THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 97 OF 2021
(Originating from the Court of Resident Magistrate of Mbeya at Mbeya Criminal Case No. 319 of 2019)

NASSIBU JUMA @ BITO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 7th March & 11th April, 2022

KARAYEMAHA, J

The appellant, Nasibu Juma @ Bito was prosecuted in the Resident Magistrate Court of Mbeya with the offence of Causing Grievous harm contrary to section 225 of the Penal Code, Cap 16 R.E 2002 [now R.E 2019]. The charge place at his door alleged that the appellant, on 26/3/2019 at Inyala Iyunga area within the City and Region of Mbeya caused grievous harm to William Mbata by using a bush knife (Machete). He was convicted and sentenced to seven (7) years imprisonment. He was aggrieved and thus filed this appeal to this Court.

Briefly, the evidence upon which the conviction of the appellant was founded arose from the events of the 26th day of March, 2019,

between 21:00 and 22:00 hours when William Mbata (PW1) and Lucy Richard Sanga (PW2) and their children had finished taking supper and attention to go to sleep. PW1 sent Daniel Mbata outside to collect the buckets and take them inside the house. At the time Daniel Mbata was getting inside two people one tall and another shot, wearing long black coats, used that opportunity to enter inside the house having their faces masked and wielded with machetes. When PW2 noticed their presence, she cried out but she was late as one had already stood before PW1. PW1 stood to fight against him by holding his machetes but the short bandit started cutting him using another machete on his head, legs and other parts of the body. Satisfied that they had weakened PW1, they drugged him outside the house while beating him with a machete nonstop which led PW1 to lose consciousness. On regaining it, he found many people surrounding him and being in a pool of blood but could not see the attackers. He was helped and taken to Police met E. 1864 D/Sgt Jaili (PW5), given a PF3 and finally was taken to Mbeya Referral hospital emergency department in his (PW5) company. In view of Dr. Prosper Bashaka (PW6), PW1 was examined by Dr. Frank Wilson who gave him the first aid and filled in the PF3. After a four days treatment he was taken to MOI – Muhimbili as he was diagnosed of skull fracture, kidney injury and a broken leg.

The police mounted a wheel of investigation and on 14/05/2019 the appellant was arrested. On the same date, the appellant led the police officers and Rhoida Sasyenga Mwang'onda (PW4) to PW1's house and explained how they entered in the premises of his house, where they found him, injured him and how they left.

In his defence, the appellant denied commission of the offence. In his very brief testimony, the appellant concentrated on how he was arrested on 14/05/2019 after retiring from his business and taken to central police. He explained how he was tortured in order to confess to have been involved in commission of the offence, his refusal and signing on papers prepared by PW5. In similar vein the appellant attacked the prosecution evidence and analyzed it to show weaknesses.

Having heard evidence from both parties, the trial Magistrate was satisfied that the prosecution proved the case beyond reasonable doubt. Consequently, the appellant was convicted and sentenced to serve seven (7) years imprisonment.

Utterly dissatisfied with the decision that convicted and sentenced him, the appellant took on an appeal to this Court. He has raised eight (8) grounds of appeal. However, on keenly looking at them they mean only three grounds and will be referred to as grounds one to three. The

three grounds are paraphrased as follows, that **one,** the appellant was convicted relying on cautioned statement recorded out of time, which was repudiated but uncorroborated, recorded by PW5 who was an investigator of this case and made involuntarily; the subject of grounds 1, 2, 3, 4, 5 and 6. **Two,** the appellant's defence evidence was not considered and evaluated; subject of ground 7. **Three**, the prosecution case was not proved beyond reasonable doubt; the subject of ground 8.

When the appeal was called on for hearing, the appellant appeared in person and unrepresented whereas the respondent republic was represented by Mr. Davis Msanga, learned State Attorney.

On being invited to expound his grounds of appeal, the appellant opted to let Mr. Msanga to respond first while reserving his right to rejoin later, if need arose.

Mr. Msanga submission began with a preambular statement expressing his support of the trial court's decision that convicted and sentenced the appellant.

