

**IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
CRIMINAL APPEAL NO. 82 OF 2022**

(Arising from Criminal Case No. 73 of 2021 at District Court of Musoma at Musoma)

MASASI S/O MWITA..... 1ST APPELLANT

DEUSI S/O KICHERE..... 2ND APPELLANT

LILIAN D/O EMMANUEL 3RD APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

21st & 30th August, 2023

M. L. KOMBA. J;

This appeal originates from Musoma District Court in Criminal Case No. 73 of 2021. Brief facts of the case goes like this; all appellants assault one Anastazia Daudi while at Shabani Street within District and Municipality of Musoma. That was 26/02/2021. On the same day at the same place appellants assault Esther Chacha and Stela Chacha and caused them to suffer actually body harm contrary to section 241 of Penal Code, Cap 16 [R. E. 2019 now 2022]. Appellants denied the charge and attracted full trial.

Basing on testimonies of three witnesses the trial court convicted the appellants and sentenced them to conditional discharge for one year.

Unsatisfied by the decision, appellants decide to search for the justice tirelessly knocking the door of this court fronting with five (5) grounds of appeal to wit;

- 1. That, the trial court erred in law and facts to convict the appellant without substance evidence that proven the charge without reasonable doubts,*
- 2. That, the trial court erred in law and further misdirected to hold the appellant had duty bound to prove the victim was assaulted to the scene of crime,*
- 3. That, the trial court erred in law, and facts to hold the charge against the appellants was proved without reasonable doubts whilst there was no any piece of evidence proven the respondent were assaulted,*
- 4. That, the judgment of the trial court is against the law as the evidence adduced in the court does not support the charge sheet,*
- 5. That, the trial court erred in law and facts to relying on the sole evidence of the respondents without an independent witness taking into count that the incident occurred at broad day where there many passerby.*

During hearing of this appeal, the appellants stand solo without representation while respondent was represented by Mr. Abdulher Sadiki.

When given time to submit on appeal, the 1st appellant prayed this court to adopt their petition of appeal and submitted that the alleged crime occurred during day time but the prosecution failed to parade an eye witness even investigator did not attend the court. He further submitted that there was two PF3 concerning one person and this problem was supposed to be solved by investigator but he decides not to show up and therefore they were denied their right to cross examine. He complained that alone was enough to show the case was not proved beyond reasonable doubts.

It was 1st appellant's further submission that PW2 explained the truth that there was a fight among the two women (Esther and Lilian) and that the 1st appellant tried to rescue them. He prayed to be found innocent and punish Republic for disturbance.

The 2nd appellant had a very short submission that he was not at the scene and he wonders how he was convicted. He prayed this court to read proceedings carefully.

The 3rd appellant was of the submission that she was the victim as was assaulted by Esther Chacha and was abused due to her volunteerism to go and testify in court. She further submitted that she was given P3 for treatment but the prosecutor did not tender her PF3 to prove she was assaulted.

While arguing against the appeal Mr. Isihaka submitted that according to the offence charged the appellants, prosecution was supposed to prove elements of assault and extent of body harm. He explained that PW1 explained while on the way from Primary Court she was attacked by three appellants the fact which was collaborated by PW2 whom they were together. About 2nd appellant, State Attorney submitted that he was at the scene as PW1 explained his role while at the scene further, PW3 (Stela Chacha) explained people who attacked them were three and the evidence show there was a fight among the appellants and the other group of people who went to testify in court against the appellants. That proved there was assault.

In respect of the extent of harm he said records are silent over the wound and the extent of injury sustained by victim(s) as there is no PF3 to prove beyond reasonable doubts neither the doctor was not among the witnesses.

He said that alone does not mean the crime was not committed as he cited the case of **Chacha Range and Mahinde Range vs. Matinde Nyabiti** (PC) Criminal Appeal No. 4 of 2021 where it cited the case of **Samson Akiti @ Oyoko** that the role of PF3 was to prove the extent of injury sustained by the victim. He said lack of PF 3 reduces the offence to minor offence on causing body harm as per section 240 of Cap 16. He further submitted and pray this court to use section 300 of the CPA on alternative verdict to substitute the offence of common assault which was proved.

