

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 83 OF 2022

(Arising from the decision of the District Court of Tarime at Tarime in Criminal Case No. 518 of 2019)

THE REPUBLIC APPELLANT

VERSUS

WEREMA MATIKU KIRUKURESPONDENT

JUDGMENT

24th & 29th May 2023

M. L. KOMBA, J.:

Republic herein was not satisfied by the decision of Tarime District Court which acquitted the respondent over the charge of an assault causing actual bodily harm as it provided under section 241 of the Penal Code, [CAP 16 R. E. 2002] now R.E 2022. The trial Magistrate was of the reason that the prosecution did not prove their case to the required standard and therefore they fronted this court with only one ground that;

'The honorable trial Magistrate grossly erred in law by holding that the case was not proved beyond reasonable doubts.'

Before presentation of what transpired during hearing, I find it imperative that a brief background of this case be told.

It was the testimony of PW1 (Boniface Magesa) the victim that on 26/10/2019 around 14:00 hrs he was at Nyamirambaro village within Tarime District grazing cows with his young brother and took them to the dam area for them to drink water. After a while he decided to take bath leaving his young brother (PW3) taking care of cows. Suddenly he saw the respondent with stick who approached him and beat him with stick on the head and on the stomach, victim becomes unconscious then he was taken to hospital.

At the hospital he was attended by PW2 (Judith January) a clinical officer who received PW1 on evening hours who was accompanied by his mother, he was unconscious with open bleeding wound on the head. He stitched the wound later on he regains conscious. According to his assessment the wound was caused by heavy blunt object, she filled PF3 which was admitted as Exh "A".

PW3 (Baraka Magesa) informed the court that on 26/10/2019 in afternoon together with his brother (PW1) they went to the dam with cows, PW1 then start taking bath that action made cows to escape and run to respondent's farm. According to his testimony, this witness knew respondent before as he is village mate, the respondent went to where PW1 was and start beating him by using a big stick then PW1 become unconscious. One villager told

this witness to report the incidence to her mother whom, when reached home he found was not around, she was accompanied by sister-in law to the scene of crime and find PW1 was already taken to hospital. From these evidence trial Magistrate found the offence was not proved and as indicated earlier, she acquitted the respondent.

On the date of hearing of this appeal, Ms. Evanjelina Ephrahim and Ms. Natujwa Bakari, both State Attorney appeared for Republic while Mr. Geofray Kalaka learned advocate appeared for the appellant. Ms. Natujwa was the first to make the ball roll. She pointed out that in order to prove the offence which the respondent was charged, there are two elements need to be proved which are the assault and the extent of injury to amount the body harm as was elaborated in the case of **Hamis Juma Elia vs. Republic**, Criminal Appeal No. 238 of 2016 HC Tabora.

She submitted that assault was proved by PW1 who saw how the assault was done because he was with the victim. PW1 explained that on 26/10/2019 around 14:00 hours he was at the dam bathing and keeping cows then respondent appeared and started beating him and he fell unconscious. Moreover, she said PW3 the young sister of the victim explained the same that they were at the dam and the cows escaped from

dam to the respondent farm and the respondent took stick and beat the victim till he become unconscious as revealed at page 4 and 7 respectively.

It was the submission by state attorney that PW2 who is a doctor explained on 26/10/2019 he received a patient who was unconscious, he was confusingly bleeding from head and injuries in other parts of the body. She prayed this court to find that Republic managed to prove the offence by showing the party of the body injured. Weapons used and the condition of the victim. Prosecution had PW1 and PW3 eye witnesses and all proved the 1st element. On the second element to show extent of injury. On proving this the republic summoned the PW2 who is the doctor and explain the places and magnitude the victim was injured. That victim had open wound in the head which was bleeding and it was stitched. The victim was unconscious that show the magnitude of injury, on top of that PF3 was admitted as exhibit which explain the extent of injury.

It was her submission that Republic managed to prove the offence in both elements although that Magistrate explained that prosecution did not explain the size of stick, it was her position that in this offence what is look on is the effect to the body. The issue of delay of sending victim does not make element of offence and the suspect (respondent) was named in the earliest

stage. In all these issues raised she said it was not right acquire the respondent.

