

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 163 OF 2023

(From Judgment of the District Court of Mafia at Mafia in criminal Case No.63 of 2022 dated 30th May 2023 as per Hon.O.B.Mkamba SRM)

FRANCIS YOHANA KASEWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 09/10/2023

Date of Judgment: 10/11/ 2023

HON.GONZI,J.;

In the District Court of Mafia District at Mafia, the appellant was charged with one count of grievous harm contrary to section 225 of the Penal Code Cap 16 of the Laws of Tanzania. The particulars of offence alleged that the appellant on 1st day of November 2022 at Tumbuju area Chunguruma village within Mafia District in Coast Region, did grievous harm to one Miraji S/O Ally Kwangaya by stabbing him in his stomach on the left side with a knife thus caused his intestines to be exposed.

The appellant denied the charge and the prosecution called 4 witnesses. The victim, Miraji Kwangaya, testified as PW1. He testified on how on the fateful day he had a confrontation with the Appellant over a sleeping space in a room owned by his uncle who is PW3. PW1 testified that he had left his bag with his belongings such as torch, knife, and lotion in the room. That when he had gone out, the Appellant had taken over his room and refused to relocate to another room when demanded to do so by PW1. So, they had a confrontation, and that the Appellant used a knife to stab him in the left hand side of the lower abdomen thereby causing deep wound and his bowels were exposed. H.4592 DC Saragundi testified as PW2. He explained on how the police were informed of the incident and proceeded to the scene where he found the victim lying down and bleeding. The Appellant had already been apprehended by a group of people. He found the knife used in the stabbing attack beside PW 1. PW2 arrested the Appellant and took the victim to hospital by ambulance. Muhmin Rajabu Nassoro testified as PW3. He is an uncle of the victim, (PW1) and also the owner of several huts used by fishermen to sleep in the fishing village. He testified of having rented out rooms to both PW1 and the Appellant and that on the fateful date he was called by someone named Iddy from where

he was drinking soda in a bar to go to his place as his nephew (PW1) had been injured. He arrived only to find the PW 1 lying down, his intestines out and blood gushing from his stomach wound. Abdallah Mohamed Bahi testified as PW 4. He stated that as a medical practitioner, he received PW1 at hospital where he works and that PW1 had a deep cut wound in the lower abdomen and that he examined the wound and filled the PF3. He testified that he conducted an operation of the abdomen of PW1 and in the report he filled in PF 3, he stated that he found the vital organs of PW 1 were intact. That the wound was caused by a sharp object. The Prosecution also tendered in the trial Court the knife as Exhibit P1 and a medical Report PF3 as Exhibit P2.

While the Prosecution side claimed that the Appellant stabbed PW1 in the stomach, on the other hand the Appellant testified as DW 1 and alleged that he did not do stab PW1. The Appellant claimed that the victim in the course of confrontation fell down on top of his own knife and that is when the knife jabbed itself in the stomach of the victim. The rest of the story by the prosecution was not disputed by the appellant except for some contradictions in the prosecution witnesses.

In its Judgment, the District Court held that the Prosecution had proved its case beyond reasonable doubt and convicted the Appellant as charged. The Appellant was sentenced to 3 years imprisonment.

Aggrieved with the conviction and sentence of the District Court, the Appellant filed the present appeal on 5 grounds of appeal which are reproduced verbatim hereunder as follows:

"1. That the honorable Trial Court erred in both facts and law by not properly evaluating the weight of the prosecution evidence and reason wherefore he failed to reach a finding that the prosecution side failed to prove its case beyond all reasonable doubt in respect of the offence of which the appellant was convicted.

2. That the learned trial Court erred in law and fact basing on the witness of the prosecution side which basically the witnesses they didn't saw the event at the material date.

3. That there was a proximity between public prosecutor and the Magistrate thing lead to doubt to the appellant to understand what is going on.

4. That the accused person was a first offender stand before the court of law for the first time lead difficult to

him because he did not have any knowledge about court session.

5. That the learned trial Magistrate erred in law and fact by not inform an accused person his right to legal representation."

The appellant therefore prayed for the appeal to be allowed and for this court to quash the conviction and sentence passed against him.

Pursuant to the court orders, the appeal was heard by way of written submissions and both parties filed timely their written submissions.

In his written submissions, the Appellant abandoned the other grounds of appeal and remained with one ground of appeal namely that the prosecution case was not proved beyond reasonable doubt. The Appellant submitted that the case against him was not proved beyond any reasonable doubt as mandatorily required under section 3(2)(a) and 110 of the Evidence Act. He relied on the case of **Ahmada Mussa Ntimba and Mohamed Kashangaki versus R** (1998) to the effect that the prosecution has a duty to prove the case beyond any reasonable doubt.

