appellant.

In **AZIZ ABDALLAH V. REPUBLIC** (1991) TLR 71, the Court of Appeal stated on page 72 of its judgment, thus:-

"The general and well-known rule is that the prosecution is under a prima facie duty to call those witnesses who, from their recollection of the transaction question, are able to testify on the material parts. If such witnesses are within reach but are not called, without sufficient reason being shown, the court may draw an inference adverse to the prosecution".

The only thing that could implicate the respondent is the alleged confession that she beat the appellant that is said to be made before Hamlet leaders, which was however, refuted. In **Rhino Migere v. Republic**, Criminal Appeal No 122 of 2002 (unreported), it was stated:

"...for a statement to qualify for a confession it must contain the admission of all the ingredients of the offence charged as provided for under section 3 (c) of the Evidence Act, 1967..."

The evidence shows that the respondent wanted a peaceful settlement. No doubt she realized what had happened wasn't good, bearing in mind the parties being wives of two brothers. She was even prepared to pay costs for treatment of the appellant. Her reasons for doing all these were: firstly, to heed to the decision of the village leaders and secondly to make peace. These being her reasons, and the fact that shew had consistently denied assaulting the appellant, the lower court were right not to consider that the respondent had confessed to the charge. Rather it was the duty of prosecution to prove it. such duty cannot be shifted merely because the appellant is a lay person.

For above reasons, I find no good basis to differ with the concurrent finding the lower courts. Their decision is accordingly upheld as I dismiss this appeal for lack of merit.

Dated at **Dodoma** this **3rd** of **August, 2022**

ABDI S. KAGOMBA

JUDGE