

IN THE HIGH COURT OF TANZANIA
AT SHINYANGA
P/C CRIMINAL APPEAL NO.03 OF 2023

*(Arising from Criminal Appeal No. 8 of 2022 in the District Court of Shinyanga and
original Criminal Case No.242 of 2021 Kizumbi Primary Court at Shinyanga)*

RICHARD MKALISIMBA -----APPELLANT

VERSUS

DAMIAN DAVID -----RESPONDENT

JUDGMENT

Date of last Order: 14.11.2023

Date of Judgment: 20.11.2023

MWAKAHESYA, J.:

The appellant, Richard Mkalisimba, is aggrieved by the judgment of the Shinyanga District Court in Criminal Appeal No. 8 of 2022 arising from Criminal Case No. 242 of 2021 at the Kizumbi Primary Court.

A brief background of the events leading to the present appeal is as follows: The appellant instituted Criminal Case No. 242 of 2021 at the Kizumbi Primary Court charging the respondent, Damian David (his sibling) with the offence of brawling contrary to section 89(1)(a) of the Penal Code. He alleged that, on the 7th of December, 2021 at Old Shinyanga within

Shinyanga Municipality, unprovoked, the respondent physically assaulted him and took his mobile phone make Samsung A20S and cash to the tune of Tshs. 400,000/=. During trial, on behalf of the appellant, evidence was adduced to the effect that on the material date a dispute arose between the litigants' wives prompting the appellant to intervene. In doing so, the respondent arrived at the scene and attacked the appellant who in turn fled to his room only for the respondent to grab a machete, pursue him, inflict a wound on his head and make away with the appellant's mobile phone.

Meanwhile, on behalf of the respondent, evidence was adduced to the effect that it was the respondent who arrived first at the scene of the quarrel between the two wives and later on the appellant arrived and attacked the respondent. During the melee the appellant's wife started throwing rocks at the respondent whereby she accidentally hit her husband (the appellant) on the head and injured him.

In the end, the trial court decided in favour of the respondent thereby prompting the appellant to appeal to the district court, which also decided in favour of the respondent. Still aggrieved, the appellant has filed the present appeal based on four grounds which are to the effect that:

1. The district court erred in law and fact when it failed to allow the appellant's appeal;
2. The district court erred in law and fact when it joined the primary court to dismiss the appeal without elaborating how the appellant failed to prove his case;
3. The district court magistrate erred in law and fact when he failed to deal with the appellant's eight grounds of appeal and instead focused on the charge sheet which was not one of the appellant's grounds of appeal; and
4. The district court erred in law and fact when it dismissed the appellant's appeal and upheld the primary court decision.

The appellant prays for the following orders:

- a) The appeal be allowed and the decisions of the lower courts be quashed and set aside; and
- b) The respondent be convicted and sentenced according to law and be ordered to compensate the appellant's mobile phone.

At the hearing of the appeal both parties appeared in person, unrepresented. The appellant, being a layperson simply adopted his grounds of appeal and submitted generally to the effect that, he has brought the appeal because the district court decided against his appeal from the primary court while his case was proved beyond reasonable doubt as all the respondent's witnesses had testified that there was a brawl and the appellant ended up injured.

In reply the respondent submitted that, at the primary court the appellant was not able to prove the charge as his testimony was at variance with the charge. While the appellant testified about the respondent taking his mobile phone the preferred charge was for the offence of brawling.

The respondent submitted further that the two lower courts did not find him guilty because the appellant failed to prove his case beyond reasonable doubt.

In a brief rejoinder, the appellant submitted that the charge against the respondent was amply proved and the respondent had admitted to brawling but gave reasons that he was defending himself.

Having heard the parties and their respective submissions the issue before this court is whether this appeal is meritorious. In doing so, I am aware of the fact that this is a second appellate court and the position of the law is that a second appellate court will not readily disturb or interfere with the concurrent findings on the facts by the trial court and of the first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure which have occasioned a miscarriage of justice, see **Masanyiwa Masolwa vs The Republic**, Criminal Appeal No. 280 Of 2018.

Grounds 1, 3 and 4 of appeal are intertwined since they both attack the district court upholding the primary court's decision and thereby dismissing the appeal. Therefore, I shall proceed to deal with those grounds collectively.

In dismissing the charge against the respondent, the trial court was of the view that, the offence the respondent was charged with was brawling but the evidence adduced by the appellant's witnesses was

towards the offence of assault hence there was variance between the charge and the evidence adduced.

While the charge was to the effect that the respondent was charged under section 89 of the Penal Code (charge dated 17.02.2022) the judgment indicated that the respondent was charged under section 89(1)(a) of the Penal Code. Section 89 of the Penal Code reads:

"89. -(1) Any person who-

(a) uses obscene, abusive or insulting language to any other person in such a manner as is likely to cause a breach of the peace; or

(b) brawls or, in any other manner, creates a disturbance in such a manner as is likely to cause a breach of the peace,

is guilty of an offence and liable to imprisonment for one year.

(2) Any person who-

(a) with intent to intimidate or annoy any person, threatens to injure, assault, shoot at or kill any person or to burn, destroy or damage any property; or

(b) with intent to alarm any person discharges a firearm or commits any other breach of the peace, is guilty of an offence and is liable to imprisonment for one year and if the offence is committed at night the offender is liable to imprisonment for two years."

Undoubtedly, it was wrong to charge the respondent under section 89 without indicating the particular subsection and paragraph because as it

can be seen section 89(1)(a) and (b) creates two distinct offences, i.e., using abusive language and brawling. While section 89(2)(a) and (b) also creates a further two offences, which are not applicable to the appeal at hand.

If indeed the respondent was charged with brawling, as correctly decided by the trial court, the evidence adduced by the appellant was to the effect that he was injured by the respondent and deprived of his mobile phone. Therefore, the proper charge would be one involving assault and causing bodily injury as well as stealing. Moreover, the actions in both offences of brawling and using abusive language must be committed in such a manner that is likely to cause a breach of the peace. However, witnesses for both the appellant and respondent testified that there was a scuffle between the two parties which I find that as conclusive proof that a breach of the peace had already taken place. Therefore, as rightly found by the two lower courts, indeed the charge varied with the evidence adduced. In the event, the first, third and fourth grounds of appeal are unmeritorious and thus dismissed.

The second ground of appeal is to the effect that, the first appellate court did not elaborate how the appellant failed to prove his case. A close

look at page 2 of the district court's judgment suggests otherwise. The learned magistrate had this to say:

"Through my peruse (sic) in prosecution/complainant evidence in primary court file and appellant's submission intensively, therein I have realized that, the appellant who was the complainant at the trial court never established his case against the appellant (sic) beyond reasonable doubt.

I do hold so because the appellant and his witnesses at the trial court they had another story contrary to the charge. While the appellant demonstrating about assault caused (sic) bodily harm and stealing phone the charge against the accused person was making mess (sic) (brawls/create a disturbances) c/s 89 of the Penal Code, Cap. 16".

The learned magistrate elaborated that the appellant through his witnesses was verifying assault causing bodily harm and stealing of a phone while the charge was about brawling. To this court this seems like a lucid explanation as to how the appellant was not able to prove his case. I therefore find the second ground of appeal unmeritorious as well.

In the event the appeal is dismissed in its entirety.

DATED at SHINYANGA this 20th day of November, 2023




N.L. MWAKAHESYA
JUDGE
20/11/2023