The appellant submitted that in the case at hand there were contradictions among the witnesses for prosecution. And that in **Wilfred Lukago versus**

R (1994) TLR 189 and the case of **Aloyce Maridadi versus R** Crim Appeal No.208 of 2016 it was held that contradictory evidence creates doubt, which doubt should be decided in favour of the accused.

The contradictions stated by the appellant were put in the form of questions that:

- (a) Why didn't PW1 shout for help?
- (b) While PW 3 got information from someone called Iddy, why the said Iddy did not testify?
- (c) Why the knife found at the crime scene was not blood stain?
- (d) There was a confrontation between him and PW1, hence PW1's evidence was not free from bias, why it was not corroborated to establish guilty of the Appellant?
- (e) Why the hut (crime scene) was not searched or inspected to establish the circumstances?
- (f) Whether PW4 (the doctor) visited the crime scene or not? This is because it was testified by PW 2 a doctor gave the victim first aid at the crime scene before taking him to hospital while PW4 (the doctor) himself testified that he received and attended the victim as the patient in the government hospital.
- (g) Why at page 28 of the typed proceedings the name of the doctor who treated the victim is mentioned by Prosecutor to be Ahmad Abubakar while the doctor who ultimately came to testify was Abdallah Mohamed.

- (h) Whether PW1 was stabbed or he fell on the knife and it jabbed into his abdomen as he fell? This is because PW1 upon cross examination stated "we entered into confrontation that I fell down into knife and stabbed with it". Hence the appellant submitted that the same was contradictory evidence.

The Appellant submitted therefore that since the prosecution case was contradictory, the witnesses were not credible. The court should quash the conviction and sentence.

The Respondent Republic in its reply submissions submitted respect to the one ground of appeal namely lack of proof beyond reasonable doubt. The Respondent submitted that there was no contradiction among prosecution witnesses. The Respondent submitted that the Appellant did not cross examine any of those areas of the alleged contradictions during the trial. Failure to cross examine on an important point, is deemed to be an admission thereof. He referred the court to the case of **Martin Misara versus R**, Criminal Appeal No.428/2016 decided by the Court of Appeal at Mbeya.

The respondent submitted that the doctor who treated the victim is not the same one who had visited the crime scene. One doctor gave first aid at the crime scene and another one did the treatment in hospital. Hence

there was no contradiction because it was not the same doctor who was said to have given first aid at the crime scene like the doctor who attended to the victim at the hospital.

On the issue of the knife found at the crime scene having or not having blood stains, the respondent submitted that the Appellant might have tempered with the knife since there were only two persons namely the appellant and PW 1. Further that, even in absence of a knife, still there is direct evidence from PW1 that he had been stabbed by the Appellant using the knife. Further that the doctor also who testified mentioned a sharp object as per PF 3. PW 2 and PW 3 who visited the crime scene also saw the knife at the crime scene.

On different names of doctors, the Respondent submitted that the one who came was Abdallah Mohamed because it is actually the one who had treated the victim.

On trustworthiness of the evidence of PW1, he submitted that every witness deserves credence as a witness.

The respondent submitted that the other contradictions were minor and the minor contradictions cannot make the prosecution case to flop.

I have considered the rival submissions by the parties and the records of the trial court. The only ground in this appeal is that prosecution did not prove its case beyond any reasonable doubt. The Appellant in his written submissions has raised certain areas in the evidence of the prosecution where he alleged that there were doubts or contradictions. I am satisfied that the Respondent has cleared the doubts raised by the Appellant in the reply submissions. The only areas which remain not clarified by the Respondent are with respect to:

- (a) Whether PW1 was stabbed or he fell on the knife and it jabbed into his abdomen as he fell? This is because PW1 upon cross examination stated "we entered into confrontation that I fell down into knife and stabbed with it". Hence the appellant submitted that the same was contradictory evidence. Also the area of Why didn't PW1 shout for help?
- (b) While PW 3 got information from someone called Iddy, why the said Iddy did not testify?
- (c) Why the knife found at the crime scene was not blood stain?
- (d) There was a confrontation between him and PW1, hence PW1's evidence was not free from bias, why it was not corroborated to establish guilty of the Appellant?
- (e) Why the hut (crime scene) was not searched or inspected to establish the circumstances?

(f) Why didn't PW1 shout for help?

I have considered the evidence on record in respect of each of the above complaints by the Appellant. It is true that while examined in chief, PW1 testified that it was the Appellant who stabbed him several times and then struck the sharp knife deeply into the stomach of PW1. But during cross examination by the Appellant, PW1 stated that that he fell on the knife. This was a contradiction in his own evidence. But then in the same testimony, when PW1 was being re-examined he testified that it is not true that he stabbed himself as he fell down. It was the Appellant who had stabbed him. Therefore, I find that the prosecution had cleared the doubt established in cross examination immediately during re-examination. Re examination is there to repair any damage that might have been caused by the cross examination. It is normal for witnesses to be shaken during cross examination but their testimonies in cross examination should not be taken solely to the exclusion of their other evidence given during examination in chief or re-examination. In fact the evidence given during examination in chief is given more credence than that given in cross examination. Hence, I find that

considering the evidence given by PW 1 on being stabbed was still coherent when considered holistically.