Mr. Msanga combined grounds 1, 2, 3, 4, 5 and 6 and argued that the trial magistrate complied with the procedural law in admitting Exhibit P1. Expounding, Mr. Msanga submitted that the prosecution asked to

tender Exhibit P1 through PW5. On being objected on allegation of torture, the trial magistrate conducted an inquiry. Satisfied that it was voluntarily made, the trial magistrate admitted and caused it to be read over, Mr. Msanga remarked. To him admission of Exhibit P1 was cleared. To illustrate his position he cited the case of ***Lack kilingani v Republic,*** Criminal Appeal No. 402 of 2015 (CAT-Iringa) at page 8.

In his rejoinder, the appellant submitted that it was wrong for the trial magistrate to base conviction on Exhibit P1 because PW5 explained what transpired before tendering it. He lamented that it was obtained through torture and was recorded out of time. This is because, he argued, he was arrested on 13/05/2019 but it was recorded on 15/05/2019. Nevertheless, the appellant faulted the trial magistrate for acting on exhibit P1 which was recorded by PW5 who was an investigator. He supported his argument with the aid of the decision in ***Idd Mhidin @ Kibatamo v Republic***, Criminal Appeal No. 101 of 2008 (unreported) which cited the case of ***Shan Kapinga v Republic***, Criminal Appeal No. 337 of 2007 CAT-Iringa (unreported)

Having considered the rival submissions and passed through the trial court's record, the first clustered ground combining grounds 1, 2, 3, 4, 5 and 6 has four major limbs of complaints. **Firstly,** cautioned

statement being recorded out of time, **secondly,** the trial magistrate acting on repudiated but uncorroborated cautioned statement, **thirdly**, competency of the investigating officer (PW5) to record the appellant's cautioned statement and **fourthly**, cautioned statement was involuntarily made but that fact not being considered.

Pertaining to the **first limb** which relates to delay to record the cautioned statement of the appellant, it is on record that he was arrested on 14/05/2019 at night and taken to the police custody. His statement was recorded on 15/05/2019 from 7:45 hours. Therefore, it is not true that he was arrested on 13/05/2019. However, section 50 of the Criminal Procedure Act, R.E. 2019 (the CPA) regulates the periods available for interviewing persons as follows:

> *50.-(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.*

(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

(b) for the purpose of-

(i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;

(ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;

(iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate; or

(iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under

restraint or while the person under restraint is doing an act in connection with the investigation;

(c) while awaiting the arrival of a person referred to in subparagraph (iv) of paragraph (b); or

(d) while the person under restraint is consulting with a lawyer.

In view of subsection (2) which is a bolded expression, a period utilized in the investigation connected with the offence is excluded in calculating the period available for interviewing a person who is under restraint in respect of an offence. The reasons for delay were that the appellant was taking the police officers to places where his companions would be found. It is my conviction, therefore, that the delay was with plausible explanation and in the circumstances, I find justification in recording the appellant's cautioned statement outside the four hours prescribed under section 50 (2) of the CPA. This aspect was considered by the trial Magistrate in her ruling. This has been a continuous position of the higher Court of the land. See the cases of ***Yusufu Masalu @ Juduvi and 3 others v Republic***, Criminal Appeal No. 163 of 2017and ***Ngasa Sita @ Mabundu***, Criminal Appeal No. 254 of 2017 (both unreported).

The appellant also complained in the **second limb** that the trial Magistrate acted on repudiated but uncorroborated cautioned statement. Mr. Msanga said nothing on this complaint. The appellant on his side repeated what he stated in the memorandum of appeal. Admittedly, the appellant retracted his confession in the cautioned statement to the effect that he was beaten to confess. The trial Magistrate was alive to the principle that a court of law should not convict an accused person on a retracted confession without corroboration unless it is satisfied of the danger of doing so. It is apparent in the record of the trial court, that the trial Magistrate observed that there was enough evidence to corroborate the cautioned statement. I wish to reproduce what the trial Magistrate observed at page 8 of her judgment:

