IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 106 OF 2023

(Originating from Criminal Case No. 79/2022 of the Babati District Court at Babati)

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

MUNE BURA.....1ST RESPONDENT

EMMANUEL MATE.....2ND RESPONDENT

MARIA SIKUKU.....3RD RESPONDENT

GISAMO MATE.....4TH RESPONDENT

SAMWEL BARIRE.....5TH RESPONDENT

SEREA TARIMO.....6TH RESPONDENT

SIMPLISI SIPRIAN @ MASSAWE.....7TH RESPONDENT

LAIDA BARAN.....8TH RESPONDENT

JUDGMENT

17th & 31st May, 2024

Kahyoza, J.:

Mune Bura, Emmanuel Mate, Maria Sikuku, Gisamo Mate, Samwel Barire, Serea Tarimo, Simplisi Siprian @ Massawe and Laida Barani (the respondents), were charged before the District Court of Babati on three

counts, namely; grievous harm, malicious damage to property and stealing. The appellants pleaded not guilty to the counts and the trial ensued. At the closure of the prosecutions' case, the trial court dismissed the charge against them for no case to answer, as per section 230 of **the Criminal Procedure Act**, [CAP. 20 R.E. 2022] (the CPA) and the respondents were all acquitted.

Briefly, the first, second, third, fourth, fifth and eighth respondents were arraigned before the district court, in the first count, charged with an offence of grievous harm contrary to section 225 of **the Penal Code**, [Cap. 16 R.E. 2022] (the **Penal Code**). It was alleged that the first, second, third, fourth, fifth and eighth respondents did, on the 1st day of March, 2022 at Maweni village, within Babati district in Manyara region, unlawfully cause grievous harm to one Umbe Awe by beating and cutting him on various parts of his body by use of panga, sticks and stone.

On the second count, the first, second, third, fourth, fifth and eighth respondents were charged with an offence of malicious damage to property contrary to section 326(1) of the **Penal Code**, where it was alleged that on the date and place mentioned in the first count, willfully and unlawfully, the respective respondents did damage bicycle make phoenix valued at Tanzania

Shillings 200,000/= and Nokia Mobile phone valued at Tanzania shillings 50,000/= the property of UMBE AWE.

On the third count, the 6th and 7th respondents were charged with an offence of stealing contrary to sections 258(1) and 265 of **the Penal Code**. The prosecution alleged that the 6th and 7th respondents did on the date and place, willfully and unlawfully, steal Tanzania Shillings 500,000/= the property of Umbe Awe.

At the end of the trial, the trial court made a finding that a *prima facie* case was not sufficiently made out by the appellant to make the respondents enter their respective defence. It acquitted the respondents.

This appeal was argued orally. The appellant enjoyed the services of Mr. Kapela, learned State Attorney, while the respondents were unrepresented, as they could not trace their advocate, thus they had nothing crucial to argue in opposing the appeal.

The appeal raises one basic issue whether the trial court erred to hold that the respondents had no case to answer. The appellant's complaint was that the trial court erred to consider the weight and credibility of its evidence

when deciding whether the respondents had a case to answer; and that the trial court did not consider the whole evidence on record.

Was the court justified to consider the weight and credibility of evidence to determine if the accused had a case to answer?

Mr. Kapela, learned state attorney submitted that the trial magistrate was not warranted to consider the credibility of witnesses and the weight of evidence at the stage of whether the accused persons had a case to answer, for the same is reserved at the end of the trial, citing the rule in **The Director of Public Prosecutions vrs. Philipo Joseph Mtonda**, Criminal Appeal No. 217 of 2020, Court of Appeal of Tanzania at Zanzibar (unreported).

The respondents had nothing to argue on the first ground of appeal.

It is obvious that the trial court considered whether the witnesses were credible. In its ruling, the trial court disbelieved the testimony of Pw6 that it was impossible to positively recognize the accused persons, let alone who inflicted cut wound upon Pw1. Not only that but also, he compared the coherence between the testimony of Pw1 and that of Pw3, as properly suggested by Mr. Kapela.

The trial court's duty was to consider the prosecution's evidence whether was sufficient to support conviction if not controverted. The Court of Appeal in **Director of Public Prosecutions vs Peter Kibatala** (Civil Appeal No. 4 of 2015) [2019] TZCA 157 (4 July 2019), had the following to say regarding a *prima facie* evidence-

> *"A natural and ordinary meaning makes it plain that, this being a criminal case, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt. What essentially the court looks at is prima facie evidence for the prosecution which unless controverted would be sufficient to establish the elements of the offence."*

At stage of determining whether a prima facie case has been established, as Mr. Kapela put it, that the court is not required to direct its mind whether the evidence is weighty enough to support conviction or if believed would have weight to support conviction. This was a position in **Rex V. Jagjiwan M. Patel and Four Others** (1948) 1 TLR (R) 85 where it was observed that: -

