IN THE HIGH COURT OF TANZANIA

MOROGORO SUB-REGISTRY

AT IJC MOROGORO

CRIMINAL APPEAL NO.1612 OF 2024

(Originating from the decision of the District Court of Mvomero in Criminal Case No.82/2023)

ELISHA VICTOR MSIMBE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

19th June,2024.

MANSOOR, J.

Elisha Victor Msimbe, the appellant herein, together with Lameck Msuva, Mohamed Said and Elius Emili who are not parties to the instant appeal, were charged and convicted by the District Court of Mvomero (herein the Trial Court) for two counts of Causing Grievous Harm to one Lukui Mtwanguru by cutting his right hand using a machete and by cutting the left hand of Tiyake Mtemi, thereby causing them to suffer bodily injuries contrary to section 225 of the Penal Code, [Cap 16 R.E.2022].

The facts of the case as gleaned from the trial court's records are that; On 24th day of September 2023 at Ng'wambe Area within Mvomero District

in Morogoro Region one Lukui Mtwanguru (PW1) and his fellow Matinda Michael and Lisinda were grazing their herds of cattle. On their way, they met with one Tiyake Mtemi (PW2) who was searching for his lost cattle. Unjustifiably, the Appellant and his co-accused namely Lameck Msuva, Mohamed Said and Elius Emili approached Lukui Mtwanguru and Tiyake Mtemi alleging that they were grazing in the prohibited area and soon after a brief confrontation, the Appellant and the co-accused started assaulting the victims using machetes. The victims testified at trial as PW1 and PW2. In the mid of attack Lameck Msuva (1st Accused at trial) assaulted the victims by using nyengo (machete). As a result, the victims sustained grievous harm as PW1 Lukui Mtwanguru had a cut wound on his hand while one Tiyake Mtemi (PW2) lost his left palm.

After hearing both sides, the trial court was convinced that the prosecution evidence was convincing and undoubtful. It therefore found the all the four accused persons guilty for both counts and a sentenced them to serve twelve months' imprisonment for each count.

Discontented by the decision of the trial Court, the Appellant appealed to this Court contesting both the conviction and sentence. In a bid to pursue for his rights, the Appellant filed a petition of appeal comprising of six grounds of appeal couched in layman language as reproduced hereunder;

1. *That, the learned trial court magistrate glossily misdirected himself to enter conviction on me relying on insufficient evidence of the prosecution;*
2. *The trial court magistrate deliberately misdirected himself to convict me on this offence without taking onto account that prosecution fail to prove the case beyond reasonable doubt against me;*
3. *That, the learned trial court magistrate deliberately erred in law and fact for failure to note the fact that there is no evidence adduced implicating me with the offence of Causing Grievous Harm to neither Pw1 nor Pw2;*
4. *The learned trial court magistrate erred in law and fact to convict me relying his conviction on the fabricated evidence of the prosecution without taking into account the facts that the harm was the result of self-defense on the part of 1st accused against the PW1 and PW2 and their fellows attach;*
5. *That, the trial court erred in law and fact for failure to note that no evidence adduced to prove common intention on the offence of causing Grievous Harm. The evidence proves that common intention was to arrest the person grazing cattle on prohibited area of the Village;*

6. *The learned trial magistrate erred in law and fact for failure to note contradictions on the prosecution evidence against me. PW1 and PW2 testified on the facts that the appellant said " Piga hao piga hao" but the evidence of Pw3 the Doctor did not testified on the fact that PW1 and PW2 had been beaten rather cut on hands.*

With the leave of the Court, the hearing of the appeal was canvassed by way of written submission. Parties were represented, while Advocate Ignas Punge represented the appellant, the respondent on his part was represented by Mr. Shaban Kabelwa, Learned State Attorney.

In the written submissions filed in Court, Advocate Ignas Punge consolidated all the grounds of appeal and argued them jointly. He started by expressing his belief that the prosecution failed to prove its case beyond reasonable doubt against the Appellant herein. He highlighted that, there were four accused persons jointly charged and the Appellant herein was the fourth accused. Referring to the evidence in record he submitted that, PW1 and PW2 the victims, were attacked by the first, second and third accused persons only. He insisted that the Appellant herein did not attack/wound the victims and said that the appellant had no common intention with the others.

