IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISRTY

AT MOSHI

CRIMINAL APPEAL NO. 11 OF 2023

(C/F Criminal Case No. 87 of 2021 of the District Court of Moshi at Moshi)

BENJAMIN ANOLD..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

05/06/2023 & 30/06/2023

SIMFUKWE, J.

The appellant was arraigned before the District Court of Moshi at Moshi (trial court) in Criminal Case No. 87 of 2021, charged with the offence of causing grievous harm contrary to **section 225 of the Penal Code, Cap 16 R.E 2019**. After full trial, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubts. Hence, convicted the appellant and sentenced him to serve four years imprisonment.

Aggrieved with the decision, the Appellant preferred this appeal on five grounds of appeal:

1. *That, the trial court grossly erred in law and fact when convicted and sentenced the Appellant while there was variance on date between evidence (PW1-15/2/2021) and the charge sheet (13/02/20210 making the charge sheet not to be compatible with evidence hence defective.*
2. *That, the trial magistrate erred in law and fact when convicted and sentenced the Appellant whiles the prosecution evidence was loaded with contradictions, inconsistences and discrepancies, tainting their credibility.*
3. *That, the trial court erred in law and fact when convicted and sentenced the Appellant while the material witnesses, i.e., Victor and Selebibo mentioned by PW2 to be at the scene of crime were not summoned.*
4. *That, the trial court erroneously convicted and sentenced the Appellant without considering his defines (sic).*
5. *That, the trial court grossly erred in law and fact when convicted and sentenced the Appellant in a case which was not proved beyond reasonable doubt.*

During the hearing of the appeal, the appellant was unrepresented while the respondent was represented by Mr. John Mgave and Ramadhani Kagembe both learned State Attorneys. The appeal proceeded *viva voce*.

The appellant being unrepresented had nothing to say in respect of the grounds of appeal rather than stating that he did not commit the alleged offence. In addition, he submitted briefly that the doctor who testified did not tender any identity to substantiate that he was a doctor. The appellant also faulted the prosecution for failure to tender any exhibit or weapon used to inflict grievous harm to the victim. He asserted that at the police station, his statement was not recorded.

In reply, Mr. John Mgave notified this court that the appellant did not submit on the grounds of appeal. Responding to the allegation that the doctor did not tender his identity card, Mr. Mgave stated that during the trial, the appellant had an opportunity to cross examine the said doctor. That, the appellant objected admission of the PF3 only but did not cross examine about the identity card of the doctor or request the same to be tendered. He referred to page 20 of the trial court proceedings where the doctor stated that he had soft copy of his identity card.

Mr. Ramadhan learned State Attorney responded to the first ground of appeal which concerns variance of evidence of PW1 and the charge sheet.

He submitted that the ground has no merit since at page 10 and 19 of the proceedings, PW2 and PW3 testified that the incident took place on 13.02.2021 as indicated in the charge sheet. That, the variance between the evidence of PW1 and the charge sheet did not prejudice the appellant as he had time to cross examine PW1. Reference was made to the case of **Othman Mokiwa Sudi vs Republic, Criminal Appeal No. 190 of 2014** where at page 17-19 it was held that variance between the charge and the adduced evidence is curable under **section 388** and **section 234(3) of the Criminal Procedure Act.**

On the second ground of appeal which is to the effect that the prosecution evidence was loaded with contradictions, inconsistencies, discrepancies and lacked credibility; Mr. Ramadhan explained that the elements of the offence of grievous harm are reflected at page 3 of the judgment of the trial court. That, evidence of PW1 (the victim), PW2 and PW3 was consistent since they narrated what happened on the fateful day and there was no contradiction. That, PW2 explained exactly like what the victim explained. Page 10-12 of the proceedings are relevant. Moreover, all witnesses identified the appellant as the person who committed the offence. In addition, the learned State attorney stated that evidence of

the doctor reflected the injuries which the victim had sustained. Thus, the prosecution evidence was credible and free from contradictions.

On the 3rd ground of appeal that material witnesses were not summoned to wit, Victor and Selebibo who were mentioned by PW2 to be at the scene of crime; it was stated that the prosecution paraded three witnesses who were found to suffice to prove the offence charged. That, PW1 was the victim, PW2 was an eyewitness and PW3 was a doctor who attended the victim. Mr. Ramadhani referred to the case of **Christopher Marwa Mturu vs Republic, Criminal Appeal No. 561 of 2019**, at page 10, 2nd paragraph where the Court of Appeal held that:

> *"We wish to emphasize that, pursuant to the provisions of section 143 of the Evidence Act [Cap 6 R. E 2022] there is no legal requirement for the prosecution to call a specific number of witnesses, what is required, is the quality of evidence and the credibility of witnesses."*

Based on the above decision, Mr. Ramadhani stated that the prosecution is not bound to call a certain number of witnesses.

Mr. John learned State Attorney responded to the 4th ground of appeal which concerns failure to consider the defence of the appellant. He

contended that the trial court considered the defence of the appellant at page 3 of its judgment. That, in his defence the appellant based his defence on 15/02/2021 and he did not tell the court about the offence alleged to have been committed by him on 13th. The court proceeded to convict the appellant of the committed offence which the appellant did not bother to defend. That, it was not true that the trial court did not consider the defence of the appellant.

Responding to the 5th ground of appeal that the appellant was convicted and sentenced in a case which was not proved beyond reasonable doubt; Mr. John submitted that PW1, PW2 and PW3 convinced the court through their testimonies that it was true that it was the appellant who had inflicted grievous harm to the victim. That PW1 and PW2 managed to identify the appellant as the person who had committed the offence. PW3 proved before the court that the victim (PW1) sustained injuries which were inflicted by the appellant. Mr. John was of the view that the prosecution managed to assure the court that the offence charged was proved beyond reasonable doubts by proving the elements of the offence charged.

