

TANZANIA / JUDGMENT

20190326 TZHC Mwanza

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. I \ I I (\ I HIGH COURT OF TANZANIA I I (DISTRICT REGISTRY) ATMWANZA I I HC. CRIMINAL
1APPEAL NO. 326 OF 2018 I I (Arising from the Judgment of the District Court of Misungwi; in
Criminal Case No. 106/ 2018) I . 1. WAVA S/O MALEKALJ, f>.. ~ . ,.; \ /);~~ . THE
REPUBLIC:..... ,..... RESPONDENT (J~~v . ~ ~ Ju~mh~~ \ Last Order:
08.03.- A.Z.MGEYEKWA, J \ \ ~ ~ c t Court of Misu~gwi, the appellants namely; Waya I 1 S/O
Malekale, Mila S/O Mashauri .and Paschal S/O Shije jointly and together were stand charged for
causing grievous harm .C/S 225 of the Penal Cod~ Cap.16 [R.E 2002].\The particulars count; on the
14th day of August 2018 around 07: 30 hours at Mwamaguha Village I I I I I \ i i l c I I I within
Misungwi District in· Mwanza Region beat one Mihayo D/0 Kubelela and caused her to suffer
grievous harm. I I . \ The background concerning this appeal is as follows. PW1 testified that on
the 14th day of August 2018 morning hours he found 1 ' people were uprooting his dengu· from
his farm. PW1 asked the accused why are they uprooting his dengu then sh~sed the alarm. The
accused started to beat PW1 until she was~ttAcon_ sc~snes~ The \ \ ~ "V/ appellant was brought to
court and d:iarged\witti toree counts of. . ' "'(\ 1/. ',-,..) offence as stated above. The „appellant
was not"t~tisfied hence this appeal. . 1 • ' • \) The appellant filed~~',Qrounds. as follows the same
can be reduced to threJ~~u~~-a~al as follows: One, that th~e exhibit P01 was wr~IY. relied_ot:llb}
the trial court. Two, the rights ~ ~ "- ~ of defence u~c:ler'sE!ction~ of the Criminal Procedure Act,
Cap.20 [R.E 20Q2] ~~~l~hree, the prosecution case failed to prove h /~b~d' "" b d b t e \ \ eye~~~na
le ou t. 1 At~ring of the appeal, the appellants appeared in person while Ms. · Flyeregete, learned
I State Attorney represented the respondent, Republic .. The appellant prayed for this court to
adopt his grounds of· I appeal. \ I Ms. Flyeregete on her part supported the conviction and
sentence for the reasons to be advanced herein. Arguing for ground number one of the appeal,
Ms. Flyeregete submitted that the court erred in relying on exhibit P01 she stated I that PW1
tendered the PF3, exhibit P01, and the appellant did not object. She continued to state that the
appellants ~e~mpiled that the procedure of tendering the.. exhibit was~ft.,Joll~e~./4) was
contrary to section 240(1)93) of the Cr~inal P~-Act?c:p. 20 . : ~ \V/'-0 [R.E 2002] the section
required the court,whern (admitting medical evidence to call a Doctor to enab~Q~~~~o cross-
examine the Doctor. She added ~ ~~~~ admitted without .informing the appellantsltiferefor~~~~e
be expunged from the court records. · ~ - · ~ ' case ~eyond ~asonable doubt. She said on the 14th
day of August 2018 Y o u r s the appell~nts' uprooted PW1 dengus. She continued to submit that
after that PW1 raised the alarm and the appellant him arid cause him grievous harm. Ms.
Fleregete added that the prosecution evidence of PW1, PW2, PW3, and· PW4 was I I I credible

