IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 01 OF 2023

(C/F Criminal Appeal No. 10 of 2021 of Rombo District Court, arising from Criminal Case No. 122 of 2021 of Tarakea Primary Court)

VICTORINO FIDELIS MASIKA..... 1ST APPELLANT

PRIVA VICTORINO KIMARIO ..... 2ND APPELLANT

VERSUS

FELICHESIMO PROCHES SILAYO ..... RESPONDENT

JUDGMENT

31/07/2023 & 31/08/2023

SIMFUKWE, J.

The appellants herein were charged before the primary court of Tarakea (the trial Court) with the offences of Common assault and theft contrary to **sections 240 and 265 of the Penal Code, Cap 16 R. E 2019** now 2022**.** It was alleged before the trial court that the appellants did assault the respondent by using a club on different parts of his body while on the second count it was alleged that the appellants did steal Tshs 50,000/=

that was in the respondent's pocket of the jacket. Both offences were alleged to have been committed on 08/09/2021 at 09:00hrs at Mbomai Chini village, Tarakea Ward, within Rombo District in Kilimanjaro Region.

After full trial, the appellants were acquitted on the count of theft. However, the trial court convicted them with the offence of common assault and sentenced them to pay a fine of Tshs 150,000/- each or four months imprisonment in default. They were also ordered to pay Tshs. 50,000/= each, as compensation.

The appellants were aggrieved, they lodged an appeal before Rombo District Court (first appellate Court) vide Criminal Appeal No. 10 of 2021. The first appellate Court faulted the compensation of Tshs 50,000/- and upheld the rest of the decision of the trial court. Still aggrieved, the Appellants herein filed the instant appeal before this Court on the following grounds of appeal:

1. *That, the District court Magistrate erred in fact and law in upholding the decision of Tarakea Primary Court without considering that the respondent failed to prove the case in a standard required by the law. On the other hand, the District Court Magistrate came with extraneous issues which were neither part of the court records nor parties (sic) submission. (sic)*
2. *That, the District court Magistrate erred in fact and law in upholding the Tarakea Primary Court decision while the evidence of the respondent witnesses contained false, contradictory and fabricated evidence.*

3. *That, the District court Magistrate erred in fact and law in upholding the decision of trial Tarakea Primary Court without properly considering that the evidence tendered by the prosecution witnesses varied with the particulars of charge sheet.*
4. *That, the District court Magistrate erred in fact and law in upholding the decision of the trial Tarakea Primary Court without determining raised issue of unexplained delay in arrest of the Appellant, the principle of law provided in the case of* ***Majaliwa Ihemo v. Republic, (CAT), Criminal Appeal No 197 of 2020*** *(unreported).*
5. *That, the Appellate District court erred in fact and law in upholding the decision of trial Tarakea Primary Court with (sic) neither determining nor giving the reasons why in offences allegedly to be committed concurrently the court disbelieved the Respondent in the 2nd count when the respondent laired the trial court that the Appellant stole respondent's fifty thousand shillings, and believed the content of the 1st count that the respondent was assaulted by the Appellant contrary to the principle of law provided in the case of* ***Mohamed Said v. Republic, (CAT), Criminal Appeal No. 147 of 2017 (unreported)****, the principle of law that requires that a witness who tell a lie on a material point should not be believed in respect of other points.*
6. *That, the District court erred in fact and law in upholding the trial Tarakea Primary Court decision without considering that the Primary court failed to considering (sic) defence*

witnesses' evidence. The same trial court rejected the evidence of 2nd accused person by using precedents with principle of law provided under section 194(4) of Criminal Procedure Act Cap 20, R. E 2019, (the CPA), the law which does not apply in primary court.

When the matter was set for hearing, the appellants were represented by Advocate Elia Kiwia, while the respondent was unrepresented. The respondent prayed the appeal to be heard by filing written submissions, his prayer was granted.

On the first and second grounds of appeal, Mr. Kiwia faulted the first appellate court for failure to note that the respondent did not prove the case on a standard required by the law since his evidence was false, contradictory and fabricated. Mr. Kiwia also blamed the first appellate court for raising extraneous issues which were neither part of the court records nor parties' submission.

