

TANZANIA / JUDGMENT

20141201 TZHC Mbeya

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- IN THE HIGH COURT OF TANZANIA AT MBEYA DC. CRIMINAL APPEAL NO. 47/2014
(Original Criminal Case No. 412014 Mbeya District Court) EZEKIEL KING
•1 ST ..APPELLANT ANTHONY SIMON KAVURUNGE..... 2 ND APPELLANT VERSUS
THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last order: 29/10/2014 Date of Judgment: 01/12/2014 A. F. NGWALA, J. The Appellants were convicted of the offence of causing grievous harm, contrary to Section 225 of the Penal Code, CAP 16 R.E. 2002, they were sentenced to seven (7) years imprisonment. Still protesting their innocence, they have appealed to this court. Before commencement of the hearing of the appeal in September, 2014, the first Appellant died while in prison. Consequently, the appeal against him abated. The Appellants were represented by Mr. Baraka Mbwilo, learned Advocate. The Respondent Republic represented by Ms. Juliana leana State Attorney. 1 V In the Petition of Appeal, the Appellants listed three main grounds of appeal, namely; That the trial court erred in Law and facts when convicted and sentenced the Appellants, while the prosecution case was not proved beyond reasonable doubt. That, the Trial Court erred when it admitted PF3 as an exhibit which was weak to be relied upon. That, the Trial Magistrate erred in law and fact in shifting the burden of proof onto the Appellant. The facts as established by the prosecution side, which led to the conviction of the Appellants are that, on October, 4, 2013 at around 9:00 PM at Itiji area within the City and Region of Mbeya, the Appellants jointly did cause grievous harm to PWI Nicolaus Mwakasinga on different parts of his body. On the material date, PWI Nicolaus Mwakasinga was at the local Pombe Shop at Msomba, drinking local beer. PWI entered in the room, in which the second Appellant DW2 was selling local beer for the purpose of drinking. After entering that room, PWI found three people together with the second Appellant DW2 who pushed PWI and kicked him out. Then, the second Appellant DW2 phoned and called the first Appellant DWI and said, "Ezekiel King, nimemkamata Mwakasinga". DWI, holding a wire in his hand, together with other three men. They started to beat PWI severely. 2 They caused serious injuries to his body and legs. After the) beatings, they carried PWI) to the Central Police Station, A PF3 was issued. The Appellants carried PWI to the Mbeya Referral Hospital. The Appellants denied involvement with the offence charged. The Trial Magistrate was convinced and satisfied with the prosecution evidence. The Appellants were therefore convicted and sentenced to seven (7) years imprisonment. Mr. Mbwilo, contended on appeal that, the Appellants were not properly

identified. He submitted that the evidence of PWI was weak to be relied on by the trial Magistrate to convict the Appellants, because it is based on "eye identification" during the night. The possibility of PWI to have mistaken the identity of the appellants, as the persons who had beaten him was sufficient. He submitted that, the conditions set by WAZIRT AMANI VR, (1980) T.LR.250 were not met. Mr. Mbwilo further stated that, PWI (Nicolaus Mwakasinga), failed to state the exact time when he was beaten. The learned State Attorney replied that, there was no mistaken identity at that place where the victim met the Appellants. There was electricity light which made it possible for PWI to identify the second Appellant, DW2. The room had light from electricity. The victim PWI knew the Appellants before the incident. Ms. Juliana insisted that the Appellants were not strangers to him. These, facts made it possible for PW1 to identify the Appellants, except the other two people whom he had never seen them before. 3 The learned State Attorney argued that time factor is not an issue. There was no place on the charge sheet where the prosecution had stated this. And hence no proof of time. She insisted that time is not a fundamental element of the offence. The elements of the offence were proved beyond shadow of doubts. The appellants were properly convicted. On the second ground of appeal, Mr. Mbwilo, submitted that, the PF3 that was admitted as an exhibit was weak and defective to be relied upon. The PF3 contains alterations. The person who altered the PF3 was required to sign so as to authenticate the alterations. The learned counsel argued that, this was a cooked case, because the appellants were arraigned on 9th January, 2013 while the matter was reported in December. No reasons, for the delay to arrest the appellants were provided. He therefore doubted on the credibility of the witnesses. The earliest possibility of naming a suspect is an assurance of the witness veracity. On the error in admitting the PF3 the State Attorney retorted that this has no logic. The PF3 was tendered by the Doctor (PW2) who filled it after conducting the medical examination, this is a proper procedure. The Appellants did not object the tendering and admission of the same. Regarding the delay in procuring the Appellants before the Subordinate Court, she submitted that the argument is baseless because he did not state as to when they were arraigned to the Subordinate Court. 4 On the last ground of appeal, the learned Advocate submitted that, the trial Magistrate failed to understand the defence of DWI who was a Village Chairman, responsible for security issues. The reasoning of the trial Magistrate had shifted the burden of proof to the Appellants, something that is contrary to the principle of criminal law of proving the prosecution case beyond reasonable doubt. The learned State Attorney submitted that, the trial Magistrate analysed the evidence and was satisfied that, the prosecution side had proved the case beyond reasonable doubt. It was not true that the defence evidence was disregarded. In the Judgment, the trial Magistrate considered the evidence from both sides. With regard to the Appellant's complaint relating to unexplained delay in affecting the arrest of the appellant. The records show that, the matter was reported in December, 2013. PWI Nicolaus Mwakasinga identified the Appellants on 4th October, 2013. The Victim (PWI) should have named the Appellants on that date at the Police Station. The failure to do so raised doubts on the prosecution credibility of the witnesses. In the Case of AZIZI ATHUMANI @ BUYOGERA VR, CR. APP. NO. 222 OF 1994 (unreported) the Court observed inter alia that:- "While unexplained delay to name a suspect may justify fears on the veracity of a witness, if need not be where there is a plausible explanation.....". 5 In the case at hand, there is no such explanation. The discount of

