IN THE HIGH COURT OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 80 OF 2022

(Originating from Criminal Case No. 120 of 2021 in Sengerema District Court at Sengerema)

MASHIMO KASWANU.....1ST APPELLANT

MABULA KASWANU.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 17/03/2023

Date of Ruling: 03/04/2023

Kamana, J:

This is the first appeal in which two brothers in the names of Mashimo Kaswanu and Mabula Kaswanu are challenging the convictions and sentences meted out against them for the offences of causing grievous harm and cattle theft contrary to sections 225 and 268(1) of the Penal Code, Cap. 16 [RE.2019]. With regard to the first count of causing grievous harm, it was the Prosecution's case that on 3rd November, 2021 at Majengo-Irenza Village within Sengerema District in Mwanza Region, the duo caused grievous harm to Moses Kolwa by inflicting an injury to his head with a hoe. Concerning the second count of cattle theft, the Prosecution alleged that on the same date and place,

the two brothers willfully and unlawfully stole twelve cows valued at Tshs.4, 800,000/-, the property of Kolwa Fini.

Aggrieved by the convictions and sentences, the Appellants preferred this appeal armed with four grounds as follows:

1. That the trial Court erred in law and fact to convict and sentence them to imprisonment and to pay Tshs.4,800,000/- based on the witnesses with interest in the case.
2. That the trial Court erred in law and fact to convict and sentence them to imprisonment and to pay Tshs.4,800,000/- based on fabricated and contradictory evidence.
3. That the trial Court erred in law and fact to convict and sentence them to imprisonment and to pay Tshs.4,800,000/- whilst the Prosecution failed to field key witnesses.
4. That the trial Court erred in law and fact to convict and sentence them to imprisonment based on the defective charge sheet.

When the appeal was called on for hearing, the Republic had the services of Ms. Sabina Chogogwe, learned State Attorney whilst the Appellants enjoyed the services of Ms. Janeth Kishamba, learned Counsel. The appeal was argued viva voce.

Submitting in support of the first and third grounds, Ms. Kishamba, learned Counsel contended that the trial court erred to convict her clients without the evidence of independent witnesses. She submitted that Kolwa Fini (PW1), Moses Kolwa (PW2) and Sophia Dominiko (PW3) were the alleged victims and hence had an interest in the case. The learned Counsel contended that the Appellants' family and the victims' family had a grudge springing from probate issues, hence it was incorrect for the trial Court to rely on the evidence adduced by the victims in the absence of any collaboration. In bolstering her position, the learned Counsel referred to the case of **Abraham Wilson Saiguran and Two Others v.R** [1981] TLR 265.

Ms. Kishamba went on to submit that according to the evidence adduced by the victims, there were people who witnessed the incident. In that case, she doubted the act of the Prosecution not to parade them as independent witnesses. She further averred that since it was evidenced that the stolen cattle were taken to the Village Executive and the Village Chairman, it was crucial for the Prosecution to invite the duo as its witness.

Besides, the learned Counsel was bewildered by the act of the Prosecution of not fielding the investigator of the case as a witness. It was her contention that, though under section 143 of the Tanzania

Evidence Act, Cap. 6 [RE.2019], no specific number of witnesses is required to prove a fact, the Prosecution is under the duty to field key witnesses. In buttressing her argument, Ms. Kishamba relied on the case of **Wambura Marwa Wambura v. R**, Criminal Appeal No. 115 of 2019. She observed that had the Prosecution fielded the investigator, he could iron out issues relating to the number of persons who attacked the victims.

On the second ground, the learned Counsel contended that the evidence adduced by the Prosecution was full of contradictions. She contended that the contradictions are demonstrated in the number of persons who invaded the victims, who were attacked by the Appellants and the extent of the injury.