Further, even if the court were to believe the Appellant that he did not stab the victim, still it could not help him escape liability because the Appellant does not refute that they were fighting with PW 1. In this regard if the Appellant pushed PW1 intentionally towards the sharp knife standing erect on the ground, it makes no difference from stabbing him. Pushing the knife towards the victim and pushing the victim towards the knife would have the same consequences.

On failure by prosecution to call Iddy who had gone to call PW 3 to come to scene of crime, in my view was not a material irregularity. This is because PW 3 himself testified and he arrived at the scene of the incident earlier enough to witness the victim lying down and bleeding with the knife beneath him. There is no missing link in the prosecution case that the said Iddy would have been the key witness thereof as to make him a material witness and as to justify an adverse inference being drawn against the prosecution for failure to summon him as a witness. But any rate, the Appellant has not explained how the failure

by prosecution to summon Iddy as a witness affected the prosecution case in the trial court. This point does not hold water.

On the knife found at the crime scene not having blood stains, I find that this is a weak argument. Like it was submitted by the Respondent's counsel the blood stains are not material in the circumstances because there are other corroborating pieces of evidence showing that a knife was used in the stabbing. In particular, Exhibit P2 the Doctor's PF 3 report show that the wound was caused by a sharp object like a knife. Whatever might have happened to the blood stains does not remove the fact that the victim suffered injury due to a sharp object. But on this issue of the knife penetrating the stomach of the victim, even the Appellant did not dispute it. The appellant testified that a knife penetrated the victim in the stomach as the victim fell when they were in confrontation. One would ask, where is the blood stained knife supposedly jabbed into the stomach of the victim as he fell? There was only one knife at the scene of incident and both sides agreed that the wound was caused by that knife. Presence or absence of blood stains in the knife was immaterial in my view.

On the issue of a confrontation between the appellant and PW1, hence PW1's evidence was not free from bias, I find this point to be weak as well. To the contrary, the confrontation supplies the ill-motive on the part of the appellant to have stabbed the victim PW1. At any rate, PW1 was not a co-accused with interest to serve as to require his evidence to be corroborated by another independent evidence. PW1 was the victim and as a witness was entitled to credence. There were no good reasons to discredit his evidence. But in the case at hand, PW1's evidence was adequately corroborated by PW2, PW3, PW4 and Exhibits P1 and P2. The argument does not hold water also.

On the prosecution not explaining why the hut (crime scene) was not searched or inspected, I find that the Appellant has not shown the legal requirement for the prosecution to search or inspect the hut. The Police had their own means of doing investigation so as to gather the necessary evidence. Searching premises is one of them but is not the only method of criminal investigation. The Appellant did not cross-examine PW2 on this aspect during the hearing so as to establish that search was not done. At any rate the Appellant did not dispute the fact

that he was fighting with the victim in the crime scene when the incident happened.

On the victim not shouting for help, I am of the view that this is not a relevant factor. The testimonies of PW2 and PW3 showed that when they arrived at the scene of the crime they found the appellant apprehended by a group of people and who wanted to harm him. Whether PW1 shouted or did not shout, it did not make any difference because shouting for help is not among the ingredients of the offence of causing grievous harm.

I find that the Prosecution in the trial, was able to prove the offence of causing grievous harm beyond any reasonable doubt. The offence of grievous harm is established under section 225 of the Penal Code. It provides : **"Any person who unlawfully does grievous harm to another is guilty of an offence and is liable to imprisonment for seven years."**

The term grievous harm is defined in section 5 of the Penal Code that :

"grievous harm" means 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.

I find that the act of the Appellant to stab with a sharp knife the victim PW1 deeply in the left hand side of the abdomen was a dangerous harm. It endangered the health and life of PW1. It caused serious injury to the to PW1's internal and external organs. The attack by the Appellant on PW 1 was unlawful. Therefore the offence was proved by the prosecution and I see no ground to fault the decision of the trial court.

In the upshot, I find that the appeal at hand does not have merit. It is hereby dismissed. I confirm the conviction and sentence as imposed by the trial Court. Right of appeal explained.

It is so ordered.



A.H.Gonzi

Judge

10/11/2023



Judgment is delivered in court this 10th day of November 2023 in the presence of the Appellant in person and Bertha Kaaya learned State Attorney.



A.H.Gonzi

Judge

10/11/2023