Elaborating the above grievances, Mr. Kiwia condemned the first appellate court for failure to note that before the trial court, there were serious contradictions which transpired during the trial. According to Mr. Kiwia the noted discrepancies were to the effect that PW1/SM1, the victim told the court that he was beaten by sticks *(mamiti)* and foot *(mateke)* contrary to PW3's evidence who, when cross examined told the trial court that he did not witness the appellants attacking the respondent with *'marungu'* (clubs) but he saw them attacking the respondent with *'mateke'* (kicks) and *'mangumi' (fists)*. On such discrepancies, the learned advocate faulted the appellate Magistrate's opinion that the witnesses were not expected to use similar words in their testimony. It was argued that the

proper definition of *'Marungu'* in English is club while *'Mamiti'* is sticks which are two different weapons which ought to be differentiated by the court.

It was further contended that, even if it is assumed that PW1 and PW2 meant that *mamiti* and *marungu* were the same weapons, still those two witnesses differed in their testimony on the reason that PW3 when cross examined disagreed to the evidence that the respondent was beaten with marungu and mamiti. He testified that the appellants assaulted the respondent by using *'mateke'* and *'mangumi'*. Mr. Kiwia categorised the above noted discrepancies as serious one which ought to be resolved in favour of the appellants.

Mr. Kiwia went on to submit that, it was very impossible for a person (PW3) who was very close and present at the scene of crime together with another witness PW2, only five meters apart, both of them watching the battle and PW3 failed to see the respondent being beaten with such big weapons marungu or mamiti while PW2 managed to see it.

Mr. Kiwia spotted another area of contradiction which the first appellate court failed to put into consideration. He said that the respondent explained to the trial court that the person who rescued him in a fight was Temba, and Ruben (PW2 & PW3), while the said Temba (PW2) testified that the persons who rescued the respondent were neighbours (majirani) and ten-cell leader (balozi). PW3 told the court that he was the one who rescued the respondent. The learned counsel blamed the first appellate court's findings that it is hard to point precisely who assisted to resolve the situation in the circumstances where there is a fight with a lot of people and some of them trying to rescue the situation. The learned

counsel asserted that there is nowhere in the proceeding where it is pointed out that at the scene of crime there were a lot of people. That, the reasoning of the appellate magistrate is based on new extraneous facts. That, there is nowhere in the record of the trial court where it is stated whether *Majirani* or *Balozi* were present at the scene of crime. That, such issue of *Majirani* and Balozi came out during cross examination of PW3. It was argued that provided that the appellate Magistrate was impartial judge and not the witness, it was not proper for him to come with such opinion which was not part of trial court record. That, such act is not allowed in our jurisprudence for the reason that it caused injustice on part of the appellants.

According to Mr. Kiwia, another area of contradiction is found in the testimony of PW2 who told the trial court that, when he went to the scene of crime and found the Appellants beating the respondent, he recorded the event by shooting a video, but when cross examined and required by appellants' advocate to produce the alleged video, he changed his former story and told the court that the video does not show the appellants beating the respondent, but it showed the appellants burning grasses. Mr. Kiwia, was of the view that such fact was another area which the lower courts failed to consider in favour of the appellants.

In support of the issue of discrepancy and inconsistence, Mr. Kiwia referred the case of **Kibwana Salehe Vs Republic** (1968) H.C 391 which held that:

> *"Where a witness gives inconsistent story from that which he has given previously the effect is to destroy the credibility of the witness unless he gives a reasonable*

explanation as to the departure from the previous statement."

It was asserted that the appellate Magistrate erred in fact when he said that it was not necessary to rely on a PF-3 where there is enough evidence to prove assault contrary to what transpired in the record where evidence tendered by prosecution witnesses was false and contradictory. It was opined that provided that during the trial the respondent told the court that after he had been assaulted by the appellants he was issued with a PF-3 and went to the hospital for treatment, he ought to produce it or the sick sheet used in his treatment as evidence of treatment resulted from assault. That, the respondent had no any other evidence in support of his allegation. The learned counsel cemented his argument with the case of **Tizo Makazi vs Republic, Criminal Appeal No. 532 of 2017** at page 13 (unreported) where the Court of Appeal held that:

"His evidence has to be considered along with other evidence in the record. In the circumstances, we agree with Ms. Mushi that his evidence cannot be relied upon to ground the conviction of the appellant. On the other hand, having expunged exhibit P1 and accorded the evidence of PW2 less weight, we are of the settled opinion that it is not necessary to consider other irregularities which were raised by Ms. Mushi .... "