Concerning the number of invaders, the learned Counsel submitted that PW1 testified that the invaders were five persons while PW2 and PW3 testified the number of invaders to be three. Concerning who was attacked by the assailants, PW1 testified that he, PW2 and PW3 were both beaten while PW2 stated that he and PW1 were beaten. On her part, PW3 stated that she is the one who was beaten on her buttocks. To the extent of injury, the learned Counsel submitted that PW1, PW2 and PW3 testified that PW2 was severely injured while Selemani Daud (PW4), the Medical Practitioner testified that the wound had 1.5

centimeters in width which was only dressed. In her opinion, the wound did not amount to grievous harm hence the evidence of PW1, PW2 and PW3 was fabricated due to the bad blood they have with the Appellants.

Due to such contradictions, Ms. Kishamba, learned Counsel contended that the trial Court was under the duty to address and resolve them. To substantiate her arguments, the learned Counsel referred to the cases of **Mohamed Said Matula v. R** [1995] TLR 3 and **Barnabas William Mathayo v. R**, Criminal Appeal No. 254B of 2020.

On the fourth ground, the learned Counsel submitted that the second count of cattle theft was predicated under the wrong provision. She stated that section 268(1) of the Penal Code, Cap. 16 under which the offence was charged does not create the offence. In that case, she argued that his clients were convicted under a defective charge which in her opinion was fatal. To fortify her reasoning, she cited the case of **Omary Omary Setumbi v. R**, Criminal Appeal No. 277 of 2015.

Responding, Ms. Chogogwe, learned State Attorney, on the first and third grounds, contended that as a matter of principle every witness is entitled to credence and his evidence is to be believed unless there are reasons to disbelieve the witness. Given that, it was her contention that the trial Court considered PW1, PW2 and PW3 as credible witnesses worthy to be believed. In substantiating her arguments, the learned

State Attorney cited the case of **Goodluck Kyando v. R** [2006] TLR 367.

The learned State Attorney contended further that according to the law, there is no number of witnesses required to prove the fact. In that regard, the investigator was not in a better position to prove that PW2 had been injured or otherwise compared to PW4, the Medical Practitioner. Ms. Chogogwe, in buttressing her arguments referred to the case of **Wambura Marwa Wambura v. R (Supra)**.

As regards the second ground, the learned State Attorney contended that the inconsistencies are immaterial as they do not go to the root of the offence of causing grievous harm. She submitted that the Appellants were identified as persons who attacked PW2. Concerning the extent of the wound, Ms. Chogogwe, learned State Attorney, submitted that the extent of injury depends on the opinion of the Medical Expert. In the case at hand, the learned State Attorney stated that the opinion of PW4 was that the injury was grievous. As to who was beaten by the Appellants, the learned State Attorney contended that PW2 was the one who was beaten. She argued that if PW1 and PW3 were beaten, they chose not to prefer charges against the Appellants.

On the fourth ground, Ms. Chogogwe, learned State Attorney conceded to that ground so far as the second count of cattle theft is

concerned. She contended that the count was preferred under the wrong provisions which is fatal.

In her rejoinder, Ms. Kishamba reiterated her arguments in submission in chief.

I have objectively considered the records of the appeal in line with the advanced grounds of appeal and the submission for and against this appeal by the legal minds before me. In determining this appeal, I will work on the grounds seriatim.

Starting with the first ground that the trial Court erred in convicting the Appellants based on the evidence of the victims who had interests to serve, I am of the considered opinion that the law does not preclude victims from adducing evidence against the perpetrators of crimes against them. According to section 127 of the Tanzania Evidence Act, Cap. 6 [RE.2019], every person is considered to be a competent witness. What courts ore obliged to consider is the credibility of the witness. Section 127(1) of the Evidence Act states thus:

> *'127.-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.'*

Reading the cited section, I am convinced that a victim is not among the persons who are taken to be not competent to testify.

