

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA

PC. CRIMINAL APPEAL NO. 02 OF 2022

ROBERT LAMECK..... APPELLANT

VERSUS

MWIGULU SONDA..... RESPONDENT

(Arising from the Judgement of Manyoni District Court)

(G.F. Kapama, RM)

Dated 18th day of October, 2021

In

Criminal Appeal No.5 of 2021

JUDGMENT

21st March & 29th April, 2022

MDEMU, J.:

This is a second appeal. In the Primary Court of Manyoni, the Respondent was charged with an offence of common assault contrary to section 240 of the Penal Code, Cap. 16, R.E.2019 vide criminal case No. 75 of 2021. After full trial, he was acquitted. Being aggrieved by that decision, the Appellant appealed to Manyoni District Court vide Criminal Appeal No.5 of 2021 which also was decided in favour of the Respondent, hence this appeal on the following grounds: -

1. *That, the Court erred in law and in fact to enter the decision without taking into account that, the Appellant herein proved the case in required standard of criminal law thereof.*
2. *That, the trial Court erred in law and fact to enter decision in favour of the Respondent while considered un wanting principles of law and practice in the case without taking into account that, the Appellant herein proved the case in required standard of criminal law thereof.*
3. *That, the Court erred in law and facts by pronouncing irrational judgments since the trial Court failed to evaluate the evidence clearly thereof.*
4. *That, the Court erred in law and facts by pronouncing judgment tainted with irregularities and un procedural during adjudicating the case thereto.*
5. *That, the court erred in law and facts by pronouncing judgment against the Appellant without considering the weight and relevant evidence adduced by Appellant's side and considered the weak evidence adduced by the Respondent's side thereto.*
6. *That, the Court erred in law and facts to enter irrational decision thereof.*

When the appeal was scheduled for hearing on 21st of March, 2022,
both parties appeared in person.

Submitting in support of appeal, the Appellant stated that, there was no evidence adduced at the trial court which established that the Respondent was not liable. He added that, the Respondent admitted that on 6th of July, 2021 assaulted him when his (Respondent's) cattle was at his farm and that, some other cows were taken to the Village Executive Officer (VEO). He urged me to allow the appeal.

In reply, the Respondent stated that, the first appellate Court was correct in deciding in his favour as he did not commit any offence known in law as alleged by the Appellant and further that, he didn't admit to have taken certain cows to VEO.

Having considered submissions of both parties and the entire evidence on record, the questions to be determined are: **One**, Whether the two lower Courts directed themselves properly on evaluation of evidences. **Two**, whether the trial Primary Court confined to the rules of procedure. The two issues, in my view, will resolve all six (6) grounds of appeal. In that, the said grounds will be argued as one.

In resolving the first issue, that is, whether the two lower Courts directed themselves properly on the evaluation of evidence, among other things, the Appellant's lamentation is that, the two lower courts acted wrongly to acquit the Respondent. This being a criminal case, it is the rule

of the thumb that, the standard of proof must be beyond reasonable doubt unlike in civil cases where its standard of proof is on balance of probabilities. On the standard of proof, in the case of **John Makolobela Kulwa Makolobela & Erick Juma @ Tanganyika v. R (2002) TLR 296**, it was held that:

"A person is not guilty of criminal offence because his defense is not believed; rather a person is found guilty and convicted of criminal offence because of the strength of the prosecution evidence against him which establishes his guilty beyond reasonable doubt."

Again, it is the rule of the thumb also that, the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it.

Having expounded the legal position above, in the instant appeal, both lower Courts made similar findings that the Respondent didn't commit the offence of common assault. It is trite law that, in a second appeal like this one, the Court is not entitled to interfere with the concurrent findings of facts by the two courts below except in occasions where it is shown that, there is misapprehension of evidence or misdirection causing miscarriage of justice. In **Mbaga Julius vs. R,**

Criminal Appeal No. 131 of 2015, (unreported) the Court of Appeal emphasised that:

*"We are alive to the principle that, in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. This is so because we have not had the opportunity of seeing, hearing and assessing the demeanour of the witnesses. (See **SEIF MOHAMED E.L ABADAN vs REPUBLIC, Criminal Appeal No. 320 of 2009** (unreported). However, the Court will interfere with concurrent findings if there has been misapprehension of the nature, and quality of the evidence and other recognized factors occasioning miscarriage of justice".*

At the trial Court, according to SM1, it was 6th July, 2021, around evening hours, the Appellant went to his farm and found five cows in his maize and sunflowers farm. He called some people to assist in resolving the dispute but the Respondent however, the Respondent was reluctant to settle the matter to the extent that he assaulted the Appellant using a stick on his fingers and then disappeared. This piece of evidence tallies

with the testimonies of SM2 and SM3. However, the three witnesses' testimonies vary on what happened next after the Respondent assaulted the Appellant. Whereas PW2 stated that the Respondent disappeared with two cows, PW3 stated on three cows. Again, witnesses vary on the number of people who were present at the scene of crime. Whereas PW2 says there were four people, PW3 stated there were five people. In essence, these witnesses testimonies do contradict each other.

