IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL No.202 of 2021

(Originating from Criminal Case 04 OF 2021 of the District Court of Kibaha at Kibaha before Hon. Kibona-RM)

AZMARA AMONI CHENGULA..... APPELLANT

VS

REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 12-12-2022

Date of Judgment: 23-12-2022

MGONYA, J.

The Appellant herein, **Azmara Amoni Chengula** is challenging the Judgment of the District Court of Kibaha, handed down on 06th May, 2021, in which he was convicted of offence of grievous harm; Contrary to **section 225 of the Penal Code, [Cap. 16 R.E 2002],** and sentenced to seven (7) years in jail.

It was Prosecution's case during the trial that, the Appellant in September, 2019 at Kongowe Forest area within Kibaha District in Coastal region, did unlawfully cause grievous harm to one B.8794 WRD Godfrey by cutting him using a bush knife commonly known as panga on his head.The accused pleaded not guilty to the charge hence the Prosecution side featured five (5) witnesses and relied on two exhibits; the accused cautioned

statement (Exhibit P1) and PF3 (Exhibit P2) in a bid to prove the case. On the Defence side, the appellant relied on his own testimony and had no exhibit to tender. After full trial, Appellant's version was not bought by the trial court, instead it was satisfied that, the Prosecution proved its case beyond reasonable doubt hence the accused person was convicted and sentenced to serve 7 years in jail.

Discontented, the appellant has knocked this court's door with a Memorandum of Appeal armed with **seven (7) grounds** of appeal, going thus:

1. ***That, the learned trial Magistrate erred in law and fact by convicting the Appellant relied on Exh. P1 (cautioned statement) which was un procedurally admitted in court without conducting an inquiry after the Appellants objection raised in regarding to legal procedures of taking statements from suspects;***
2. ***That, the learned trial Magistrate erred in law and facts by convicting the Appellant for the offence of grievous harm when no sufficient explanation offered by the prosecution witness that why the said offensive weapon was not tendered in court to***

prove the fact that the Appellant had the alleged knife (panga);

3. ***That, the learned trial Magistrate erred in law and facts by failing to draw an inference adverse to the prosecution side for failing to call even one prisoner among the said seventeen (17) prisoners to testify in court in respect to whether or not the alleged incident was really committed by the appellant and on the material day contrary to the procedure of law;***
4. ***That, the learned trial Magistrate erred in law and facts by convicting the Appellant relied on the evidence of PW1, PW2, PW3 and PW4 who had the interest to save with the case as the appellant escaped from the prison;***
5. ***That, the learned trial Magistrate erred in law and facts by convicting the appellant based on Exh.P2 (PF3) which was defective and inredible as neither the document of proving the said referral tendered in court nor a police officer who issued the said PF3 was called to testify the same;***
6. ***That, the learned trial magistrate erred in law and facts by convicting the appellant relied on the***

weakness of the appellants defence evidence contrary to the procedure of law;

7. ***That, the learned trial Magistrate erred in law and facts by convicting the Appellant in a case which was not proved beyond any reasonable doubt by the Prosecution as mandatorily required by law.***

It is the Appellant's prayer based on the above grounds that, this Court allow his appeal, quash the conviction, set aside the sentence and set him at liberty.

When the Appeal was called for hearing, Appellant appeared in person unrepresented while Respondent was represented by Ms. Mgimba, learned State Attorney.

When called to address the Court on the grounds of appeal, the Appellant's prayed this court to adopt and consider his seven grounds of appeal and pleaded it to allow his appeal and acquit him.

On the Respondent's side, Ms. Mgimba submitted in support of the conviction and sentence imposed against the Appellant. Responding on the first ground of appeal, He leaned counsel stated that the law requires that objection should be on point of law. The Appellant herein raised two points of objections but he did not specify the law that was breached and on while the second objection did not fall into legal parameter highlighted

in the case of ***NYERERE NYAGUE VS THE REPUBLIC, CRIMINAL APPEAL No. 67 OF 2010*** Court of Appeal and in the case ***RAJABU JUMA @ RAMADHAN VS REPUBLIC, CRIMINAL APPEAL No. 33 of 2020*** High Court at Musoma.