She said things which were not considered by the trial court was the defence of alibi which was relied without following procedures and he did not cross examine witnesses

Mr. Geoffrey counsel for the respondent object this appeal. He submitted that Appellant failed to prove the offence beyond reasonable doubt because; **one**, in the evidence at the trial court there were silent issues as it was not known who took the victim to the hospital. PW2 (doctor) said victim was sent to the hospital by his mother. PW3 explained she did not found their mother at home, this create doubt if is the one who send victim to hospital then, according to this counsel, victim mother was supposed to be the witness. Further to that, according to PW2 at page 9 of the proceedings that the wound was open with 2-degree length. It was his submission that the magnitude of the wound needed the same to be reported to police. In this case according to PW2 showed victim appeared with PF3 but there is no information which reveal which police post attend them first before going to hospital. All these create doubt in proving the case.

Moreover, he submitted that there was important witness who were supposed to be summoned but there is no information to that effect. One is Boke who was said to be at the scene, Sara the sister-in-law and another one is Mother of the victim was not among the witness and there is no reason provided. All these people participated in they in this crime and failure to call them at the trial court was entitled the court to draw adverse inference to the prosecution as was held in **Hamed Said vs. Mohamed Nditu** (1994) TLR 113 that a court can draw adverse inference. It was his submission that witness who were left could give the different testimony as the summoned witnesses are relative apart from doctor who treated the victim. The counsel doesn't see reason why material witnesses were not summoned and referred this court to the case of **Aziza Abdallah vs. Republic** (1991) TLR at page 7 about duty of prosecution to call witness to testify on material facts or else the court will draw adverse inference.

In the case at hand, Mr. Geoffrey said there is no reasons advanced for failure to call those witnesses. This creates doubt in the prosecution case and has to be taken in favor of the respondent. He concluded by reiterate his previous submission that the appeal lacks merit on reasons explained on the weakness on the side of prosecution and prayed it be dismissed.

This is the first appeal and that this court is duty bound to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact (see **Iddi Shaban @ Amasi vs. Republic**, Criminal Appeal No. 2006 (unreported)).

The duty of this court in this appeal is to determine whether the offence was proved to the required standard during trial. First of all, I agree with Ms. Natujwa that in the offence of assault causing actual bodily harm two elements must be proved which constitute an offence, assault and the extent of injury. But in proving those elements credibility of witnesses also is considered.

First of all, I find contradiction on prosecution side, that PW2 informed the trial court that victim was accompanied by his mother to the hospital while PW1 who is the victim said he was rescued by villagers and took him to hospital. It is not answered by prosecution who took the victim to the hospital. If at all there was an assault to make a victim lost memory then, was he taken to hospital by whom? The fact that the victim was attended in hospital alone is not enough to prove the occurrence of the crime in connection with the respondent.

Second, PW2 informed the trial court that clothes worn by the victim had blood stains and 5 hour was passed since he was injured. That suggests there was a delay in taking the victim to hospital. On the other side, PW3 informed the court when she returns at the scene with sister in law she did not find PW1 as he was already taken to hospital. Record shows he did not reach the hospital immediately, where was he? A person who was beaten till he was unconscious and then to be taken to hospital five hours late create questions which were not answered by the prosecution.

Material witness (es) including the victims mother who took the victim to hospital could have different story on what happened in between. Republic who is the appellant decided to utilize section 143 of the Evidence Act, that there is no specific number of witnesses is required to prove facts, this position must be taken with great care. Just as submitted by the counsel for the appellant that victim mother was supposed to be among the witnesses whose testimony would clear some issues which remained uncleared. The time lapse from the crime to the moment he was taken to hospital is too long. This is fatal omission on the part of the prosecution's case leading to watering-down the credence of the case. See **Laurent S/O Rajabu vs. The Republic** Criminal Appeal No. 270 of 2012.

Just as was analysed by the court in **Chacha Ng'era vs. The Republic**, Criminal Appeal No. 87 of 2010 (July 2013) CAT at Mwanza, Respondent should benefit from the doubt created by prosecution evidence. I don't find reason to fault the trial Magistrate on her decision. I find the appeal lacks merit and is hereby dismissed.

Right of appeal explained.

Dated in **MUSOMA** this 29 Day of May, 2023




M. L. KOMBA

Judge

Judgement delivered in chamber while Mr. Nico Malekela was remotely connected from NPS offices and in the absence of Respondent.


M. L. KOMBA

Judge

29/05/2023