The appellants' advocate continued to fault the appellate magistrate for failure to consider that the respondent did not call even the doctor who attended him or the police where the matter was reported and who gave him the said PF-3 so as to fill in the gap. He said, in absence of such

evidence it made that piece of evidence to fall weak, nugatory and false, moving the court to decide in favour of appellants. To buttress the point, the learned advocate cited the case of **Hemed Said v. Mohamedi Mbilu**, Civil Appeal 31(B) of 1984 [1984] TLR at pg 113 which held that:

> *"(iii) where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference contrary to the party's interest."*

He continued to state that according to **section 112 of the Law of Evidence Act, Cap 6. R. E 2019,** it is trite law that the burden of proof of any particular fact lies on that person who wish the court to believe in its existence. However, in the instant matter without any explanation the respondent failed to do so.

On the 3rd ground of appeal, the first appellate court was criticized for upholding the decision of the trial court without considering the fact that the particulars of the offence in the charge sheet did not tally with the evidence tendered in court during the trial contrary to the principles established in the case of **Kandola Paulo @ Kadala vs Republic**, Criminal Appeal No. 61 of 2017 (CAT) (Unreported) where at page 7, where the case of **Justine Kakuru Kasusura @ John Laizer vs Republic** Criminal Appeal No. 175 of 2010 (unreported) was cited.

On the strength of the above cited authority, Mr. Kiwia submitted that in the present case, the particulars of the offence found in the charge show that the respondent was assaulted by clubs only and nowhere in the charge sheet it is stated that the respondent was assaulted by *mangumi* and *mateke* as testified by Ruben Juma (PW3/ SM3).

Mr. Kiwia maintained that on the 1st appeal the contentious issue was whether the charge sheet contains the particulars that the respondent was assaulted by *mangumi* and *mateke*? Nevertheless, in its judgment, the appellate Magistrate diverted that issue and came with his idea of explaining the words *marungu* and *mamiti* contrary to what was stated in the case of **Kandola Paulo @ Kadala** (supra) that requires the particulars of the charge sheet to tally with evidence.

It was submitted further that provided that the weapon used in attacking the respondent (Marungu) was among the particulars of the offence in the charge sheet, it was mandatory for the charge to contain *mateke* and *mangumi* as core particulars of the offence. Failure of which made the charge to remain unproven to the extent that the proceedings of the lower court are vitiated and therefore, the decision of the lower court should be reversed.

On the 5th ground of appeal, the learned advocate wondered how the appellate court disbelieved the respondent in the count of stealing Tshs 50,000/- and believed him in the 1st count that he was assaulted by the Appellants contrary to the principle established in the case of **Mohamed Said v. Republic**, Criminal Appeal No. 147 of 2017 (CAT) (unreported), which is to the effect that a witness who tell a lie on a material point should not be believed in respect of other points.

Mr. Kiwia suggested that such issue was important to consider since it was impossible for the appellant to be beaten in the presence of PW2 and PW3 who were standing just about five meters from the scene of crime. That, both of them failed to witness the Appellants taking out respondent's Tshs 50,000/= out of his pocket while both offences were

alleged to have been committed at the same time. He urged this court to draw adverse inference to the prosecution witnesses' evidence since this issue was skipped by the first appellate court. He said, had the first appellate court considered such facts it would have decided otherwise.

On the 4th ground of appeal, Mr. Kiwia faulted the first appellate court for upholding the decision of the trial court without determining the raised issue of unexplained delay in arrest of the Appellants as elaborated in the case of **Majaliwa Ihemo v. Republic,** (supra). He clarified that according to this case, unexplained delay in arresting the accused is fatal as transpired. That, the appellants were arrested on 29/11/2021 while the respondent alleged that the incidence occurred on 08/09/2021. This issue was raised on appeal but was not determined while the same could have made the first appellate court to decide in favour of the appellants. He implored this court to determine the same.

Lastly, on the 6th ground of appeal, the first appellate court's findings were challenged for failure to reverse the decision of the trial Court which rejected the 2nd appellant's defence of alibi on the reason that the trial court cited the cases to support the rejection. The learned advocate stated that the findings of the first appellate court on such issue were not proper since all authorities cited by the trial court regarding the defence of alibi were as per **section 194(4) of the Criminal Procedure Act Cap 20,** which is not applicable in primary courts. That, the law which is applicable in criminal proceedings in the primary court is the **Magistrate Court Act Cap 11** together with the **Primary Court Rules**, which do not require prior notice before raising the defence of alibi.