seven days that, PWI (Nicolaus Mwakasinga) spent in Hospital bed; PW3, the son of PWI (Nicolaus Mwakasinga) who was informed by PWI that the Appellants had beaten him, casts doubt on the veracity of the evidence of the witnesses. The record is silent as to why PW3 did not name the Appellants earlier in the absence of PWI (Nicolaus Mwakasinga) who was in Hospital. In answering this question, this Court borrows the wisdom in the Case of IBRAHIM SHABANI AND SHABANI ALLY KALULU VR, CR. APP. NO. 110 OF 2002 (unreported) the Court inter alia, observed: - "It is our opinion that, the slackness in arresting the Appellants was not due to inefficiency, but to lack of information as to who they were to arrest". The delay in arresting the Appellants casts doubt on the credibility of PWI and his son PW3. Now, I move to the other ground of complaint, on the issue of identification. The law on the evidence of visual identification is now settled. This evidence should only be relied upon, when all possibilities of mistaken identity are eliminated and the Court is satisfied that, the evidence before it is absolutely water tight. This principle was enunciated in the celebrated Case of WAZIPJ AMANI VR, (1980) T. L. R, 250 at page 252. The identification of the Appellants was not clear given the sequence of events and the source of light. The condition laid down in WAZIRI AMANI (Supra) was not met. In the circumstances of this case, as contended by the appellants, the descriptions of all or at least one of the appellants would have helped in lending credence to his evidence of identification. Indeed, in the context of this Case, the Case of MOHAMED ALHUI V. REX (1942) 9 EACA 72 is relevant. The court observed:- "In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of highest importance of which evidence ought always to be given, first of all, of course, by persons who gave the descriptions and purport to identify the accused, and then by person or persons to whom the description was given". As already pointed out, PWI Nicolaus Mwakasinga did not describe the Appellants. In similar vein, no evidence was reported forth coming from the Police to indicate that PWI ever described to them the Appellants, when PWI reported the incident to the Police. That being so, it can not be doubted, in my opinion, to say that, PWI had not duly identified the Appellants on the fateful day. There were some doubts in his evidence of identification. The doubts ought to have been resolved in favour of the Appellant, by giving them the benefits of doubt. 7 On the last ground of appeal, I agree with the learned counsel that the trial Magistrate erred in shifting the burden of proof onto the 2) Appellants. The law in criminal cases is very clear; that whether the appellants gave a weak defence or decided to remain silent, the burden of proving the case beyond reasonable doubt remains the noble duty of the prosecution side. In the Case of JONAS NKJZE VR, (1992) T. L. R, 213. Katiti, J (as he then was) observed, inter alia, that:- The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law and forgetting or ignoring it is unforgivable and is a peril not worth taking". For the said reasons, I am satisfied that the prosecution side had not established their case to the standards required under the law, that it was the Appellants who really wounded the PWI (Nicolaus Mwakasinga). The credibility of PWI and PW3 is questionable. In the end result, the appeal is accordingly allowed. The conviction and the sentence of seven (7) years imprisonment are quashed. The appellant is to be set free forth with unless otherwise lawfully held. A all!

x. A.F. Ngwala Judge \ 01/12/2014 r 8 ...

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