Advocate Ignas Punge submitted further that the Appellant's defence was not considered at all. He lamented that the trial Magistrate dealt with the prosecution evidence alone. To fortify his assertion, he referred this court to the decision of the Court of Appeal in the case of **Hussein Idd and Another vs. The Republic** [1986] TLR 166, where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on part of the trial Judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence. "*

The Counsel concluded his submission urging this court to allow the appeal and to quash the conviction and sentence entered against the Appellant and acquit him.

Responding to the Appellant's submission, the Learned State Attorney Shaaban Kabelwa also combined and replied to the grounds of appeal jointly.

On the issue that the case was not proved beyond reasonable doubt, the Learned State Attorney argued that the evidence adduced before the trial

court was strong enough to prove the case against the appellant and his co-accused. Substantiating his reasoning, he propounded that the appellant did not dispute nor disagreed with the evidence adduced against him before the court through cross-examining the prosecution witnesses.

In so reasoning, the learned state attorney was fortified by the decision in the case of **Nyerere Nyegue Vs Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 where it was observed that a party who fails to cross examine a witness on a certain matter is deemed to have accepted the same.

On the issue of common intention, Mr. Kabelwa submitted that the prosecution evidence clearly show that the appellant and his co-accused were acting with common intention. He averred that, both PW1 and PW2 testified at page 9, paragraph 3 and page 11, paragraph 3 respectively of the trial court proceedings on the involvement of the appellant.

He accentuated further that, the issue of common intention is well stated in the case **Abdi Alli vs R**. [1956] E.A.C.A, 573 where it was underlined that;

> *".... the existence of common intention being the sole test of joint responsibility, it must be proved what the common intention was and that the common act for which the accused were to be made*

responsible was acted upon in furtherance of that common intention".

Responding to the issue that the defence evidence was not considered, the Learned State Attorney referred this court at page 10 and 11 of the trial court typed judgement and stated that the defence evidence was considered and also the reason to disbelieve their testimony was specified.

He concluded that this appeal lacks merit, and urged this court to dismiss the appeal and uphold the conviction and sentence meted out by the trial court.

Having considered the submission by the parties, and having carefully examined the records of the trial court in line with the fronted grounds of appeal, the sole issue which needs my attention for determination is whether the instant appeal is meritorious.

I will start with the complaint that; the trial court didn't consider the defence evidence. I am aware with the settled law that, before a court reaches into its final verdict, the evidence of both parties must be considered, evaluated and reasoned in the judgment and further that the court is not allowed to unjustifiably disregard the evidence of one party however worthless it might be. It follows that, failure to consider the

defence evidence constitutes a fatal error. (See: **Baruani Hassan v. Republic**, Criminal Appeal No. 580 of 2017: CAT - Mwanza (Unreported). Again, non-consideration of the defence evidence before arriving at the decision amounts to a breach of one of the rules of natural justice, which is the right to be heard. (See: **Fikiri Katunge vs. Republic**, Criminal Appeal No. 552 of 2016: CAT - Tabora (Unreported).

As it can be depicted in the trial court's typed judgment, the trial magistrate after having summarized the evidence of both parties, proceeded to raise one issue for determination and on evaluating the evidence at page 11 of the judgement the trial court had this to say;

> *'As far as this case is concerned this court sees what was testified by the witness is nothing but he truth as had what the accussed person rise at their defence were the truth, they would have posed questions to challenge prosecution witnesses on those incriminating aspects but failure or refraining from doing the same amount to acceptance as being the truth hence they are estopped from urging the court the court to disregard the testimony of the prosecutions witnesses.*

From the above quoted passage of the trial court judgment, it is clear that the learned trial magistrate, considered the evidence adduced by the accused persons to include the appellant (defence evidence). In my

opinion, the learned trial magistrate dealt with the evidence of both sides and come up with a conclusion why she chose to believe the evidence of the prosecution witnesses and discard the defence evidence. In the final analysis, I am satisfied that, the trial magistrate considered the defence evidence contrary to what is asserted by the appellant. Due to such state of affairs I find the complaint unfounded.

