

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**APPELLATE JURISDICTION**

**(DC) CRIMINAL APPEAL NO. 43 OF 2021**

(Arising from Criminal Case No. 96/2020 of Kigoma District Court,  
before Hon. E.B. Mushi - RM)

**DIRECTOR OF PUBLIC PROSECUTION ..... APPELLANT**

**VERSUS**

**MARY D/O JOHN..... RESPONDENT**

**J U D G E M E N T**

28/04/2022 & 27/05/2022

**L.M. MLACHA, J.**

The respondent, Mary John was sent to the district court of Kigoma in Criminal Case No. 96 of 2020 charged of Grievous Harm contrary to section 225 of the Penal Code, Cap. 16, R.E. 2019. It was alleged that she caused grievous harm to Theresia Andrea on 13<sup>th</sup> June, 2020 at Bushabani area within the District and Region of Kigoma. She was found not guilty and acquitted. The appellant Republic was aggrieved hence the appeal.

The grounds upon which the appeal is based read thus;

- 1. That, the learned Trial Magistrate erred in law and in fact by acquitting the Accused/Respondent basing on reasons that the*

*Prosecutions side failed to prove the case beyond reasonable doubt while the case was proved beyond reasonable doubt.*

- 2. That, the learned Trial Magistrate erred in Law and in fact by acquitting the Accused/Respondent on the reasons that the Respondent was insulted by the victim while ignoring that she should report the matter to the Police and not to take justice on his hand.*
- 3. That the learned Trial Magistrate erred in Law and in fact by acquitting the Accused/Respondent without regarding that injuries sustained by the Respondent was caused by the victim while defending herself from the Respondent's assault.*

Mr. Benedict Kivuma state attorney appeared for the appellant Republic while the respondent had the services of Mr. Kagashe advocate. Hearing was done by oral submissions but before considering the counsel submissions I find it necessary, this being a first appeal which amount to a rehearing, to reproduce the summary of the evidence which was adduced at the lower court in order to be in a position to respond correctly to the grounds of appeal and counsel submissions. The prosecution had six witnesses while the defence had four witnesses.

PW1 Nebo Shabani Mashaka (5) was addressed in terms of section 127 of the Evidence Act and promised to tell the truth and not lies. He said that

on 13/6/2020 while playing with his friend Dotto, Emma came and told them that his mother was calling them. They moved and met mama Charle, the accused person, who sent them to pick palm leaves (Makuti) from Mama Wawili's home and bring them to her. They moved and picked them. They sent them to mama Charles who gave them ice cream. His sister came and asked Mama Charle why he had sent the children to steal palm leaves from mama Wawili. Mama Charle remained silent. His sister said that if she could do that, she could send them to steal a phone at a price of Tshs. 100. Mama Charle attacked her. She held her neck, pressed her on the wall and entered her face in the water basin. She also beat her with gravel (Kokoto) and pulled her down. She sent Emma to bring a knife and a cooking spoon (mwiko). Emma brought a cooking spoon only. She beat her with the spoon on the head and shoulder. She sat on her stomach. Mama Abdul, Mama Bray and a visitor who was there came to interfere. They separated them. His sister made a call to his mother. PW1 respondent during cross examination and said that Mama Emma need the palm trees to prepare ice cream. And that they were sent to Mama Wawili to steal the palm leaves.

The complainant Theresis Andrew (17) appeared as PW2. He said that on 13/6/2020 during the evening, he received a report that his young brother, Mebo (PW1) was being beaten by Mama Wawili for stealing palm leaves. She moved to Mama Wawili who told her that she had punished him for stealing his palm leaves. After some discussions, she took the kids (Mebo, Emma and Dotto) to Mama Charle, the accused person. She told her that she had come to pick the palm leaves because the owner needed them. She added that it was not a good behavior to send young boys to steal. She told her that if she had sent them to steal palm leaves in exchange of ice creams next time she could send them to steal phones at a price of Tshs 100. The accused replied saying, "*umetoka huko unakuja kunitukana kwangu*". PW2 replied that she was not insulting her. The accused told her that she was going to teach her a lesson so that she could not come to the house next time. She held her neck and pressed her to the wall. She proceeded to push her to the water basin. She beat her with gravel on his face and head. She fell her down. She sat on her stomach and slapped her. She then sent a child to bring a knife or cooking spoon but he came with a cooking spoon only. She beat her with it on the head. She cried for help. She was bleeding on the nose, mouth and eyes.

