

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF TANGA
AT TANGA**

DC CRIMINAL APPEAL NO. 65 OF 2022

(Originating from Criminal Case No. 38 of 2021 of the Court of the Resident Magistrate of Tanga at Tanga)

ATHUMANI RASHID APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

Date of Last order: 25/09/2023

Date of Judgment: 09/10/2023

MANYANDA, J.

The Appellant, Athumani Rashid, is aggrieved by the judgment of the District Court of Korogwe at Korogwe in Tanga Region, hereafter referred to as "the trial court" dated 10/12/2021 in Criminal Case No. 38 of 2021. In the trial court, the Appellant was tried and convicted with an offence of grievous harm, contrary to section 225 of the Penal Code, [Cap. 16 R. E. 2022] and sentenced to seven (07) years imprisonment.

The particulars of the offence which were read to him alleged that on 11th June, 2021 at Msumbiji area in Kwamkole Village, within



Korogwe District in Tanga Region, unlawfully caused grievous harm to Batuli Hamisi @ Nesige by beating her in her body causing injuries on her head, leg and hand. After pleading not guilty to the charge, the prosecution paraded four (4) witnesses.

In summary, the evidence of the prosecution was that the Appellant and the victim lived under one roof in concubinage. That on the fateful day by 11:00 a.m., the Appellant was seen fiercely beating the victim with kicks and fists on her various parts of her body until she lost consciousness. In his defence the Appellant denied to have beaten her alleging that a day before 11th June, 2021 both of them drunk too alcohol such that he could not know what happened to her alleging that he might have fallen and got injured, in short, he denied beating her.

The trial court found him guilty and convicted him after analyzing the evidence of both parties and came to believe the evidence of the the prosecution and disbelieving the defence's evidence. It sentenced him to serve seven (7) years in prison. As explained above, he is dissatisfied with both, conviction and sentence, hence the instant appeal armed with the following three (3) grounds of appeal: -



1. *That the name of the victim appears in page one of the judgment that is Batuli Hamis Nesige differs with that which is in page two (2) PW2, Batuli Hamis Penge where it creates doubts as to who is a proper complainant in this criminal case;*
2. *That the learned trial magistrate erred in law and facts, because she did not consider deeply the facts that the spouses used alcohol, the victim possibly may has hurted (sic) by herself due to alcoholism; and*
3. *That, the learned trial magistrate erred in law and facts in condemning the appellant without considering his evidence;*

At the oral hearing of the appeal, the Appellant argued his appeal unrepresented while the Respondent, Republic, was represented by Mr. Christopher Waikama, learned State Attorney.

The Appellant had nothing to say other than adopting his grounds of appeals part of his submissions.

Mr. Waikama opposed the appeal, thereby, supporting both the conviction and sentence. He argued all three grounds of appeal seriatim. In respect of ground one, the State Attorney submitted conceding that

the last name of the victim is invariably referred to differently in the judgement, but quickly pointed out that, it is a mere slip of a pen which does not go to the root of the case and it is curable because the proper name is mentioned in the charge sheet and in the testimony of the witness.

I have gone through the names of the victim. In the charge, the full name of the victim is **Batuli Hamisi @ Nesige**. In her testimony, at page 11 of the typed proceedings the victim mentioned her names in full as being **Batuli Hamis Denge** and that she was also known as **Nesigwa**. When the trial Magistrate was summarizing the evidence at page 2 of the judgement mentioned the name of the victim as **Batuli Hamisi Penge** and noted that she was also known as **Nesigwa**.

The Appellant complaint is that **Batuli Hamis Nesige** and **Batuli Hamis Penge** are two different names. Hence, according to the Appellant, the person referred to in the judgement is quite different from the one in the proceedings and this was an error going to the root of the case, vitiating the proceedings and judgement. The State Attorney argument is that the differences in the third name of the victim



is a mere slip of a pen which do not go to the root of the case, it is curable.

This Court agrees with the State Attorney that there is a slight difference of names in the last name of the victim. The difference is from two last letters 'GE' instead of 'GWA' as a result the last name reads as Nesige in the charge instead of Nesigwa. The name "Penge" was mentioned by the victim as her middle name during testification though not indicated in the charge sheet, it is a mere middle name which was omitted in the charge. The victim corrected her names in her testimony after been affirmed mentioning it as as being Batuli Hamis Nesigwa.

This Court finds that the difference in the last name is a mere slip of a pen and curable as the same do not go to the root of the case based on the following reasons: - One, the first and second names of the victim remained the same as in the charge, proceedings and the judgment, meaning the person referred to was the same, the victim; Second, no miscarriage of justice has been stated by the Appellant on that mere slip of the third name of the victim as to how it affected him; Three, the evidence tendered in court all concerned the Appellant



assaulting the victim, his concubine namely Batuli Hamis Nasigwa, whom her very knew well including all her names; and Four, he did not even cross examine her when she mentioned her names which were referred to by the trial magistrate in the judgement, an act which connotes that the Appellant had no doubt with the names of the victim.

