IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 40126 OF 2023

(Arising from the District Court of Mpwapwa at Mpwapwa in Criminal Case N0. 52 of 2023)

KALEBI DAUDI MBEHO.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 07/03/2024

Date of the Judgment: 20/03/2024

LONGOPA, J.:

This is an appeal against the conviction and sentence on offence of causing grievous harm C/S 225 of the Penal Code, Cap 16 R.E. 2022 entered by the District Court of Mpwapwa against the appellant. It was alleged that on 12th April 2023 at about 06:00 hours at Makutupa village within Mpwapwa District in Dodoma Region unlawfully did cause grievous harm to one Jeremia S/O Kusena by pushing him out from motorvehicle registered Reg. No. T337 BZL make Nissan Caravan causing him to suffer severe injuries on his head and chest.

On 4th December 2023, being aggrieved by the decision of the District Court of Mpwapwa the appellant instituted an appeal against the decision on the following grounds, namely:

1. That, the trial magistrate erred in law and in facts by not properly evaluating evidence given by the appellant and his witnesses thereby reaching to erroneous decision.

2. That the trial court erred in law and in facts when acted on the evidence of the prosecution side which did not prove the necessary ingredients beyond reasonable doubts that is:-

i. There was no evidence that victim sustained grievous harm for lack of X ray or other scientific documents tendered to establish that really the victim has scar cracks and ear fissure;

(i) There is no evidence that harm was unlawfully caused by the appellant;

(ii) That there was no evidence proving that the appellant participated in causing the grievous harm.

3. That, the trial Court grossly erred in law and in fact when convicted the appellant basing on accusation which were not proved thus arriving at a wrong decision thereby occasioning miscarriage of justice.

4. That, the trial court erred in law and in fact when he failed to uphold the appellant's unchallenged evidence thus arriving at a wrong decision thereby occasioning a miscarriage of justice.

On 07/03/2024, the parties appeared before me for viva voce argument on the grounds of appeal. The appellant fended for himself while the respondent was represented by Ms. Neema Taji, learned State Attorney.

The appellant took up the matter by adopting all four grounds of appeal as they appear in the petition of appeal to form part of his submission.

It was the appellant's submission that all evidence of the defence was not considered by the trial magistrate. This is despite that she availed opportunity to bring witnesses who testified but their testimonies were not accommodated in the decision. These witnesses included DW 2 who was the driver involved in the matter, DW 3 was an agent who requested the appellant to pick the victim, and DW 4 was another bus agent at the station before where the victim was picked to board in the bus. He argued that there was failure to accommodate the evidence of these witnesses in the decision of the Court.

The appellant also attacked the evidence of PW 1 for containing lies on oath before the trial magistrate that PW 1 was a passenger who paid the bus fare and lied about the place he was going on that material date. This is neither a credible nor reliable witness.

Further, the appellant attacked evidence of the medical doctor that it was weak as during cross examination the medical doctor failed to identify the place of the accident/scene of the crime. There was no evidence from the medical doctor that harm was resulting from the happenings that victim sustained during travelling by that bus. Apart from oral testimony there was nothing to indicate that the medical doctor attended to the victim at all.

On strengths of these grounds and submission the appellant prayed that this Court be pleased to release the appellant as he alleges to have been convicted and sentenced without being afforded all the rights he deserved.

The learned State Attorney for the respondent commenced her submission by stating categorically that the appeal was not supported. He urged Court to uphold the decision of the District of Mpwapwa which convicted and sentenced the appellant. It is on these introductory premises that the learned State Attorney prayed that the sentence against the appellant be enhanced as it is too lenient compared to that stipulated under section 225 of the Penal Code Cap 16 R.E 2022.

The respondent argued all the grounds jointly as they relate to failure to prove the case beyond reasonable doubts on the respondent 's side. Under section 225 of the Penal Code, Cap 16 R.E 2022 the offence in question has three main ingredients. First, the victim should be injured. Second, the injury must be caused by unlawful act. Third, there must be causation that it is the appellant/accused who caused the harm to the victim.