PW3 Rozalia Denis (15) told the court that on 13/6/2020 during the evening, she saw the complainant with Mebo and Emma coming. PW2 asked the accused why she had sent the children to steal palm trees in exchange for ice cream. There was an exchange of words leading to a fight. The accused held the complainant by the neck and pressed her on the wall. She pressed her on the basin of water. She fell down. The accused sat on her stomach and beat her using gravel. She also asked for a cooking spoon and used it to beat her on the head saying she needed to teach her discipline. Some people came to separate them later.

PW4 Hamisi Yasini (40) is the street chairman. On 13/6/2020 during the evening while in his office he saw the complainant coming. She was bleeding on her nose, eye and right hand. She said that her neighbor had assaulted her. He referred them to the police station.

PW5 Dr. Christopher Samwel (39) is a medical officer at Maweni Referral Hospital Kigoma. He attended the complainant on 13/6/2020, night hours. She complained of pains on the head, right hand and right shoulder. She said that she had been bitten by teeth on her right hand. She had a swollen face and her clothes had dust. They conducted an X-Rays to the head. The results were negative. He filled the PF3.

PW6 Joan Lusolela (26) is the investigator. She is the one who did the investigations and recorded the statements.

In his defence, the accused, DW1 Mary John (29) told the court that she is an entrepreneur selling various items including ice creams. The complainant lives in the third house from her house. She told the court that on 13/6/2020, while at home, three Kids – Ikra, Mebo and Dotto came and asked for guava. She told them that she had no guava. She gave them ice cream. Her son told her that Mama Wawili was in need of '*Spinach*'. She stopped what she was doing inside the house and moved out to uproot Spinach for Mama Wawili. She gave them to his son who sent them to Mama Wawili. She returned inside. While inside she heard some one coming uttering insults. She moved out and met the complainant at the door uttering abusive language. She was calling her a fool, savage dog and was saying that she had sent the boys to steal palm leaves. She told her that she had not sent them but she continued to insult. She asked Mebo and Dotto if she had ever sent them to steal and they said no. She ordered her to leave her house. She refused. She pushed her with hands to leave but she held the hand and bit her finger. They pushed each other. She bit the finger again. She moved and picked a brick and beat her on the

head. She bent to pick a stick to beat her. She moved to prevent her but she bit her on his right hand bellow the elbow. Mama brayan and Mama Abdul came to separate them.

DW1 went to the police on the other day where she got a PF3. She proceeded to Maweni Hospital where she was attended by Dr. Mashaka. She showed the scars to the court.

DW2 Emmanuel Frank (9) was tested in terms of section 127 of the Evidence Act and promised to tell the truth not lies. She said that she met Mebo and Dotto stealing Mama Wawili's palm leaves. She sent them to Mama Wawili who punished them. She then saw the complainant coming to her mother with Mebo and Dotto. She was insulting her mother (the accused). She told her that she was a dog, savage and fool. That she had sent the children to steal palm leaves. There was an exchange of words leading to a fight. She bit her mother with teeth. She also beat her with a brick on the head. She denied to bring anything for her mother. DW3 Liveta Libert (17) supported what was said by DW1 and DW2. DW4 Dr. Mashaka Dominic (36) of Maweni Referral Hospital agreed to attend the appellant on 14/6/2020. She had a finger bitten by teeth. He filled his findings in the PF3 (Exhibit D1).

The PF3 of the complainant (Exhibit P1) is written; *'facial swelling, bite marks on the right hand, pain on the shoulder'*. The condition and appearance are marked; *clothes stain with dust, bite marks on the right hand, blood on the site of the bite*. The skull was put on the x-ray and gave the result, *normal* findings. The remark of the doctor was Grievous Harm. The PF3 of the accused, Exhibit D1, is marked, bite teeth noted. The extent of Injury was marked, *Harm*.

Submitting on ground one, Mr. Benedict Kivuma told the court that there was direct evidence proving the evidence beyond reasonable doubt. PW1 saw what happened (pages 6,7, and 8 of the record). PW2 saw what happened (pages 8,9,10 and 11). That, they saw the respondent cutting the complainant with a panga. PW5 supported PW1 and PW2, he said.

In ground two, counsel submitted that if the accused was insulted, he was to report the matter to the police. She had no justification to take the law to his hands. In ground three, counsel said that the respondent was also injured but that happened in the course of defence.

The state attorney asked the court to vacate the decision of the district court and find the respondent guilty and proceed to convict her.