It is trite principle of law that failure to cross examine a witness on an important matter amount to acceptance of the truth of evidence of that witness - See for example the cases of **Cyprian Athanas Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992, **Damian Luhehe v. Republic**, Criminal Appeal No. 501 of 2007 and **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (all unreported), to mention a few.

In the last case, the Court of Appeal of Tanzania stated as follows:

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"As a matter of principle, a party who fail to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

This Court finds no merit in ground one and this finding takes me to the second ground.

The complaint in ground two is about the learned trial magistrate failure to find that the victim might have injured herself due to excessive drunkenness of alcohol. The State Attorney opposed this allegation arguing that the evidence is very clear that it was the Appellant who assaulted the victim on the fateful day 11/06/2021.

As submitted by the State Attorney, the evidence in this case is straight forward that the Appellant and the victim were living under one roof as concubines. That, the duo slept together peacefully the whole night of the fateful day 11/06/2021, until late at 11:00 a.m when they got awake. That, after awakening, the Appellant complained of feeling hungry, hence, ordered the victim to cook for him. However, she had neither food stuff nor money for buying the same, she requested him to give her some in order to buy the food stuff. This act, aggrieved the Appellant who started to belabour her with fists and kicks in various parts of her body, thereby badly injuring her to an extent of losing consciousness.

As it was day time, some people, including PW3, saw the Appellant belabouring her, they made a follow up, who made sure that the victim was sent for treatment and caused the Appellant to be arrested. PW4 is a police officer who issued a PF3 for the victim to be treated whereas PW1, a Clinical Officer examined the victim and treated her. His observation was that there were multiple wounds on various injuries on the body of the victim.

The PF3 which PW1 filled was tendered as Exhibit P1 and read aloud in Court, indicates the injuries as including swollen face with bruises, swollen left hand with bruises and swollen mouth deviating to the right side. PW1 received the victim in unconscious state bleeding in the face. He opined the cause of the wounds as being hit by a blunt object. Due to seriousness of the injuries, PW1 sent her to a referral hospital for further treatments.

As it can be seen, the evidence basically comes from the victim herself who stated that she was assaulted by the Appellant. There is evidence corroborating her, which evidence comes from PW1 and PW3. PW1 explained the multiple injuries which were caused by a blunt object. Such wounds are unlikely and incompatible with the "possibility" the



Appellant wants this Court to believe that she sustained the same after collapsing. Moreover, there is the evidence of PW3 who witnessed the state of the victim as being very bad as she was in unconscious state bleeding from multiple injuries. This witness went to the victim's home to trace information he had received that the Appellant beat the victim. He is the one who reported to the Village Authorities who arrested the Appellant.

I have read thoroughly the proceedings, I did not come across with any cross examination to shake the evidence of PW1, the victim and PW3 on this fact of the Appellant beating her.

As rightly found by the trial magistrate, the evidence adduced by the prosecution proved the charge in all the ingredients. The second ground has no merit also.

The third ground complaint is that the trial magistrate failed to consider the defence evidence. The State Attorney rejected this ground arguing that the conviction of the Appellant was supported by strong evidence by the prosecution and the trial magistrate after weighing the

evidence of both sides found the prosecution as strong and convicted him accordingly.

I have taken pain to go through the evidence of both sides. I agree with the State Attorney that the trial magistrate considered the defence evidence before coming to the findings. At page 7, the trial magistrate properly analyzed each ingredient of the offence rightly found that there was harm, that is the victim sustained injuries; that, the same were unlawfully caused and were caused by the Appellant who was responsible with causing the same. Further, the trial court rightly found that the evidence from the victim, whom it found to be a reliable witness, proved that there was assault which caused the wounds per testimony of PW1.

The instrument used, according to the PF3, Exhibit P1, was a blunt instrument. This corroborated the victims' testimony that she was assaulted with kicks and fists. The assault was unlawful in all aspects. Therefore, the evidence from the victim and PW3 points a finger at the Appellant.



In his defence, the Appellant basically denied committing the offence alleging that he just woke up and suddenly found his sexual partner, whom he loved, bearing all those serious injuries. The trial magistrate questioned failure by the Appellant of taking any action to have her sent to hospital, let alone helping her or asking for help from his neighbours.

After analyzing the evidence in support of the charge, the trial magistrate rightly well analyzed the defence evidence at pages 8 and 9 which was basically a denial, alleging that the victim might have fallen and got injured, it rightly found the same as incapable of shaking the prosecution's evidence.

I have gone through thoroughly the defence evidence, I have no flicker of doubt or reason to differ from the trial magistrate's findings that the denial by the Appellant alleging that the victim injuries were likely caused by her falling down as completely incompatible with the prosecution's evidence as explained above. The conviction of the Appellant was rightly preceded by strong prosecution's evidence which established all the ingredients of the offence. The third ground lack merits.



In the result, for reasons stated above, I find this appeal as barren of fruits. Consequently, I do hereby dismiss it in its entirety. I uphold the conviction and sentence. Order accordingly.

Dated at Tanga this 09th day of October, 2023



A handwritten signature in blue ink, appearing to read "F. K. Manyanda".

F. K. MANYANDA

JUDGE