Mr. John implored the court to dismiss all grounds of appeal as they lack merit.

From the above submissions of both parties, the grounds of appeal and the trial court's record, the issue is *whether the prosecution case was proved beyond reasonable doubt.*

It is trite law that the prosecution has the duty to prove the case beyond any reasonable doubt. That, in case of any doubt, the accused person should have been given a benefit of it. In the case of **Magendo Paul and Another vs Republic [1993] T.L.R 219** the court held that:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

The question in this case is whether the prosecution case was proved to the extent explained above. I have noted that the appellant did not submit on the grounds of appeal rather he raised new grounds of appeal which I will not consider. However, I will deal with one ground after another as replied by the learned State Attorneys.

On the first ground of appeal, the appellant alleged that there was variance on date between the charge sheet and evidence of PW1. This ground was contested by Mr. Ramadhani, learned State attorney who

was of the view that PW2 and PW3 testified that the incident took place on 13.02.2021 as indicated in the charge sheet. He opined that the variance between evidence of PW1 and the charge sheet did not prejudice the appellant.

I have gone through the proceedings and noted the said variance in respect of the evidence of PW1 only. The rest of the witnesses testified that the incidence occurred on 13/02/2023 the date which was mentioned in the charge sheet. I concur with Mr. Ramadhani that since the rest of the prosecution witnesses testified that the incidence took place on 13/02/2023 as per charge sheet, then the appellant was not prejudiced with such variance. Also, the said variance does not take away the fact that the victim was assaulted by the appellant.

On the second ground of appeal the appellant averred that the prosecution evidence suffered inconsistencies, contradictions and discrepancies. Unfortunately, the appellant did not point out the said inconsistencies. Contesting this ground of appeal, Mr. Ramadhani explained that the elements of grievous harm were all established as seen at page 3 of the judgment.

I had an ample time to examine the entire proceedings, I failed to note any discrepancy. The witnesses were consistent in so far as elements of

the offence of grievous harm are concerned. Further to that, two eye witnesses PW1 and PW2 consistently narrated what transpired at the scene of crime. Therefore, the second ground of appeal has no merit.

On the third ground of appeal, the grievance of the appellant was that the prosecution did not call material witnesses to wit, Victor and Selebibo. Countering this ground, the learned State Attorney submitted that the prosecution paraded three witnesses who were found to suffice to prove the offence charged. He referred to the case of **Christopher Marwa Mturu** (supra) to support the argument that there is no legal requirement for the prosecution to call a specific number of witnesses.

I wish to state that the prosecution was duty bound to prove beyond reasonable doubt that the appellant inflicted grievous harm to PW1 by calling witnesses who witnessed the incidence. As it was held in the cited case of **Christopher Marwa Mturu** (supra), there is no number of witnesses required to prove the fact as per **section 143 of the Evidence Act,** (supra). I am alive that the prosecution ought to call key witnesses.

In the instant matter, I hasten to conclude that the prosecution called key witnesses to wit PW1 (the victim) and PW2 the eyewitness. These witnesses were able to prove the offence of grievous harm. It was not necessary for the prosecution to call each witness who witnessed the

incident since PW2 represented the alleged Victor and Selebibo. Things would be worse if there was no one else who testified apart from the victim. Given such circumstances, I find that this ground is unmerited.

On the 4th ground of appeal, the appellant lamented that the trial court did not consider his defence. This ground was disputed by Mr. John who stated that the defence of the appellant was considered.

I am aware with the principle that failure to consider defence evidence is fatal as stated in the case of **Leonard Mwanashoka v Republic (Criminal Appeal 226 of 2014) [2015] TZCA 294** [Tanzlii]. Much as I am aware with the above principle, in the instant matter, the trial magistrate apart from summarizing the defence evidence, in her judgment, she did not consider it at all. The issue which follows is what is the remedy for such omission? The remedy was stated in the case of **Hassan Singano @ Kang'ombe (Criminal Appeal No. 57 of 2022) [2022] TZCA 261** at page 10 where it was stated that:

> *"We have carefully examined the record and satisfied ourselves that, indeed the appellant's defence was not considered by the trial court. The position of the law on that aspect is settled. The trial court, before determining the guilty or otherwise of the accused, is obliged to*

consider both the prosecution and defence evidence. Where such a duty is omitted by the trial court, ***it is trite law, the first appellate court is bound so to do.***"

[Emphasis Added]

On the strength of the above authority, this court being the first appellate court, I step into the shoes of the trial court and consider the accused's evidence.

During the trial, the appellant narrated inter alia how he was arrested. He told the trial court that the police officers who arrested him demanded Tshs 50,000/- since he did not have, they told him that *'tutakukomesha',* meaning that they would teach him a lesson.

As stated earlier, the accused is not required to prove his innocence. What is required is for him to raise reasonable doubt. Looking at the defence of the appellant in this case, he did not manage to raise reasonable doubt on the prosecution case. He did not state whether he knew the victim or not and why he was victimized with the offence. During the preliminary hearing, the appellant said that he knew the victim. Thus, this court considers his defence as a mere denial of the offence.

On the fifth ground of appeal the appellant complained that the prosecution case was not proved beyond reasonable doubt. I need not reiterated my findings on the above grounds of appeal as the trial Magistrate was in a better position to determine the demeanour of witnesses who testified before the trial court. She was satisfied that the prosecution case was proved on the standard required by the law. Therefore, I find no reason to fault the findings of the trial court and sentence meted against the appellant.

In the event, I confirm the conviction and sentence imposed by the trial court and dismiss this appeal forthwith.

Ordered accordingly.

Dated and delivered at Moshi this 30th day of June 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

30/06/2023