

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**(PC) CRIMINAL APPEAL NO 37 OF 2019**

(Arising from Criminal Appeal No 12/2019 delivered on 16<sup>th</sup> October, 2019 at Magu District Court Before Hon. E.P. Kente - RM)

**JUMANNE MICHAEL .....APPELLANT**

**VERSUS**

**TENDERWA MWEBEYA .....RESPONDENT**

**JUDGMENT**

11 & 20/05/2020

**RUMANYIKA**

The 2<sup>nd</sup> appeal is against judgment and decision of 16/10/2019 of Magu district court. The later having reversed decision of Nyanguge / Kongolo primary court dated 1/3/2019 whereby the court convicted and sentenced him to 2 months the latter having had acquitted Jumanne Michael (the present appellant) from the charges of assault causing bodily harm Contrary to Section 241 of the Penal Code Cap 16 RE. 2002 on that the case wasn't beyond reasonable doubts proved.

Rephrased, the 4 grounds of appeal very briefly revolve around three (3) main points:-

- 1) That the respondent did not prove that indeed he was assaulted because no copy of PF3 was produced.
- 2) That the 1<sup>st</sup> appeal court improperly evaluated the evidence on record.
- 3) That if anything, the appellant should have been charged jointly and together with the other alleged two assailants.

Like the appellant, Tenderwa Mwebeya (the respondent) appeared in person.

When the appeal was called on 11/5/2020 for hearing, but following global outbreak of the Coronavirus Pandemic and pursuant to my order of 17/3/2020 the parties were present online (mobile numbers 0745 254 323 and 0754 752 505) respectively, by way of Audio Teleconferencing they were heard;

Each of them made no useful submissions as they had nothing material to add to the petition of appeal or reply thereto respectively.

The evidence on record are brief and straight forward as follows:-

SM1 Tenderwa Mwebeya stated that just as he was at their family grave yard and he found it physically disturbed, too the appellant and father arrived, they threatened and beat him up then he reported the appellant to police hence the case. That is all.

SU1 Jumanne Michael stated that as he was on 2/12/2018 at his shamba selling maize to a customer from Mwanza, too the respondent, the latter's brother and two others arrived, they asked for, and he gave them

some maize, one of them took some photographs then they left the place undisturbed by anyone.

SU2 Deshi Kasungi a resident of Buswelu area Mwanza stated that together with SU1 they had been at the scene of the alleged crime as he was buying some maize (materially he supported evidence SU1).

In his judgment and findings, the learned resident magistrate said:-

**... During the hearing of this matter the respondent denied to have been at the mentioned shamba, and therefore that he did not attack the appellant. The aspect of not making noise does not necessarily mean that the appellant was not attacked ... I am of the humble approach that the respondent was attacked by the respondent... I find the respondent guilty and convict him accordingly...**

The issue could be whether the appellant assaulted the respondent. The former, during the 1<sup>st</sup> appeal he denied at the material time if at all having had been at the scene of crime he contradicted himself (given his testimonies on record). Rightly so in my considered view but quietly out of it the learned resident magistrate he took adverse inference and she convicted him. The appellant was so fortunate that he was so leniently sentenced to 2 (two) months only .

Nevertheless from its inception, and given SM1's evidence the circumstances of the case suggested between them there having been a

land dispute. The appellant said it just scantily herein. The respondent's testimony that just on his arrival he found their grave yard disturbed, shortly on his arrival the appellant ran wild/ violent and he assaulted him the vital evidence should not have been left to go it left much for the two courts bellow to inquire. Leave alone if at all on their arrival the respondent and company they just took photographs and quitted. The 1<sup>st</sup> appeal court should have investigated with a view to ascertaining what had it all about to do with the incident, who, may have disturbed the grave yard, when and why. Leave alone why, if any one took photographs of it and he quitted the place etc.

Had the two courts considered all the above they should not even have entertained any criminal proceedings. If anything, and it is trite law whatever might have happened reasonably or not until such time as against one the issue of ownership was determined by a court of competent jurisdiction, any one of them might have exercised their bonafide claim of right over the piece of land. Appeal is for that reasons allowed. Should the dispute persist the parties are accordingly advised. It is ordered as such.

Right of appeal explained.

  
**S. M. RUMANYIKA**  
**JUDGE**  
**17/05/2020**

It is delivered under my hand and seal of the court in chambers this 20/5/2020 in absence of the parties with notice (copies to be supplied immediately).



  
**S. M. RUMANYIKA**  
**JUDGE**  
**20/05/2020**