Having considered this ground of appeal and the evidence on record, I agree with the learned State Attorney's proposition that, the point of objection raised by the Appellant during the trial lacks the quality of the objection which demands the court to make inquiry. Going through the trial court proceeding at page 26, PW3 prayed to tender the cautioned statement. When the same was shown to the accused he stated that:

"1. It does not complied with the law

2. It is not listed in the Memorandum of fact"

The accused person did not elaborate which law was violated during recording cautioned statement, he didn't complain that he never recorded the said statement nor the same was involuntarily recorded. Going with that fact this court finds that the **first ground of appeal has no merit.**

With regard to the second ground of Appeal that the trial court convicted the appellant while the Prosecution did not tender the weapon used in commission of the offence, Ms. Mgimba Responded that, tendering a weapon is not one of the

essential element of the offence of grievous harm. Therefore, this ground of appeal has no merit.

Going through the provision of the law which provides for the offence of grievous harm, I do agree with the learned State Attorney that, in proving any charge, it is the legal requirement that essential elements that establishes the said offence should be proved beyond reasonable doubt.

In this Appeal the Appellant was charged with the offence of grievous harm contrary to section 225 of the Penal Code. Reading between the lines the said provision of the law for the offence of grievous harm to stand, there are two elements to be proved. **One** there must be unlawful act and **Second;** is to certain who is the perpetrator of the said unlawful act. There is nowhere tendering of the weapon used to commit an offence is said to be one of the elements in proving the offence of grievous harm. Consequently, **I find no merit in this ground of Appeal.**

Responding to the third ground of Appeal that trial Magistrate erred by failing to draw an adverse inference on Prosecution side for failing to call even one prisoner among 17 prisoners, no particular number of witnesses shall in any case be required for the proof of any fact.

Having considered the third ground of Appeal as well as the submission filed by the learned State Attorney on this ground, I join hands with the Ms. Mgimba's submission that failure to call the Prisoners to testify before the trial court, did not, in any way, weaken the Prosecution case as pursuant to the provisions of **Section 143 of the Evidence Act, Cap. 6 [R. E. 2019],** as there is no legal requirement for the Prosecution to call a specific number of witnesses. What is required is the quality of evidence and the credibility of witnesses. See; ***PETER DIDIA @ RUMALA V. REPUBLIC, CRMININAL APPEAL NO. 421 OF 2019*** (Unreported) and ***HASSAN JUMA KANENYERA V. REPUBLIC [1992] T.L.R. 100.***

It is also on record that, the evidence of PW1, PW2, and PW3 was corroborated by the evidence of PW5 a doctor who proved the charge of grievous harm against the Appellant. Therefore, failure to summon the seventeen prisoners to testify does not in any way shaken the Prosecution's case. Consequently, **I find no merit in this ground of appeal.**

Responding to the fourth ground of appeal that trial court erred by relying on the evidence of PW1, PW2, PW3 and PW4 who had interest to save as the appellant escaped from the prison, the learned state attorney responded that, the law does not forbid the parties to call witnesses who they work together

or relatives to testify before the court. Ms. Mgimba stated that what the law requires is the evidence material to the case and credible witnesses. To support her stance, she cited the case of ***GODFREY GABINUS @ NDIMBAAND & 2 OTHERS VS THE REPUBLIC, Criminal Appeal No.273*** of 2017. Basing on the decision made in this case, Ms. Mgimba prayed this court to find the fourth ground of appeal without merit.

Having perused the trial court proceedings, I find that this is a straight forward issue as it is apparent that, the accused committed the offence while he was among the prisoners who were in the forest with the prison officers. The appellant admits that while there, he was assigned to prepare the food for his fellow prisoners and the prison officers. At the scene of crime, they were only two, himself and the victim who was watching him. He also admits that he escaped from that area although while defending himself he tried to evade to narrate how he managed to escape from there as the said facts will be a proof that he did that after committing the offence he was charged in this case.

