

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB-REGISTRY

AT SONGEA

CRIMINAL APPEAL NO. 47 OF 2023

*(Appeal originating from the decision of the District Court of Nyasa at Nyasa in
Criminal Case No. 29 of 2023)*

JOHN SIMIZES KAKONGWE..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Dated: 18th March & 15th April, 2024

KARAYEMAHA, J.

In the District Court of Nyasa, the respondent Republic charged the appellant for the offence of Grievous harm contrary to the provisions of section 225 of the Penal Code, [Cap. 16 R.E 2022] (the Penal Code). According to the particulars of offence, the appellant was charged to have been involved in unlawful kicking and fracturing distal part of left thigh (leg) of Andrea Amos Haule (the victim or PW1) which led to suffering serious injury.

The prosecution case involving the victim, Aletas Christoms Mwikipolkile, Mary Charles Lupindo, Evans Takudzwa Mazhunga Rosemary Dominick, Jasinta Jessy and Nurdin Sadik Tunutu, PW1, PW2



and PW3 respectively, is to the effect that the victim was assaulted, beaten by kicking by the appellant ultimately succumbed his broken leg on the way on 9/6/2023. On the material date, the victim after completing his job of selling sea fish, went to get steam off at Mama Msemwa's local brew shop. He ordered bottles of local alcohol commonly known as "*wanzuki*". Siwa, the bar attendant, was the one who served him. According to the victim, the appellant entered in the local brew shop. No sooner had he entered therein than he grabbed one of the victim's bottles. Efforts to prevent him bore fruits. However the victim used abusive language and threatened to break the victim's leg. Soon after those threats, the victim left the local brew shop and headed to his house. On the way the appellant appeared and assaulted him. The victim testified at the trial that the appellant beat him/kicked him. In the due course, he pressed his left leg which resulted into breaking his leg particularly the digital part of his left thigh.

The victim's cry for help, triggered people to usher in at the scene of crime. According to the prosecution's evidence, the appellant was apprehended there at and taken to the Ng'ombo Village Executive officer's office (the VEO). While at PW2, the appellant denied to break



the victim's leg. According to PW2 the appellant's story was that the two were fighting and in the fracas the victim's leg was broken.

Meanwhile, the victim was taken to Ng'ombo Dispensary where he was given first aid by PW2 and referred to District Hospital (St. Annes Liuli Hospital). At the latter hospital, the victim was attended by PW4. After finding out through x-ray that it was a fracture of the distal part of the left leg on the thigh caused by blunt object, PW4 referred the victim to Songea Regional Referral Hospital for opening reduction and internal fixation of the broken leg. PW4 tendered the PF3, which was admitted as exhibit PE1 to bolster his evidence.

The incident was later reported to police station at Mbamba bay. PW5 was instructed by the OC-CID to conduct investigation. In her investigation, she was satisfied that it was the appellant who assaulted and grievously harmed the victim. She, then, formed an opinion to charge the appellant.

Though the appellant denied to grievously harm the victim and narrated that the accused was the one who abused him and on trying to flee from the scene of crime, knocked the stem and broke his leg, the trial court did not believe him. It convicted the appellant for the offence of grievous harm and sentenced him to suffer four (4) years



imprisonment on 9/8/2023. Aggrieved by the findings of the trial court, the appellant has preferred the instant appeal to protest his innocence. His petition of appeal contains three grounds of appeal but one is not a complaint. It is the 3rd ground of appeal which informs this court that the trial court gave him an opportunity to make his defence and summon his witnesses. I have gone through the typed trial court's proceedings at pages 28 and I am satisfied that after a ruling on a case to answer, the appellant was accorded his rights, some of which, were to defend himself and call witnesses to support his defence. Indeed, the appellant defended himself as reflected at page 30 through 32. Thereafter, he elected to close his defence case without calling any other witnesses. The two remaining grounds of appeal which I find pertinent in challenging the trial court's decision are:

- 1. The trial court erred in law and fact to base conviction on the exhibit which was unprocedurally admitted.*
- 2. The trial court erred in law and fact to admit hearsay evidence from witnesses which needed corroboration from other witnesses.*

At the hearing of the appeal, in appearance was Mr. Gaston Mapunda learned State Attorney representing the respondent republic whereas the appellant fended for himself. When I called on the



appellant to argue his appeal, he requested the learned State Attorney to put up his response after which, need arising, he would submit in rejoinder.