On regard to the claim that the case against the appellant was not proved beyond reasonable doubt. It must be noted that, the standard of proof in criminal trials is beyond reasonable doubt, meaning that the accused person is held guilty only when the prosecution has succeeded to prove the charges against him without leaving a shadow of doubt. That, in case of any doubt, the accused person should have been given a benefit of it. In the case of **Magendo Paul and Another vs Republic** [1993] T.L.R 219 the court held that:

> *'For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed.'*

The offence of grievous harm is established under section 225 of the Penal Code [Cap 16 R.E 2022]. The section 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 (supra) 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, which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense.'*

In the case at hand there is sufficient evidence that the Appellant together with the other offenders assaulted Lukui Mtwanguru and Tiyake Mtemi thus causing grievous harm to PW1 Lukui Mtwanguru who had a cut on his hand and one Tiyake Mtemi who lost his left palm. It is apparent that the attack caused serious injury to the to the victim's external organs.

Exhibit P1 (PF3) shows that the Tiyake Mtemi sustained a big cut on the palm of his left hand and that the doctor recommended amputation of the palm. Likewise, Exhibit P2(PF3) indicate that Lukui Mtwanguru sustained a deep cut on his right hand.

The appellant herein claims that the evidence on record does not prove that he attacked the victims. He maintained that, PW1 and PW2 the victims, were attacked by the first, second and third accused persons only.

Looking at the evidence adduced at the trial court it is evident that the appellant's claims are not true. The reason is not far-fetched. The records reveal that PW2 (Tiyake Mtemi) mentioned the appellant to be among the culprits who assaulted him as indicated at page 11 of the trial court proceedings where he was recorded to state as follows;

'The fourth accused also beaten me'.

On the other hand, PW1(Lukui Mtwanguru) mentioned the appellant to have uttered the words to encourage the other culprits to assault him and Tiyake Mtemi. This is reflected at page 09 of the trial court proceedings where the PW1 was recorded to state that;

'The 4th accused alikuwa anahamasisha hao pigeni aooo'.

Basing on what is depicted from the trial court records, it is apparent that the evidence on record establish appellant's involvement in attacking the victims.

In relation to the appellant's allegation that his common intention with the other offenders was not proved by the prosecution side. I will be guided with the decision of the Court of Appeal in the case of **Godfrey James Ihuya v R** (1980) TLR 197 where the court held that:

"To constitute a common intention to prosecute an unlawful purpose ... it is not necessary that

there should have been any concerted agreement between the accused persons prior to the attack of the so called thief. Their common intention may be inferred from their presence, their actions, and the omission of any them to dissociate himself from the assault."

In the present case, according to the evidence adduced at the trial court, the appellant was not only present at the scene of the crime, but also, by his actions he assaulted PW2 and also uttered the words "pigeni haoo" to mean that he was supporting the other offenders in inflicting harm to the victims. Again, the appellant's omissions to resolve the attack which happened on his presence means that he was supporting the assault and thus he cannot at this stage dissociate himself from what the rest of his fellows proposed to do to Lukui Mtwanguru and Tiyake Mtemi.

I am therefore convinced that in this case, there was common intention between the appellant and his fellows accused persons which was sufficiently proved by the prosecution side.

From the foregoing I find no justification to disagree with the conclusion reached by the trial court that the prosecution proved the offence of causing grievous harm against the appellant beyond reasonable doubt as

there was sufficient evidence put forward to convince the trial court that the appellant was also guilty of the offence.

Consequently, I find no merit in the appeal and hereby dismiss it in its entirety and uphold the decision of the trial court.

It is so ordered.

DATED AND DELIVERED AT MOROGORO THIS 19TH DAY OF JUNE 2024

L. MANSOOR,

JUDGE

19.06.2024