In her submission, the learned Counsel for the Appellants insinuated that the victims were relatives and that their family with the family of the Appellants had a feud over probate issues. In that case, the victims had the interest to serve. Again, it is my conviction that relatives as per section 127(1) of the Tanzania Evidence Act are not precluded from testifying in support of their case. Relatives are competent witnesses unless they are considered to be incompetent under that section or when their evidence is found to be incredible. In the case of **Mustafa Ramadhani Kihiyo v. The Republic** [2006] TLR 323, the Court of Appeal held:

> *'The evidence of relatives is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited unless there is ground for doing so.'*

Fortified by the above authorities, I am of the settled mind PW1, PW2 and PW3, even though they were and are the victims and relatives, were competent witnesses. Further, since there was no evidence that the trio did conspire to adduce false evidence against the Appellants, I restrain myself to conclude that the witnesses were not credible. The mere fact that there was a grudge between the victims and the

Appellants does not convince me that the victims lied when adducing evidence to serve their interests which were not in evidence.

In her submission, the learned Counsel cited the case of **Abraham Wilson Saiguran and Two Others v.R (Supra).** In my opinion, that case is not applicable in the circumstances of this case. In that case, this Court held that evidence of the person with an interest must be approached carefully and corroborated by independent evidence. The Court held that in the circumstances which are opposite to the circumstances of this case. In that case, the witness Fatuma Sunderji had an interest in exonerating herself because had the Court found the Appellants innocent, she would have been a suspect. In the instant matter, the victims when adducing evidence were not trying to exonerate themselves from any accusation. For those reasons, the first ground crumbles.

On the second ground that the trial Court convicted the accused on fabricated and contradictory evidence, the arguments of the learned Counsel focused on the offence of causing grievous harm. In arguing this ground, Ms. Kishamba, learned Counsel, divided the ground into three parts. Starting with the first part that the witnesses differed on the number of persons who invaded them, the learned Counsel contended that PW1 stated the number to be five whilst PW2 and PW3 stated the

number as three. In that case, the learned Counsel thought that such a discrepancy touches the root of the case. In my opinion, I shake hands with Ms. Chogogwe, learned Counsel, that such a contradiction is a minor one and does not go to the root of the case.

In the circumstances in which persons are invaded and attacked, normally, the victims are frightened. It becomes difficult for a terrorized person to keenly observe the frightening situation. In the circumstances of this case where the invaders were armed with sticks, hoes and spears, it is my considered view that the situation was tense, hence the witnesses should not be expected to be uncontradictory. In this regard, I am fortified by the decision of the Court of Appeal in the case of **Sylivester Stephano v. R**, Criminal Appeal No. 527 of 2016 where it was stated:

> *'It is generally accepted that even where an event occurs in the presence of several people, their testimony in court is susceptible to normal discrepancies. This is normal for, there are errors of observation, memory failures due to time lapse from the time the event occurred to the time of testifying or even panic and horror associated with the incident.'*

In that case, it is my conviction that the discrepancy in the number of assailants did not go to the root of the offence of causing grievous harm. I also find this part of the second ground devoid of merits.

Coming to the second part of the second group, the learned Counsel for the Appellants contended that the witnesses differ sharply as to who was attacked by the assailants. She contended that such a contradiction goes to the root of the case. Again, I agree with the learned State Attorney that the contradiction in question does not affect the Prosecution's case. For the reasons I provided when dealing with the first part of this ground, I find this part devoid of merits.

On the third part of the second ground, Ms. Kishamba, learned Counsel for the Appellant contended that there was a contradiction regarding the extent of injury whereby PW1, PW2 and PW3 testified that the injury was severe whilst PW4, the Medical Practitioner testified that he only dressed the wound. On her part, Ms. Chogogwe, learned State Attorney submitted that PW2 was grievously harmed as per the opinion of PW4.

In determining this part of the second ground, I concur with the arguments advanced by the learned Counsel for the Appellants. My perusal of the records of appeal convinces me that there was no scintilla of evidence that proves that PW2 was grievously harmed. At this point, I

think it justly to reproduce the interpretation of grievous harm as per section 5 of the Penal Code, Cap.16 [RE.2019] as follows:

> *'**grievous harm**" 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.'*

In his evidence, PW4 stated that he received PW2 at Nyakaliro Health Centre with an injury on his head. The witness testified that he dressed his wound and injected PW2 with a painkiller and discharged him.