because they saw the appellants beating the victim. The learned State Attorney submitted that the crime occurred in the morning; therefore, the appellants were well identified since they reside in the same Village. She added that although the exhibit P01 is expunged, it cannot supersede the evidence of eyewitnesses. The learned State Attorney further submitted that the appellant had an opportunity to cross-examine PW1, but they opted not to do so; therefore, it was an admission that what PW1 testified was correct. To support her argument she cited section 122 of the Evidence Act, Cap. 6 [R.E 2002] and the case of *Nicholaus @ Jeshi & another v R Criminal Appeal No. 1 of 2010* (unreported). The learned Judge stated that the defence case was not considered as a bar to the appellant's duty to testify, but the trial Magistrate found exhibit P01 and PE2 the trial Magistrate was still duty bound to comply with section 291 (3) of the Criminal Procedure Act Cap. 20 [R.E 2002]. The irregularities in the reception of exhibit P01 deprived the appellant the right to know not only the content of exhibit P01 but also the right to cross-examine which goes to the root of the minimum standard of an unfair trial. In the case of *Thomas Ernest I I 4, r. (Msungu @ Nyoka Mkenga v R Criminal Appeal No. 78 of 2012)* (unreported), it was held that: "... even if in this case the defence counsel did not object to the production of the post mortem report the trial judge was still duty bound to comply with section 291 (3) of the CPA." I accordingly expunge the exhibit P01 from the court record. Once I have expunged the exhibit P01 the evidence of the testimonies of Mihayo D/O Kubelela, Seleestina S/O Kulwa Mwamaguha (PW2), Kurwa Siyamba Mar-e (PW3), Dotto S/O Shija Mwamagwaha (PW4) from the same Village. It is in the record that the first accused by his name Waya, admitted that he did not mention the names of the 2nd and 3rd accused. PW2, PW3, and PW4 did not mention the names of the appellants and they know the appellants well. If they knew them why didn't they mention their names? and describe their taking to account that the incident has occurred in the morning. Apart from the PF3 being expunged but I expected a Doctor as an important witness and neutral person was supposed to be called to testify. Therefore, I stand to differ with the learned State Attorney that the PF3 was an important exhibit to prove that PW1 was beaten and injured since the appellants have denied committing the said offence. Without the PF3 the matter is left unsolved as to whether the victim was real beaten or not. Taking to account that the incident occurred in the morning but the identification of the appellants is flawed. The prosecution witnesses have just stated that they identified them because they knew them and they are residing in the same Village. If they were in the same Village PW2, PW3, PW4 were in position to describe the offence and to name the appellants in the earliest opportunity. As it was stated in the case of *Ibrahim v R* [1992] 1 TLR 100, the Court of Appeal of Tanzania said: "In every case where there is a question as to the identity of the accused, the evidence of the highest importance of which evidence ought always to be given..." Similarly in the case of *Marwa Wangiti Mwita and Another v The Republic*, Criminal Appeal No. 6 of 1995 (unreported) it was stated as follows: "The ability of a witness to name a suspect's name at the earliest opportunity is an important assurance of his reliability." In the case of *JARIBU ABDALLAH v THE REPUBLIC*, Criminal Appeal No. 220 of 1994, the Court of Appeal of

Tanzania had the following to say: - 'I in matters of identification) it is not enough merely look at 'credibility of witnesses. The conditions for (identification) ~, factors favouring accurate identification. Equally important is the appeal ideal but that is no guarantee against unjustified. I ~ _} f. Guided by the above authorities, I find that the reason that the incident occurred in the ~~~~ does not suffice; thus the identification evidence ~~~~~ is unreliable. . The trial court was (not) corroborated evidence to ~~~~ - ~ prove that the appellant is the one who uprooted the dengue in the land of Pwani. ~~~~~ of corroborating evidence, there is very little evidence left to connect the appellant with the offence. Therefore the prosecution case did not have a strong legal leg to ~~~~~ leading to the conviction of the appellant. Fortified by this sober legal truth, the conviction cannot stand. I With the above reasons, I find no need to discuss the other grounds of appeal which were raised by the appellant as to do so I would be a mere academic exercise. It only suffices to hold that, ~, there was no justification in finding the appellant culpable to the charged offence. It is so ordered. I I 8

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