IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MBEYA SUB – REGISTRY
AT MBEYA

CRIMINAL APPEAL NO. 148 OF 2023

(Originating from the decision of the District Court of Chunya at Chunya in Criminal Case No. 143 of 2022)

CLEMENCE RAPHAEL .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

2nd & 13th November, 2023

MPAZE, J.:

In Criminal Case No. 143 of 2022 before the District Court of Chunya, the appellant was charged with and convicted of the offence of grievous harm contrary to section 225 of the Penal Code [Cap 16 R.E. 2019 now 2022]. After trial, the accused was sentenced to 5 years imprisonment.

Dissatisfied with both the conviction and sentence, he has preferred this appeal with four grounds that can conveniently be summarized into three, **one**; that the conditions at the scene of the crime were unfavourable for proper and reliant identification, **two**; that the case was not proved beyond reasonable doubt and **three**; the

defence evidence was not considered.

The facts before the trial court were albeit in brief as follows, on 17th September, 2022 at 00:00, one Oliver Sephania (PW1) who is also co-parent to the appellant was asleep when she heard the door being pushed by someone entering her room. PW1 claimed to have identified the appellant through both a solar lamp and a torch light.

PW1 stated that the appellant expressed a desire to take their child, whom they had parented together. However, PW1 objected to the appellant's request, leading to an altercation wherein the appellant assaulted PW1. During this confrontation, the appellant wielded a razorblade, inflicting cuts on various parts of PW1's body. In response, PW1 raised an alarm and sought refuge in a nearby house.

The neighbours who heard the alarm responded to it managed to arrest the appellant and took him to the police station. PW1 was given a PF3 and proceeded to the hospital for medical treatment and examination, thereafter admitted for three (3) days.

In his defense, the appellant distanced himself from the alleged crime. He claimed that on the 17th of September, 2022, at 05:00 hrs. while at home he responded to a knock on his door. Upon opening it he found himself facing PW2 who informed him of the accusations regarding the injuries inflicted on PW1 and subsequently arrested him.

During the hearing, the appellant requested that his grounds of appeal be considered, and he suggested that the Republic start its submission while reserving the right to respond as needed. Representing the Republic, Ms. Lilian Chagula, state attorney opposed the appellant's appeal.

Addressing the grounds related to the conditions at the crime scene favouring accurate identification, Ms. Chagula contended that the circumstances were conducive to unmistakable identification of the assailant. She argued that the appellant was familiar with the victim, and during the incident, he used a flashlight in the victim's room, facilitating PW1's ability to identify him. The complainant's (PW1) identification was also substantiated by the presence of solar light.

The learned State Attorney referred this court to page 7 of the typed proceedings where PW1 testified on how she identified and recognized the appellant. She accounted for the time spent at the scene of the crime, the dialogue that the two had and how close they were during the assault as aids for sufficient recognition of the appellant.

In relation to the claim that the case was not proven beyond a reasonable doubt the appellant raised three specific issues in support of his complaint. Ms. Chagula, in her response, argued that the appellant had misunderstood the testimony of PW2. She underscored that PW2's

account was lucid, providing a detailed description of the role played by the appellant upon reaching the crime scene, which included apprehending the appellant. PW2 unmistakably identified the appellant as the one who have a child together.

Concerning the complaint regarding contradictions of evidence concerning the time when the offence was committed, Ms. Chagula conceded that, as such, there was such a contradiction. However, it was her submission that the said contradiction is so minor that does not go into the root of the case. She cited the High Court decision in the case of **Athuman Adamu Kapaya v. Republic**, Criminal Appeal No. 102 of 2019 (Unreported), (Arusha Registry) and Court of **Appeal in Mohamed Said Matula v. Republic** [1995] T.L.R 3 cementing her argument.

Regarding the contention about the prosecution's failure to summon material witnesses, Ms. Chagula rebuffed this claim, asserting that it lacks substance since the neighbours who witnessed the incident did, indeed, testify. However, she reiterated the legal position that there is no specific number of witnesses that the prosecution is required to call to prove her case citing section 143 of the Evidence Act, [Cap. 6 R.E 2022], she insisted that the crux lies in the credibility of the witnesses and the weight of the evidence presented. To support this position, she

referred to the precedent set by the Court of Appeal in **Siaba Mswaki v. Republic, Criminal Appeal No. 401 of 2019** (Unreported), (Dar es Salaam Registry).

