

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 126 OF 2021

(Arising from Criminal Case No. 54 of 2020 in the District Court of Musoma at Musoma)

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

1. ERNEST WARYOBA @ MUHINDI.....1ST RESPONDENT

2. MUHINDI S/O ERNEST.....2ND RESPONDENT

JUDGMENT

17th & 22nd August, 2022.

A. A. MBAGWA, J.:

This is an appeal by the Director of Public Prosecutions against the ruling of the trial District Court of Musoma which found the respondents with no case to answer and consequently acquitted them.

The respondents, Ernest Waryoba @ Muhindi and Muhindi Ernest were arraigned before the District Court of Musoma and charged with the offence of Griveous Harm contrary to section 225 of the Penal Code.

The particulars of the offence were to the effect that Ernest Waryoba @ Muhindi and Muhindi Ernest on 9th day of March, 2020 at Buruma village

within Butiama district in Mara region, unlawfully caused grievous harm to Marwa Mwikwabi.

When they were called to plead, both respondents entered a plea of not guilty. As such, the prosecution paraded four witnesses and one documentary exhibit namely, PF3 (exhibit P1) to prove the charge.

In a nutshell, the prosecution account was to the effect that on 9th day of March, 2020 at around 08:00hrs, the victim Marwa Mwikwabi (PW1) was in his father's farm clearing it for cultivation. He had tools of trade to wit, two machetes and a sharpener. All of the sudden, the respondents together with 1st respondent's wife emerged at the farm. The 1st respondent was holding a stick whereas the 2nd respondent Muhindi Ernest was holding a machete and the 1st respondent's wife had nothing in her possession. Ernest Muhindi asked (PW1) as to who permitted him to clear the farm while 2nd respondent Muhindi Ernest told him that he was going to butcher the victim. Hardly had the respondents uttered the words than they violently attacked the victim. It is the evidence of PW1 that the 1st respondent hit him with a stick whilst the 2nd respondent cut him on his head and left hand with a machete. PW1 sustained injuries and started bleeding excessively. He thus raised an alarm for help.

PW2 Matatizo John Rubi who was nearby the scene responded to the alarm. He rushed to the scene of crime and found the victim (PW1) laying on the ground while excessively bleeding. PW2 stated that while running towards the scene, he saw three people running away from the scene. He identified them to be Muhindi Ernest (2nd respondent), Ernest Muhindi (1st respondent) and Mrs Ernest Muhindi. PW2 further testified that Muhindi Ernest was carrying three machetes.

Soon after PW2 had arrived at the scene, Jacob Tega joined him. Thus, the two carried the victim to Bisumwa Police Post to obtain a PF3. On their way to Bisumwa Police Post, they were joined with the victim's father one Juma Hukumu (PW3) who came on motorcycle. Therefore, PW1, PW2 and PW3 boarded the motorcycle and proceeded to Bisumwa Police Post whereas Jacob Tega returned home on bicycle.

After obtaining PF3 from Bisumwa Police Post, the victim was taken to Bisumwa Dispensary but due to severity of wounds, Bisumwa dispensary referred the victim to Nyasho Health Centre. At Nyasho, the victim was attended by Hilary Mohamed (PW4) who also filled in the PF3 (exhibit P1). Later on, the victim was further referred to Musoma Reginal Hospital. Exhibit

P1 tells it all that the victim had cut wounds at arm and head which resulted into massive bleeding.

PW1 elaborated that while clearing the farm, he had two machetes and one tupa but after he was attacked there remained one machete as the 2nd respondent left with two machetes, one being the victim's. PW2 also, during cross examination, said that he found one machete at the scene. PW2 further testified that he saw Muhindi Ernest (2nd respondent) holding three machetes, one in his right hand and two in his left hand.

At the closure of the prosecution case, the trial magistrate found the respondents with no case to answer as such, he acquitted them. According to the ruling, the main reason for acquittal verdict was discrepancies in the testimonies of PW1 and PW2. The trial magistrate pointed out at page 6 of the typed ruling that PW1 testified that the attackers had two bush knives and after the incident they left with one bush knife whereas PW2 said that he saw attackers with three bush knives and did not find any machete at the scene. According to the trial magistrate, this was fundamental contradictions which dented the witnesses' credibility.

The Director of Public Prosecutions (DPP) was not happy with the findings of the trial magistrate. He thus knocked the doors of the court to assail the decision. The DPP filed a petition of appeal with two grounds namely;

1. That, the Honourable trial Magistrate erred in law and fact by completely ignoring the weight of prosecution's evidence against the accused person and therefore proceeded to rule out on a no case to answer and acquit the respondents
2. That the Honourable trial Magistrate erred in law and fact by ignoring the evidence of PW1 and PW3 which managed to prove the case beyond reasonable doubt.

At the hearing of this appeal, the appellant appeared through Isihaka Ibrahimu, learned State Attorney whilst the respondents had the services of Baraka Makowe, learned advocate.

Mr. Ibrahimu combined the two grounds of appeal and argued them conjointly. He said that the prosecution was required to establish three elements in order to prove the charge of grievous harm contrary to section 225 of the Penal Code. He submitted that the three elements are **one**, that the victim sustained grievous harm, **two**, that the harm was caused

unlawfully and **three**, that the accused caused or participated in causing grievous harm. On this, the State Attorney relied on the case of **Huba Hassan Makihi vs the Republic**, Criminal Appeal No. 378 of 2018, HC at Dar es Salaam

Expounding on the first element, the learned State Attorney contended that PW1 established it very well on the grievous harm he sustained and his evidence was corroborated by PW4 and exhibit P1 (PF3).

