THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

MOROGORO

CRIMINAL APPEAL NO. 03 OF 2023

(Originating from Criminal Case no. 89 of 2022 of Kilombero District Court at Ifakara, Before I.O Khamsini – PRM Judgement dated 07.12.2022)

MBIHA CHALUCHA ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

JUDGEMENT

Date of last Order: 13/03/2021
Date of Judgement: 21/04/2023

MALATA, J

This a judgement in respect to the appellant's appeal one Mbiha Chalucha who was charged together with two others namely; Issaka Yohana and Majuto Balagunyu before Kilombero District Court for the offence of causing grievous harm contrary to section 225 of the Penal Code, Cap 16, R. E. 2019.

In nutshell the facts leading to offence depict that, on 29/04/2022 at about 08.00 – 10.00 evening while at Magongola area, Kisegese Village in Namawala Ward within Kilombero District, all the accused did cause

grievous harm to the body of one Lucas Balagunyu. Upon the charge being read over to the accused persons, they all pleaded not guilty.

To prove the case, the prosecution side called four witnesses; PW1, PW2, PW3 and PW4 and the accused persons defended themselves with one witness (DW4).

PW1 testified that, he resides at Magongola and he has been residing there since his birth, he knows the accused persons well. He further testified that on 29/07/2022 at evening hours around 7 to 8 pm he had gone to local brew bar namely kwa mama Juma located at Magongola suburb where he found the three accused who by 11.00 they left went to Majuto's while around 11.30 PW1 decided to left. Suddenly after left he met three accused persons who pulled him off his bicycle and beat him with fists, PW1 ran away but at a certain distance he saw other two persons holding a torch while holding sticks on their hands and he managed to see them clearly through torch light. The other two he had left behind also ran after him to the point they reached him and they joined efforts in beating him. As a result of such beating, he lost consciousness, later he heard her sisters voice by far, he gained consciousness later at the Police and he was later taken to St. Francis Referral Hospital where he was admitted for two weeks, at the hospital

his was told that his right hand had been broken twice and his right rib has been broken. PW1 added that he doesn't understand the offence he committed against the accused to deserve such a beating.

PW2, Mariamu Balu Mboje who is PW1 sister testified that she knows all the accused persons by their names. She stated that on 30.07.2022 he was followed by their suburb chairperson one Charles (PW3) who awakened her to tell her that PW1 had been seriously injured and he was at his place waiting for first aid. She followed PW3 to his home to find PW1 semi-conscious while had been injured on his right-side eye, PW2 called PW1 who replied '*ni wewe dada*', then he said '*dada mimi nakufa, walioniua ni Isaka, Yohana na Majuto Balagumu*', to mean sister I am dying and the persons who killed me are Issaka, Yohana and Majuto Balagumu. Thereafter PW1 stopped talking. They were given a letter to take to police post where they were further given a letter to take PW1 to the hospital where he was admitted for two weeks, PW2 further stated back even after gaining his senses PW1 keept mentioning the name of the accused persons as the one injured him.

PW3 (suburb chairman) testified that on 29.07.2022 at midnight he was awakened by his neighbor one George Dismas who told him he heard some kind of noise and he needed PW3 to move along with him to find

what is going on. They moved a distance of like three houses in between, using the torch light they saw someone lying down in a desperate state, they managed to recognize a person as PW1, PW1 had some blood on his head and he said he had been beaten by the accused persons. PW1 was in pain he couldn't stand and he told PW3 to take him to his house, from there PW3 and Gorge Damas took PW1 TO PW3 house and PW1 relatives were found, PW1 was further taken the police and later to the hospital.

PW4 is the Doctor in orthopedic department in St. Francis Referral Hospital. PW4 testified that, he remember, on 30/07/2022 at evening hours he was called at the hospital on emergency to attend to a patient on emergency basis, when he arrived at emergency room he find a man by the name of Lucas whose right arm had two broken bones, he could not breath properly and he told him he had been beaten. PW4 further testified that PW1 was hospitalized and on 25/08/2022 he filled the PF3 of PW1.

