**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL No. 06 OF 2021**

*(Arising from Criminal Appeal No. 07 of 2021 in the District Court of Monduli at Monduli, Original from Criminal Case No. 116 of 2021 of the Primary Court of Monduli District, at Monduli)*

**NDEVESO LOBULU..... APPELLANT**

**VERSUS**

**EDWARD SAIGULAN..... RESPONDENT**

**JUDGMENT**

19th September & 21st October, 2022

**TIGANGA, J.**

Before the Primary Court of Monduli District, at Mto wa Mbu, herein after referred to as the trial Court, Edward Saigulani herein after referred to as the respondent, stood charged with assault causing actual bodily harm contrary to section 241 of the Penal Code [Cap. 16 R.E 2022]. That offence was allegedly committed against one Ndeveso Lobulu, herein after referred to as the appellant. The offence was alleged to have been committed at Makuyuni in Monduli District.

After full trial before the trial Court, the respondent was acquitted on the ground that, the complainant failed to prove the case beyond reasonable doubt. The appellant was aggrieved by the judgment of the trial Court, he appealed to the District Court of Monduli at Monduli herein referred to as the first appellate court where he lodged four grounds of appeal. Also after full trial which involved both parties, the District Court dismissed the appeal for want of merits.

Following that findings, the appellant was further dissatisfied, he lodged this appeal via the petition of appeal prepared and filed by Mr. Ngeseyan who represented the appellant, fronted in this court the amended petition of appeal with six grounds to wit;

1. That, the first Appellate Court erred in law and in fact for not holding that the defence of alibi was raised and accepted contrary to the law.

2. That, the first Appellate Court erred in law and in fact in deciding the matter in that it failed to convict the Respondent while the case was proved beyond reasonable doubt as per the standard required by the law.

3. That, the first Appellate Court erred in law and in fact in deciding the matter for not drawing an adverse inference against the Respondent for failure to produce (sic) key/ material witnesses.

4. That, the first Appellate Court erred in law and in fact in that it misdirected itself on issues which were not material to that case.

5. That, the first Appellate Court erred in law and in facts by raise (sic) a new issue which was not addressed to the parties which amount (sic) to denied (sic) the Appellant the right to be heard.

6. That, the first Appellate Court erred in law and in fact in in deciding the appeal which was not contested by the Respondent.

Service of the process was effected to the respondent, both physically and by substituted service by way of publication in Mwananchi News Paper dated 06th September, 2022. However, for reasons best known to the respondent, he did not attend to defend the appeal against him.

Following such non appearance of the respondent, the court ordered the appeal to be heard *ex parte*. At the hearing, the appellant was represented by Mr. Lecktony L. Ngeseyan, learned Counsel.

After the grounds stated above, I waited for Mr. Ngeseyan's submission before I indulge into the nitty gritty of the appeal. Indeed, the Advocate orally submitted on his stances.

On the first ground, Mr. Ngeseyan faulted the procedure used by the respondent in fending himself through the defence of alibi. He said, that the defence was raised without prior notice and thus, it was supposed not to be believed. To buttress the argument, the Advocate cited the case of **Sijali Juma Kocho versus The Republic**, (1997) TLR No. 2016. The Advocate further argued that, he is aware that the Criminal Procedure Act, [Cap. 20 R.E 2022] does not apply in proceedings conducted in Primary Court but so long as there are case laws, on the requirement of the procedure, the Primary Court was bound to follow the precedent. Fortifying his position, he cited the case of **Hamis Said Butwe versus The Republic,** Criminal Appeal No. 489 of 2007 (unreported) where the appeal was dismissed for failure to procedurally raise the defence of alibi. Pondering on it, he said the defence of alibi was raised later without prior notice.

On the second ground, Mr. Ngeseyan was of the view that, the trial court and the first appellate court failure to convict the respondent was a grave misdirection because, the case was proved beyond

reasonable doubt. That, the accused did neither dispute the facts nor ask the appellant any question. That, failure to cross examine is tantamount to admission of the offence. To that, the case of **John Shini versus The Republic,** Criminal Appeal No. 573 of 2016 (unreported) was referred.