During rejoinder, the 1st appellant explained that after the event they went to Kitaji Police post where they were given PF3 but victim and others went to police central and did not return. He said he had a case and other two appellants were his witnesses.

In rejoinder the 3rd appellant said Esther was the one who strangulate her and she did not respond as she was sick by that time.

That makes end of submission and the duty of this court is to determine whether the offence was proved to the required standard in criminal cases.

See Section 3 (2) (a) of the Evidence Act, Cap. 6 [R. E 2022].

The offence charged with the appellants is provided under section 241 of Cap 16 thus;

*S. 241. Any person who commits an **assault occasioning actual bodily harm** is guilty of an offence and liable to imprisonment for five years.*

From the above excerpt, assault is a common element in proving offence of this nature. In this, prosecution needed not only to prove assault but also the extent of assault.

State Attorney submitted that failure to tender PF3 make the proof of extent of injury difficult and therefore he submitted that this court to find the offence committed was of lesser than charged, common assault as in section 240 of Cap 16. I subscribe to the cited case of **Chacha Range and Mahinde Range vs. Matinde Nyabiti** that PF3 would help to see the extent of injury, however, in the circumstance of the case at hand is doubtful if assault itself was committed. Let us see what transpired during trial and the testimonies of prosecution;

*PW1; I was accompanied with Stelah Chacha, Annastazia Daudi and others, **Masasi Mwita, Deusu Kichere, Lilian Emmanuel, Pili Msai and one old mother** who not among known to me, they invaded us and started to beat me at different part of our body.'*

Page 21.

*PW2; ...while going home from Kitaji/Musoma Urban Primary court with Esther (PW1) and Stella Chacha at Shaban street the accused **Masasi Mwita and Deus Kichere** who was known to me invaded us with PW1. Page 24.*

*PW3: On 26/02/2021 at 13:00-14:00 hours while at Shaaban Street the accused **Masasi Mwita, Deus Kichere and Lilian Emmanuel** invaded us. Page 28.*

From the above excerpt, there are different group of people who are claimed to invade the victims. The question here is how many people invaded complainants who were together. Were they five people as narrated by PW1 or two people or three people. Whom to believe among the prosecution witnesses. It is trite that a person who tells lie should hardly be believed. See **Mohamed Said vs. The Republic**, Criminal Appeal No. 145 of 2017 and **Zakaria Jackson Magayo vs. The Republic**, Criminal Appeal No. 411 of 2018, CAT at Dar es salaam.

In the case at hand, I find difficult to believe testimonies of PW1, PW2 and PW3 as they contradicted each other on whom invaded them bearing in mind they were together and it was day time while the sky was bright. This makes their testimonies to contain lying at some points.

Bearing in mind that this is criminal case, the standard of prove is beyond reasonable doubt. When it is said beyond reasonable doubt it means to put is simply, is that the prosecution evidence must be strongly as to leave no doubt to the criminal liability of an accused person. Further, a person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt. See **John Makolebela vs. Kulwa Makolobela and Eric Juma @ Tanganyika** [2002] T.L.R. 296 and **Samson Matiga vs. Republic**, Criminal Appeal No. 205 of 2007, CAT at Mtwara (unreported).

From the analysis I find prosecution failed to prove the offence to the required standard.

Consequently, I allow the appeal, I hereby quashed the conviction and set aside sentence imposed against appellants. I am aware that the appellant had completed their sentence on 18/08/2023. So, no order for their release.

DATED at **MUSOMA** this 30th Day of August, 2023.




M. L. KOMBA

Judge

Judgement delivered in chamber in the presence of all appellants and Ms.

Beatrice Mgumba State Attorney for Republic.


M. L. KOMBA

Judge

30 August, 2023