Arguing in respect of the 1st ground of appeal Mr. Mapunda submitted that procedures for admitting the PF3, which was the lone prosecution exhibit, were complied with. He explained citing pages 22 and 23 of the trial court's typed proceedings that prior tendering it, PW4, the doctor, cleared it by laying a foundation on how he knew it. On being shown, PW4 identified assisted by marks on it. Thereafter, the witness prayed to tender it as an exhibit in court. Lastly, it was read over by PW4 after the court had admitted it. On this point, he sought refuge at page 24 of the typed proceedings.

In addition, the respondent's counsel contended further that on being tendered the appellant did not object to its admissibility. He, therefore, held the view that the appellant accepted the authenticity of it. Mr. Mapunda laughed off the appellant's attempt to object it at this stage and labeled that conduct as an afterthought. To underscore his view, he cited the case of **Vicent Ilomo v Republic**, Criminal Appeal no. 337 of 2017 (unreported) where at page 22 quoted the case of **Emmanuel Lohay and Udagene Yatosha v. republic**, Criminal



Appeal No. 278 of 2010. The learned counsel stressed seeking guidance of the just cited cases that if the accused intended to object admissibility of exhibit PE1 he ought to do so at the time it was being tendered not at this stage.

Arguing the second ground of appeal, Mr. Mapunda contended that there no hearsay evidence on the record. Referring to the evidence of PW5, the learned counsel said that this witness explained that the victim and the appellant were the only people who were at the scene of crime when the offence was committed. He also said that the evidence revealed that the incident was immediately reported to PW2 and the appellant was mentioned thereat. On the evidence of PW2 and PW4, Mr. Mapunda submitted that the same categorically proved before the trial court that they received the victim with a broken leg and started treating him. This piece of evidence corroborated the evidence that the victim's leg was broken.

In all therefore, he argued, that the appellant's appeal is lacking in merit and thus urged this court to dismiss it and upholding the conviction and sentence.

In his rejoinder, the appellant supported Mr. Mapunda's submission and admitted that he unfortunately broken the victim's leg.



He explained that someone pushed him and fell on the victim. Ultimately, broken his leg. Finally, he urged this Court to decrease the term of his sentence.

To begin with, as argued by Mr. Mapunda, the grounds of appeal, the record before this court and the submissions made by either party, boil down to mainly two issues, that is, whether the admission of exhibit PE1 complied with procedures and whether there was any hearsay evidence adduced in the trial court.

In the first issue I am called upon to decide whether in admitting exhibit PE1 the trial court complied with the procedure. Traditionally, the rule is that all facts, except the contents of documents or electronic records, may be proved by oral evidence. Clear as the provision provides, contents of documents intended to be relied upon by a party to a case cannot be proved orally. This takes me to a notion that the truth contained in the particular document can be proved by a document itself. The production of such document for Court's inspection is necessary whether it be primary or secondary evidence. The question is how can that be attained?

Essentially, exhibits are tendered at various stages of the proceedings depending on prevailing circumstances. One of the stages




which the exhibit can be tendered is during trial. During that stage, principally, exhibits can be tendered during examination in-chief. The rationale behind tendering a document during examination in chief is to enable the adverse part to challenge it by way cross examination. I am not alone on this position. The Court of Appeal guided in **Msanif Ramadhan Msanif v. Director of Public Prosecutions**, Criminal Appeal No. 454 of 2019 (unreported), that:

"Exhibits forming part of the prosecution evidence should be produced and tendered by a witness and during examination in chief so as to afford opportunity to an accused person to challenge it by way of cross-examination."

The correct mode and manner of tendering documentary exhibits was elucidated in the case of **Mbaga Julius v. R**, Criminal Appeal No. 131 of 2015, where the Court of Appeal speaking through Mugasha J.A. observed that:

*"... like any other documentary evidence whenever it is intended to be introduced in evidence, **it must be initially cleared for admission and then actually admitted before it can be read out**". [Emphasis supplied].*

This holding gives us three main stages through which a document must pass before being duly available for court's scrutiny. **First**, it must be cleared for admission. **Secondly**, it must actually be admitted and **finally**, should be read over. 