With regard to the 2nd and 3rd elements, Mr. Ibrahimu said that the eye witness PW1 along with PW2 adequately established that it is the respondents who attacked the victim and caused grievous harm. He stressed that PW1 mentioned the respondents to PW2 immediately after the incident and that this fact was not cross examined by the defence.

Mr. Ibrahimu continued that PW1's testimony is very clear that it is the respondents who attacked him without lawful cause. The learned State Attorney adamantly submitted that PW1 is a credible witness while referring the court to the case of **Goodluck Kyando vs Republic**, 2006 TLR 363.

He said that, according to the ruling, the court acquitted the respondents on the grounds that PW1 and PW2 were not credible because contradictions

namely, that the number of machetes and as to who actually injured the victim between the 1st and 2nd accused.

The State Attorney faulted the trial magistrate by holding, at page 5 of the ruling, that PW1 testified that the second accused had two bush knives while attacking him. Mr. Ibrahimu lamented that this fact is not born from the evidence as such the magistrate imposed something not born from the record.

According to the State Attorney, there were no contradictions in the testimonies of PW1 and PW2 and if there was any, they did go to the root of the matter. He fathomed his point with the case **Mohamed Said Matula vs the Republic** 1995 (TLR) 3.

The learned State Attorney was thus of the opinion that the trial court misdirected itself by taking into account the stipulated grounds (credibility issues) at the prima facie stage. He cited the case of **Kibo Match Group Limited vs HS Impex Ltd**, HC at Dar es Salaam TLR (2001) 152 and submitted that the court held that at prima facie case stage the court should not go to the merits of the case as that would amount to pre judging the case.

In conclusion, the State Attorney prayed the court to set aside the ruling and remit the matter to the trial court to proceed before another magistrate with competent jurisdiction.

In reply, Mr. Makowe, learned advocate indicated that he was in full support of the impugned ruling. He said that, upon holistic appraisal of the evidence, there is no evidence to require the respondents to enter defence. However, on being probed by the court, Mr. Makowe conceded that PW1 did not say that the attackers had two bush knives as erroneously held by the trial magistrate at page 6 of the ruling. He admitted that the alleged contradictions on the number of bush knives were not born from evidence, rather the trial magistrate fell into an oversight. Nonetheless, Mr. Makowe maintained that the totality of evidence did not establish a prima facie case.

Upon navigating through the record and the submissions by the counsel for both sides, the germane issue for determination is whether the trial magistrate was right to acquit the respondents on the ground that the prosecution evidence did not establish a prima facie case.

It is a trite law that prima facie case means a standard of proof whose evidence suffices to ground conviction if the accused does not offer explanation. See **Patel vs Republic** [1968] 1 EA 97.

Further, it is a clear position of law that in assessing evidence at the prima facie stage, the court is not required to apply a fully-fledged analysis. This is what makes prima facie distinct from proof beyond reasonable doubt. See **the Republic vs Kileo Bakari Kileo and 6 others**, Criminal Sessions Case No. 19B of 2011, HC at Tanga and **the Republic vs Jonas James @ Kombe**, Criminal Sessions Case No. 18 of 2002, HC at Arusha. In this case the trial magistrate (Hon. Swai SRM) delved too much into evaluation of the witnesses' credibility. Eventually, it was the trial magistrate's findings that PW1 and PW2 contradicted themselves with regard to the number of machetes that the attackers were in possession.

I have keenly gone through the trial court record. With due respect to the trial magistrate, the alleged contradictions are not born out of the evidence on record. PW1 was very clear that when he went to the farm, he had two bush knives (machetes) and a sharpener. He continued that the respondents came with stick and a machete. PW1 clarified that 1st respondent Ernest Muhindi was holding a stick whereas the 2nd respondent Muhindi Ernest was

in possession of a machete and he used the same to cut him. Further, PW1 is recorded to say that at the time of leaving, 2nd respondent left with two machetes that is to say he took one of the PW1's machete leaving one machete on the ground. See page 15 of the typed proceedings. PW1's evidence tallied with PW2 who clearly stated that he found one machete at the scene of crime. See page 22 of the typed proceedings. As such, the trial magistrate's findings on the alleged contradictions were not backed up by the evidence and therefore unfounded.

In addition, the trial magistrate went beyond what he was required to do at this stage. He invoked a fully-fledged probative and weight analysis of the evidence by assessing the demeanour of witnesses. To be specific, determination of evidential weight should be done at the final stage.

Had he properly assessed the evidence, he would have found that a prima facie case was established.

In view of the above deliberations, it is my findings that, on the strength of the prosecution evidence on record, a prima facie case was made sufficiently to require the respondents to enter their defence.

In the event, I allow the appeal and set aside the trial court's ruling which acquitted the respondents. In the stead, I hold that the prosecution established a prima facie case against both respondents as such, they have a case to answer.

That said and done, I remit the case file to the trial District Court of Musoma for the respondents to enter their defence. The trial should proceed before another magistrate with competent jurisdiction.

It is so ordered

The right to appeal is explained.



A handwritten signature in blue ink, appearing to read "A. A. Mbagwa".

A. A. Mbagwa

JUDGE

22/08/2022