> *"Although the evidence against the accused person was basically circumstantial, the evidence is sufficient on conviction via corroboration. In the case of* ***UMALO MUSA V REPUBLIC****, Criminal Appeal No. 150 of 2005 (unreported), the Court cited wit approval the famous case of* ***TUWAMOI V UGANDA*** *[1967] E.A. 84 in which the Court of Appeal for East Africa ruled that, when any confession is retracted, the same should not as a matter of practice, be acted upon unless is corroborated."*

Having so warned herself, the trial Magistrate went on:

> *"Thus, in the instant case, the evidence of Exhibit P1 was admissible and it corroborates with (sic) other evidences (sic) as relevant facts adduced herein. Since in the said exhibit P1, the accused person had admitted having wounded the victim (PW1) by cutting him with a machete, the circumstances are that he cannot be disassociated with this offence. The PF3 shows that the victim had a big cut wounds (sic) on the head and another cut wound on the eyelash, the same was testified by other prosecution witness."*

It is my view that the trial Court did its best to expound the position of the law and reached a correct verdict. On my part as the 1st appellate being warranted to re-evaluate the evidence I find it apposite to have a word. See ***Prince Charles Junior v Republic***, Criminal Appeal No. 250 of 2014 (unreported). After carefully examined the whole prosecution evidence, for instance, of PW1, PW2, PW4 and PW6 it is clear that the case rests on circumstantial evidence. The evidence of PW4 reveals that the appellant having been arrested led the police officers and her to PW1's house and demonstrated how they entered in the house and committed the offence. This piece of evidence is incapable of any other explanations except the accused person's guilty. It is evidence of surrounding circumstances which by undersigned

coincidence is providing a proposition with the accuracy of what actually happened to PW1 and is supported by exhibit P1. I find solace in this standpoint in the decision of the Court of Appeal of Tanzania in ***Hassan Fadhili v Republic [1994] TLR 89***, and ***Seif Seleman v Republic***, Criminal Appeal No. 130 of 2005 CAT (unreported) which propounded on this aspect. It suffices that when we consider the whole evidence of the prosecution, undisputedly, even if the confession is declared untrue or that it was not made voluntarily, the remaining evidence is very strong and enough to prove the prosecution case. The unmerited ground is rejected. I shall demonstrate later in this judgment why I find PW4 a credible witness.

On the **third limb** the appellant complains that PW5 being an investigator was incompetent to interrogate and record his cautioned statement. Before me the contention of the appellant who was, as was the position in the trial court unrepresented, is that PW5 was assigned a duty to investigate this case. So being an investigating officer he was incompetent to record the cautioned statement. With due respect, the position is now settled that the investigating officer is competent to record the cautioned statement of the suspect. The position has

currently been changed from the one we had in 2008 in the case of ***Idd Mhidin @ Kibatamo*** (supra). In that case the position was that:

> *"... it is inadvisable, if not improper, for the police officer who is conducting the investigation of a case to charge and record cautioned statement."*

It is however glaring that the accused person committed the offence in 2019 after the amendment of **Criminal Procedure vide Written Laws (Miscellaneous Amendments) Act, 2011** whereby **subsection (4) was added in section 58** and it stipulates as follows:

> *"Subject to the provision of paragraph (c) of section 53, a police officer investigating an offence for the purpose of ascertaining whether the person under restraint has committed an offence my record a statement of that person..."*

I am strengthened by the case of **Ngasa Sita @ Mabundu** (supra) to hold that by virtue of the said provision PW5 was competent and qualified to record the appellant's cautioned statement. In this case the Court of Appeal of Tanzania was faced with the similar complaint. Guided by the Written Laws (Miscellaneous Amendments) Act, 2011 the court held that the investigating officer was qualified to record a cautioned statement of the appellant.

The **fourth limb** of the appellant's complaint is that the cautioned statement was made involuntarily. This complaint should not detain me much. In principle voluntariness of the cautioned statement is tested through a trial within trial conducted by the High Court and an inquiry in the subordinate Courts thereto. I have passed through the trial Court's record thorough well. It is clearer at page 26 of the typed proceedings that when the prosecution through PW5 asked to tender the appellant's cautioned statement, the appellant objected alleging to have been beaten when the same was being recorded. After cogitating, the trial Magistrate found a justification to conduct an inquiry. Both parties were heard. The prosecution fielded one witness and one exhibit and the defence three witnesses. After hearing both parties, the trial Magistrate found that the cautioned statement was made voluntarily and admitted it as exhibit P1. Thus, I find myself unable to agree with the complaint that the trial Magistrate did not determine the issue of voluntariness.

