

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT BUKOBA (CORAM: KILEO. J.A.. LUANDA. 3.A. And MUSSA. J.A.) CRIMINAL APPEAL NO. 363 OF 2013 AFIDH HABIBU..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Bukoba) (Khadav, J.1 dated the 02nd day of October, 2013 in HC Criminal Appeal No. 19 of 2010 JUDGMENT OF THE COURT 11th & 13th March, 2014 KILEO. J.A.: The appellant, Afidh Habibu appeared before the District Court of Ngara in Criminal case no. 69 of 2009 to answer a charge comprising of two counts. On the first count he was accused of assaulting an insurance officer contrary to section 243 (c) of the Penal Code and on the second count he was charged with possession of forged motor cycle insurance contrary to section 337 of the Penal Code. The District Court found him guilty on both counts and an omnibus sentence of conditional discharge (which was subsequently corrected by the High Court) was imposed for both counts. On appeal to the High Court the conviction entered on the charge of assault was sustained while conviction on possession of forged motorcycle insurance was quashed. The charge upon which the appellant was convicted states: 1st COUNT: OFFENCE SECTION AND LAW: ASSAULT INSUARANCE OFFICER WHILE ON DUTY C/S 243 (C) OF THE PENAL CODE CAP 16 VOL 1 OF THE LAWS: PARTICULARS OF OFFENCE: That AFIDH S/O HABIBU charged on 29h day of June 2009 at about 14:20 hrs at Kabanga Village within Ngara District in Kagera, wilfully assaulted LAURIAN S/O NKWABI a Director of Insurance Operation in Tanzania Officer in the due execution of the his inspection to motor cycle Reg. T.748 A W make TVS which belongs to you. We will revert to a discussion of the propriety of the charge later. Being aggrieved by the decision of the High Court the appellant through the services of Mr. Josephat Rweyemamu has come to this Court on a second appeal. Before discussing the grounds of appeal it befits to give a brief background to this appeal. It was the case for the prosecution at the trial that on 29/06/2009 PW3, PW2 and PW1 were in an operation on behalf of the National Insurance Company to inspect and detect motor vehicles and motor cycles that were operating without the necessary insurance cover. PW1 was a police man, PW2 and PW3 claimed to be officers of Basoga Holdings which were allegedly in the employ of the National Insurance Corporation. PW3 was leading the operation. In the process they came across the motorcycle owned by the appellant which they found to have a forged insurance certificate. The motor cycle was parked near a certain house. As PW3 was in the course of seizing the motorcycle in order to take it to the Police Station the appellant appeared demanding to know why and where was the motorcycle being taken. The

appellant is said to have picked up a quarrel a result of which he assaulted PW3. These are the facts upon which the appellant's conviction was sustained. The memorandum of appeal contains the following three grounds:

1. In the absence and rejection of the PF3 exhibit P5 the Court wrongly proceeded to convict the accused on the offence in the first Count.
2. In the light of the fact that the complainant was executing an unlawful and unauthorized purpose a con man for that matter, it was wrong to believe the testimony of his evidence as well as his companions as opposed to the weight of evidence by the appellant and his witnesses.
3. In the light of what transpired and accepted by the Court as regards the second Count and the admission by the respondent that there was no such company known as Busoga Holdings nor any agency of such company to NIC, it was to be held that the purported arrest of the appellant was in fact unlawful. Arguing the appeal on behalf of his client Mr. Rweyemamu submitted that the PF3 having been expunged from the record, there remained not enough evidence to sustain the conviction of assault. The learned counsel also submitted that the appellant was entitled to resist the seizure of his motorcycle as it was unlawful. Mr. Athumani Matuma, learned State Attorney who appeared on behalf of the respondent Republic supported the appeal. The learned State Attorney was of the view that even if it was proved that there was assault; the question would still remain as to whether it was justified. Taking us through the evidence, Mr. Matuma pointed out that it was not indicated anywhere in the record that PW3 and those in his company ever introduced themselves to the appellant before proceeding to seize his motorcycle. In the circumstances, in terms of sections 18, 18A and 18B of the Penal Code the appellant was entitled to use reasonable force in the defence of his property, the learned State Attorney submitted. The relevant parts of the provisions cited by Mr. Matuma state: "18. Subject to the provisions of section 18A, a person is not criminally liable for an act done in the exercise of the right of self defence or the defence of another or the defence of property in accordance with the provisions of this Code. 18A (1) Subject to the provisions of this Code every person has the right-
 - (a)
 - (b) to defend his own property or any property in his lawful possession, custody or under his care or the property of any other person against any unlawful act of seizure or destruction or violence. 18B. (1) In exercising the right of self defence or in defence of another or in defence of property, a person shall be entitled to use only such reasonable force as may be necessary for that defence." Going through the record it is glaringly clear that the prosecution witnesses did not introduce themselves to the appellant prior to the seizure of his motorcycle. PW3 who was the principal witness for the prosecution and who claimed to have been assaulted found the motor cycle parked, seized it and started dragging it, allegedly to the Police Station even without inquiring as to who was the owner. In such

circumstances anyone might have thought that the motorcycle was being stolen. No wonder the appellant wanted to know where and why they were taking his motorcycle. We are satisfied that the appellant was justified, in view of the circumstances to use reasonable force in the defence of his property. The next question is, did he use reasonable force? Mr. Matuma was right in his submission that in the absence of the PF3 it would not be possible to ascertain the extent of the injury sustained by PW3. Moreover, evidence shows that there was no use of any weapon but only fists were used. The use of fists in the surrounding circumstances cannot be said to be use of excessive force. Reverting to the question of the charge, Mr. Matuma submitted that it was defective in that the provision under which the appellant was charged did not cover insurance officers who get assaulted in the due execution of their duties. The learned State Attorney's argument is sound. It is obvious that the provision of the law that the appellant was said to have contravened has nothing to do with the assault of insurance officers who are assaulted in execution of their duties. The said section 243 (c) of the Penal Code provides: "243. Any person who- (a).....

(b)

(c) assaults any person in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or respecting any trade, business or manufacture or respecting any person concerned or employed therein.;

(d)

(e) is guilty of an offence and liable to imprisonment for five years. As pointed out by Mr. Matuma, the trial magistrate saw the anomaly but he resolved it by merely stating that the appellant ought to have been charged under sub section (e) of section 243 of the Penal Code instead of sub section (c). We are of the settled mind, and we concur with Mr. Matuma's submission, that subsection (e) could not in any event have been applicable as the lawful execution of duty was not established. The conviction which was based on the defective charge ought not in the circumstances to have been sustained. In view of our considerations above, we find that the appeal by Afidh Habibu was filed with good cause. We accordingly allow it. We quash the conviction entered and set aside the sentence imposed. The order of compensation is also set aside. DATED at BUKOBA this 12th Day of March, 2014. E. A. KILEO JUSTICE OF APPEAL B. M. LUANDA JUSTICE OF APPEAL K. M. MUSSA JUSTICE OF APPEAL I certify that this is a true copy of the original. Z. A. DEPUTY REGISTRAR COURT OF APPEAL

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