It was submitted that the prosecution rallied several witnesses to establish the commission of the offence. PW 1 who was the victim testified that on 12/4/2023 boarded a bus driven by DW 2 as a driver and the appellant was a conductor in that bus. PW 1 stated that he knows the appellant and that on fateful day at Makutupa Village, the appellant told the victim to drop out of the bus while the same was on motion and the victim refused thus the appellant decided to push the victim from the bus. The victim sustained injuries including vomiting blood and spilling of blood from mouth, nose and ears. The victim lost consciousness. It is good Samaritans who took him to hospital.

It was argued further that PW 3 a medical doctor corroborated that the victim sustained injuries as he received the victim at the hospital while unconscious with bruises on the hands, head and blood spilling from the mouth, nose and ears. The medical doctor proved that there were injuries sustained by the victim. He tendered PF 3 which was admitted as Exhibit P2 as reflected at page 16 of the proceedings. Finally, the medical doctor referred the victim to attend some more specialised treatments at Dodoma

Regional Referral Hospital for further treatment as major injuries were sustained including those requiring specialised medical attention.

On the other hand, DW 2 who was the driver of the said bus in which the alleged offence was committed testified in support of the defence that when they arrived at the next village he received a call informing him that the victim sustained injuries thus he advised that they take the victim to hospital by any car that passed the village or through a motorcycle. This is reflected on page 21 of the proceedings.

PW 2 testified that he saw the appellant quarrelling with the victim and saw the appellant pushing the victim as revealed at page 14 of the proceedings. This was when the bus was still on motion. This witness tendered the bus ticket as Exhibit P1.

Also, DW 3 corroborates that the victim was in the bus where the appellant was the bus conductor. The victim was not given a ticket as he was only assisted to travel by being given a lift.

In totality, all these pieces of evidence there is proof that the victim was in the bus where the appellant was a bus conductor. There was proof that it is the appellant who pushed the victim from the bus on motion thus causing harm to the victim. Also, there was harm i.e. injuries were sustained and there was proof by evidence of PW 3 the medical doctor

together with Exhibit P2. This was the most important proof to show that grievous harm that victim sustained.

The respondent argued that there was no any unsubstantiated accusation regarding the matter. It is true that the prosecution had a burden of proof as per section 110 of the Evidence Act, Cap 6 R.E. 2019. That is why the witnesses who were material were paraded to court to establish the same.

Moreover, it was argued that it is not true that defence evidence was not considered. At pages 7-8 of the judgment, the trial court analysed the evidence of the defence. Essentially, the defence evidence was supporting the prosecution case that the victim was in the bus that appellant used to work as bus conductor, that the victim sustained injuries/ harm on that material date. The only aspect defence witnesses were denying is the fact that the victim was pushed by the appellant.

The respondent reiterated that this Court is entitled to revisit the evidence on record under section 359 of the Criminal Procedure Act, Cap 20 R.E. 2022 to re-evaluate the evidence and enter a proper decision if the same was not considered.

In the circumstances, it was respondent's opinion that the appellant was rightly convicted and sentenced. We are praying that this Court be

pleased to enhance the sentence to seven years imprisonment given that the appellant was leniently punished with four years' imprisonment.

Having heard submissions from both sides in this appeal, I have dispassionately reviewed the available record to analyse the merits or otherwise of this appeal.

I shall first address the aspect related to the failure to prove ingredients of the offence and that of conviction based on accusations that were not proved. The offence which the appellant stood charged is under section 225 of the Penal Code, Cap 16 R.E. 2022. It provides that:

> *225. Any person who unlawfully does grievous harm to another is guilty of an offence and is liable to imprisonment for seven years.*

This offence indicates that elements include: First, there should be grievous harm to another person. Second, that grievous harm be caused by unlawful act or omission. Third, it must be the accused who does harm.

The evidence on record indicates that PW 1 testified that on 12/04/2023 he boarded a bus and when he reached at Makutupa village the appellant required PW 1 to get out of the bus while the bus was on motion with very speed. PW 1 reiterated that appellant pushed him out of the bus without caring. PW 1 fell, was injured and started vomiting and

spitting blood from nose, mouth and ears. As a result, he was treated and informed that his skull cracked. In cross examination, PW 1reiterated that PW 1 and appellant argued, and appellant pushed him from bus on motion.

