IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 83 OF 2021

(Arising from Criminal Case. No. 570 of 2019 in the District Court of Tarime at Tarime)

JULIUS MHERE MANG'ERA @ MSIMBITI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

9th and 28th February, 2022

F.H. MAHIMBALI, J.:

Julius s/o Mhere Mangéra @ Msimbiti , the appellant was arraigned before Tarime District court at Tarime charged with the offence of grievous harm contrary to section 225 of the Penal Code, Cap. 16 RE 2019. He denied the charges levelled against him. The trial court heard the parties and at the end, the appellant was convicted and sentenced to serve five years imprisonment.

The material facts leading to this appeal are as follows; On the 27/11/2019 Magaigwa (PW1) herein referred the "victim" was on his way

home from farm. He was attacked by the appellant who cut him with a machet on his shoulder and head when he refused to obey that he should not pass that way he used to pass and that he should take a longer route. He fell down and lost conscious. When he regained his conscious, he found himself admitted at Kiongera Health Center and discharged later in the evening. He pointed at the appellant while in the trial court as culprit having cut him by machete at his shoulder and head.

Mr. Nyamhanga Chacha Manamba, testified as PW2. His testimony is to the effect he was told by his mother that PW1 was cut wounds by the appellant and that he was admitted at Kiongera for medication. As he knows him, he went to the said dispensary and met the victim being admitted and being stitched on his wounds by nurse. He was then asked by the nurse to go to police station to report on the said incident where then was given PF3 and gave it to the nurse. Upon his return home, the appellant pipped through his window and told that he had done a good work against Magaigwa who is the victim, suggesting that the victim was joyful of what he had done to the victim.

PW3 (Jackson Machota), testified that he is a nurse officer, who graduated from St. Andrew Musoma and is five years' experience in

general nursing. That on 27th November, 2019 while at Kiongela Dispensary, amongst others he had received PW1 – victim who had two fresh wounds. He being a nursing officer, he attended the patient first by linger latent liquid against the wounds and then proceeded with stitching the wounds. He further provided pain killer tablets and antibiotics, tetanus injection and later on discharged him. After seven days he filled the PF3 which he tendered in court as PE1.

D/CPL Wilson testified as PW4. His testimony is to the effect that he drew the sketch map plan of the scene which it was admitted in court as PE2 exhibit. In his investigation, he established that there was a long-standing land dispute between the appellant and the victim which was yet resolved.

In his defense, the accused person testified that on the material date and time, he was in Migori Kenya as he had gone there since 26th November 2019 for his clinic. As he spent a night there, he returned home on the next day and arrived at his home around 17.30hrs (of 27/11/2019) where he was told by his wife that Mr. Magoigwa had assaulted her and took away his cattle which was tied outside. When she cried for help, people responded and followed after Magoigwa's foot prints and

successfully brought back the said cow. He tendered a letter from village authority in that respect which was admitted as Exh DE1.

After hearing both parties the court ruled that the prosecution had proved its case beyond reasonable doubt and hence convicted and sentenced the appellant as stated above.

The trial court's decision did not amuse the appellant hence he has come to this court through his petition of appeal armed with eleven grounds of appeal. The said grounds of appeal can be rephrased as follows for purposes of understanding them well;

1. *That the trial court did not consider the defense of alibi that the appellant was in Kenya from 26/11/2019 and returned home on 27/11/2019 around 17.30hrs.*
2. *That the evidence by the prosecution alleging the appellant to have assaulted the victim is wanting.*
3. *That the case against the appellant is a planted one to weaken the cattle theft offence against PW1.*
4. *That the said PF3 (exhibit PE1) is a forged document as filled after seven days from the date of treatment.*
5. *That there were no witnesses by the prosecution who testified on that account.*
6. *That the testimony by PW1 to PW4 is false evidence by the prosecution.*

7. *That there was no corroboration evidence by the prosecution in account of PW1's testimony.*
8. *That the prosecution's case is contradictory in evidence between the testimony of PW1, PW2 and PW3.*
9. *That the defense testimony was not considered by the trial magistrate.*
10. *That the trial magistrate failed to evaluate the entire evidence at hand.*
11. *The prosecution's case has not been proved beyond reasonable doubt as per law.*

When this matter came up for hearing, the appellant was present in person and unrepresented while the respondent enjoyed the legal services of Mr. Malekela, learned State Attorney. The appellant prayed that his grounds of appeal be adopted to form part of his appeal's submission. He had no more to add and invited the respondent to make his reply.

With ground number of the petition of appeal, Mr. Malekela submitted that the fact that at the time of committing the said offence the appellant was in Migori Kenya, suggests a defense of alibi. This ought to have been raised at the trial court by giving a proper notice as per law. Section 194 (4) of the CPA is clear on this legal compliance. Raising it now

is an afterthought. With this, he prayed that this ground of appeal is bankrupt of merit and unfounded, thus be dismissed.