About the claim that the appellant's defence was not considered, the learned state attorney referred this court to page 3 of the typed judgement of the trial court showing that the appellant's defence was considered. However, she was of the view that if it is noted that the same was not considered, this court must analyse and examine the evidence produced at the trial court and come to its conclusion. She referred the High Court decision of **Abdullatif Leonard v. Republic**, Criminal Appeal No. 73 of 2021 (Unreported) (Bukoba Registry).

In her conclusion, Ms. Chagula urged this court to find out the prosecution case was proved beyond reasonable doubt thus dismissing the appeal with the conviction and sentence of the trial court sustained.

In the rejoinder, the appellant insisted that he never committed the charged offence arguing that he had no any conflict with PW1 adding that there was no reason for him to go and take the four-month-old baby.

According to the submissions by parties and this being the first appellate court, this court will reevaluate the evidence for both sides to satisfy itself that the findings of the trial court were justified and

impeccably necessary worth for one to come up with the met conviction.

Since the appellant was charged with the offence of grievous harm, the court must first ascertain whether the injuries stained to PW1 amount to grievous harm as defined under section 5 of the Penal Code (supra). The referred to section 5 defines grievous harm to the effect that:

> *"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 any permanent or serious injury to any external or internal organ, member or sense; "maim" means the destruction or permanent disabling of any external or internal organ, member or sense; "harm" is defined as any bodily hurt, disease or disorder whether permanent or temporary; and "dangerous harm" means harm endangering life*".

It was also held by the High Court in the case of **Juma Lebenge v. Republic** [1972] H.C.D 225 to the effect that:

> '*The term grievous harm as defined in the penal code necessarily involves a consideration whether the harm is such as seriously to interfere with health or comfort and the answer to the question may depend on the nature of the injury and the surrounding circumstances of the case'.*

From the accorded definition and the cited case above in proving

grievous harm, the prosecution is required to show that there is sufficient evidence on the harm that amounts to the inferred dangerous or serious or permanent injuries to the health or which is likely to injure the health.

In this case, the adduced evidence indicates that PW1 suffered injuries to various parts of her body, including multiple wounds on her cheek, face, and head. PW1 recounted that she lost consciousness and only regained awareness at 06:00 hrs. while in the hospital. Testifying on the medical aspect, PW3 confirmed treating PW1 for the sustained injuries. During her hospital stay, the wounds were stitched, and she underwent a blood transfusion, ultimately requiring a three days hospitalization.

The crucial question at hand is whether the evidence aligns with the charges of grievous harm as defined in section 5. The presented evidence illustrates that PW1 underwent stitching, lost consciousness, received a blood transfusion, and was subsequently hospitalized for three days. This sequence of events indicates that the assault had a severe impact on PW1's health, leading this court to conclude that it indeed amounts to grievous harm.

The next question is as to who caused the inflicted grievous harm on PW1. The evidence on record shows that the attack occurred at

00:00hrs whereas PW1 said that she managed to identify the assailant (the appellant) through a flashlight and solar lamp. Among the aiding gears include the fact that the appellant is a co-parent to PW1 whereas the two are said to have been blessed with a baby who became the cause of the assault. PW1's account reveals that on the night of the assault, the two engaged in a dialogue regarding the taking of their child, providing further context that supports the identification of the appellant as a person responsible for the inflicted grievous harm to PW1.

According to the evidence on record, both PW2 and PW4 are PW1's neighbours who responded to the alarm raised by PW1. The two found PW1 bleeding in various parts of her body. PW1 rushed inside PW4's house with the appellant following her whereas PW4 pushed the appellant and with the help of PW2 they managed to restrain the appellant.

In his defence, the appellant refuted the allegations, denying any involvement in the commission of the offence. He contended that he was arrested at his own home by PW2 at 05:00 hrs.

Having gone through the evidence on record and the respective submissions by the appellant and the respondent, the following are the deliberations of this court in the disposal of the appeal at hand.

To start with, this Court is keenly aware and alive with the

deliberations of the Court of Appeal in the landmark case of **Waziri Amani v. Republic**, (1980) T.L.R 250 where the Court of Appeal firmly underscored that the evidence of visual identification is of weakest kind and most unreliable. The Court of Appeal further held that courts of law should not act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight.

In resolving the question of whether the identification is watertight the Court in **Waziri Amani** (*supra*) listed several circumstances that must be examined which include;

1. The time the witness had the accused under observation;
2. The distance at which he observed him;
3. The conditions in which the observation occurred for instance, whether it was day or night, whether there was good or poor lighting at the scene; and
4. Whether the witness knew or had seen the accused before.

In the present case, PW1 testified that the appellant is her co-parent and the two had been blessed with a baby child. She added that she unmistakably identified the appellant using a flashlight and solar lamp and that the two had a comforted dialogue as the appellant was forcing to take the child.

