IN HE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF SONGEA

AT SONGEA

CRIMINAL APPEAL NO. 37 OF 2023

TABIA ALLY ATHUMANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Tunduru at Tunduru in Criminal Case No. 186 of 2022)

JUDGMENT

4th and 29th September, 2023

KISANYA, J.:

Before the District Court of Tunduru (the trial court), the appellant was charged with and convicted of an offence of causing grievous harm contrary to section 225 of the Penal Code, Cap. 16, R.E. 2019 (now R.E. 2022). She was then sentenced to serve five (5) years imprisonment and pay compensation of TZS 500,000/=. The allegation in the charge sheet was that, on 12th December, 2022 at Mchuruka village within Tunduru District in Ruvuma Region, the appellant unlawfully caused grievous harm to one, Ally Abdallah Matuka (henceforth "the victim" or "PW1") by beating him with a piece of brick on his head.

The evidence that led to the conviction of the appellant was as follows: On the fatefully day around 1700 to 18 hours, Ally Abdalla Matuka (PW1) went to the victim's house. He wanted to clear himself from the allegation of harvesting the appellant's banana, which he (the appellant) had reported to PW1's mother one, Mwajibu Shaibu (PW2). The victim stated that the appellant was not ready to settle the matter with him and that he was attacked by the appellant together with her other two children, Ally Kessi and Amina Kessi. PW1 expounded that the said Ally Kessi and Amina Kessi slapped and punched him on different parts of his body, while the victim hit him with a piece of brick on his head. Consequently, the victim bled profusely and lost consciousness. He found himself at Ndanda Hospital where he was admitted for three months.

The victim's mother testified as PW2. She stated to have informed the victim of the appellant's complaint in respect of stolen banana. It was her evidence that, the victim (PW1) decided to trace the appellant at her house. Later on, PW2 heard people shouting from the appellant's house. Upon responding to the alarm, she found the victim lying unconsciously on the ground. PW2 took the victim to Tunduru Hospital for medical treatment. According to her, the victim was referred to Ndanda Mission Hospital for further medical treatment and examination, including CT scan examination.

The last witness for the prosecution was Agabe Elimaya Mwita (PW3), a medical doctor from Tunduru District Hospital. He testified to have received and attended the victim on 12th December, 2022. PW3 stated further that the victim was unconscious and that, he gave him first aid before referring him to Ndanda Mission Hospital for further examination, particularly, CT scan which was not available at Tunduru District Hospital. To supplement his evidence, PW3 tendered a PF3 which was admitted in evidence as Exhibit P1.

In his defence, the appellant denied to have committed the offence. She claimed that on arrival at her house, the victim uttered abusive language, twisted her neck and hit her. It was her further defence that, the victim took a machete and attempted to harm her before being stopped by the people who arrived at the crime scene. The appellant further testified to have reported the matter to the village executive officer. However, she was arrested, together with her husband who was discharged after four days, on allegation which led to this appeal.

To support her defence, the appellant paraded Mwanabibi (DW2) and Jaffar Haji Hassan (DW3). According to DW3, the victim assaulted the appellant and when she (the appellant) screamed for a help, the victim wanted to cut her

with a machete. DW3 further stated that, the appellant was rescued by the people who responded to the alarm raised by the appellant,

At the conclusion of the trial, the trial court found the appellant guilt, and thus, it convicted and sentenced her as aforesaid.

Aggrieved, the appellant preferred this appeal, premising it on four grounds of appeal which hinge on the following two points of complaint; **one,** that the prosecution failed to prove its case beyond all reasonable doubt; and **two,** the evidence adduced by the defence was not considered.

On the date of disposing of this appeal, the appellant appeared in person, while the respondent was represented by Ms. Lucia Bukuku, learned State Attorney.

Arguing in support of the appeal, the appellant submitted that the trial court did not consider her evidence that she was attacked by the victim and that, the victim was attacked by the people who responded to the alarm. It was her further submission that, the prosecution did not prove its case beyond all reasonable doubts. She also submitted that, the case was not proved because there was misunderstanding between her and the victim. Therefore, the appellant urged the court to consider her grounds of appeal and allow the appeal.