Submitting in reply, Mr. Kagashe said that section 225 of the Penal Code speaks of any person who unlawfully does grievous harm to another. There is an element of *mens rea* in the law, he said. He proceeded to say that the magistrate did not examine *mens rea*. He proceeded to say that PW2 saw her young brother crying after being beaten by Mama Wawili but did not check why. She instead moved to the house of the respondent and entered. She accused her for sending children to steal palm leaves. The respondent said that she never sent the children. The children were questioned and denied. She moved at the door and proceeded to insult her. The respondent pushed her outside the fence. A dispute erupted and each was injured. Counsel added that there was no reason for the quarrel. She said that the doctor made an exaggeration. He also released the results of the x-ray 2 days later.

He went on to say that the defence of the accused was based on provocation. Any person in the circumstance could do so. The Republic have failed to prove the case.

In ground two counsel had the view that both of them had a duty to report to the police but did not do so. In ground three counsel had the view that the complainant was required to vacate and refused. She was also the first

person to bit the respondent who used a reasonable force to evict her. She was in a defensive position. He supported the finding of the district court.

Mr. Benedict Kivuma made a rejoinder submission and stressed that the respondent had a duty to follow the legal process. He added that the complainant had reason to go there to ask why the respondent had sent the children to steal palm leaves.

I had time to examine the evidence closely. I have considered the counsel submission and the grounds of appeal. I will make a general discussion covering all grounds of appeal. The evidence is loud that the complainant moved to the respondent to ask the reason as to why she had sent the children to steal palm leaves. The complainant was harsh and uttered insulting words. The evidence is clear that the respondent formed a criminal intention in the course and made a decision to punish her. She moved to execute her plans straight away. I think she acted unreasonably. She had a chance to report the matter to the local leadership but could not do so. She instead decided to take the law to her own hands and proceeded to teach the complainant a lesson. She held the complainant by the neck and pressed her on the wall. She pushed her face to the basin of

water. She beat her by gravel (Kokoto) before pulling her down. While on the ground, she sat on her stomach and asked for a knife and cooking spoon. She was supplied with a cooking spoon which she used to beat her on the head. They were then separated. PW1, PW2 and PW3 are clear on this area. PW5 was not present at the scene of crime but saw her with dust and blood from the nose, eye and hand. PW4 supports what is said by PW1, PW2, PW3 and PW5. He also saw her with dust and blood from the nose, eye and hand.

With respect to Mr. Kagashe, the fact that the respondent's finger was bitten in the course does change the truth that she took the law to her own hands and decided to punish the complainant heavily. She acted in a very barbaric way! She had no justification to do what she did. As was said by the state attorney, the injuries sustained by the respondent were caused by the complainant in the course of trying to liberate herself from the wrath of the respondent. They were also minor. They should not be used to cover the deliberate criminal mind and acts of the respondent.

Equally, the fact that respondent was insulted did not give her mandate to beat the complainant. She was supposed to follow legal channels to pursue her right. Legal channels which were available to her included

reporting the matter to the ten cell leader, the street chairman and the police. She had no legal mandate to punish her neighbor for insulting her or for any other reason. Citizen of this country are equal and are all governed by the law. In whatever situation they are not expected to take the law to their own hands. If they do so, the way it was done in this case, they become criminals like any other criminals and liable to prosecution despite the fact that some criminal acts were done to them previously.

In totally therefore, with respect to the learned resident magistrate, I find that there was good evidence to convict the respondent but I think the evidence did not lead to the offence of Grievous Harm but the lesser offence of Assault Causing Actual Bodily Harm contrary to section 241 of the penal code. The injuries sustained were not that much serious so as to constitute the crime of Grievous Harm contrary to section 225 of the penal Code. The x ray did not show any injury to the head. I think she had an attack which caused actual bodily harm rather than grievous harm.

That said, I set aside the decision of the district court and proceed to find the respondent guilty of Assault Causing Actual Grievous Harm Contrary to Section 241 of the Penal Code. I proceed to convict her accordingly.

The appeal is allowed.



**L.M. MLACHA**

**JUDGE**

**27/05/2022**

**Court:** The respondent is sentenced to six months in jail. She will also pay Tshs. 200,000/= to the complainant for injuries sustained.



**L.M. MLACHA**

**JUDGE**

**27/05/2022**

**Court:** Judgment delivered. Right of appeal explained.



**L.M. MLACHA**

**JUDGE**

**27/05/2022**