With this piece of evidence and considering the interpretation of the term "grievous harm", my reasoning dictates that PW2 was not grievously harmed. Under normal circumstances, a person who is grievously harmed is not expected that he will be only injected with painkillers and discharged. I take that position while I am mindful of what PW4 filled in PF3 in Part III(v) of PF3 which states:

> *'Immediate Degree of the clinical results of the injury sustained (e.g. whether injury amounts to "harm". "grievous harm" or 'maim".....'*

PW4 filled "Harm".

I understand that medical opinion is not binding on this Court but I find no good reason to depart from what PW4, the Medical Practitioner testified and filled in PF3. That being the case, the second ground so far as its third part is concerned is meritorious. I will decide on the way forward after determining the third and fourth grounds.

About the third ground, Ms. Kishamba, learned Counsel faulted the trial Court for convicting her clients in the absence of the evidence of key witnesses. She mentioned key witnesses as neighbours who witnessed the fracas, the Village Chairman, the Village Executive and the investigator of the case. On the other hand, Ms. Chogogwe, learned State Attorney, maintained that the Prosecution is at the liberty to call witnesses who are necessary to prove its case.

In this regard, I agree with the expositions of the legal minds before me. Starting with the arguments of Ms. Kishamba, I agree with her that it is important for the Prosecution to field key witnesses. It is an established principle that key witnesses must be fielded to link disjointed parts of the case. When there is a missing link, the Prosecution is under the obligation to parade a witness who will fill the gap. Failure to do that, the Court may draw an adverse inference against the Prosecution. In the case at hand, while citing the case of **Wambura Marwa Wambura v. R (Supra)**, Ms. Kishamba contended that the investigator

of the case was a key witness who would testify as to an exact number of assailants that attacked the victims. In my view, the investigator was not better placed to fill what the learned Counsel consider as a gap since he was not at the scene of the crime. In view of that, I agree with the line of argument taken by Ms. Chogogwe, learned State Attorney, that the Prosecution had the liberty to parade witnesses of its choice. I find this ground of appeal baseless.

Coming to the fourth ground, both learned minds were not in dispute that the Appellants so far as the offence of cattle stealing were charged under the wrong provisions. Instead of being charged under section 258(1) of the Penal Code, Cap. 16, the brothers were charged under section 268(1) of the Code which provides for penalty for cattle stealing. It is trite law that when a person is found guilty under the defective charge, the whole proceedings and the conviction thereof so far as the defective charge is concerned is a nullity. This position was pronounced by the Court of Appeal in the case of **Mnazi Philimon v. Republic**, Criminal Appeal No. 401 of 2015 as follows:

> *'Being found guilty on a detective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried.'*

Based on the above authority, I find the fourth ground meritorious.

Before I conclude, I had time to go through the evidence of the Appellants and their witnesses. None of the appellants admitted to having been at the locus in quo on the material date. Further, the witnesses adduced by the Appellants testified to have not been at the scene of the crime. However, given the credibility of the witnesses fielded by the Prosecution, it is my view that the Appellants' evidence aimed at saving their skins from the wrath of the law. None of them adducing convincing evidence of his whereabouts at the material time on the fateful date.

For the foregoing reasons, regarding the first count of causing grievous harm, it is my holding that the Prosecution managed to prove the lesser offence of assaults causing actual bodily harm contrary to section 241 of the Penal Code, Cap. 16. In that case, I convict the first and the second Appellants of the offence of assaults causing bodily harm contrary to section 241.

Consequently, I substitute their sentence from five years imprisonment to six months imprisonment which runs from the date of their conviction of the substituted offence. Since the Appellants were convicted on 11th July, 2022, I order their immediate release from prison unless they are held for other lawful causes.

Further, concerning the offence of cattle stealing, I quash their conviction and set aside the sentence. I order their immediate release from prison unless they are held for other lawful causes. Order accordingly.

Right To Appeal Explained.

DATED at **MWANZA** this 3rd day of April, 2023.

KS KAMANA

JUDGE