

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SONGEA SUB - REGISTRY
AT SONGEA**

DC. CRIMINAL APPEAL NO. 34 OF 2023

(Originating from Tunduru District Court in Criminal Case No. 167 of 2023)

HARUNI RASHIDI SONGWE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 14/09/2023

Date of Judgment: 19/09/2023

U. E. Madeha, J.

To begin with, the above named Appellant was charged with the offence of causing grievous harm contrary to section 225 of the *Penal Code* (Cap. 16, R. E. 2022). It was alleged by the prosecution side that on the 3rd day of November, 2022, at Namiungo Village within Tunduru District in Ruvuma Region, the Appellant did cause grievous harm to one Majembe Msafiri Latu by cutting him with a sharp object on the palm of the right hand causing bodily injury. After full trial the Appellant was found guilty convicted and sentenced to serve five years in prison.

As a matter of fact, the evidence which led to the conviction and sentence of the Appellant are as follows: PW1 who was the victim, told the trial Court that on 2nd day of November, 2023 he discovered that his young brother was in an abnormal appearance as his mouth was swollen. When he asked his young brother he was told that he was beaten by the Appellant. The matter was reported at the Village Office where they were ordered to go and report again in the morning of the of the nex day since it was already night time. In the next morning, before going to the Village Office, PW1 asked his young brother to led him to the Appellant's residence where they met him. The Appellant was asked on why he has beaten PW1's young brother, he denied to have beaten him and he told PW1 that he only ordered PW1's young brother not to graze in his farm. After that a fight occurred and the Appellant who took a machete and attacked PW1 and cut him in his palm of the right hand and run away. The incidence was reported at the Village Office and they were advised to report at Tunduru Police Station and later he went at Tunduru District Hospital for treatment.

PW1's testimony was collaborated by PW2 (PW1's young brother) and PW3 who witnessed the incident. Also, PW4, who is a Police Officer, in his party told the trial Court that he recorded the cautioned statement of the

Appellant and he confessed to cut PW1 in the palm of the right hand by using the machete. The Appellant's cautioned statement was tendered and admitted as "exhibit P1". PW5 was a doctor who attended the injuries in PW1's palm of the right hand and he tendered the filled PF3 which was admitted as an exhibit.

In his defence, the Appellant denied to cut PW1 in his palm of the right hand. He told the trial Court that on 2nd November, 2022, five pastoralists went to his farm accusing him for assaulting their relative. He denied the allegations and he was ordered to accompany them towards the Village Office. While on the way towards the Village Office, a fight between them occurred and in the course of fighting he tried to defend himself but accidentally he cut one man with a machete. He added that due to the fighting, he was also injured and he reported at Nakapanya Police Station where he was given the PF3 and he went to the hospital for treatment.

Basing on the above evidence, the trial Court found the Appellant guilty of the offence of causing grievous harm, convicted him and sentenced him to serve five years imprisonment. Dissatisfied with both conviction and sentence, the Appellant has preferred this appeal on the following grounds:

- 1. That, the prosecution case was not proved beyond reasonable doubt.*
- 2. That, the trial Magistrate erred in law and facts in convicting the Appellant without adhering to the law requirements.*

Before this Court, the Appellant has the legal service of Mr. Grey Ajetu, the learned advocate whereas the Respondent was represented by Ms. Ester Mfanyakazi, the learned State Attorney. The appeal was argued by way of written submissions and both parties adhered to the orders of the Court except for an order of filing a rejoinder submission of which the Appellant's advocate opted not to file.

Submitting in support of the first ground of appeal, Mr. Grey Ajetu, submitted that the prosecution case was not proved to the required standard of proving beyond reasonable doubt. He contended that the offence of causing grievous harm was not proved since there was variance between that charge and the evidence given by the prosecution in support of the charge. He went on submitting that while the charge in its statement of the offence provides that the offence was committed at Namiungo Village but there was no even a single witness who told the trial Court that the offence was committed at Namiungo Village but according to the prosecution witnesses the offence was committed at the grazing area and

PW2 testified that the grazing area is at Muhuwei Village and not at Namiungo Village. He argued that it is a legal principle that prosecution evidence must support the charge and failure of that makes the charge to be unproven. He invited this Court to be guided by the decision of the Court of Appeal of Tanzania in the case of **Emmanuel Lazaro & Two Others v. Republic**, Criminal Appeal No. 395 of 2015 (unreported).