In winding up his submissions, Mr Kiwia implored the court to allow all the grounds of appeal, quash the trial primary court proceedings, orders and judgment, set aside conviction and sentence and set the appellants at liberty including returning of Tshs 150,000/= of the fine paid as punishment in the alternative of imprisonment. Also, he prayed the attached cited cases to form part of their submissions.

In reply, the respondent on the outset acknowledged to be aware of the cardinal principle in criminal justice that the burden of proof is on the prosecution and this burden never shifts as enshrined under **section 110(1) of the Evidence Act** [CAP 6 R.E 2019] for the District Court and **Rule 5 (1) of the Primary Court Rules of Evidence**, GN No. 62 of 1974 for the Primary Courts. That, the said principle has been insisted in numerous case laws giving an example of the case of **Jonas Nkize V. Republic [1992] TLR 214**.

In the present case, the respondent was of the view that the prosecution managed to fulfill their legal duty in respect of the first count at the required standard to the satisfaction of the Court to warrant conviction and sentence against the appellants. He said, the court subjected the prosecution and defence evidence in an objective analysis and finally came up with a finding that prosecution evidence was sufficient enough to prove the charge beyond reasonable doubt.

It was explained that as per the records, the respondent and his witnesses testified that he was assaulted by the appellants and they both witnessed use of force against him which is a key ingredient of the offence charged. He was of the view that nowhere the appellate magistrate came with a new issue in respect of the first ground.

Responding to the issue of contradiction on the weapon used to assault him, it was the opinion of the respondent that the noted discrepancy is not calling a serious attention as witnesses were testifying to prove the offence. That, variation in the names of the objects used to commit an assault against the respondent does not change the fact that the respondent was assaulted by the appellants. He supported his contention with the first appellate court's finding that witnesses are not expected to use similar words which was supported with the case of **Evarist Kachembeho & Others vs Republic [1978] LTR** and **Chrisant John Vs Republic, Criminal Appeal No. 313/2015** (unreported). He stated further that, witnesses testified as to what they saw and it is very possible that witnesses may not concentrate at the incident and they cannot record in mind all what happened. That, one may see what another did not and their evidence may vary though they are deposing evidence of the same context.

The respondent refrained from replying the fourth and fifth grounds of appeal by arguing that the same were not raised in first appeal and that the same are not raising the point of law. He referred to the case of **Halid Maulidi vs Republic, Criminal appeal No. 94 of 2021** (Unreported) which observed that:

> *"Matters not raised in first appeal and they are not raising point of law should not be raised in the second appeal."*

Regarding the issue of defence of alibi particularly on the contention that the cited law doesn't apply in Primary Courts, it was the respondent's reply that the trial court applied the principle established in the case of **Mwita Mhere and Another vs The Republic [2005] TLR 107** which held

that for the defence of alibi to be relied, the one wishing to rely on it should file notice that in his defence he will rely on the defence of alibi. Otherwise, such evidence cannot be relied upon by the trial Court. That, the trial magistrate never mentioned **section 194(4) of the Criminal Procedure Act**, (supra) as alleged by the appellants. He argued that the case laws (precedent rule) bind all subordinate courts and the trial court has got no power to depart from the decisions of higher courts.

The respondent prayed the court to dismiss the appeal in its entirely and uphold the judgment and proceeding of the trial court and the first appellate Court.

Re-joining on the submission that the noted discrepancies does not touch the root of the case, it was Mr. Kiwia's argument that any reasonable man will not agree that *marungu* or *mamiti* have the same meaning with *mateke* and *mangumi*. He reiterated the authorities which he cited in his submission in chief.

It was also noted that the respondent did not reply on the reasons of failure to produce treatment documents or to call the doctor as raised by the learned counsel for the appellants.

Responding to the argument that the 4th and 5th grounds of appeal were not raised at the first appellate court, Mr. Kiwia stated that at page 6 last but one page of the written submission before the first appellate court the appellants questioned why the respondent failed to report the matter at the earliest possible moment and waited for more than a month. Also, at page 5 of the written submission, the appellants questioned why the court believed that the respondent was attacked by appellants but disbelieved his allegations that the appellants stole his money.