Upon the evidence of prosecution witnesses the court found out that the prima facie case has been established against all accused and defence case commenced.

DW1, DW2 and Dw3 denied to commit the offence.

DW1 testified that on 03/07/2022 at evening hours around 6.00 pm he went to a local brew where he stayed up to 8.00 evening, suddenly PW1 appeared and he was with three people, a quarrel began involving PW1 with another person, DW1 decided to move in to settle the quarrel, the person quarreling with PW1 went away. PW1 decided to continue a quarrel with DW1. All people decided to ran away leaving behind PW1. Dw1 further testified that 1 o'clock DW1 knocked the door at his house saying *wewe umbwa toka nje tumalizane kwa sababu umemkimbiza mtu wangu*, PW1 opened the door by force, lit his face by torch and started a fight and he managed to injure him. At his surprise the next day he was held by MG and he was arrested on the allegation that he injured PW1.

DW2, Issaka Yohana testified that on 30.07.2022 he woke up and get himself into some errands where they were paid and they went to place where they buy their daily needs, afterward they decided to go to a local brew named kwa mama Sahani, they found PW1 there and PW1 said that he is looking for DW1. DW2 stated that later that night PW1 went at DW1 place and knock at the door when DW1 showed up PW1 ran upon him and injured DW1 at his mouth at the same tie PW1 fell down and hit himself on a rock.

DW3 who is the appellant in this appeal testified that on 14/08/2022 around 9.00 morning hours he was arrested by policemen on the allegation of injuring PW1.

DW4 testified that on 30/07/2022 by 7.00 midnight he heard some noises like someone is crying, he went to a ten cell leader and woke him up. They went together to the area of incidence he saw PW1 who said he has been beaten by Tolu, PW1 was carried to the ten-cell leader residence, and his relative were called.

Based on that evidence the court find all the accused guilty of the offence and they were all convicted and sentenced to serve five years imprisonment.

The appellant herein being aggrieved with the conviction and sentence appealed to this court with six grounds of appeal as follows;

1. That, the trial magistrate erred in law by not adhering to the principle of standard of proof which is required in criminal cases that, that the prosecution must prove its case beyond reasonable doubt that the convicted committed the alleged offence without leaving behind any shadow of doubt.
2. That, the trial erred in law and fact by not adhering to the principles of criminal evidential burden of proving the charge, that the

appellant was charged to commit grievous harm but there was no direct evidence produced in the trial to substantiate the charge because there was no witness who testified to have seen the appellant committing the same.

3. That, the trial magistrate erred in law and fact by not adhering to the principle of criminal evaluation of evidence, the trial court did not extensively evaluate the prosecution evidence because the appellant was nowhere mentioned by the prosecution witnesses as he committed the alleged offence.
4. That, the trial magistrate erred in law and fact by not adhering to the principle of criminal assessment of prosecution evidence that, which of no value because all witnesses were hearsay ones and violating the principle of direct evidence.
5. That, the trial magistrate erred in law and fact by not adhering to the principles of criminal assessment of prosecution evidence that PW1 did not mention the appellant that he perpetuated the offence, however the visual identification was not watertight to support conviction because PW1 was so drunk then clogged by blackout and the assailants were the one who held torch directing to PW1.
6. That the trial magistrate erred in law and in fact by not adhering to the principle of criminal assessment of prosecution evidence that,

there was lack of prosecution evidence implicating the appellant in the charge of grievous harm.

Thus, the appellant prayed the judgment of the trial court to be quashed, conviction and sentence set aside appellant be acquitted and set free.

When this appeal came for hearing all parties were represented, the appellant was represented by Mr. Mteite, learned counsel while the respondent (Republic) was represented by Mr. Emmanuel Kahigi, learned State Attorney.

Submitting in support of appeal, Mr. Mteite submitted on the first ground that, the trial magistrate failed to adhere to the principle of standard of proof beyond reasonable doubt. There is nowhere in his evidence the key witness PW1 mentioned the appellant to be involved in any way in commission of the offence, he named other witnesses and not the appellant. As for the rest of witnesses they were not present at the crime scene, thus their evidence is hearsay.

