

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 7 OF 2023

(originating from Criminal Appeal No. 4 of 2023 before Bariadi District Court, the same arising from Criminal Case No. 128 of 2023 before Somanda Primary Court)

KILULU MAKOYE APPELLANT

VERSUS

ELIAS DALALI RESPONDENT

JUDGMENT

3^d November & 10th November, 2023

KAWISHE, J.:

The appellant unsuccessful sued the respondent at Somanda Primary Court for the offence of causing body injury contrary to section 241 of the Penal Code, Cap 16, R.E 2019. Dissatisfied with the decision of the primary court, he appealed against the decision to the first appellate court. Once again, the decision of the first appellate court was not in his favour. Hence, this second appeal.

The gist of the matter in a nutshell run as follows: it was alleged by the complainant that on 6th March, 2023 at around 13:00hrs at Bwawa la

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Malambo T area, within Bariadi District in Simiyu Region, the accused person beat the complainant in several parts of his body by using stick, and caused severe body pain. Discontented with the decision of the first appellate court, the appellant preferred this appeal before this court with four reasons. The reasons are:

***First**, that the trial and the district court magistrates both erred in law and fact by holding in favour of the respondent while he failed totally to defend himself together with his witnesses; **second**, that the trial and district court Magistrates both erred in law and fact by considering inventively the conclusive evidence of the appellant together with his legal witnesses; **third**, that the district court magistrate erred in law and fact for failure to evaluate evidence of the appellant's side and rely on rere and fabulous evidences of the respondent and **fourth**, the district magistrate erred in law and fact for failure to realise the numerous irregularities which were made by the trial court magistrate.*

When the parties were called for hearing, the respondent enjoyed the service of Mr. Martin Sabini learned advocate, while the appellant appeared in person and unrepresented.

The appellant prayed to this court to adopt his petition of appeal to form part of his submission. Building on the 1st ground of his appeal, the appellant insisted that the trial and the district court magistrates erred in law and fact by deciding in favor of the respondent who failed to defend himself and his witnesses. He prayed to this Court to make a proper decision and quash the decision of the district court.

Submitting on the 2nd ground, the appellant stated that, the subordinate courts were against the appellant because he had a big number of witnesses and evidence in the case. He prayed to this court to consider the evidence given and the documents tendered in the court.

Supporting the 3rd ground, the appellant argued that, his evidence was stronger than that of the respondent. He alleged that, the respondent adduced evidence by tendering a copy of a work attendance register which was signed in the morning whereas, the offence was committed in the afternoon. He prayed to the court to apply the law and do justice.

On the 4th ground the appellant stated that, there were irregularities occasioned by the primary court but were not attended by the district court. The primary court decided the matter in favor of the respondent who

failed to defend himself together with his witnesses. He concluded by praying to the court to allow his appeal.

Mr. Martin learned advocate for the respondent replied to the grounds of appeal one by one. Starting with the 1st ground, argued that, at the trial court, the respondent defended himself strongly and his evidence was corroborated with that of his witnesses. The witnesses testified that, on the material day and time, the respondent was in the office. In criminal cases, the complainant is duty bound to prove his case beyond reasonable doubt, and the complainant in this case failed to discharge his duty.

Mr. Martin responded to the 2nd ground by alluding that, at the trial court and the first appellate court the appellant relied on a photocopied PF3. Mr. Martin contended that, the appellant failed to produce the original copy of the PF3 and failed to explain it before the court. The appellant did not call the doctor who examined him as a witness to explain the PF3. Attacking the testimony of SM4 – Nkia Sima, Mr. Martin contended that, the witness testified that, while she was passing by heading to town and observed the respondent beating the appellant. That she saw the respondent taking 200 herds of cattle, Mr. Martin questioned how did she

know the number of the animals. Hence, her testimony is doubtful. Mr. Martin further, contended that, the appellant stated that 46 herds of cattle were found near Bariadi District Council, while the evidence showed that the herds of cattle were matched by the respondent. He questioned the whereabouts of the left 154 herds of cattle.

Mr. Martin reacted to the 3rd ground of appeal by stating that the trial and first appellate court evaluated the evidence critically. The evidence adduced by the complainant was weak that is why the case was not proved beyond reasonable doubt. Mr. Martin alluded that, the respondent produced a copy of the work attendance register showing that on the material day he was in the office. That defense of the respondent was corroborated by defense witnesses who testified that the respondent was in office on the material date and he returned home around 18:00hrs.

Mr. Martin turned on the 4th ground and claimed that it is a new matter which was not raised in the subordinate courts. I perused the grounds of appeal submitted to the first appellate court and realized it was not raised. For that reason, I drop it outright.

The appellant in his rejoinder stated that, the original copy of the PF3 may be ordered by this Court to be produced by the police. The appellant further submitted that the trial court was duty bound to call the medical doctor who examined him to explain the PF3, he prayed to this Court that his appeal be allowed.

