

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA  
AT MUSOMA**

**(PC) CRIMINAL APPEAL NO 06 OF 2020**

*(Arising from Criminal Appeal No 12 of 2019 in the District Court of Serengeti at  
Mugumu and originating from Mugumu Urban Primary Court on Criminal Case No 195 of  
2019)*

**SAMWEL NYANSAHO .....APPELLANT**

**Versus**

**MSAMBI ITEMBE .....}**  
**SIMION MWITA PETRO.....} RESPONDENTS**  
**NYAMBARI TUSIRYA MARWA .....}**

**JUDGMENT**

*3<sup>rd</sup> & 13<sup>th</sup> November, 2020*

***Kahyoza, J.***

This is a second appeal. It originates from **Mugumu Urban Primary Court** (henceforth the trial court) where one **Samwel s/o Nyansaho**, (the appellant) unsuccessfully instituted criminal proceedings against **Msambi Itembe, Simion Mwita Petro** and **Nyambari Tusirya Marwa**, (the respondents) for the offence of assaults. After a full trial, the court found the respondents not guilty and acquitted them.

Aggrieved, the appellant appealed to the **District Court of Serengeti** (the appellate court), where he lost the appeal.

Dissatisfied still, the appellant has appealed to this Court raising three grounds are as hereunder-

1. That, the first appellate court erred in law and in fact in declaring that prosecution did not pray to tender a discharge summary from Bugando, as receiving and marking of exhibit is the duty of the court.
2. That the first appellate court erred in law and fact by not ordering re-trial so that a discharge summary from Bugando and other exhibit[s] be received and marked as exhibits that is why the complainant brought the document and they were received by the court and filed in record: and,
3. That the first appellate court did not properly evaluate the proceedings and evidence recorded by the trial court.

I deduce the following issues from the appellant's grounds of appeal-

1. Whether the trial court had a duty to order the prosecution to tender the discharge summary from Bugando as exhibit.
2. Whether the appellate court had a duty to order retrial to give the prosecution a chance to tender exhibit.
3. Whether the appellate court evaluated the proceedings and evidence on the records.

The appellant and the respondents appeared in person. They argued the appeal orally. Their oral submissions had no substance to add to their written petition and reply to petition of appeal.

I now consider the issues. Before that, I wish point out that this

is a second appeal.

**Did the trial court have a duty to order the prosecution to tender a discharge summary from Bugando as exhibits?**

The position of the law is clear, that it is the complainant or the prosecution, which has a duty to prove its case. The **Magistrates' Courts** (Rules of Evidence in Primary Courts) **Regulations**, G.N. 22/1964, item 1 of the Schedule provides that-

*1. What the complainant or the claimant must prove*

*(1) Where a person is accused of an offence, the **complainant must prove all the facts which constitute the offence**, unless the accused admits the offence and pleads guilty.*

The appellant had a duty to prove all facts including tendering evidence showing that he was attacked and injured by the respondents, admitted, and treated at Bugando hospital. This position is supported by the decision of the Court of Appeal in the case of **Mariki George Ngendakumana Vs the Republic**, Criminal Appeal No. 353 of 2014 (CAT unreported), which inter alia held that-

*"It is the principle of law that in Criminal Cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the accused person who committed it"*

The appellant had a duty to tender the discharged summary form issued by Bugando hospital. The court had duty to direct the

appellant to do so. The appellant never mentioned anything about the discharge summary form issued by Bugando. The appellant told the trial court that he underwent operation at Bugando. He did not request to tender the discharge summary form.

I find the appellant's complaint in the in the first ground of appeal baseless. I dismiss it.

**Did the appellate court err by not ordering a retrial to give the prosecution a chance to tender exhibit?**

The appellant complains that the appellant court erred in law and fact by not ordering re-trial so that the appellant may tender the discharge summary from Bugando as exhibit.

