IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL No. 20 OF 2022

(Original Criminal case No. 30 of 2022 of the Primary Court of Buyogo arising from appeal No. 08 of the District Court of Kwimba at Kwimba)

PASCHAL ELIKANA----------APPELLANT

VERSUS

JEFTA ELIKANA---------- RESPONDENT

JUDGMENT

Last Order: 10/10/2022

Judgment: 27/10/2022

M. MNYUKWA, J.

This is the second appeal whereas the appellant Paschal Elikana who was the complainant, filed a criminal case before Buyogo Primary Court alleging to have been assaulted by the respondent c/s 240 of the Penal Code Cap. 16 RE: 2019. The trial court findings were that, the appellant did not prove the case against the respondent to the standard required. Dissatisfied, the appellant appealed to the District Court of Kwimba at Kwimba in Criminal Appeal No. 08 of 2022, which upheld the decision of

the trial court. Still aggrieved, the appellant appealed to this court with four grounds of appeal: -

1. *That the trial Magistrate erred in law and in fact for upholding the decision of the trial court without assigning reasons.*
2. *That the trial Magistrate erred in law and in fact for failure to consider the evidence of the appellant who proved that the respondent assaulted him with an iron rod while at shamba for the allegation that he was cultivating the farm that belonged to his mother who is a witch.*
3. *The trial Magistrate erred in law and in fact for holding that the evidence adduced by the appellant was hearsay evidence and not direct evidence while witnesses testified and the exhibit was tendered to prove that it was direct evidence.*
4. *That the trial Magistrate erred in law and in fact for failure to consider the grounds of appeal of the appellant that the prosecution side proved the case.*

At the hearing of appeal before the court, parties appeared in person, unrepresented and the appeal was argued by way of oral submissions. The appellant was the first to submit and he prayed this court to adopt his grounds of appeal. He added that, the 1st appellate court dismissed his appeal without assigning reasons. It was his submission that, the

respondent committed the offence c/s 241 of the Penal Code Cap. 16 RE 2019. He prays this court to consider the law and allow the appeal.

In responding to the appellant's submissions, the respondent was brief. He prays this court to adopt his reply to the grounds of the appeal and do justice.

From the brief submissions of parties as it appears and the contents of the grounds of appeal and the reply thereto, tasking is to determine whether the appeal before me has merit. In determination, therefore, in mind I am aware of the settled principle that, it is very rare for a second appellate court to interfere with concurrent findings of fact by two courts below unless there is a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice, See:- **Mussa Mwaikunda v Republic**, [2006] TLR 387, also **Michael s/o Joseph Vs The Republic,** Criminal Appeal No. 506 Of 2016.

On the first ground of appeal, the appellant claims that the appellate court erred in law and in fact for upholding the decision of the trial court without assigning reasons. On reply, the respondent opposed to the appellant's claims insisting that the 1st appellate court was right to hold the decision of the trial court for the reasons that the appellant's evidence was not watertight to render the court to part with the trial court decision.

Going to the 1st appellate court records, the 1st appellate court rightly before his final decision, referred to what transpired at the trial court. The 1st appellate court subjected into test the evidence of SM1, SM2 and SM3 as against the evidence of SU1, SU2 and SU3 and formed his opinion that, the reasons to uphold the decision of the trial court was as a result of contradictory evidence of the SM1, SM2 and SM3 who despite being legally tasked to prove the case on the standard required, the claimant and his witnesses failed. In that regard, I find the first appellate court records in accord with the findings of the trial court and consequently, I find this ground with no merit.

On the second ground that the trial Magistrate erred in law and in fact for failure to consider the evidence of the appellant who proved that the respondent assaulted him with an iron rod while at shamba, the respondent objected. Going to the records, the claims of the appellant is unfounded for the reasons that, the trial court weighed the evidence of both parties and gave reasons for the verdict. The 1st appellate court referred to the evidence adduced on the trial and made its findings that the evidence of SM1, SM2 and SM3 and the exhibit SMK1 tendered contradicts and could not prove the offence to the standard required.

It is a principle of law that, for a contradiction to affect the witness evidence it has to be in the root of the matter (See the case of **Emmanuel**

Josephat vs R, Criminal Appeal No. 323 of 2016,CAT Arusha). From the 1st appellate court judgement the same was addressed by the magistrate on page 4 of the typed proceedings as he enligted the contradictions on the prosecution evidence. The trial court's proceedings reveals that SM1 evidence contradicted with SM2 and SM3 as SM1 alleged to be assaulted by the respondent until he lost consciousness and that's when his mother was called by other people. However SM2 evidence is contrary to what was testified by SM1 as she testified to have reached at the scene of crime and found the respondent beating the appellant. from these contradictory story, it is hard to say that the appellant proved his case.

Apart from that, the defence side evidence was so consistency to the point of showing doubts on the prosecution evidence. SU1, SU2 and SU3 evidence was both on consistence that, the appellant was the one found the respondent at the farm and started harassing him. Comparing to the contradictory evidence of prosecution witnesses, the lower courts were right to hold that the complainant failed to prove their case beyond reasonable doubt. It is my findings therefore, this ground has no merit.

On the 3rd ground of appeal that, the trial Magistrate erred in law and in fact for holding that the evidence adduced by the appellant was hearsay evidence and not direct evidence while witnesses testified and the exhibit was tendered to prove that it was direct evidence.

Going to the findings of the 1st appellate court, it was the testimony of the appellant at a trial court that, he was assaulted by the respondent in the presence of SM3 while the respondent denied claiming that, it was the appellant who started the fight. SU3 one Elikana Sahani the father of both the appellant and the respondent testified that he went to the scene and he found the appellant on the shamba of the respondent and he was told that the appellant started the fight which was witnessed by SU2. As held by the trial court and rightly upheld by the 1st appellate court, the appellant failed to prove his case as to why he was on the respondent's shamba and the respondent's self-defence raised a reasonable doubt on the part of the appellant. Consequently, this ground has no merit.

On the 4th ground of appeal, that the trial Magistrate erred in law and in fact for failure to consider the grounds of appeal of the appellant that the prosecution side proved the case, has been covered by the determination of the above grounds of appeal for they are intertwined. In the process, based on the principle stated in **Akwino Malata vs The Republic,** Criminal Appeal No. 438 of 2019, it is the duty of the prosecution to prove the case beyond reasonable doubt and that duty never shifts to the accused and whenever there is doubt on the prosecution case, however slight, the same should be resolved in favour of the accused.

This principle is also stated in Magistrate Court (Rules of Evidence in Primary Court) 1964, in which Rule 5 states that;

5. Criminal Cases

(1) In criminal cases, the court must be satisfied beyond reasonable doubt that the accused commited the offence.

(2) If at the end of the case, the court is not satisfied that the facts- in issue have been proved the court must acquit the accused.

(See also **Makolobela Kulwa Makolobela and Erie Juma alias Tanganyika** [2002] T.L.R 296; **George Mwanyingili v. R,** Criminal Appeal No. 335 of 2016; and **Nchangwa Marwa Wambura v. R,** Criminal Appeal No. 44 of 2017).

Since there is doubts on the prosecution case, I resolve the same with the findings of the two courts below. I, therefore, find that the prosecution did not prove the case beyond a reasonable doubt. In the event, I find the appeal wanting of merit and consequently, I dismiss it.

It is so ordered.

M. MNYUKWA
JUDGE
27/10/2022

The right of appeal fully explained to the parties

M. MNYUKWA
JUDGE
27/10/2022

Court: Judgement delivered on 27th day of October, 2022 in presence of parties.

M. MNYUKWA
JUDGE
27/10/2022