

# IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CRIMINAL APPEAL NUMBER 24 of 2010

(Originating from Criminal Case 158/2008 in the District Court of Kilombero-  
S.S. Mbepwa-PDM)

**JOSEPH MALAWA..... APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

## JUDGMENT

Date of last Order: 25-08-2011

Date of Judgment: 06-09-2011

**JUMA, J.:**

The Appellant, Joseph Malawa was charged and convicted in the District Court Kilombero of the offence of grievous harm contrary to section 225 of the **Penal Code, Cap 16 R.E. 2002** and sentenced to imprisonment for terms of 2 years and to pay the victim of the harm compensation totalling TZS 500,000/=. Briefly, the facts leading to the conviction of the appellant were that on 11th February 2008 at around 01.30 a.m. he used a wheel spanner to hit Nassoro Ramadhani Lyana on his left eye and on both legs causing grievous harm.

Being aggrieved by the decision of the Principal District Magistrate (**S.S. Mbepwa-PDM**), the appellant preferred this

appeal challenging the conviction and the resulting sentence. The appeal, which was filed for the appellant by KOGA & Company Advocates, was on two grounds –

1. That the trial magistrate erred in law and facts by convicting the appellant while there was no direct evidence to substantiate that the appellant assaulted Nassoro Ramadhani Lyana.
2. That, the trial magistrate erred in law and fact by not properly evaluating evidence given by the appellant and his witnesses thereby reaching erroneous decision.

At the hearing of the appeal on 8<sup>th</sup> June 2011, learned counsel for the appellant, Mr. Koga, submitted that there was no direct evidence apart from the victim. That, it was the five people who had chased the victim shouting 'thief', 'thief'- and when PW3 arrived at the scene the five people had already disappeared leaving behind the injured Nassoro Ramadhani Lyana. The learned Advocate contended that from evidence there is no direct evidence linking the appellant with the assault because the five people who had chased the victim were not identified. It was the appellant and the local ten cell leader who arranged to take the victim for treatment. Since the appellant had a car, he

assisted in driving the victim to the police and later to hospital. It was on humanitarian grounds on part of the appellant when he decided to give the victim TZS 500,000/=. Mr. Koga reiterated that the mere fact that no one saw the appellant assaulting the victim, it is hard to conclude that it was the appellant who assaulted the victim. With regard to the second ground of appeal, Mr. Koga submitted that none of the appellant's witnesses saw the appellant assaulting the Nassoro Ramadhani Lyana.

The learned State Attorney, Mr. Mangowi, opposed the appeal and supported the conviction and sentence. At the hearing of the appeal the learned State Attorney did not agree with Mr. Koga that the victim of the assault was already injured when the appellant arrived at the scene of the crime. Mr. Magowi referred this Court to the evidence of Mary Sangila (PW4) who on page 5 of the typed proceedings testified that she heard the victim of the assault crying for help and she went to the scene and found the appellant holding a spanner, hitting the victim on the legs. Further, the learned State Attorney submitted that the TZS 500,000/= which the appellant gave the victim of the assault was not a humanitarian gesture to the victim who the appellant

was assaulting for having stolen from him. Mr. Mangowi referred this Court to the evidence of other people who had witnessed the appellant when he was hitting the victim of the assault.

On the second ground of appeal, Mr. Mangowi insisted that PW2 and even PW4 testified to have seen the appellant assaulting Nassoro Ramadhani Lyana. Further, the learned state attorney noted that the witnesses testifying for defence contradicted themselves and their evidence could not be relied upon.

I have considered the submissions made by the two learned counsel in light of both the grounds of appeal and evidence on record of proceedings of the trial court. As shown earlier, the appellant was charged with an offence of causing grievous harm contrary to section 225 of the **Penal Code**, which states –

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

Section 5 of the **Penal Code** further defines grievous harm to mean-

*"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, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense;*

It is not in dispute that the complainant who testified as PW1 was assaulted and sustained grievous harm. The extent of permanent injures to the victim's health was confirmed by Edgar Michael, an eye clinic doctor who testified as PW5. PW5 examined Nassoro Ramadhani Liyana's injured left eye and found it completely destroyed. What is disputed is whether it was the appellant who caused the harm. In re-evaluation of evidence that was tendered before the trial court, this Court will want to know whether the prosecution proved beyond reasonable doubt two basic elements of the offence of grievous harm disclosed under section 225 of the **Penal Code**. In my re-evaluation, the first element is whether it was the appellant who caused grievous harm to Nassoro Ramadhani Lyana on that 11<sup>th</sup> day of July 2008 at around 01.30 a.m. The second element is whether that the said grievous harm was caused unlawfully.