I will not belabor on this issue as the law is settled that the court should not order trial *de novo* to give an opportunity to a party to fill the gaps in the evidence. See the case of **Fatehali Manji v. R.**, (1966) E.A. 343, it was held that-

*"In general, a retrial may be ordered only where the original trial was illegal or defective **it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence** at the first trial each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it "*  
*(Emphasis is added)*

I find the appellate court committed no error to refrain from ordering a retrial in order to give an opportunity to the appellant to

fill in the gap in his evidence. Consequently, I dismiss the second ground of appeal for want of merit.

**Did the appellate court evaluate evidence on the records?**

The first appellate court has a duty to evaluate the evidence and if necessary form its own opinion. The appellate court was alive that duty and discharged it. It stated-

*"I went through the grounds of appeal filed by the appellant in respect of the judgment delivered by the trial court and the testimonies and evidence at the trial court as it was held in the case of **VUYO JACK VS. REPUBLIC CRIMINAL APPEAL NO. 334 OF 2016, IN THE COURT OF APPEAL OF TANZANIA AT MBEYA (unreported)** and I quote-*

*"the first appellate court has a duty to re-evaluate the entire evidence on records by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusion of fact."*

A glance at the appellate court's judgment, depicts that the first appellate ably discharged its duty. It subjected the whole evidence to scrutiny and reached a conclusion similar to that of the trial court, that the appellant did not prove the respondents guilty. I had a cursory look at the evidence before the trial court, the judgment of the trial and that of the appellate court, I have no reason to fault their conclusion. The appellant's evidence, as the courts below held, was wanting.

The two courts concluded that the charged sheet mismatched with the evidence. The charge sheet stated that the respondents assaulted the appellant with the stick inflicting injuries on him and the evidence tendered showed that the respondents hit the appellant with stones causing his injuries. The trial and appellate courts were right to take mismatch between the evidence and the charge sheet as a fatal defect. The charge sheet was presented by police to the trial court. The police had an opportunity to investigate the matter or at least record the appellant's complaint before it submitted the charge sheet to the court. The appellant must have explained to police how he sustained the injury. The discrepancy between the charge sheet and the evidence destroys the credibility of the appellant's evidence.

Further, both courts considered the contradiction between the appellant, Pw2, Pw3 on one side and Pw4 on the other side and found that the contradiction was major and affected their credibility. Pw4 deposed that he attended the appellant two days after he was injured. He found him bleeding. The appellant's evidence supported by Pw2's and Pw3's evidence was that he went to hospital immediately after he was injured, that is on the 20<sup>th</sup> June, 2016. Such a contradiction is not minor. Pw4 tendered a PF. 3 showing that he attended that appellant on the 21<sup>st</sup> June, 2016 and not on the date the appellant alleged the respondent injured him. The contradiction erodes the credibility of the appellant and his witnesses. It raises a reasonable doubt whether the respondents inflicted injury

on the appellant or if they did, whether the injury was so fatal.

It is trite law that where there are concurrent findings of facts by two courts below, the second appellate court should not disturb the findings, unless, it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure as it provided in the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31. See also the case of **Michael Elias v R.** Criminal Appeal No. 243/2009 (CAT unreported), where the Court said-

*"On the second appeal, we are supposed to deal with questions of law. But this approach rests on the premises that the findings of fact are based on a correct appreciation of the evidence. If both courts completely misapprehend the substance, nature and quality of the evidence, resulting in an unfair conviction, this Court must, in the interest of justice, interfere."*

I see no misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure to allure me to interfere with the concurrent findings of trial and first appellate courts.

Finally, I find the appellant lodged the appeal without good grounds of complaint. I uphold the decisions of the trial and first appellate courts and dismiss the appeal in its entirety. I make no

order as to costs on the ground that a criminal case attracts no costs.

I order accordingly.



**J. R. Kahyoza**  
**JUDGE**  
**13/11/2020**

**Court:** Judgment delivered in the absence of the parties as it was difficult to connect them to this Court via the video link. B/C Tenga present.



**J. R. Kahyoza**  
**JUDGE**  
**13/11/2020**