Submitting on the second ground, the learned counsel stated that the trial court failed to deal with evidential value in proving the offence of grievous harm.

In respect of the third ground, the learned advocate submitted that the trial court misapprehended the evidence as the appellant is nowhere mentioned to have been involved in the commission of the offence.

On the fourth ground Mr. Mteite submitted that the evidence by PW2, PW3 and PW4 were hearsay evidence as such it had no value in the absence of the key primary evidence establishing the offence against the appellant.

Submitting on the fifth ground learned counsel submitted that there was a problem of visual identification as PW1 was drunk, there was no enough light around 11.00 hours at night, it is on record that the assailants were holding torch lighting in the direction of the victim, it was impossible for the victim to identify the assailant including the appellant.

He prayed to support his submission with the case of **Abdallah Ally Chande and two others vs. Republic**, Criminal Appeal no 82 of 2003 on the issue of identification, also he prayed reference to be made to section 62 and section 110 of the Evidence Act.

Replying to the submission by the learned counsel, Mr. Emmanuel Kahigi learned State Attorney conceded to the appeal on the following that, **one**, The Republic did not prove the offence beyond reasonable doubt, the main issue being the identification of the accused other than PW1. Mr.

Kahigi submitted that, it is on record that the incidence occurred at night hence it was expected the description of the appellant to be detailed as to how the appellant was identified, duration of identification, distance from where the appellant stood (proximity), source of light and intensity of light, whether the victim and appellant knew each other before the incidence. To buttress his submission Mr. Kahigi cited the case of **Amani Waziri vs. Republic**, Criminal (1980) T.L.R 250, where the court principled on the factors to be considered in case of identification and how identification should be.

Two, the learned State Attorney submitted that the appellant was not named anywhere by any witness, as such he supported the appeal.

Upon rejoinder Mr. Mteite had nothing to rejoin.

In disposing the appeal, this court took gathered issues for determination these are, **one** whether the appellant identified and named by the victim as the assailant **two**, whether the prosecution discharged its duty of proving the case beyond reasonable doubt.

As the first appellate court, the High Court has a duty to re-evaluate and reconsider the material evidence before the trial court and make its own independent conclusion on whether or not the findings of the trial court should stand.

In the case of **Faki Said Mtanda vs. Republic,** Criminal Application No.249 of 2014 (Unreported) the Court of Appeal of Tanzania quoted with approval the decision of then East African Court of Appeal in the case of **R. D. Pandya vs Republic** [1957]EA 336 that;

> *"It is a salutary principle of law that a first appeal is in the form re- hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion."*

That is a duty I will shortly turn to do.

Responding to the first issue on identification and naming the appellant at the earliest stage, this court is of the settled view that in arriving to whether the accused was correctly identified or not, it is guided by among others that, the victim was able to; **one,** described the accused, **two**, stated accused's peculiar identity, **three**, stated the nature of light helped in identifying the accused, **four,** stated the intensity of the light, **five,** stated the familiarity with the accused, **six**, stated the proximity or distance from where the accused stood, **seven**, stated how the identification was made and **eight**, victim's naming the accused immediately or at the earliest time to the first person he reported to or

appeared at the incidence. Some of these factors were considered by the court of appeal in the case of **Waziri Aman.**

Throughout the evidence of all the prosecution witnesses, including the victim, nowhere stated that the appellant herein was named by the victim to have been involved in the incidence. Further, there is no evidence on record that, pointing out how the above named factors were considered as none of them were stated and described.

