IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 117 OF 2023

(C/f Criminal Case No. 83 of 2023 District Court of Karatu at Karatu)

TARMO HIPOLIT ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

21st November & 13th December, 2023

TIGANGA, J

This appeal emanates from the decision of the District Court of Karatu at Karatu (the trial court) in Criminal Case No. 83 of 2023 where the appellant herein was charged with and convicted of the offence of grievous harm contrary to section 225 of the **Penal Code**, Cap 16 R.E. 2022.

Particulars of the offence provide that, on 27th May 2023 at Mahhahha Village within Karatu District in Arusha Region, the appellant herein assaulted one Meta Tlatlaa by beating and cutting him on several parts of his body using a shovel and a piece of brick causing him harm. According to the prosecution evidence as presented at the trial court, the appellant

approached the victim while having a shovel accusing him of passing across his farm as he saw some footprints. When the victim inquired how he knew if the footprints were his, the appellant started insulting and assaulting him all over his body. When the trial was still halfway, the appellant jumped bail hence the verdict was reached against him and his absentia. He was sentenced to serve five (5) years imprisonment. He was later arrested and given the right to be heard in respect of his non-appearance. His reason was only that, he lost his paternal grandmother and lost track of the case, the trial court was not satisfied with such a reason hence the sentence issued was maintained.

Aggrieved by the decision, the appellant filed this appeal with the following four (4) grounds;

1. That, the trial magistrate erred both in law and fact in convicting the appellant while the prosecution side failed to prove their case beyond reasonable doubt.
2. That, the decision is a nullity for the accused was not accorded the right to defence.
3. That, the entire proceedings is a nullity for improper admission of exhibit P1

4. That, the verdict is wrong for poor analysis of contradictory evidence.

During the hearing, the applicant was represented by Ms. Anna Ombay, learned Advocate while the respondent was represented by Ms. Adelaide Kasara, learned state attorney.

Supporting the appeal, Ms. Ombay submitted on the 1st and 4th grounds that, the prosecution did not prove their case beyond reasonable doubt. That, although the appellant was charged with the offence of causing grievous harm to the complainant by using a shovel and piece of bricks as reflected on page 6 of the proceedings. However, throughout the proceedings, neither the alleged shovel nor the piece of brick were tendered as exhibits. They were not even seized by the police when alarm was raised, hence apart from mere words there is no enough proof that the offence was committed using the said tools.

Learned counsel referred the Court to the case of **Magondo Paulo & Another vs The Republic** [1983] TLR 219 and argued that it is always the prosecution who has to prove the case beyond reasonable doubt and when there is a doubt however small crumbles the prosecution case and benefits the accused. She also pointed out another doubt as the fact that PW3, the

medical doctor who attended the appellant addressed the victim as a female while the same was male which is proof that, she did not know whom she attended.

On the 2nd ground Ms. Ombay submitted that the appellant was denied his right to defend himself because on 17th July, 2023 when he did not enter appearance, the prosecution asked for the matter to proceed *ex-parte* against him under section 226 of the **Criminal Procedure Act**, Cat 20, R.E. 2022 (CAP). In her view that was not a fair procedure because the prosecution did not ask for an arrest warrant but rather continuation of hearing which was contrary to section 230 of CPA which renders the proceedings a nullity.

More so, on 5th September 2023, when the appellant was arrested, he fended himself that he was bereaved and his sureties did not inform him of the continuation of the case. Thus, the trial court ought to have set aside the conviction and availed the appellant's right to defend himself since the reason for his non-appearance was out of his control.

On the 3rd ground of appeal, it was Ms. Ombay's submission that there was improper admission exhibit P.1 which was not read after its admission

as gleaned on page 14 of the trial court's typed proceedings. She asserted that such document was supposed to be read aloud after its admission, failure of which renders the same invalid and ought to be expunged from the record as held in the case of **Lucas Nyerenda Karikene vs. The Republic**, Criminal Appeal No. 81/2021 HCTZ at Moshi. She prayed that exhibit P1 be expunged from the records, the conviction be quashed and the sentence be set aside.

In reply, Ms. Kasala opposed the appeal and submitted on the 1st and 4th grounds of appeal that the case against the appellant was proved beyond reasonable doubt as required by the law. That, the appellant was charged under section 225 of the Penal code and it was PW1 who gave evidence that he was attacked by the appellant by using a shovel. Furthermore, this evidence was supported by PW2 who witnessed the said fight and told the trial court that he saw the appellant having a shovel in his hand while attacking the victim.

She argued that, since it was it was in the afternoon and the appellant was known to both PW1 and PW2, there was no room for a mistaken identity. More so, the trial court recorded the marks of the scars from the wounds inflicted on PW1 by the appellant and the evidence of PW3, the doctor who

attended him. According to her, this proved the offence at the required standard. As to the PW3 addressing the victim as female, the learned state attorney prayed for the court to ignore it as it was a slip of a pen.

On the 2nd ground, Ms. Kasala submitted that the appellant had the right to defend himself as he was accorded the same as soon as he was arrested after jumping bail. Moreover, after the appellant's non-appearance on 17th July 2023, the prosecution prayed to proceed *ex-parte* under section 226 (1) of the CPA, and on the very day, the trial court issued an order for an arrest warrant to both the appellant and the sureties. In her view, the appellant waived his right by defaulting appearance since he knew that he had a case before the court but opted to run away from the course of Justice. In this circumstance, the trial court did not err to proceed *ex parte*. To cement her point, she cited the case of **Tagara Makongoro vs. The Republic**, Criminal Appeal No. 126 of 2015, CAT at Mwanza, and insisted that, the appellant wanted to evade justice, he thus has to bear the consequences.