Having considered carefully submissions of both parties, the grounds of appeal as well as the records of the two courts below, the issue is ***whether this appeal has merit***.

This being the second appellate court, the court is barred from disturbing the concurrent findings of the lower courts unless it is found that there is misapprehension of the evidence, violation of some principles of law and/or practice, miscarriage of justice, existence of obvious errors on the face of the record or misdirection or non-direction of the evidence. In the case of **Jafari Mohamed vs Republic (Criminal Appeal 112 of 2006) [2013] TZCA 344** at page 12-13 the Court of Appeal explained that:

> *An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it unreasonable or perverse" leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law …"*

Also, in the due cause of dealing with this appeal, I will be guided by the principle as envisaged under **Regulation 1(1) of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations GN. No. 22 of 1964** which is to the effect that the complainant is required to prove all the facts which constitute the offence unless the accused admits such offence. Also, **Regulation 5** of the same law provides that in criminal cases, the court must satisfy itself beyond reasonable doubt that the accused committed the offence.

Turning to the present matter, on the first and second grounds of appeal, Mr. Kiwia challenged the findings of the first appellate court on the reason

that the court came up with extraneous issue which was neither raised at the trial and failed to appreciate the fact that the prosecution case suffered inconsistence. It was noted that there were discrepancies in respect of the weapon used to assault the respondent.

The respondent was of the view that the discrepancies on the weapon used to assault him are not material as the same do not take away the fact that he was assaulted.

The trial court while deciding on the noted discrepancy at page 7 third paragraph of its judgment had this to say:

> *"…kwani mashahidi waliotoa ushahidi upande wa mashtaka wote kwa pamoja walieleza kuwa waliona mshtakiwa akishambuliwa na washtakiwa richa ya kuwa kulikuwa na utofauti wa vifaa vilivyotumika kwa mmoja kusema mti mwingine ngumi na mateke lakini utofauti huu hauingilii katika kiini cha shauri kwamba kunaondoa maana ya shambulio vilevile mtu mmoja anaweza kuona mti na akaita rungu au rungu akaita fimbo kwani ni vifaa vyenye mfanano kwa namna moja au nyingine, ngumi na mateke vinaweza kutumika kwa pamoja kwenye matukio ya shambulio ama uvunjifu wowote wa amani."*

On the first appeal, while addressing the noted discrepancy the appellate magistrate at page 8 of the judgment had this to say:

> *"Therefore, the purported discrepancies is (sic) very minor it neither goes to the root of the case nor does it deflect*

from the essence of the prosecution evidence that it was the appellants who assaulted the respondent…

It is my view that whatever the meaning of each phrase they refer to the same fact assault. Assault is about attacking another person involving physical contact with that other person's body by any body part or object."

Basing on the quoted decisions of the lower courts, since the learned advocate was of the view that the noted discrepancy touches the root of the case, I am of considered opinion that there is allegations of misapprehension of evidence and violation of some principles of law which this court has been called upon to determine.

Both appellants were charged and convicted with an offence of common assault contrary to **section 240 of the Penal Code**. The term **Assault** has been defined at page 38 of the **Essential Law Dictionary** to mean:

"… to threaten or attempt to cause injury to someone else. When contact occurs as well, the offense is often called assault and battery…".

In the case of **Abubakary and Another vs Uganda [1973] 1 EA 230** (CAK) the defunct East Africa Court of Appeal referred to **Russell on Crime, 12th Edition, Vol. 1 at p. 652** which defined **assault** to mean:

"An assault, as distinct from battery, is a threat by one man to inflict unlawful force (whether light or heavy) upon another; it constitutes a crime at common law when the threatener, by some physical act, has intentionally caused

the other to believe that such force is about to be inflicted upon him."

From the above definitions, for the offence of assault it is not necessary for the accused to attack the victim physically and cause grievously harm but threat to inflict unlawful force may amount to assault. The offence of common assault as stipulated under **section 240 of the Penal Code** is different with an offence of assault causing actual bodily harm as provided under **section 241 of the Penal Code.** The two offences are differentiated by the impact which result from such assault since the impact of assault under section **241 of the Penal Code** is causing actual bodily harm, while the offence of common assault under **section 240** (supra) it is only the threat and there is no bodily harm.