On seeing this, the trial Court at page 6 of the judgement made the following observation:-

*"Kwa mujibu wa **kifungu cha 10 (1) (a)** cha sheria kanuni za ushahidi katika mahakama za mwanzo ushahidi wa mdomo unatakiwa kuwa wa moja kwa moja yaani ushahidi wake uonyeshe kuwa aliona tukio husika kwa ukamilifu wake. Hivyo basi kitendo cha mashahidi wa mlalamikaji kueleza mbele ya mahakama kuwa walishuhudia tukio huku wakitofautiana katika mambo mbalimbali kinaleta utata kwa mahakama kuamini kama mashuhuda wa tukio.*

In essence, it is trite law that, discrepancies or contradictions among the prosecution witnesses create doubt which should benefit the accused.

In the case of **Michael Haishi vs. R [1992] T.L.R. 92**, the Court of Appeal stated that: -

"Where prosecution witness contradicts themselves in vital detail of the case must found doubt about the guilty of the accused."

In essence, the position of the law is that, discrepancies and inconsistencies in the witness' testimony can only be considered adversely if they are fundamental, that is, those which goes to the root of the matter. If the contradictions are of trifling effect, then the same ought to be ignored by the Court. In **Luziro Sichone v. Republic, Criminal Appeal No. 231 of 2010** (unreported), it was held that:

*"We shall remain alive to the fact that, not every discrepancy or inconsistency in witness's evidence is fatal to the case; minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. **It is only fundamental discrepancies going to discredit the witness which count.**" [Emphasis added]*

The decision in the just cited case above followed in the footsteps of another splendid decision of the Court of Appeal of Tanzania in the case of **Dickson Elia Nsamba Shapwata & Another v. Republic, Criminal Appeal No. 92 of 2007** (unreported) in which the Court of

Appeal quoted a passage in Sarkar's Code of Civil Procedure. It was held as follows:

*"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful witness may be. **Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do.**"* [Emphasis supplied].

In **Mukami Wankyo v. Republic [1990] TLR 46**, the Court of Appeal took the view that, contradictions which do not affect the central story, are immaterial. See also: **Bikoiimana Odasi@ Bimeifasi v. Republic, Criminal Appeal No. 269 of 2012** (unreported).

What I acknowledge is that, there are variations of testimony regarding number of people present at the scene and the number of cows

the Respondent alleged to have run away with after assaulting the Appellant. In my view, this may not be the basis to disconnect the Respondent from the alleged offence. Particularly so as there is no dispute that livestock of the Respondent were found in the farm of the Appellant. Again, evidence of the Respondent at the trial Court that the Appellant fell down when chasing the Respondent is an afterthought. It has not discredited the evidence of SM2 and SM3 who witnessed the Appellant being assaulted by the Respondent.

On the second issue relating to irregularities, this Court having gone through the two lower Courts' record found that, the two lower Courts did not address the evidence on the PF-3 tendered which, in the view of this Court, is one of the essential pieces of evidence to rely upon so as to prove whether assault was committed. The PF-3 was tendered by SM1 and admitted by the trial Court as Exhibit M1. I am aware that, after its admission, it was not read out in Court. It is now settled law that, failure to read out the exhibit after its admission in Court constitutes a fatal irregularity as stated in **Manjee Yhana and Another vs. R, Criminal Appeal No. 147 of 2016** (unreported) that: -

"Given the plethora of authorities, failure to read out the exhibit after admission in court constituted a fatal irregularity. It should be expunged."

Under the premises, I proceed to expunge it from the record. This notwithstanding, the remaining evidence of SM1, SM2 and SM3 who were at the scene of crime and witnessed the Respondent assaulting the Appellant, is direct one and is admissible under Rule 10 of Rules of Evidence in Primary Courts.

That said and done, I find that the prosecution case was proved beyond reasonable doubt. As stated above, there was misapprehension of evidence and facts which entitles this Court to interfere with the concurrent findings of the two lower Courts. I therefore find this appeal to be meritorious. The Respondent is thus found guilty and accordingly convicted for the offence of Common Assault Contrary to the provision of section 240 of the Penal Code, Cap. 16, R.E.2019 as charged.



Gerson J. Mdemu

JUDGE

29/04/2022

DATED at DODOMA this 29th day of April 2022



Gerson J. Mdemu

JUDGE

29/04/2022

ANTECEDENT

Appellant

I leave the matter to Court on the proper sentence according to law.

He is a first offender.



Gerson J. Mdemu

JUDGE

29/04/2022

Respondent

My Lord, I pray the Court to be lenient and if possibly, I be given conditional discharge. That is all.



Gerson J. Mdemu

JUDGE

29/04/2022

The Respondent is a first offender. They are leaving together in one village with the Appellant. On that note, the Respondent is hereby sentenced to a conditional discharge of six months (6).

It is so ordered.

~~Gerson J. Mdemu~~

JUDGE

29/04/2022