Having heard the submissions of both parties and referred to the record of the first appellate court which I have thoroughly scrutinized, I wish to state categorically that this is a second appeal, I do not wish to interfere with the findings of the two subordinate courts. This principle was laid down by the Court of Appeal in the case of **Director of Public Prosecutions vs. Simon Mashauri** (Civil Application 394 of 2017) [2019] TZCA 22. The Court stated:

"We wish to preface our decision by stating from the outset that this is a second appeal. It is now settled law that where there are concurrent findings of facts of the two courts below, the Court should not under normal circumstances interfere with such concurrent findings of facts. However, if such courts below have misapprehended the substance, nature and quality of such evidence which result into unfair conviction in the interest of justice, the Court may interfere"

See also the case of **Abdallahman Athuman vs. Republic**, Criminal Appeal No. 149 of 2014; **Omari Mussa Juma vs. Republic**, Criminal

In determining this appeal the major issue for consideration is whether this appeal has merit.

Starting with first ground *that, the trial and the district court erred both in law and fact by holding in favour of the respondent while he failed totally to defend himself together with his witnesses;* the appellant who was the key witness told the trial court that he was beaten by the respondent and his son at the Malambo ya Bwawani. He stated that, he ran away and the attackers matched the 200 herds of cattle to their home. In cross examination the appellant stated that, he did not raise alarm when he was beaten. Yet there were some people who witnessed the respondent while beating the appellant. The appellant produced in court a copy of the PF3 which he did not manage to explain.

I agree with the first appellate court that failure to read over documentary evidence is total irregularity, since it denies the parties an opportunity to have knowledge of the contents of such evidence. See the case of **Robinson Mwanjisi and 3 others vs. Republic**, (2003) TLR 100. Since the appellant failed to read out and explain the PF3 he should have lost the case. The appellant was duty bound to call a witness who

would have read and explain the PF3 before the court. Documentary evidence has to be read in court, refer **Issa Hassani Uki vs. Republic (Criminal Appeal 129 of 2017) [2018] TZCA 361**. The respondent proved in court through testimony that on the material day he was at work. No evidence adduced to prove that the respondent attacked the appellant as complained. This being the case, the first ground lacks merit hence dismissed.

Embarking on the 2nd ground of this appeal, the appellant stated that, the subordinate courts were against the appellant because he had a big number of witnesses and evidence in the case. He prayed to this court to consider the evidence given and the documents tendered in the court. It has to be noted that, the appellant produced a copy of PF3 and he called three witnesses, whose testimony was evaluated by the trial court and found not capable of proving the case beyond reasonable doubt.

It is a trite law that a case is not proved by the number of witnesses but the credibility and relevance of the evidence. In the case of **Godfrid Mpimbwe vs. Republic** (DC Criminal Appeal 52 of 2020) [2022] TZHC 9575, the court stated that:

"Unless there are other reasonable grounds to think otherwise, the trial court is best placed to determine matters on credibility of witnesses."

Also see the case of **Martin Ernest vs. Republic**, [1987] TLR 130 HC and **Julius Billie vs. R**, [1981] TLR 333. To this extent, I am of the settled mind that, the subordinate courts evaluated the appellant's evidence as required. Thus, the second ground of appeal lacks merit and is hereby dismissed.

Next for consideration is the 3rd ground of appeal which is a complaint to the effect that appellant's evidence was stronger than that of the respondent. The appellant submitted that, the respondent adduced evidence by tendering a copy of a work attendance register which was signed in the morning whereas, the offence was committed in the afternoon. The appellant is not aware that the respondent produced a copy of work attendance register and called four witnesses who testified that the respondent was at work on the material day until 18:00hrs. The appellant did not produce any evidence condemning the respondent to show that he committed the offence charged with. This ground like the preceding grounds, it is baseless and it is hereby dismissed.

I will not labour on the 4th ground as it is a new issue which was not raised at the first appellate court. As a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the court (s) below to be raised on appeal. See **Kennedy Owino Onyango and Others vs. R**, Criminal Appeal No. 48 of 2006 (unreported).

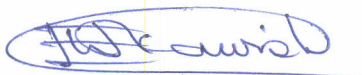
Having determined the grounds of appeal presented before this Court, it is clear that the trial court and the first appellate court's decisions were correct. Thus, the issue is answered in negative.

The foregoing said and done, I am of the firm view that there is no scintilla of merit in the present appeal. That is the reason why I dismiss it in its entirety.

It is so ordered.

Right of further appeal explained.

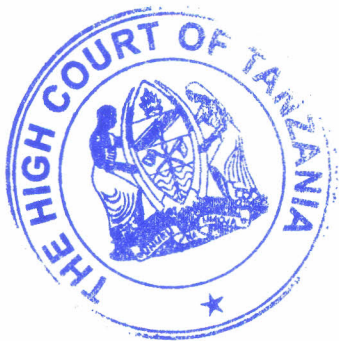
Dated at **SHINYANGA** this day of 10th November, 2023.



E.L. KAWISHE

JUDGE

COURT: Judgement delivered in Chambers this 10th day of November, 2023 in the presence of Kilulu Makoye the appellant in person unrepresented and Dalali Elias respondent in person.



A handwritten signature in blue ink, which appears to read "E.L. Kawishe", is written over a horizontal line.

E.L. KAWISHE

JUDGE

7/11/ 2023