On the same subject of identification, both PW2 and PW4 have asserted that they positively identified the appellant at the scene of the crime and were responsible for his subsequent arrest. It's worth noting that the recognition of the appellant by PW1 has been argued to be more reliable than a mere identification.

In **Shamir John v. Republic**, Criminal Appeal No. 166/2004 (Unreported), (Mtwara Registry) the Court of Appeal observed to the effect that:

> *'...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made.'*

In this appeal, the appellant did not contest the fact that PW1 is his co-parent. However, his defence focused on denying that he ever entered PW1's room at midnight or that he inflicted grievous harm on her.

Upon careful consideration, this court has not found the appellant's defence to have undermined the prosecution's case in any significant manner. The testimonies of PW1, PW2, and PW4 remain consistent and unequivocal, leaving no room for ambiguity. Their

accounts collectively assert that none other than the accused was responsible for causing grievous harm to PW1.

Furthermore, the evidence indicates that the appellant was apprehended at the scene of the crime, contrary to the testimony and submission of the appellant who claimed to have been arrested at his home. The conditions under which PW1 identified the appellant were detailed in her testimony.

PW1 described the intensity of the solar light and flashlight, emphasizing that the favourable lighting conditions played a crucial role in enabling her to recognize the appellant. She also provided insights into the duration of the confrontation, explaining that it occurred during a quarrel over taking of their child.

The chain of events shows clearly that it was PW2 and PW4 who interrupted the appellant when he was running after PW1 when she was seeking help from her neighbours. The said neighbours were the ones as such (according to the rendered evidence) who not only interrupted the appellant, rather who restrained and arrested the appellant.

Employing the conditions set in the landmark case of **Waziri Amani** (*supra*), it has been to the satisfaction of this court that the appellant was properly recognized, not only by PW1 but also, by both PW2 and PW4 who arrested him at the very scene of the crime on the

fateful date. Reigning from the above, the first condensed ground of appeal collapses.

The appellant also complained some material witnesses were not called. As rightly submitted by the learned state attorney, there is no legal requirement for the prosecution to parade a specific number of witnesses, what is required of law is the weight and credibility of the witnesses. This takes us to the rephrased second ground that the case was not proved beyond reasonable doubt. The evidence on record in wholesome makes it clear that the trial court properly considered the paraded evidence to her satisfaction that the case was proved beyond reasonable doubt.

Henceforth, this court also joins hands with the learned state attorney that failure to call the hamlet leader and other neighbours other than PW2 and PW4 did not in any way weaken the prosecution case. See **Siaba Mswaki v. Republic** (*supra*) and Court of Appeal decision in **Hassan Juma Kanenyera and others v. Republic**, [1992] T.L.R 100.

As regards the complaint by the appellant that there were some contradictions in the evidence of PW1 and PW4 concerning the time of the incident, it is on the record that the incident occurred on 17th September 2022 with both PW1 and PW2 all stating that the incident

occurred at 00:00hrs. It was only during cross-examination when PW4 said it was 08:00. Profoundly, the learned trial magistrate did not indicate whether the said time was am or pm. Be as it may in wholesome, this court firmly finds such contradiction(s) not to have gone into the root of the case.

The law is settled that not every discrepancy will cause the prosecution case to fall as stated by the Court of Appeal in **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 (Unreported) that:

> '*It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory that the prosecution case will be dismantled*.

That being the position of the law, this court finds the levelled ground about contradiction to be devoid of any merit in law worth credit.

Furthermore, sailing through the rephrased third ground of appeal, the appellant in his attempt to find the conviction quashed faulted the findings of the trial court arguing that he was as such convicted by the trial court without the trial court considering his defence. This Court went through the trial court judgement and on page 3 the court stated:

'*The accused person was availed of an opportunity to make his*

defence. He only denied to have caused harm to PW1. It is clear now the accused visited PW1 at night.'

The quoted statement and what transpired during the analysis of the trial court before entering the verdict clearly shows that the appellant's defence was considered though the same was watered down by the strength of the prosecution evidence. For the above-stated reasons, this court finds the appeal devoid of merit and thus hereby dismissed in its entirety.

Dated at **Mbeya** this 13th November 2023.

M.B. MPAZE
JUDGE

Court: Judgment was delivered in the presence of the appellant in person and the presence of Mr Augustino Magesa for Republic.

Right of Appeal fully explained.

THE HIGH COURT OF TANZANIA

M.B. MPAZE
JUDGE
13/11/2023