

TANZANIA / JUDGMENT

ZENA MUSSA JUDGMENT

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10 October 2024

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IN THE HIGH COURT OF TANZANIA (MWANZA SUB-REGISTRY) AT MWANZA PC. CRIMINAL APPEAL NO. 12561 OF 2024 (Arising from Criminal Appeal No. 17 of 2023 in Nyamagana District Court at Mwanza and from Criminal Case No. 1868 of 2023 in Mwanza Mjini Primary Court at Mwanza) HASSAN ISSA.....APPELLANT VERSUS ZENA MUSSA.....RESPONDENT

JUDGMENT

10th September & 10th October, 2024 KAMANA, J. This is a second appeal. Briefly, Ms. Zena Mussa, the respondent was a complainant in Criminal Case No. 1868 of 2023 in Mwanza Mjini Primary Court. It was the respondent's case that on 16th July, 2023, Mr. Hassan Issa, the appellant, assaulted her in various parts of her body. She testified that the source of the incident was her allegations that the appellant's young brother had stolen her money from the handbag. The appellant denied committing the offence. Upon full trial, the appellant was convicted of assault contrary to section 240 of the Penal Code, Cap. 16 [RE.2019]. 1 Aggrieved by the conviction and sentence, the appellant appealed to Nyamagana District Court in Criminal Appeal No. 17 of 2023. His grounds of appeal were:

1. That the trial court erred in law to convict and sentence him upon the respondent's failure to prove her case beyond a reasonable doubt.
2. That the trial court erred in law and fact for failure to make an analysis and evaluation of the evidence while convicting and sentencing him. The first appellate court heard the appeal by way of written submissions. The first appellate court upheld the trial court's decision. Hence, this appeal. In this second appeal, the appellant is armed with three reasons as follows:
 1. That the first appellate court erred in law and fact for failure to afford the appellant the right to be heard on submission in chief which amounted to denial of such right.
 2. That the first appellate court erred in law and fact to uphold the trial court's decision upon the respondent's failure to prove her case beyond a reasonable doubt. 2

3. That the first appellate court erred in law and fact to uphold the trial court's decision upon the trial court's failure to make critical analysis and evaluation of the parties' evidence. The appeal was disposed of by way of written submissions. Both parties complied with the scheduling order. For the purpose of this judgment, I will focus on the third ground as it determines the matter. Submitting in support of the third ground, Mr. Denis Paulin, learned Counsel for the appellant, contended that the impugned judgment is short of the essential ingredients of the judgment. He lambasted the said judgment for lacking critical analysis of the evidence adduced by the parties during the trial. He added that the first appellate court did not supply reasons for upholding the trial court's decision. supporting his arguments, the learned Counsel cited the case of Abel Masikiti v. Republic, Criminal Appeal No. 24 of 2015-CAT (Unreported); and Hamis Rajabu Dibagula v. Republic [2004] TLR
196. He summed up his argument by inviting this Court to nullify the proceedings and orders of the lower courts. Responding, the respondent submitted that the first appellate court found no reason to fault the decision of the trial court as the latter court analyzed the evidence adduced before it and found that the respondent's evidence was heavier than that of the appellant. To buttress her stance, the respondent invited this Court to consider the case of Lutter Symphorian Nelson v. The Hon. Attorney General and Ibrahim Said Msabaha [2000] TLR 429. She urged this court to dismiss the appeal. At this point, I wish to restate the cardinal principle that the first appellate court must critically reevaluate the evidence adduced during the trial before coming to its conclusion and provide the reasons for such a conclusion. In essence, the first appeal is the rehearing of the case and it is compulsory for the first appellate court to re-examine the evidence before coming to its conclusion. This position was enunciated in a plethora of authorities including the case of R.D. Pandya v. Republic [1957] EA 336 where the defunct East African Court of Appeal had this to state: 'It is a salutary principle of law that a first appeal is in the form of re-hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion.' In the first appellate court's judgment, before upholding the trial court's judgment, the former had this to state: 'Having heard both sides and perused the lower court file, this court found the proceedings on record overt with no unprocedural or 4 irregularities done by the lower court. Both sides were given an opportunity to be heard. The respondent/plaintiff/complainant evidence was fortified by SM2 one PRIKALIA BUCHAND and SM3 the Clinical officer who examined and treated the respondent after being beaten. Their statements were in tally. To disapprove the respondent/complaint case he brought his young brother only while he had a wider chance to bring any person apart from themselves to say that he/she did not see the appellant/accused beating the respondent. From the accounts stated above, this court nurtures the lower court Judgment. Costs to follow the event. Order accordingly.' With respect, the first appellate court abdicated its duty to re-evaluate the evidence adduced in the trial court. I am aware that this being the second appellate court is precluded from interfering with the concurrent findings of the lower court unless there is a misapprehension of evidence occasioning a miscarriage of justice. Had the first appellate

court re-evaluated the evidence and come to the same findings as the trial Court, I would not have hesitated to step into the first appellate court if the findings would have the effect of occasioning a miscarriage of justice. However, before me, there are no reasons for such findings as 5 the impugned judgment is short of analysis of the evidence adduced during the trial. I am further aware that the second appellate court has the discretion to either step into the shoes of the first appellate court and analyze the evidence or remit the matter to the first appellate court for recomposing the judgment. See: Hassan Mzee Mfaume v. Republic

[1981] T.L.R. 167. In the upshot, I invoke my revisionary powers by setting aside the judgment and orders issued by the first appellate court. Further, I remit the case file to the first appellate court for recomposing the judgment by another Magistrate. No order as to costs. Right To Appeal Explained. It is so ordered. DATED at MWANZA this 10th of October, 2024. KS KAMANA JUDGE 6

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