As to non-compliance with section 230 of the CPA, the learned state attorney submitted that the same deals with the situation where the accused

is before the court, but in the case at hand, the appellant defaulted appearance.

On the 3rd ground in respect of exhibit P1, Ms. Kasala conceded to the fact that the same was not read as seen on page 14 of the trial court's typed proceedings at page 14. However, she argued, the rationale behind reading aloud the admitted exhibit is to afford the accused to be aware of its content and prepare for his defence. In that regard, since the appellant was not present before the court, there is no way he was prejudiced. She prayed that the same should not be expunged from the record and if this Court finds it a must to expunge it then the evidence of PW3 is sufficient.

She prayed that this appeal be dismissed and the trial court's decision be upheld.

In rejoinder, the appellant's counsel maintained that the case against the appellant was not proved at the required standard and prayed for the appellant's acquittal.

Having gone through the trial court's records and each party's submissions while having in mind as a first appellate court I am duty bound to assess and reevaluate the evidence, the only question for determination

is whether the case against the appellant was proved to the required standard to warrant his conviction.

Starting with the 1st and 4th grounds of appeal, the appellant claimed that, the case against the appellant was not proved to the required standard. The appellant was charged with and convicted of the offence of grievous harm contrary to section 225 of the Penal Code. The section reads;

> ***225***. *Any person who unlawfully does grievous harm to another is guilty of an offence and is liable to imprisonment for seven years.*

From this provision there are two ingredients to be proven, first; a victim was grievously harmed, and second; it was the accused who inflicted such harm. The appellant's counsel tried to raise doubt that, the said shovel was never tended in court, hence there is no enough proof of the assault. However, looking at the evidence on record and as briefly narrated above, the victim, PW1 made his testimony that, the appellant went to his home with a shovel and accused him of crossing his farm as he saw his footprint. As the PW1 was arguing about what mark his footprint had that made the appellant suspect him, the appellant started giving abusive language and assaulting him using the said shovel and a brick. This was witnessed by PW2 and rather confirmed by PW3 who testified as a medical expert that, the

complainant, PW1, was assaulted by a sharp object in his hand, chest, and face, and after he attended him he filled a PF3 which was admitted as exhibit P1. The latter shows that PW1 had multiple cut wounds on the face and arm. In my view, with or without a shovel being tendered as evidence, all this proves that the complainant was grievously harmed and it was the appellant who inflicted him such harm.

Appellant's counsel also challenged the fact that PW3, the doctor referred the complainant as a female while he was a male, I joined hands with the respondent's counsel that, such irregularity is minor and does not go to the root of the case. I hold so because exhibit P1 shows that the person who attended was male and not female. in the case of Dickson **Elia Nsamba Shapwata & another vs. R.** Criminal Appeal No. 92 of 2007 and similarly in the case of **Osward Mokiwa @ Sudi vs. R.** Criminal Appeal No. 190 of 2014, the Court of Appeal of Tanzania observed that;

> " ... *Minor contradictions, discrepancies or inconsistencies which do not affect the case for prosecution, cannot be a ground upon which the evidence can be discounted and that they do not affect the credibility of the party's case."*

See also **Frank Majanga vs. R.** Criminal Appeal No. 93 of 2018 and **Mohamed Said Matola vs. R** [1995] TLR 3.

In light of the above, the fact that a shovel was not tendered and the complainant was addressed as female is minor and does not go to the root of the case to make the whole prosecution case crumble. These two grounds have no merit and the same are dismissed.

On the 2nd ground, the appellant claimed that he was not accorded the right to be heard in his defence contrary to section 230 of the CPA. The section reads;

> ***230***. *Where at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence either about the offence with which he is charged or about any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall dismiss the charge and acquit the accused person.*

With due respect and as rightly argued by the respondent's counsel, this provision is applicable only when the accused is present in court. In the case at hand, since the appellant defaulted appearance during the prosecution hearing up to when the judgment was pronounced against him, this provision cannot apply to him. On the same note, the respondent prayed

and was granted to proceed with the case *ex-parte* under section 226 (1) of the CPA. Likewise, the appellant was addressed in terms of section 226 (2) of the CPA to give reasons for his non-appearance. His reasons were that he was bereaved and he lost track of the case as his sureties did not tell him of the same.

Just as the trial magistrate, I do not find his reason sufficient enough because, he was not in court for more than one month. Since he lost track of the case as he claimed, he ought to have gone to the trial court and inquired of the same instead of waiting until he gets arrested. Be as it may, I do not find that the appellant was denied the right to defend himself rather, he jumped bail and waived such right of his own volition. This ground is also dismissed.

On the last ground regarding exhibit P1 not being read out aloud, while I am aware that admitted evidence needs to be read out loud after admission, I however, join hands with the respondent that, since the appellant was not present during tendering and admission of such exhibit P1, reading it loud would have not served any purpose. This ground also lacks merit and the same is dismissed.

This being a criminal case, a conviction may only be entered based on the strength of the prosecution case and not on the weakness of the defence case. Thus, the burden to prove the case never shifts. See **Jonas Nkize vs. Republic** [1992] TLR 213, **Abuhi Omary Abdallah & 3 Others vs. Republic** Criminal Appeal No. 28 of 2010 CAT at Dsm (unreported) and **Luhemeja Buswelu vs. Republic**, Criminal Appeal No. 164 of 2012, CAT at Mwanza (unreported).

Going through the trial court's proceedings, and judgment as well as based on the above analysis, I find the case against the appellant to have been proved to the required standard hence, the conviction entered and the sentence imposed was deserving. Therefore, this appeal is dismissed for want of merit, and the trial court's decision is hereby upheld.

It is so ordered.

DATED and Delivered at **ARUSHA** this 13th Day of December 2023

J. C. TIGANGA

JUDGE