From my re-evaluation of evidence on record two opposing versions of evidence stand out regarding who caused the grievous harm. Evidence of PW2, PW3 and PW4 clearly identifies the appellant as the perpetrator of the grievous harm. Evidence of the victim of the assault (PW2) identified the appellant to have caused him the grievous harm by hitting him on his eye by a spanner. According to PW2, after being hit by the spanner he ran away with the appellant and others in hot pursuit. PW2 testified that he was being chased as he was being assaulted. That he shouted for help running towards Issa Sabala (PW3). Appellant caught up with PW2 and hit him this time on his leg using the heavy spanner. PW3 who lived in the same neighbourhood heard PW2 shouting the name of the appellant as his assailant when PW2 was crying for help from good Samaritans. PW3 went out together with his wife Mary Sangila (PW4). PW3 testified that he saw the appellant hitting his victim's knee using a white object. PW4 corroborated the evidence of her husband (PW3) that it was PW3 who beseeched the appellant to stop further assault on the victim.

According to the second version of evidence, it was unknown persons who caused the grievous harm. Appellant, testifying as

DW1, claimed that the victim of the assault was arrested by his watchman for stealing spare parts from appellant's garage. The watchman took the victim with stolen items to the appellant's place to verify whether he was one of appellant's employees. That the victim ran away from where the appellant and his watchman were. Appellant could not join the chase at faster pace because he carried an aching leg. Appellant maintains that he caught up with the victim when he was already injured by those who had chased him. Testifying as DW2, David Mwangosi was short on details on who actually caused the grievous harm.

Janet John who is the appellant's wife testified as DW3. According to DW3, she went out with the appellant when the people who had arrested the victim brought the victim to their house. According to DW3, after he had directed the arresting party to take the suspect to a ten-cell leader, appellant retired back to his room to put on more clothing. That moment later, the victim under arrest ran off with the group chasing behind. According to DW3, appellant was not one of the people who took part in the beating of the victim. I do not agree with the version of evidence led on the appellant's behalf. The


watchman, who allegedly arrested the complainant conveying stolen items, did not testify nor was his name mentioned.

With due respect, I do not agree with Mr. Koga that there was no direct evidence witnessing the assault of the victim. I am in full agreement with Mr. Mangowi in his submission that the evidence on record of the trial court clearly supports the decision of the trial magistrate to convict the appellant on the basis of evidence of the prosecution witnesses. In my opinion the evidence of the appellant's wife (DW3) that appellant had directed those who had arrested the suspect to take the suspect to a ten-cell leader and that the appellant retired back to his room to put on more clothing was a belated attempt to take the appellant from the scene of crime where he actually was. I hereby find that evidence before the trial court proved beyond any reasonable doubt that Nassoro Ramadhani Liyana was arrested and taken before the appellant. Appellant was present when assault against the Mr. Liyana begun and appellant used a heavy object to hit Nassoro Ramadhani Liyana causing him grievous harm. By hitting his victim with a metal object on the eye and on the leg, the appellant must be deemed to have intended some grievous harm to befall his victim. Losing an eye



is a permanent disfigurement within the definition of grievous harm ascribed under section 5 read together with section 225 of the **Penal Code**. In Tanzania, any person suspected of having committed any crime is supposed to be taken before the police to be formally arrested and taken to court. The law does not condone the culture of mob justice. Appellant had no justification in law to harm any person suspected to be a thief. I hereby find that the Appellant's act was unlawful.

For the above reasons, the appeal clearly lacks merit. The maximum sentence for offence under section 225 is seven years in prison. I do not see any reason to interfere with the judicial discretion of the trial Principal District Magistrate to sentence the appellant to imprisonment for terms of 2 years. Appeal is dismissed in its entirety.



**I.H. Juma,  
JUDGE  
06-09-2011**

**Delivered** in presence of Ms Mariam Haji (State Attorney) for the Respondent.



**I.H. Juma,  
JUDGE  
06-09-2011**