Arguing the 3rd ground, the learned Advocate contended that, the respondent failed to call, as witness his father who he said was with him and that he did not call any person who was with him in the material fateful day. To hummer the matter, the cases of **Ally Aziz Abdallah versus the Republic** (1991) TLR 71, **Sijali versus The Republic** (1994) TLR 24 and **Hemed Said versus Mohamed Mbilu** (1984) TLR 103 were referred to this court which require the court to draw adverse inference against the respondent and calling key witnesses, sequentially.

On the 4th ground the learned Advocate contended that, the first appellate court accepted and determined the issue of identification at page 12 of the impugned judgment which was knew and was supposed not to be brought at that stage. Receiving it was tantamount to denial of right to be heard, he said. The case of **Margwe Erro and 2 Others versus Moshi Bahalulu,** was cited. The case held that, the decision

which have been reached without hearing the parties is as good as denying parties the right to be heard.

Submitting on the last ground, Mr. Ngeseyan argued that, so long as the respondent did not dispute the appeal, there was no any justifiable reasons for him not be convicted by the first appellate court.

Lastly, the learned Advocate prayed to the court to quash and set aside the decision of both lower courts and order compensation and costs to the appellant. Equally that, the court should convict and sentence the respondent on the strength of the evidences on record.

After venturing a lot on the submission of the learned counsel, it is now high time to focus on the demanding question for reply. I think, the borne of contention requiring resolution and determination of this court is whether, this appeal is meritorious.

Before going that far, I have to state at the outset that, Mr. Ngeseyen did not submit on the 4th ground of what he called amended petition of appeal. Instead, he renumbered the fifth ground as the 4th ground. Thus, only five grounds were argued living behind the said one. Perhaps, he did not see the essence of it due to its similarity in coaching

with the 5th ground. I therefore, take this omission as constructive abandonment.

Now back to the raised issue, I propose to start with the first ground of appeal. It is a principle of law that, when the defence of alibi is intended to be relied upon by the accused person, the foundation for it must be laid down. That the notice of intention to rely on the defence of alibi must be given prior or before the prosecution case is closed. Authorities on this area are no longer grey. Coupled with those cited by Mr. Ngeseyan, are; **Twalaha Hassan versus The Republic,** Criminal Appeal No. 127 of 2019 CAT at DSM, **Ludovick Sebastian versus The Republic,** Criminal Appeal No. 318 of 2007 CAT at Tabora and **Otto Shirima Karist Shirima versus The Republic**, Criminal Appeal No. 234 of 2008 CAT at Arusha (all unreported). In the latter case, the court on the issue of loosely raised defence of alibi observed that;

> *"Since the appellant did not deny having raised such defence, and the trial magistrate was only referring to that defence in the judgment, we cannot see any justification for impeaching the record. We accordingly dismiss this ground too."*

It is not disputed that though; the respondent did not give the notice of alibi prior, but he raised it in the defence as rightly submitted by Mr. Ngeseyan. Condemning the respondent basing on the technicality of procedure and taking into account that the matter was in the primary court where neither Rules of evidence nor Rules of Criminal Procedure does not underlie it, is importing the versions of Criminal Procedure Act, [Cap. 20 RE 2022] into the court which is not bound by its enactment. Therefore, this ground is wanting of merit. It is dismissed.

Let me go to the third ground. In this Mr. Ngeseyan is submitting that the accused person failed to bring key witnesses and therefore the court was required to draw adverse inference against him. With due respect to the learned Advocate, I think, he has forgotten the principle of law that, the accused person is not required to prove the case against him. This duty is on the shoulders of the prosecution. Requiring the accused person to bring key witnesses is as equal as forcing him to prove that he is not guilty the duty which is not burdened to him.