Both counsels for the Republic and appellant were in agreement that, there was no favourable conditions for identifications. Further, the incidence occurred at night at around 11:00hrs of which with no doubt, the identification and the circumstances were not favourable unless proved otherwise. In this case, there was clear explanation as to how the appellant herein was convicted and sentenced on the basis of which strong identification evidence. This is because the whole case was solely based on identification. The court in the case Waziri Amani, held that

> *"The evidence of visual identification is of the weakest kind and no court should act on it unless all possibilities of mistaken identity are eliminated, and the court is fully satisfied that the evidence before it is absolutely water tight before relying on such evidence, the trial court should put into consideration the time the witness had the*

accused person under observation, the distance at which the witness had the accused person under observation, if there is any tight, then the source of light, and intensity of light and whether the witness knew the accused person before"

This is also the position in the case of **Kassim Salum vs. Republic, C**riminal Appeal No. 186 of 2008 (CAT) (Unreported) while citing the case of **Scup John and another vs Republic**, Criminal Appeal no 197 of 2008 the Court of Appeal restated the factors to be considered in identification to include;

"1. How long the witness had the accused under observation.

2. What was the estimated distance.

3. If the offence was committed at night, which kind of light existed and what was its intensity.

4. Whether the accused was known to the witness before the incident.

5. Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the tatter's concentration"

Reasonably, where the evidence to be relied upon is of visual identification, the courts need to satisfy itself on the above factors before relying on such evidence.

PW1 testified that he was on his way home he met the accused persons they pulled him aside and start beating him, he succeeded to ran away but after a little distance he met other two persons holding torches and he managed to see them clearly by using torch light. PW1 mentioned he was able to identify the accused persons because there was torch light; He mentioned the source of light to be torch.

Now, in this case before trial court, a total of four prosecution witnesses gave evidence that they know the appellant, but none of them were present at the crime scene, PW1 was alone at the incidence however he did not; one, name the accused, two, state how he identified the accused, state the condition of identification bearing in mind the incidence occurred at 11:00hrs, three, state the intensity of the light, four, state the proximity, five, state for how long he did identified the accused, six, name the accused at earliest to the person who first appeared at the incidence.

The Court of appeal has in numerous decisions discussed on the effect of failure by the victim to mention the assailant at earliest stage. This is gathered in **Jaribu Abdalla Vs. The Republic**; Criminal Appeal No. 220 of 1994 (CAT) (Unreported) where the court, inter alia, held that;

> *"Delay in naming a suspect at the earliest opportunity dents a witness credibility, especially where the identification of the suspect is in issue."*

This stance was also reiterated in case of **Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 39 where the Court emphasized that the ability to name the suspect at the earliest opportune moment is an all-important assurance that the witness is reliable and that even the unexplained delay or complete failure to do so has to put the court to inquiry. All the above factors were nor put on the table and have answers from the prosecution side.

The rest of the prosecution witnesses testified as hearsay as they were not present at the locus in quo and that all what they testified were from PW1. They testified that, they know the appellant but the issue whether the appellant was seen committing the alleged offence which fact was not proved by either.

Having re-evaluated and reconsidered the evidence against the finding of the lower court, I am therefore satisfied that, as the case was solely based on identification, the lower court failed to direct its mind and satisfy itself on the conditions for favourable identification before arriving to the verdict. What happened in this case has already discussed herein above and how identification was and it felt short in meeting the legal requirement for proper identification.

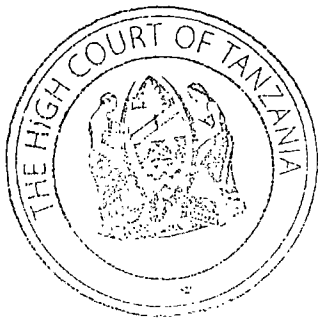
In the conclusion therefore, I am of the settled mind that, the conviction and sentence of the appellant was based on weak identification evidence which failed to prove the offence beyond reasonable doubt. Consequently, the identified weaknesses on the prosecution witnesses must therefore benefit the appellant.

All said and done, I hereby interfere with the lower court's decision by allowing the appeal, quash the conviction and set aside the sentence.

I further order for immediate release of the appellant one **MBIHA CHALUCHA** unless held for other lawful reasons.

IT IS SO ORDERED

DATED at **MOROGORO** this 21st April, 2023



G. P. MALATA

JUDGE

21/04/2023