> *"... all that the Court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may*

be a strong case or it may be a weak case. ***The Court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively beyond reasonable doubt.*** *A ruling on a case to answer would be justified in my opinion in a borderline case where the Court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."(Emphasis added)*

The above position has since changed. The current position is that the court may consider the credibility of witnesses and weight of evidence when making a ruling as to whether the accused has a case to answer or otherwise. The Court of Appeal pronounced the position in **the Director of Public Prosecutions vs. Morgan Maliki & Another**, Criminal Appeal No. 133/0223 and **Director of Public Prosecutions vs Peter Kibatala** (supra). In the former the Court of Appeal stated, thus-

"The respondent has relied on the decision of the High Court of Tanganyika in ***R v. JAGWAN M. PATEL AND OTHERS*** *(supra) which set to consider what constituted a prima facie case under section 205 of the Code. There, it was held inter alia-*

"... all that the Court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The Court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively beyond reasonable doubt. A ruling on a case to answer would be justified in my opinion in a borderline case where the Court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."

But this passage was disapproved by the Court of Appeal for East Africa, in RAMANLAL TRAMBAKLAL BHATT V. R. (supra) which came out with the following formulation-

> *(i) the onus is on the prosecution to prove its case beyond reasonable doubt, and a prima facie case is not made out, if at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction."*
>
> *(ii) the question whether there is a case to answer cannot depend only whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his*

defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence."

This formulation was followed in ***MURIMI V R.*** *(1967) I EA 542, where the same Court went on to emphasize that:-*

"The provisions of section 205 are mandatory, and if at the close of the prosecution case, a prima facie has not been made out the accused person is entitled to an acquittal. If an accused person is wrongly called on for his defence then, this is an error of law..."

We think that the formulation in BHATT's case reflects good law, and must be followed. Therefore, it is wrong to place reliance on PATEL's case as the appellant has pressed us to do."

I find no merit in the complaint that the trial was not required to assess the credibility or the weight of the prosecution's evidence when determining whether the respondents had a case to answer. He was not entitled to rely on the holding in **the Director of Public Prosecutions v. Philipo Joseph Mtonda** (supra) as it has been swept by strong and current wind as demonstrated.

Was there sufficient evidence to establish a *prima facie* case?

Mr. Kapela submitted that there was sufficient evidence to require the respondents to give evidence. Pw1, the victim, mentioned the respondents

as persons who committed the offence. Attempts to define a *prima facie* case has never been an easy endeavour, rather, the courts of law have on a number of cases tried to shed a light, as it was case in **Ramanlal Trambaklal Bhatt vrs. Republic** [1957] EA 332-335 where it was stated that-

> *"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one, which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence.* ***It may not be easy to define what is meant by a prima facie, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.*** *"(Emphasis added)*

I had a cursory review on the evidence availed at trial and the charge laid against the respondents, it is apparent that Umbwe Awe (Pw1) testified

to have met with the respondents at his farm on the 1st day of March, 2022 at 16:00 hrs, and who assaulted him, some destroyed his bicycle maliciously and others stole money from his pair of trousers' pocket. Mwahija Abdallah (Pw2) supported Umbwe Awe (Pw1)'s story that on the material date, at 22:00 hrs, as a medical practitioner, attended him. F. 495 D/SGT HATIBU, the investigator from the police force, testified to have drawn a sketch map plan of the scene of crime, interviewed some witnesses, seized the complainant's bicycle, prepared a certificate of seizure, and all the handing over of exhibits was through a chain of custody. G. 157 D/CPL DONALD, the exhibit keeper testified to have kept the said bicycle until it was produced at trial.

Without making any evaluation of evidence, it is settled in my mind that the appellant (the then prosecution) managed to establish a *prima facie* case against all the respondents on account of respective counts in which they were charged. Vital elements of all three counts preferred against the respondents are reflected by the evidence availed, and any reasonable court could sustain conviction on the availed evidence if no evidence is established to the contrary. The second ground of appeal is sustained and the appeal is allowed to the extent demonstrated.

In the end, I quash the ruling of the district court of Babati and set aside the acquittal order. For justice's sake, I order the matter to be re-assigned to another magistrate, who after composing a ruling, shall take the defence evidence and write the judgment.

It is ordered accordingly.

Dated at Mbulu, this 31st day of May, 2024.

J.R. Kahyoza
JUDGE

Court: Judgment delivered in the virtual presence of Mr Leonce Bizmana State Attorney for the appellant, the 1st to 7th respondents and their advocate. The 8th Respondent is absent. B/C Ms Fatina Haymale (RMA) present. The respondents ordered to appear before the district court on 11.6.2024 at 09:00 am.

J.R. Kahyoza
JUDGE
31/05/2024