PW 2 evidence was to the effect that at Makutupa village the appellant argued with the victim. It is PW 2's testimony that the appellant pushed the victim down while it was on motion. PW 2 stated to have seen appellant pushing the victim and that appellant was the bus conductor.

Further, PW 3 testified that on 12/04/2023, he received a victim at emergency department at the District Hospital at Mpwapwa while unconscious, with bruises on his forehead, right shoulder and bleeding from his nose and ears. PW 3 stated that victim was examined through X-ray and it was found that there was internal hemorrhage and skull fracture thus the victim was admitted as an in-patient. PW 3 tendered PF 3 which was not objected by the appellant. Later, the victim was referred to Dodoma Regional Referral Hospital for further treatment.

The defence evidence by DW 1 states that victim was in the bus and it is victim who jumped out of the car at Makutupa village. DW 1 reiterated that he did not see the victim when jumping but only saw him down. DW 2's evidence reveals that he saw through side mirror that victim had dropped himself without knowledge of the bus conductor, the appellant. DW 2 stated that later he was informed via phone that the person who

dropped at Makutupa village was injured. DW 3 stated that victim was one of the passengers in the bus where the appellant was bus conductor.

From the totality of evidence on record, it is lucid that the following aspects were established. First, the victim was a passenger on the bus in which the appellant was the bus conductor. Second, that he suffered bodily harm because of dropping from the bus in motion. Third, it is the appellant who caused the victim to drop from the bus on motion.

I concur with submission made by the learned State Attorney that all ingredients of the offence were established. Evidence of PW 1 who is the victim was corroborate by the evidence of PW 2 and PW 3. PW 1 stated that it is the appellant who pushed him from the bus while it was in motion. This is cemented by PW 2 that appellant and victim argued before the appellant decided to push the victim out of the bus which was on motion.

PW 2 was present at the scene of crime. PW 2 saw the appellant pushing the victim out of the bus. This is credible and reliable evidence. It is so strong evidence that was not sufficiently challenged. The evidence of PW 2 is in line with the provision of Section 62(1)(a) of the Evidence Act which provides that:

> *62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say-*

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

PW 2 testimony is to the effect that he first heard the appellant and victim argue. The appellant was the one on the door of the bus in which he was a bus conductor. He was the appellant pushing the victim out of the bus while the bus was on motion.

The testimonies of PW 1 and PW 2 is sufficient to establish that appellant through his unlawful act of pushing the victim from the bus while it was still on motion resulted into the victim's suffering injuries. In the case of **William Ntumbi vs Director of Public Prosecutions** (Criminal Appeal 320 of 2019) [2022] TZCA 72 (25 February 2022) (TANZLII), at page 12 the Court of Appeal observed that:

We wish to reaffirm the elementary principle of law under section 143 of the EA as rightly submitted by the learned State Attorney that, there is no particular number of witnesses required to prove a fact as it was aptly discussed in ***Yohana Msigwa*** *(supra),* ***Gabriel Simon Mnyele v. Republic****, Criminal Appeal No. 437 of 2007 and* ***Godfrey Gabinus @Ndimbo and Two Others v. Republic,*** *Criminal Appeal No. 273 (both unreported). The court can act even on the evidence of a single witness if that witness can be believed given all surrounding circumstances. The*

truth is not discovered by a majority of votes. One solitary credible witness can establish a case beyond reasonable doubt provided that the court finds the witness to be cogent and credible.

It is not only testimonies of PW 1 and PW 2 which demonstrated existence of the ingredients of the offence of grievous harm but also the evidence of PW 3 who is a clinical officer. According to PW 3 the victim was received at Mpwapwa District hospital while in unconscious state and he is the one attended the victim. The evidence of PW 3 confirmed that victim sustained injuries including bruises on his forehead, right should and bleeding from nose, and ears. The victim was treated as patient with severe triatic brain injury and soft tissue injury. According to PW 3 the victim was examined through x-ray, and it was found that he had internal hemorrhage and skull fracture. That evidence is also summed up in the PF 3 which was admitted without objection by appellant, and it was read out loudly in court.

