

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)**

AT MWANZA

CRIMINAL APPEAL NO.83 OF 2019

(Appeal from the decision of the district court of Misungwi before honorable ER Marley dated the 20th day of April 2020 criminal case NO.26 2020)

KANGA ALPHONCE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Last Order: 29.07.2020

Judgment Date: 29.07.2020

A.Z.MGEYEKWA, J

The appellant KANGA ALPHONCE was arraigned by the District Court of Misungwi and stand charged for causing grievous harm contrary to section 225 of the Penal Code Cap.16 [R.E 2019].

A brief account of the evidence which led to the conviction of the appellant is as follows; it was alleged by the prosecution that ON 18TH DAY OF February 2020 around 16:00 hours at Nguge Village within Misungwi District in Mwanza Region, the accused did willfully and unlawfully beat one EMMANUEL S/O MANYASI to suffer grievous harm.

Having, accepted the prosecution's version to be true the trial court convicted the appellant and he was sentenced to serve 30 years imprisonment. Undaunted, the appellant has preferred this appeal. In the petition of appeal, he has raised two grounds of appeal as follows:-

- 1. That, the trial Magistrate erred in law to the extent that there were procedural irregularities both in judgment and proceedings which resulted in convicting the appellant based on the PF3 tendered by the victim without adherence to the section 240 (3) of the criminal procedure Act, Cap 20.*
- 2. That, the trial magistrate erred in law and fact by convicting the accused person basing on the evidence adduced by the prosecution witnesses which was not sufficient to prove the case beyond reasonable doubt, the required standard.*

The hearing was done through audio teleconference, whereas, the appellant enjoyed the service of Mr. Eric Mutta, learned counsel,

and the respondent was represented by Mr. Castus Ndamgoba, learned Principal State Attorney.

Supporting the appeal, Mr. Mutta opted to combine and argue the grounds of appeal together, he submitted that the trial Magistrate misdirected himself in not considering the requirement of the law, specifically section 240 (3) of Criminal Procedure Act Cap. 20 [R.E 2019]. He argued that the victim had the right to call the person who prepared the PF3 to enable him to cross-examine him. Mr. Mutta went to state that the Magistrate admitted the PF3 which was tendered by PW1 as an exhibit without coupling with the said section. Mr. Mutta fortified his submission by referring this court to the case of **Mashaka Zakayo v R** Criminal Appeal No.130 of 2019 High Court at Mwanza (unreported).

In conclusion, the learned counsel for the appellant urged this court to expunge the PF3 from the court records for failure to inform the appellant on his rights to cross-examine the Doctor and find that the appellant was wrongly convicted and allow the appeal.

In his reply, the learned Principal State Attorney supported the appeal. He submitted that the appellant was not given a chance to cross-examine the Doctor as per section 240 (3) of the Criminal Procedure Act, Cap.20 [R.E 2019]. Mr. Ndamgoba added that the PF3 was also not read in court to afford the appellant's right to understand the contents of PF3. He joined hands with the learned counsel for the appellant that the PF3 be expunged from the court records.

He continued to argue that what is expunged from the court records is the PF3 not the evidence but even the evidence on record is not heavy enough to ground conviction upon the appellant. He went on to state that the offense of grievous harm c/s 225 of the Penal Code Cap. 20 [R.E 2019] requires the prosecution to prove that the victim was injured without a PF3 in place the prosecution is left with no other proof.

Having considered the grounds of appeal and the submissions made by the learned State Attorney and the appellant, I will determine the issue of ***whether or not the present appeal is meritorious.***

Using this legal benchmark, the prosecution dutifully, lined up three prosecution witnesses also tendered a PF3 (Exh.P01) which in total intended to prove the case to the standard required by law.

In relation the first ground of appeal, that the PF3 was wrongly admitted as evidence, I had to peruse the court records and found that the PF3 was tendered by PW1 and the court asked the accused if he had any objection then it proceeded to admit the PF3 and the same was marked as Exh. P01. However, as rightly pointed out by Mr. Mutta and Mr. Ndamgoba the trial Magistrate did not afford the appellant's right to call the person who prepared the PF3 to allow the appellant to cross-examine him. Section 240 (3) of the Criminal Procedure Act, Cap.20 [R.E 2019] provides that:-

*" 240 (3) When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and **the court shall inform the accused of his right to require the person who made the report to be summoned following the provisions of this subsection.** [Emphases added].*

In my considered opinion, it was not proper for the trial court to disregard the right of the accused person to cross-examine the Doctor who prepared the PF3 over the correctness and authenticity of the PF3.

Another ailment pointed out by Mr. Ndamgoba, learned Principal State Attorney that the PF3 was wrongly admitted in court because it was not read over. The procedure for admission of PF3 is regulated by the Evidence Act, like any other documentary evidence, whenever it is intended to be introduced in evidence, it must be initially cleared for admission and then actually admitted before it can be read aloud. This was stated in the case of **Walii Abdallah Kibutwa & 2 Others v R**, Criminal Appeal No. 181 of 2006, and in the case of **Omari Iddi Mbezi v Republic**, Criminal Appeal No. 227 of 2009 (both unreported).

In the trial under scrutiny on page 8 of the trial court typed proceedings, it is shown that the PF3 upon admission as exhibit P01 was not read over to the appellant as required by the law thus the same is a fatal irregularity. Therefore, I proceed to expunge Exh. P01

from the court records. For the aforesaid finding, I find that the case against the appellant was not proved to the hilt.

Under the circumstances, I allow the appeal. I quash the conviction and set aside the sentence. I order the immediate release of the appellant from prison unless he is lawfully held for other lawful purposes.

Order accordingly.

DATED at Mwanza this 29th day of July 2020.


A.Z.MGEYEKWA

JUDGE

29.07.2020

Judgment delivered on this 29th day of July 2020 via audio teleconference and Mr. Mutta, learned counsel for the appellant and Mr. Ndamgoba, learned Principal State Attorney were remotely present.




A.Z.MGEYEKWA

JUDGE

29.07.2020