As to who testified in this case, apart from PW1 the victim himself, there was PW2 and PW3 the prisoner officers who were also in the said forest hence they are direct witness. Apart, from them there was the evidence of PW4 a police officer who

recorded the Appellant's cautioned statement (Exh.P1) and PW5 a doctor who received PW1 who had injuries at his head at Tumbi Hospital. In the circumstances **I find this ground of appeal has no merit.**

In regard to the fifth ground of appeal that the trial Magistrate erred to convict the Appellant based on exhibit P2 (PF3), which was defective and incredible as there was no document to prove the referral was tendered in court nor police officer who issued the same was called to testify. The learned state attorney responded that, it is the requirement of the law that PF3 should be tendered by the person who filled as he is able to explain what is written in it. Hence failure to call a police officer who issued the same does not render the PF3 admission nullity. According to Ms. Mgimba, this ground has no merit.

I have painstakingly examined the record of appeal in the light of the Appellant's ground of appeal and the Respondent's submission in reply to. It is true as submitted Ms. Mgimba that the law provides for the requirement of the person who filled a PF3 to appear before the court. It is not the requirement of the law that a police officer who issued the PF3 should be summoned before the court for the PF3 to be admissible. Therefore, **this ground of appeal has no leg to stand henceforth I dismiss it.**

The sixth and seventh ground of appeal that the trial Magistrate erred in law and fact by convicting the Appellant relied on the weakness of the Appellant's defence evidence contrary to law and that the Prosecution case was not proved beyond reasonable doubt. Ms. Mgimba Responded that Prosecution side proved the case beyond reasonable doubt. The evidence of PW1, PW2 and PW3 who were at the scene of crime corroborated with the evidence of the Appellant in the cautioned statement. She submitted that at page 9 of the Judgment the Magistrate discussed the defence evidence but did not base on it in conviction.

As shown earlier, the Appellant was charged with an offence of causing grievous harm **Contrary to Section 225 of the Penal Code,** which states that:

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

What amounts to grievous harm has been defined under **Section 5 of the Penal Code** 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;

In the appeal at hand, 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 Mgendi Mbasa, Human doctor who testified as PW5. PW5 examined Geofrey who had injury at his head. He said the patient has a wound which was caused by a sharp object. That wound was almost 10 centimeter.The skull was also injured.

The issue at hand is whether the said grievous harm was caused unlawfully. From the evidence on record PW1 who is the complainant, PW2 and PW3 clearly identifies the appellant as the perpetrator of the grievous harm. Evidence of the victim of the assault (PW1) identified the appellant who was the prisoner to have caused him the grievous harm by cutting him on his head by machete, after asking PW1 to allow him to leave. He then invaded and cut him with a machete at his head and he then disappeared. According to PW2 and PW3 while at the forest they heard shouting from their fellow Geofrey. When they went to respond on it they met PW1 bleeding at his head and he later became unconscious. They took him to hospital where after

treatment he told them that, it was Azmara Chengula (the appellant) who invaded and cut him before he succeeded to run away after the incident.

The testimony of PW1, PW2 and PW3 corroborates with the appellant's cautioned statement in which he admitted to cut PW1 and escaped. From these facts, I hereby find that the **Prosecution side proved beyond reasonable doubt that the Appellant's act of causing harm was unlawful.**

On the six ground of appeal the appellant faults that he was convicted basing on weakness of his defence contrary to the law. As it has been submitted by the learned state attorney the trial magistrate considered the defence evidence but it is true that the same form the base of conviction. Reading at page 9 of the trial Court's Judgment at the third paragraph it has been stated that:

> ***"The DW1 in her defence, I do not see any material evidence in his defence apart from general denial...does not shake the strong prosecution evidence even the doubt raised does not contravene any lawn.."***

The quoted paragraph speaks all about the Appellant's claim that it is not his defence which form the conviction.

In the light of the foregoing, and looking at the totality of the evidence, I entertain no doubt that with the available evidence, the trial court properly held that the case against the appellant was proved beyond reasonable doubt. **Consequently, I find no merit in the appeal and I hereby dismiss it in its entirety.**

It is so ordered.

Right of Appeal explained.

L. E. MGONYA

JUDGE

23/12/2022