He submitted further that the prosecution evidences are full of contradictions. He argued that while PW1 told the trial Court that they met with the Appellant at his home on 3rd November, 2023 but PW2 and PW3 testified that they met with the Appellant at the grazing area and the incident took place at that area. He contended that those contradictions creates doubts which goes to the roots of the case.

Submitting on the second ground of appeal, Mr. Agey Ajetu contended that there was non-adherence to some legal principles in the whole trial. He stated that the trial of the case was conducted before three different Magistrates and interchangeably without assigning reasons. He stated that the Magistrate who recorded the Appellant's plea was different to the one who recorded the Preliminary Hearing and the one who cancelled his bail was also different to the Maistrate who presided in his

case during Preliminary Hearing. He added that the three Magistrates presided over the same case in different occasions and interchangeably throughout the whole trial and without assigning good reasons. To buttress his stance, he invited this Court to be guided by the decision of the Court of Appeal of Tanzania in the case of **Gideon Musajege Mwakifamba and Another v. Republic**, Criminal Appeal No. 451 of 2019 (unreported) in which the Court held that proceedings for preliminary hearing are part and parcel of the trial.

Mr. Ajetu stated further that under section 214 (1) of the *Criminal Procedure Act* (Cap. 20, R. E. 2022) the law allows to change a Magistrate but for any change of Magistrate reason must be assigned. He referred this Court to the decision of the Court of Appeal of Tanzania in the case of **Abdi Masoud @ Iboma and Others v. Republic**, Criminal Appeal No. 116 of 2015 (unreported), in which the Court stated that where it is necessary to re-assign a partly heard matters to another Magistrate, the reasons for the re-assignment must be recorded and failure of that may lead to chaos in the administration of justice and its against the constitutional principle of fair trial and the Appellant was prejudiced by that trend of change of Magistrate without assigning reason.

On the other hand, Ms. Ester Mfanyakazi the learned State Attorney resisted the appeal and argued that it is the principle that the prosecution has the duty to prove the case beyond reasonable doubt is universal and she referred this Court to the decision made in **Woodington v. DPP** (1935) C 462. She contended that in the present appeal the Appellant was charged with the offence of causing grievous harm contrary to section 225 of the *Penal Code* (supra) and the prosecution proved all the ingredients of the offence beyond reasonable doubt.

She further submitted that the Appellant's advocate is contending that there are variances between the charge and the evidence adduced by the prosecution witnesses in respect of the place where the offence was committed, the learned State Attorney invited this Court to be persuaded by the writings of a prominent author in ***Sarkar: The Law of Evidence, 16th Edition, 2007***, in which it is stated that however honest and truthful a witness may be, normal discrepancies are expected in evidence 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 Courts have to categorize the discrepancies and normal discrepancies do not corrode the credibility of a parties' case.

She added that contradictions by any particular witness or among witnesses cannot be avoided in any case as it was stated by the Court of Appeal of Tanzania in the case of **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). She was of the firm view that the purported variances or discrepancies between the charge sheet and the evidence of PW2 and PW3 were trifling discrepancies and omissions that did not corrode the prosecution case since such errors do not go to the root of the case. She stated that the error found in the prosecution witnesses are curable under the provision of section 388 of the *Criminal Procedure Act* (supra). She concluded that the errors cannot make a charge fatally defective or a conviction null. He argued further that, the prosecution proved the case beyond a reasonable doubt and the first ground of appeal has no merit.

On the second ground of appeal that the trial Court erred in law and in convicting and sentencing the Appellant without adhering to the law requirement, she contended that the Appellant has misconceived himself on the interpretation of the provision of section 214 (1) of the *Criminal Procedure Act* (supra), which provides for the change of Magistrate.

She further submitted that the case against the Appellant was not heard by three different Magistrates but by only one Magistrate despite the fact that preliminary hearing was conducted before another Magistrate when the presiding trial Magistrate was not present and there was no changes or re-assignments of Magistrate, hence there was no legal requirement that was violated by the trial Court. Finally, she prayed for this appeal to be dismissed in its entirety and the findings of the trial Court be upheld.