Ms Bukuku did not support the appeal. She submitted that the prosecution proved that, the offence was committed by the appellant. According to her, PW1 identified the appellant as the one who hit him. It was her further submission that, the appellant did not cross-examine the victim on the issue of identification.

As for the complaint that the defence was not considered, the learned State Attorney submitted that, the trial court considered evidence adduced by both sides. She further submitted that, having considered the said evidence, the trial court arrived at a finding that the defence case was lacking in merit. Referring to page 11 and 12 of the judgment, she submitted that the trial court analysed the defence case and it convicted the appellant based on the evidence of the prosecution which proved the charge laid against the appellant.

Citing the case of **Venance Okuku vs Thomas Jackson Otilia**, Criminal Appeal No. 31 of 2021, Ms. Bukuku submitted that, an offence of causing grievous harm is proved by establishing the following: *One,* that the accused person applied force; *two,* that the accused person did so intentionally, that is, deliberately or recklessly; *three,* without consent or lawful excuse; and *four,* that the accused person's action caused actual bodily harm. The learned State Attorney went on to submit that, PW1's testimony that the appellant threw

a piece of block on the back of his head his suggests that she (the appellant) had malice. It was her further argument that the said act caused the victim to suffer actual bodily harm as confirmed by PW3 and supported by Exhibit P1.

As for the appellant's complaint on grudges between him and the victim, the learned State Attorney submitted that the said complaint or fact was not raised during trial. She concluded her submission by asking this Court to dismiss the appeal for want of merit.

In her rejoinder submission, the appellant reiterated her contention in submission in chief that, she did not commit the offence and that, the victim was attacked by the people who responded to her (appellant) alarm.

I wish to state at the outset that this being a first appeal, this Court is entitled to re-evaluate the evidence on record, subject it to a critical analysis and uphold the trial court's decision or arrive at its own finding or conclusion. I am bolstered by the cases of **Napambano Michael @Mayanga vs R**, Criminal Appeal No. 268 of 2015 and **Faki Said Mtanda vs R**, Criminal Appeal No. 249 of 2014 (both unreported). In the latter case, the Court of Appeal held 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.

I begin my determination of the appeal by addressing the second point of complaint. The appellant faults the trial court for failure to consider the defence evidence. Having examined the record of the trial court, I entirely agree with Ms Bukuku that, the defence evidence was duly considered. The trial court dismissed the said evidence for want of merit. The evidence of DW1 and DW3 that, the appellant was assaulted by the victim was not considered on the ground that the said allegation was not proved. In the circumstance, it cannot be held that the defence evidence was taken into account. I thus, dismiss the second point of complaint for want of merits.

Reverting to the first point of complaint, the issue is whether the prosecution proved its case beyond all reasonable doubts. To begin with, I reproduce section 225 of the Penal Code, which creates the offence of causing grievous harm that was preferred against the appellant. It stipulates:

"Any person who unlawfully does grievous harm to another is guilty of an offence and is liable to imprisonment for seven years."

My understanding of the above provision is that, the offence of causing grievous harm is proved by establishing the following ingredients; *First,* that, victim sustained grievous harm; *second,* that, the accused person was involved

in causing the grievous harm; and *third,* that, grievous harm was unlawfully caused. The case of **Venance Okuku** (*supra)* cited by Ms. Bukuku and referred to by the trial court was related to the offence of assault causing actual bodily harm under section 241 of the Penal Code and thus, it is distinguishable from this case.

Starting with the first ingredient, the issue is whether the victim sustained grievous harm. It is instructive to note that, the word "grievous harm" is defined by section 5 of the Penal Code (*supra*) in the following terms:

> *"any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense"*

In our case, evidence of PW1, PW2 and PW3 show that the victim sustained injuries on his head. They only stated that the victim bled profusely, without telling the court whether the nature or extent of injuries amounted to a maim or dangerous harm, or seriously or permanently injury of health or was likely to injure health, or extended to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense of the victim.