Regulation 1(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, on the issue of whose duty to prove the case in criminal matters provides as hereunder:

> ***Where a person is accused of an offence, the complainant must prove all the facts which constitute the offence,*** *unless the accused admits the offence and pleads guilty.* (Emphasis added).

This position of the law, was further exemplified by the Court of Appeal of Tanzania in the case of **George Mwanyingili versus The Republic**, Criminal Appeal No. 335 of 2016 CAT at Mbeya (unreported) where it was observed that;

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise."*

Guided by the above authorities, I hereby reject the argument by the Counsel aiming at burdening the respondent to prove the case by bringing the witnesses in order to prove that he is not guilty, the duty which is not casted to him by the law. This ground also suffers dismissal for lack of merit.

Ground five is on the complaint that, the first appellate court raised and discussed the new issue which was not addressed by the

parties and therefore, denied them the right to be heard. The said new issue allegedly to have been raised is on the identification. The counsel referred this court to page 12 of the impugned judgment. I have revisited the said page whereby in paragraph 5, the referred excerpt reads as follows:

> *"In this case, the appellant and witnesses did not at all identity (sic) the respondent, this omission sheerly vitiates the weights of the prosecution case."*

However, one of the grounds of appeal fronted in the first appellate court was ground 2 to the effect that, the case before the trial court was proved beyond reasonable doubt. In the circumstances, it is obvious the appellant required the first appellate court to re-evaluate the evidence on record in order to satisfy it self as to whether the case was proved to the required standard or otherwise. In so doing, the first appellate court in considering the facts of the case is not raising new issue, but it does so to satisfy itself in order to clearly respond to the ground. There could not be a possibility of ascertaining as to whether the case was proved beyond reasonable doubt without first considering the fact of the case in relation to the guiding principle in proving the case, the importance of identification being one of the very important

guiding principle. That said therefore, this ground also fails for the reasons given.

Ground six is on the context that, the first appellate court decided the appeal which was not contested. Perusing the first appellate court's record it has came to light that, just like the appeal at hand, it was heard ex-parte. The appellant's contention is that, since the appeal was heard ex parte, then that was a guarantee that, the appellant would win. In my considered view, the fact that the appeal is heard ex-parte does not mean that, the appeal is not contested. The appellant is duty bound to prove the appeal by proving each and every ground of appeal before he is entitled to the victory. Construing this principle otherwise is to shift the burden to the respondent thus defeating the cardinal principle "He who alleges must prove".

In principle, the appellant cannot hide on the umbrella of the absence of the respondent in court to shift the burden lawfully shouldered by him. He must prove the appeal no matter what. Thus, this ground also fails and it is dismissed for lack of merits.

The last ground to be delt with is the 2nd ground which is that, the case was proved beyond reasonable doubt and therefore the lower court was supposed to convict and sentence the respondent. Regarding this

ground, I share the same holding with the two lower courts. The reason is apparent that, the appellant complained of being assaulted as it is gleaned from the charge and the evidence by the complainant on record. She says, after being beaten by the respondent, she was taken to police station and later on, to the hospital for treatment and medication. However, she did not tender even the PF.3 justifying that, she was taken to hospital as she claims. Failure to tender such important evidence is tantamount to failure to prove that she was beaten. In this issue of failing to tender material evidence, the Court of Appeal of Tanzania in the case of **Bernard Masumbuko Shio and Another versus The Republic,** Criminal Appeal No. 213 of 2007 held that:

> *"After all if the prosecution fails to tender material evidence in its possession, that will be to its detriment and an advantage to the defence."*

Therefore, the failure done by the appellant as shown above in fact was so detrimental to her and beneficial to the respondent as he is now enjoying the breath of doubts.

For reasons I have herein given, I am satisfied that this appeal is devoid of merit. It is hereby dismissed in its entirety.

It is ordered accordingly.

**DATED** at **ARUSHA** this 21st day of October, 2022


**J.C. TIGANGA**

**JUDGE.**