As far as I am concerned, I have carefully considered the submissions made by the Counsel for both parties and I will starting with the first ground of appeal, that the prosecution case was not proved beyond reasonable doubt. The Appellant's learned advocate in his submission has raised two points in this ground of appeal.

The first point is on uncertainty of the scene of the crime. He claimed that there are variances between the charge and the evidence adduced by the prosecution witnesses in respect to the place where the offence has been committed. He submitted that the evidence shows that the scene of crime was at the grazing area which is at Muhuwesi Village as testified by PW2 but the charge shows that the scene of the crime was at Namiungo Village in Tunduru District. He argued that the place where the

offence was committed was not proved by the prosecution evidence. To the contrary, the learned State Attorney for the Republic submitted that these are normal discrepancies and omissions that cannot be avoided in any testimonies and they are curable under section 338 of the *Criminal Procedure Act* (supra).

On my part, being guided by the original records of this appeal, I find the evidence given by the prosecution witnesses named two scenes of crime. The grazing area and Namiungo Village. Also, the in Appellant's cautioned statement which was not disputed during trial and admitted as exhibit P1, the Appellant stated that the offence was committed at Namiungo Village where he was engaged in farming activities. In such circumstance, I find the prosecution evidence through the Appellant's cautioned statement in which he stated the place named in the charge to be the scene of crime clearly proved the charge in respect to the scene of crime. Thus, the variance between the charge and the prosecution evidence is cured by exhibit P1 and the contention made by the Appellant's learned advocate is unfounded.

The second point which has been adduced by the Appellant's advocate is on contradictions of the prosecution evidence. The learned

Counsel has contended that the prosecution witnesses contradicted each other on the place where the incident occurred. I have gone through the records and find that the contradictions are very minor. In **Emmanuel Lyabonga v. Republic** (Criminal Appeal 257 of 2019) [2021] TZCA 152 (29 April 2021; TanzLII), the Court had this to state:

" ... invariably in all trials, normal contradictions and discrepancies occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence of the incident".

Therefore, the contradictions and inconsistencies found in the original case records are normal and by any means they never prejudiced the Appellant. The first ground of appeal is hereby dismissed.

On the second ground of appeal, the Appellant's learned Counsel contended that the change of Magistrate in the proceedings of the trial Court didn't follow the legal procedures. He argued that during trial three Magistrates presided over the same case file in different dates but no reasons were assigned on the change of Magistrates. The Respondent

resisted that there was no change of Magistrate and the trial was conducted by a single Magistrate.

Having gone through the original records of the trial Court, I found the plea was taken by a Magistrate who didn't conduct preliminary hearing. Also, the Appellant's bail was cancelled by another Magistrate. The hearing of the case was conducted by the Magistrate who recorded the evidence of all witnesses and composed the judgment. In such circumstances, I find this ground of appeal has no merit since the hearing of the case was conducted by a single Magistrate who also composed the judgment. The Appellant was not prejudiced because all the disputed facts were heard and determined by the same Magistrate. Therefore, the change of Magistrate during preliminary hearing in which the Appellant agreed only his personal particulars didn't prejudice him and I find this ground of appeal lacks merits.

Finally, taking into account all the circumstances of the case, I am certified that the prosecution proved their case to the required standard of proving beyond reasonable doubt and there was no any prejudice on party of the Appellant.

Therefore, the appeal is hereby dismissed in its entirety and the conviction and sentence of the trial Court are upheld. It is so ordered.

DATED and DELIVERED at **SONGEA** this 19th day of September, 2023.



A handwritten signature in blue ink, appearing to read "U. E. Madeha".

U. E. MADEHA

JUDGE

19/09/2023

COURT: Judgment is read over in the presence of the Appellant and Mr. Madundo Mhina, the learned State Attorney for the Respondent. Right of appeal is explained.



A handwritten signature in blue ink, identical to the one above, appearing to read "U. E. Madeha".

U. E. MADEHA

JUDGE

19/09/2023