The nature of PW 3 testimony is regarded as expert opinion and it is admissible within ambits of section 240 of the Criminal Procedure Act, Cap 20 R.E. 2022. in the case of **Abdallah Athumani vs Republic** (Criminal Appeal No. 669 of 2020) [2023] TZCA 139 (23 March 2023) (TANZLII), where the Court of Appeal, at pages 12-13 stated:

Having examined the record, we uphold Ms. Luzungana's submission that PW5 fully explained his medical credentials. He testified that he had been in active practice of his profession for thirty-five years and indicated in Exhibit P4 that at the material time he held the designation of Principal Assistant Medical Officer (PAMO). It is significant that he was not cross examined on his qualifications, implying that no attempt was made to rebut the presumption as to his competence.

It is certain that PW 3 was a credible and reliable witness of the prosecution. Reasons for so finding are straightforward. First, the tendering of Exhibit PWE 2 was not objected by the appellant, and it adhered to all the procedures of tendering documentary evidence in forms of exhibits. Second, his oral testimony revealed extent of injuries suffered by the victim thus grievous harm. Third, he demonstrated his professional qualifications and experience. Nothing was discredited in cross examination in any manner.

In the case of **Tumaini Yared Mtoro vs Republic** (Criminal Appeal No. 218 of 2022) [2024] TZCA 23 (9 February 2024) (TANZLII), at page 19 the Court of Appeal lucidly stated that:

It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted

and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth.

The only aspect challenged by the appellant in cross examination was the state of the victim and the source of information about accident of the victim. PW 3 responded professionally that he received the victim who was in unconscious state and that statement about the victim's accident was obtained from relatives who brought the patient to hospital for medical treatment. PW 3 was not at the scene of crime. The lamentation by the appellant that PW 3 failed to identify the scene of crime is not meritorious.

The Court of Appeal have provided guidance on the role of expert evidence in the case of **Mussa Ernest vs Republic** (Criminal Appeal 463 of 2019) [2022] TZCA 655 (27 October 2022) (TANZLII), at page 17 the Court of Appeal observed that:

As for PW4, being an expert witness, her evidence was specifically intended to provide the trial court with the information which was outside the experience and knowledge of the trial magistrate. In other words, an expert witness is required to provide the court with a statement of his or her opinion on any matter in dispute calling for the expertise by the witness provided that they have the necessary qualification to give such an opinion. It

is instructive to observe that, in view of the above stated role, it would be a serious violation and indeed a disregard of the cognitive organs which are available to the grasp of any ordinary human-kind if the court were to press an expert witness in a criminal trial to give a first-hand description or narrative of occurrence of a criminal incident, to which he was not eyewitness.

It is evident that expert evidence relates to establishing issues in general terms that a particular profession understands them within the purview of skills, practice, and knowledge of that profession. It was not expected that PW 3 would state about the occurrence of victim being pushed from a moving car at Makutupa village where he was not there. The evidential value of the PW 3's testimony lies on expressing expert opinion that if accepted by the Court normally have a corroborative nature of other evidence relating to occurrence or otherwise of a particular fact in issue.

Having complied with all pertinent requirements of admissibility of documentary evidence and exhibits, Exhibit PWE 2 formed important part of the testimonies of the prosecution. It tends to establish that the victim suffered grievous harm which is one of the important ingredients of the offence for which the appellant stood charged. In the case of **Erneo Kidilo & Another vs Republic** (Criminal Appeal 206 of 2017) [2019] TZCA 253 (21 August 2019) (TANZLII), at pp.11-12, the Court of Appeal noted that:

Contents of these exhibits carry detailed facts which affect ingredients of the counts preferred against these appellants. The obligation to read out the facts contained in the tendered exhibits goes a long way to fully appraise the accused concerned all of facts that are locked in the exhibits. This appraisal in light of full knowledge of facts in exhibits will enable the accused person to either accept the facts therein as true, or even reject them.

Indeed, this analysis have disposed the 2nd and 3rd grounds of appeal in the negative as they lack merits. Therefore, the second and third grounds of appeal are dismissed for lack of merits.

In respect to failure to accommodate the defence evidence, which was unchallenged, and failure to evaluate evidence, I am of the view that this matter cannot detain the Court. The reason is simple. All the defence witnesses do not dispute that the victim was a passenger in the bus where the appellant was a bus conductor. The defence evidence is not disputing that the victim dropped out of the bus which was on motion. Third, the defence evidence does not challenge that victim was seriously injured. The only point of departure in the defence evidence is that the victim was not pushed by the appellant.