In the present case, I find force in what Mr. Mapunda has said. The trial court's record reveals clearer at page 22 that PW4 cleared exhibit PE1 (PF3) for admission by testifying that he could identify it by help of his handwriting, signature, official seal, name of the hospital and his registration number. After clearing it, the PF3 was shown to him and he identified it by recapping the features he stated earlier. Page 23 of the typed proceedings indicates that the accused was invited to comment and informed the trial court that he had no objection. Thereafter, the PF3 was admitted as exhibit PE1 and finally it was read over. What was done by the trial court is consistent with the guidance of the Court of Appeal in **Mbaga Julius** case. In the circumstances, the appellant's first complaint cannot stand. Consequently, it is dismissed.

I will briefly discuss the complaint in ground two. It is that the trial court convicted him relying on hearsay evidence that needed corroboration. In so doing it infringed the appellant's rights.

Mr. Mapunda submitted that legally hearsay evidence is inadmissible. He, however, was very quick to respond that PW1 was the victim who encountered the beating. On the evidence of PW5, WP Oliva, the learned counsel contended that she simply testified when the incident occurred and the timing in reporting the incident to PW2. He



stated that the evidence that PW4 received PW1 with a broken leg was corroborated by PW1 and PW2. Mr. Mapunda concluded that the 2nd ground of appeal is lacking in merit and should be dismissed.

I have carefully reviewed the evidence on record. There are two types of witnesses. Those who gave direct evidence and those who told the court what they heard from other people. For instance, PW1 a victim gave direct evidence. In his rejoinder, the appellant has confirmed that he broke his leg. This is not hearsay evidence. However, PW2, PW3 and PW4 testifying on what happened is hearsay in the sense that their evidence is not firsthand. Important is the fact that they explained their role in this case. PW2 explained his role which was arresting the appellant. The gist of PW4's evidence is that PW1 was taken to him with broken leg in the hospital and treated him. The central story milked in PW5's evidence is how he conducted the investigation. Other witnesses testified how they found PW1 agonizing with a broken leg and assisted him to the hospital.

In view of the above findings, I would agree with Mr. Mapunda that there is direct evidence in court. Of utmost important is the fact that the trial magistrate relied on direct evidence to convict the appellant. No corroboration was needed because the purpose of



corroboration is not to give validity or credence to evidence which is deficient or incredible. Corroborative evidence is needed to confirm or support that which is sufficient, satisfactory and credible.

As introduced above, the appellant submitted in the rejoinder that he indeed broke PW1's leg. He pleaded this court to reduce the period of sentence. This suggestion cannot stand. Why? It is a principle of law that the proper sentence to impose in any particular case is at the discretion of the convicting court. A reviewing court will not lightly interfere with the sentence imposed by such a court, unless the court misdirected itself in principle or the sentence itself is so manifestly inadequate and unsuitable.

In this case, the trial court had the opportunity of assessing the whole evidence brought before it and also saw the complainant's alleged injuries as shown on the medical report. After that the trial court decided on the suitable sentence to be imposed against the appellant.

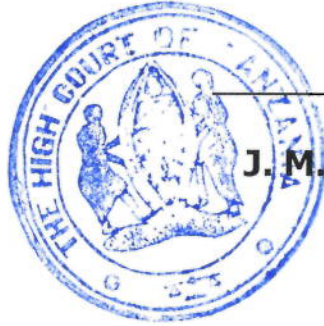
This court does not find that the sentence imposed on the appellant by the trial court is so manifestly improper that it cannot be sustained nor does this court find that the trial court misdirected itself in principle on the sentence passed.



Accordingly, this appeal dismissed. Conviction and the sentence of four (4) years imprisonment imposed by the trial court is sustained.

It is so ordered.

DATED at **SONGEA** this 15th day of April, 2024.



A handwritten signature in blue ink, appearing to read "J. M. Karayemaha", is written over a horizontal line.

J. M. KARAYEMAHA
JUDGE