I have observed that the contentious issue on whether the noted discrepancy on the weapon used to commit the offence of assault touches the root of the case or not, has arisen due to the fact that there is misinterpretation and failure to differentiate between the two offences.

In the present case, as a matter of reference, the charge sheet reads:

"Wewe VICTORINO s/o FIDELIS @ MASIKA pamoja na PRIVER s/o VICTORINO @ KIMARIO mnashtakiwa kuwa mnamo tarehe 08/09/2021 majira ya saa 09:45hrs huko Kijiji cha Mbomai chini tarafa ya Tarakea "W" Rombo na 'M' KILIMANJARO kwa makusudi na bila halali mkijua kuwa ni kosa mlimshambulia FELICHESIMO s/o PROCHES SILAYO kwa kumpiga na rungu maeneo mbalimbali ya mwili wake na kumsababishia maumivu makali kitendo ambacho ni kinyume cha sheria."

The above quoted particulars of the offence disclose the offence of assault causing actual bodily harm under **section 241 of the Penal Code** (supra) and not common assault as charged. In other words, the particulars of the charge of common assault as quoted above reflects the different offence of assault causing actual bodily harm. Also, evidence of the prosecution/complainant suggests the same thing that the respondent sustained actual bodily harm. Therefore, the offence charged does not tally with the particulars of the offence. If the appellants were charged with greater offence under **section 241 of the Penal Code** (supra), the court could have convicted them with lesser offence of common assault. However, since the charge is the foundation of a criminal offence as stated in the case of **Simon Kitalika vs Republic, Criminal Appeal No. 468 of 2016**, in the circumstances of such confusion in the offence charged and particulars of offence and basing on the noted discrepancies, I am of considered opinion that the charge was not proved beyond reasonable doubt.

Without prejudice to the findings above, I am alive that there are two categories of discrepancy; the one that touches the root of the case which dismantle the case and minor discrepancy which does not touch the root of the case. This has been stated in a number of decisions. For instance, in the case of **Dickson Elia Nsamba Shapwata and Another vs Republic** (Criminal Appeal 92 of 2007) [2008] TZCA 17, at page 7, the Court of Appeal made reference to Sarkar, The Law of Evidence, 16th Edition, 2007 at page 48 where it is stated that:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation; normal errors of memory*

due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's' case, material discrepancies do."

In the present matter, with due respect to the lower courts, even if for the sake of argument, there would be no variation in the offence charged and the particulars of the offence, I wish to differ with their findings that the noted discrepancies do not touch the root of the case on the following reasons:

First, if the appellants were charged with an offence of assault causing actual bodily harm, the type of weapon used to assault the respondent is directly connected to an offence of assault itself. In the circumstances where the charge sheet explain that the respondent was assaulted by using rungu (club) to the extent of causing pain, it was necessary for the evidence to show that indeed the appellant was assaulted by using the said rungu (club) and not as stated by the witnesses that the respondent was assaulted using mateke and mangumi (kicks and fists).

Second, in the circumstances where there is allegation that the respondent sustained injuries as per the evidence of SM2 and SM3, it was necessary for the respondent to tender the alleged PF3 to support the argument. I am of considered opinion that failure to tender a PF3 draw adverse inference to the complainant's case. On such confusion and

inconsistences, a PF3 could have proved that indeed the appellant was assaulted.

The charge must be proved beyond reasonable doubt and it is the duty of the prosecution to make sure that what is contained in the particulars of the offence is proved. See the case of **DPP vs Yusufu Mohamed Yusufu, Criminal Appeal No. 331 of 2014**. In this case, the charge sheet is to the effect that the respondent was assaulted by using *'rungu'* on different parts of his body and suffered pain. However, the respondent did not tell the trial court that he was assaulted to the extent of suffering pain. Strangely, it was his witnesses who narrated that the respondent sustained injuries and was taken to hospital. All these discrepancies make the complainant's story unbelievable and I am afraid to conclude like the lower courts that the prosecution case was proved beyond reasonable doubt. The confusion on the offence and particulars of the offence if considered together with the contradictions above leads me to conclude that the offence of common assault was not proved beyond reasonable doubt.

The above findings, suffice to dispose of this appeal. Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellants by the trial court which was confirmed by the first appellate court. The appellants should be refunded the money already paid as a fine, if any. Appeal allowed.

Order accordingly.

Dated and delivered at Moshi this 31st August, 2023.

X

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

31/08/2023