On ground no 2, the appellant's argument that PW1 had stolen the appellant's cattle and that he was reported at the village hamlet is wanting of evidence. There ought to have been evidence from the village hamlet to that effect. As if this is not enough, the appellant has not stated at the trial court whether PW1 was charged at any court or police and reference number of it. With the reply to this ground of appeal, it also suffices to ground no 3 which suggests that the case was planted against him.

Turning to ground no 4 of the petition of appeal that pf3 was forged by PW1 at Kiongera Dispensary because it lapsed seven days from the date of issue by police to the date of treatment (i.e date of issue 27/11/2019 and date of treatment is on 4/12/2019). As per testimony of Pw3 (at page 22) the explanations are clear that PW1 visited the said dispensary first on 27/11/2019 and the PF3 was filled on 4/12/2019 after the patient (PW1) had fully recovered. Thus, this ground of appeal is bankrupt of merit, it be dismissed.

On ground no 5, that there was no direct witness of the incident and that no one corroborated it, he submitted that it is not a pleasure that any one should come to court to testify but only material witnesses are the one who are called to testify in court. The immaterial witnesses are not called. This is a science of prosecution. In the circumstances, as the material witness was the victim himself, he was the one to tell the court.

In his consideration as to the testimony of Pw1, Pw2, Pw3 and Pw4 as per ground of appeal no 6, he finds no falsity in it. This is because, PW1 who is the victim was attended by PW3. What PW4 did as the investigator of the case, he drew the sketch map plan and tendered it in Court. In his opinion may be the testimony of PW2 is the one which can be questioned somehow but not the whole of it. Otherwise, the relevancy of his testimony is to the effect that he visited PW2 at the Hospital and went to police to collect PF3 as requested by PW3 for PW1's medical examination report. In that stance, none of the prosecution witnesses were incredible as alleged. Otherwise, the appellant is at task to establish the incredibility aspect of the said witnesses.

Responding to ground the no 7 that there was no corroboration evidence by the prosecution in account of PW1's testimony, he submitted that this is replica to ground no 5. As these two grounds do resemble.

Countering ground no 8, it was his submission that there was no any confusion at all. As Pw2 just visited PW1 at hospital, PW3 is the one who received PW1 and attended him at the Hospital. In any way the timing of events must not be identical as they refer to different events.

With the 9th ground of appeal, the argument that the trial court failed to evaluate the appellant's evidence against that of prosecution, he replied that in consideration to what he had replied in ground no 1, that the appellant's evidence is weaker and not shaking the prosecution's case. This reply should also cater for ground no 10 which is replica and identical.

Lastly, in totality of the prosecution's case as a whole, the case has been proved beyond reasonable doubt. He thus prayed that this appeal be dismissed as it is bankrupt of any merit.

Responding to the issue raised by the court regarding the competence of PW3 (Nursing Officer) in attending PW1 and tendering PF3, Mr. Malekela submitted that he has no good answer on this. However, he

commented that he did a commendable job and he testified what he did. He however, left it for the Court to decide on.

In his rejoinder submission, the appellant had nothing material to add. He reiterated his prayer of being acquitted. He added that upon making a thorough analysis of the whole trial court's proceedings and judgment, the Prosecution's evidence is wanting, thus he prayed for acquittal.

Having heard the submissions of the parties and gone through the court's record, this court will now determine if this appeal has merits.

In my digest to the all grounds of appeal filed and argued, I am of the firm view that as they all touch issues of facts and evidence adduced, they all boil into one main ground of appeal whether the prosecution's case has been proved beyond reasonable doubt.

What I gather from the proceedings of the trial court, the evidence adduced and analysis done, I am convinced by the trial court's conviction that the appellant is guilty of the offence of grievous harm charged with. The argument by the appellant that he was not there but in Migori, ought to have been sufficiently established at the trial court. A mere saying that

he was not there is not sufficient as provided under section 194 (4) of the CPA. Considering what PW1 and PW2 testified, it is undoubted that the appellant was irresistibly the one who harmed the victim – PW1. The defense of alibi was not properly particularized as per law and did not outweigh the available direct evidence which pointed finger at the accused person.

In other consideration of the prosecution's evidence, I concur with Mr. Malekela that there was no any contradiction by the prosecution's evidence so far as per available evidence in record as sufficiently argued. As each witness testified what he did (PW2, PW3 and PW4), thus nothing contradicts the PW1's testimony. The argument that the PF3 is forged is baseless as per explanations offered by the learned state attorney which is well backed up by the PW3's testimony that he filled the PF3 on the seventh day after he had completed the final medication and examination of the victim.

In fine, the appeal is partly dismissed and partly allowed. Whereas conviction is upheld, sentence is reduced to two years from the date of

conviction by the trial court as the same is neither a scheduled offence nor one falling into the Minimum Sentences Act.

It is so ordered.

DATED at MUSOMA this 28th day of February, 2022.

F.H. Mahimbali

Judge

28/02/2022

Court: Judgment delivered this 28th day of February, 2022 in the presence of appellant, Mr. Frank Nchanial state attorney for the respondent and Gidion Mugoa – RMA.

F.H. Mahimbali

Judge

28/02/2022