DW 2 stated to have seen the victim dropping from the bus through the side mirrors without the knowledge of the bus conductor. He further stated that when they arrived at the station where he wanted to drop off the victim, he was informed by bus conductor that victim dropped off. DW 1 stated to have opened the door while the bus was on motion and the victim jumped off. The evidence is contradictory in nature. According to DW 2, victim dropped off without knowledge of the appellant bus conductor who was at the door allegedly used by victim to drop off. At the same time, on arrival at the station the appellant is the one who informed the driver about the victim having dropped off.

Such defence testimonies is well addressed by the evidence of PW 1 and PW 2. These witnesses are categorically clear that it is the appellant who pushed the victim from the bus on motion not otherwise. This strong evidence from eyewitnesses was not challenged by the defence serious to shake it. In cross examination, PW 2 stated vividly that the door of the bus was open while the appellant was arguing with the victim and that it is the appellant who pushed the victim from a bus on motion.

I am satisfied that evidence of PW 1 and PW 2 leave no doubt that victim was pushed by the appellant thus causing serious injuries on the victim because of that unlawful act of the appellant. The first and fourth grounds of appeal collapse for being devoid of merits.

The trial Court summarised evidence of both sides on pages 1 to 5 of the judgment and evaluate well the evidence on pages 7 and 8 of the judgment reached to a finding that it is in affirmative that the appellant pushed the victim out of the motorvehicle Reg No. T337 BZL make Nissan Caravan. The trail court considered evidence from both sides before arriving at its findings that the prosecution has proved the case beyond all reasonable doubt.

The analysis undertaken by this Court as the first appellate court with all powers to re-evaluate the evidence on record reveals nothing apart from the findings that having evaluated all the available evidence the trial court was right to enter conviction and sentence the appellant for the offence charged as the prosecution managed successfully to prove their case on the required standards.

The Court relied on the evidence PW 1, PW 2 and PW 3 to find that all ingredients of the offence of unlawful causing grievous harm c/s 225 of the Penal Code, Cap 16 R.E. 2022 were proved to the required standard of proof beyond all reasonable doubt. The evidence on record in their totality points out to only one direction that the appellant did cause grievous harm to the victim by his unlawful act of pushing him from the bus which was a motion.

The findings that a criminal case was established within the required standard of proof have only one effect in an appeal. That appeal deserves

nothing but dismissal. To borrow the words of the Court of Appeal in **Tumaini Yared Mtoro vs Republic** (Criminal Appeal No. 218 of 2022) [2024] TZCA 23 (9 February 2024) (TANZLII), at page 20, the Court stated that:

> *For the foregoing reasons, we are satisfied that the evidence, taken as a whole, establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and it is hereby dismissed in its entirety.*

Before I wind up this appeal, I should address the prayer by the learned State Attorney who urged this Court to enhance the sentence to seven years as she considers that four years' imprisonment imposed on the appellant was too lenient.

I am of the different view as I consider the sentence to be appropriate on the circumstances. Trial court took into consideration of both aggravating and mitigation factors as recorded on page 10 of the judgment. These include absence of previous convictions records, the appellant being the first offender who was remorse and prayed for leniency of the Court. Trial Court exercised its discretionary powers judiciously as the provision under which the appellant stood charged does not provide for a mandatory sentence of seven years. That sentence is the maximum sentence under that provision. These are not my words but a wise

guidance of the Court of Appeal in the case of **Anna Moses Chisano vs Republic** (Criminal Application No. 42/01 of 2021) [2024] TZCA 167 (6 March 2024) (TANZLII), at pages 8-10 where the Court stated that:

> *The bolded words "shall be liable to" do not mean that the trial court is mandatorily required to impose the stipulated penalty of life imprisonment but rather bestow upon the trial court a discretionary power to impose, depending on the circumstance of each case and upon considering the mitigating and aggravating factors, any appropriate sentence up to the maximum limit of life imprisonment.*

In the upshot, this appeal is devoid of merits, and it is hereby dismissed in its entirety.

It is so ordered.

DATED at **DODOMA** this 20th day of March 2024.

E.E. LONGOPA
JUDGE
20/03/2024.