I have noticed that, at page 19 of the judgment, the learned trial magistrate held that the nature of injuries was described in PF3 (Exhibit P1) as "grievous harm". However, such finding does not feature in Exhibit P1. It was not stated in Exhibit P1 whether the sustained injuries were "harm", "grievous harm" or "maim". In his oral testimony, PW3's stated that the victim lost conscious because he had bled profusely. It was also his evidence that, he gave him first aid before referring him to Ndanda Mission Hospital for further medical treatment and examination, particularly, CT scan examination. That was after noticing that the victim had all signs of internal injuries. In that regard, the evidence from Ndanda Mission Hospital where the victim was alleged to have been examined was required to enlighten us on whether the sustained injuries were grievous harm or otherwise. Since this was not done, I find that the first ingredient of the offence causing grievous harm was not proved.

Next and crucial issue for consideration is whether the appellant caused or participated in causing the grievous harm. In other words, did the prosecution prove that it is the appellant who inflicted the injuries? It was the trial court's findings, at page 17 of the judgment that, this fact was duly proved by PW1.

As it can be gleaned from the evidence of both sides, it is the victim who went to the appellant's house where the offence was alleged to have been committed. According to PW1 and PW2 that, the victim went there after learning that she (appellant) was complaining that he (the victim) had harvested or stolen her banana. It is my considered view that, such fact alone suggest that the appellant and the victim had misunderstanding. In that regard, Ms. Bukuku's argument that the issue of misunderstanding or grudges between the appellant and victim was not stated during trial flops.

I have then considered PW1's evidence that, he left the appellant's house without arriving at an agreement on the issue of stolen banana. PW1 claimed to have been assaulted first, by the appellant's children namely Ally Kessi and Amina Kessi, who punched him on different parts of his body. Now, it is not known as to why the appellant's children named by PW1 were not charged. Neither the investigator nor other witness gave an evidence to clarify on the failure to charge Ally Kessi and Amina who were named by PW1 as his assailants.

Furthermore, PW1's evidence indicates he was lying on the ground when the appellant threw a piece of brick at him. This gives rise to the question whether PW1 identified the appellant as the one who threw the piece of brick

which hit him. I say so because PW1 stated to have raised an alarm when the appellant's children were beating him; and PW2 told the trial court that he found people at the crime scene. That being the case, the issue whether the victim identified the appellant arises. In her reply submission, Ms. Bukuku contended, *inter alia,* that, the appellant was duly identified by PW1 and that PW1's evidence on identification was not challenged during cross-examination.

It a trite law underlined in the landmark case of **Waziri Amani vs R [1980]** TLR 250, and other cases, that, evidence of visual identification is one of the weakest kind. The court should not act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence before it is watertight. The law is further settled in this jurisdiction that, in addressing the question whether identification is watertight there is a number of factors which must be examined. These include, the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance, whether it was day or night- time, whether there was good or poor lightening at the scene; and further whether the witness knew or had seen the accused before. See also the case of **Waziri Amani** *(supra).*

In the present case, evidence of PW1 displays that, it all started with Ally Kessi who followed and got hold of him, whereby Amina Kessi, joined him few minutes later. According to PW1, he fell down when the said Ally and Amina slapped and punched him on different parties of his body. That fact implies that there was commotion. Further, PW1 did not state whether the appellant was also present when the said Ally and Amina started to assault him. Considering that the piece of brick was thrown at PW1 when he (PW1) was lying down and screaming for help, PW1 ought to have substantiated on how he identified the appellant as the person who threw the said piece of brick and not any other person. For instance, PW1 did not state the distance at which he observed the appellant and the time under which the appellant remained under his observation.

Further to the foregoing, it not disputed that, PW1 knew the appellant before the incident. In order to assure his credibility on identification, PW1 was expected to name him after gaining his consciousness. None of the prosecution witnesses testified that PW1 named the appellant immediately after the commission of the offence or after gaining the consciousness.

I find, in the circumstances that, the evidence on identification of the appellant, as the person who assaulted PW1 was not watertight. In that respect,

the prosecution did not prove the second ingredient of the offence of causing grievous harm. For that reason, find no need of addressing the third ingredient which is based on the issue whether the grievous harm was unlawfully caused. In the end result, I hold that the prosecution case was not proved beyond all reasonable doubts.

Ultimately, the appeal is with merit and it is accordingly allowed. Consequently, I quash the conviction, set aside the sentence and the order for compensation. I further order that the appellant be released from prison custody unless held there for some other lawful cause.

It is so ordered.

DATED this 29th day of September, 2023.

S.E. KISANYA
JUDGE
29/09/2023