IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(Kigoma District Registry)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 18 OF 2020

(Original Criminal Case No. 235 of 2019 of the District Court of Kasulu at Kasulu before Hon. I.D. Batenzi - RM)

DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT

VERSUS

JOHN S/O LAMBIKANO..... RESPONDENT

J U D G M E N T

12/10/2020 & 04/11/2020

I.C. MUGETA, J.

The respondent had been charged of causing grievous harm c/s 225 of the penal Code. He was acquitted as having no case to answer in terms of section 130 of the CPA [Cap. 20 R.E. 2019]. The DPP was aggrieved. Consequently, an appeal with two grounds of appeal has been preferred. These are:-

(i) *That, the trial Magistrate erred in law and fact for acquitting respondent for no case to answer on the ground that there was inconsistency on prosecution evidence without taking into consideration that the inconsistency was very monor and did not go to the root of the case.*

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(ii) *That, the trial magistrate erred in law and fact for his failure to evaluate fully the evidence of PW1, PW2 and PW3 hence came with wrong decision of no case to answer against the respondent.*

Robert Magige, learned State Attorney represented the DPP. The respondent appeared in person. On the first ground, Robert Magige argued that the learned trial magistrate erred to base his decision on inconsistencies which are on irrelevant evidence. He argued that time when the son of the respondent arrived at the scene of crime which is the basis of the decision of the trial court is not a material fact to the allegation of assault. He, however, conceded to the existence of the alleged inconsistencies in the evidence of PW1, PW2 and PW3. On the second ground of appeal he submitted that had the trial magistrate properly evaluated the evidence of PW1, PW2, and PW3 which is positive evidence, he would not have ruled that the respondent has no case to answer.

The respondent submitted in reply that the learned trial magistrate reached a correct decision because the case is a frame up due to sour blood between him and the victim. That is why, he further submitted, all the prosecution witnesses are relatives and it was due to their ill motives that they gave inconsistent evidence relevant to the fact in issue regarding the time when his son arrived.

Going by the trial court's record, the prosecution marshalled six witnesses. Three of them, namely Agness Ngumije (PW1), Agness Balanzize (PW2) and Naomi Daudi (PW3) are relatives. They testified that on the incident

date they were working in the field planting beans when the respondent (allegedly) arrived and assaulted (PW1) with a stick. His grievance was that they were working in his shamba. Abdallah Lukokwa (PW5) was working in the nearby shamba. He heard PW1's scream for pain inflicted by the beatings. He did not see her being beaten up but he saw the respondent walking away from the direction where the assault allegedly took place. Songo Omari (PW4) is the street chairman who took the victim to the Police Station and Bwama Mkinya (PW6) is a clinical officer who attended the victim. His report in the PF3 was admitted as exhibit P1. It shows that the victim had fracture in the left hand, wound on the left hand and bruises at the back.

From the above evidence, it is not true that all witnesses are relatives. Abdallah Lukokwa testified to have seen the respondent at the scene of crime. There is no evidence that he is related to PW1, PW2 and PW3. The same applies to PW4 and PW6. The complaint by the respondent about witnesses being relatives is, therefore, unjustified. After all, there is neither a law nor rule of procedure which bars relatives to testify in same case in support of each other.

Regarding the first ground of appeal, as submitted by the learned State Attorney, the trial magistrate decided the case based on inconsistencies he pointed out in the prosecution's case. He held: -

> *"In this case there are three eye witnesses to the crime. These are PW1, PW2 and PW3. PW1 and PW2 testified to this court one and the same story. However, PW3 gave a different story from what*

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was told by the other two witnesses. The former told the court that, the accused assaulted the victim before calling his son to the scene. But the latter told this court that, the accused did not assault the victim until his son joined him to the scene of crime".

Indeed, there is contradictory account on when the respondent's son arrived between the testimony of PW1 and PW2 on the one hand and that of PW3 on the other hand. The contradiction is as stated by the trial magistrate in the above quoted passage. However, as submitted by the learned State Attorney, the arrival of the son of the respondent at the scene of crime is not a relevant evidence to the fact in issue which is whether the respondent assaulted the victim. The learned trial magistrate considered the principle of law relating to inconsistencies in evidence and rightly held that the court must decide if they are minor or go to the root of the case. He found that the same went to the root of the case. He, however, overlooked the fact that, for such inconsistencies to be termed as going to the root of the case, they must be relevant to the fact in issue. This is where the learned trial magistrate fell into error. The first ground of appeal has merits.

Coming to the second ground of appeal, as the learned trial magistrate held, there is on record three eye witnesses' evidence. These are PW1, PW2 and PW3. They said they saw the respondent hitting the victim. As submitted by the learned State Attorney, their evidence is positive evidence which ought to be believed until when it is countered by another evidence. Under normal course of events, such evidence ought to come from the defence. It follows, therefore, that the learned trial magistrate

erred to ignore the positive evidence on record and concentrated on irrelevant inconsistencies. The trial court, on the evidence on record, ought to have found that the respondent has a case to answer. The second ground of appeal, therefore, has merits too. I hereby find that the respondent has a case to answer and he must enter a defence at the trial court before another magistrate. The ruling acquitting him is hereby quashed and all consequential orders are set aside. Appeal is allowed.

I.C. Mugeta

Judge

04/11/2020

Court: Ruling delivered in chambers in the presence of Robert Magige, State Attorney for the appellant and the respondent in person.

Sgd: I. C. Mugeta

Judge

04/11/2020