I now turn to consider the complaint in the 7th ground in which the appellant complains that his defence evidence was not considered and evaluated. Mr. Msanga agreed with the appellant on this complaint. He argued the judgment of the trial Court does not show that the appellant's defence evidence was considered. He, nevertheless, urged

this 1st appellate Court to step into the trial Court's shoes and evaluate the defence evidence. He relied on the case of ***Prince Charles Junior*** (supra) to reinforce his position. On his part, the appellant attacked the trial court for its failure to execute its duty.

On this issue, a settled position is that as a matter of law, the trial court is bound to evaluate the evidence of both the prosecution and defence sides before it arrives at the conclusion of the case for and against issues framed for determination. Failure to consider the defence is fatal to the trial or proceedings as per the case of ***Jonas Bulai v Republic***, Criminal Appeal No.49 of 2006 (unreported) and a score of other decisions have long settled the position in this area. Underscoring further, the Court of Appeal of Tanzania in ***Jonas Bulai case*** (supra) insisted that it is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty. The principle is elementary, but fundamental none the less, and as per the authority emphasize is not needed for the preposition that failure to take into account the defence put up by the accused will vitiate conviction.

No doubt that the foregoing settled principles emphasis on the necessity to consider the evidence adduced by both parties. In the

present case, I have read closely, notably, parties' evidence, especially the defence evidence was summarized in the trial court's judgment. In summarizing it the trial Court remarked that:

> *"The accused's defence consists of general denials that he did not commit the alleged offence of causing grievous."*

As reflected from the same judgment, the trial magistrate didn't analyse the defence case and evaluated the evidence before reaching to the conclusion. I shall take that task on board. I have carefully examined the defence evidence. As I pointed out hereinabove, the appellant concentrated on how he was arrested on 14/05/2019 after retiring from his business and taken to central police. He explained how he was tortured in order to confess to have been involved in commission of the offence, his refusal and signing on papers prepared by PW5. In similar vein the appellant attacked the prosecution evidence and analyzed it to show weaknesses. Weighing it against the prosecution evidence, I am made to conclude that the same has no spine to disturb the central story of the prosecution case.

Let me consider the 8th and last ground whose complaint is, essentially on the failure of the prosecution to prove the case beyond reasonable doubt.

A cardinal principle is that the burden is on the prosecution to prove beyond reasonable doubt that the appellant caused grievous harm to PW1. It is not upon the appellant to prove his innocence or even that PW1 was grievously harmed by someone else except where the law expressly provides so. See the case of ***Hadija Yusto Mgonja and another v Republic,*** Criminal Appeal No. 282 of 2011. It is the law of our land that in cases of this nature the accused can only be convicted of the offence on the basis of the strength of the prosecution case and not on the basis of the weakness of the defence case. Even suspicions, however ingenious or strong can never be a basis of a criminal conviction or a substitute for proof beyond reasonable doubt.

In this case, therefore, the prosecution has to prove to the required standard not only that PW1 was grievously harmed, but also that he was grievously harmed by the appellant and that the assault was unlawful.

It is not disputed in this case that PW1 was assaulted by people who invaded his house at night wielded with pangas and covering their faces. Nobody identified them. It is evident that one of the bandits cut him on his head, legs and other parts of the body. Satisfied that they had weakened PW1, they drugged him to outside while beating him with

a panga nonstop and lost consciousness. PW6 informed the trial court that when PW1 was taken to the hospital he had wounds on his head and face. Exhibit P2 (the PF3) tendered by PW6 reveals that PW1 had cut wound on the parietal aspect of the head measuring 10x1, 1mm deep and another cut wound on the (r) eye lash measuring 3x1mm caused by a sharp. On this basis and on the totality of the evidence before me, I will not hesitate to hold that PW1 was grievously harmed. I say so because grievous harm as defined under section 5 of the penal code means:

> *"any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense".*

Are the facts in this case compatible with the above definition as the definition of grievous harm shows, a harm to be classified as grievous *"it must amount to a maim or amount to a dangerous harm".* In the present case, facts and testimonies from PW1, PW2, PW5 and PW6 show that PW1 was cut on his head, legs and other parts of the body. Cut wound on the parietal aspect of the head measured 10x1, 1mm deep and another cut wound on the ® eye lash measured 3x1mm.

To curb the acute situation, PW1 was taken to the emergence room in Mbeya Referral hospital whereby he was stitched and admitted in the ward for four days. Thereafter, he was rushed to Mhimbili National Hospital, MOI department, due to skull fracture, injured kidney and broken leg which perhaps could not be treated in Mbeya referral hospital. He stayed there for seven days and advised to stay in Dar es Salaam for further check up. The attack endangered his life and in my view amounts to dangerous harm and therefore within the definition of grievous harm.

The vexing question now is who then assaulted PW1 and caused grievous harm? The evidence on record does not give me many options. It points unerringly to only one individual, the appellant.

As alluded to above, PW1 and PW2 witnessed the incident but didn't identify the bandits on the fateful night. This is because they wore masks that covered their faces. As such the evidence relied on by the prosecution is wholly circumstantial. The only evidence that incriminating or connecting the appellant with the commission of the offence comes from PW4, who by then was the member of the local government – Inyala and the appellant's cautioned statement (exhibit P1). PW4 testified that on 24/5/2019 the street executive officer called

her to go to the office as there were visitors. When she got there she found police officers and two young men one of them turned out to be the appellant. She was informed that they were there for the purpose of investigating the incident of PW1 attack. On entering the car, those two young men led them to the PW1's house and explained how they jumped the wall and entered the house and the manner they attacked him.

The trial court found PW4 an incredible witness. The trial Magistrate held the view that, I quote:

> *"PW4's evidence was that on 24/5/2019 she went at the office of the street executive officer found the police officers and two young men who directed and led them to the house of PW1. That one of the young men he (sic) identified as the accused in this case. That the accused and his fellow narrated to them on how they entered the house (sic) of PW1 and committed the offence therein. This piece of evidence is that what PW4 said heard (sic) from the accused and his fellow, however, the accused denied to commit the offence and in cross examination (sic) PW4 stated that he did not saw (sic) the accused before and this makes court to doubt even his evidence. Therefore, the court disregards his (sic) evidence".*

On my part, PW4 is a credible witness. In fact she testified on what she saw and from what the appellant lectured. Undisputedly, she

didn't know what happened to PW1 before she was illuminated by the appellant. She never knew the appellant but knew on the date she was called to witness the appellant leading the police to the house he committed the offence. From her evidence there is nothing scanned indicating that she was prepared by police officers to implicate the appellant.

It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. See the case of ***Goodluck Kyando v Republic***, [2006] T.L.R 363 and the case of ***Vuyo Jack v The DPP***, Criminal Appeal No. 334 of 2016 (unreported). In the case of ***Shaban Daudi v Republic***, Criminal Appeal No. 20 of 2000 as cited with authority in ***DPP v Simon Mashuri***, Criminal Appeal No. 138 of 2016 CAT at Tanga (both unreported) had this to say:

> *"The credibility of a witness can also be determined in two ways; one when assessing the coherence of the testimony of that witness, two, when the testimony of that witness is considered in relation to the evidence of other witness including that of the accused person.* ***In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court.***
> "[Emphasis mine]

Subjecting the above legal position to the instant appeal it is undisputedly categorical that PW4's evidence is coherent and when considered with evidence of PW1, PW2, PW3 and PW5 along with exhibit P1 it tells what happened clearly. She was therefore a credible witness because she coherent. The appellant did not pose serious questions to her to elicit from her evidence supporting version of the facts in issue, to weaken or cast doubt upon the accuracy of the evidence given by her in chief and therefore impeach her credibility.

The above stated. I find no merit in the appellant's appeal and dismiss it entirely.

DATED at **MBEYA** this **11th** day of **April, 2022**

J. M. KARAYEMAHA
JUDGE