

A NDIZU NGASA v. MASISA MAGASHA

**B HIGH COURT OF TANZANIA
AT TABORA**

(Mchome, J.)

(PC) CRIMINAL APPEAL No. 140 OF 1997

C (From the decision of the District Court of Shinyanga at Shinyanga, I.P.Kitusi, Resident Magistrate, in Criminal Appeal No. 71 of 1998)

Evidence – Assessment of evidence – Re-assessment of evidence by Appellate Court – Duty of first appellate court in making re-assessment.

D The respondent was acquitted of a charge of causing actual bodily harm to the appellant. On appeal to the District Court, the acquittal was upheld on the ground that the Appellate court could not fault the court of first instance because the assessment of evidence was based on credibility of the witnesses. On second appeal to the High Court.

E Held: (i) The first appellate court has a duty to re-assess the evidence of the trial court;

(ii) Had both the Lower Courts properly directed themselves on the evidence of the appellant, of PW2 the ten-cell leader, and on the PF.3 report, these would have sufficed to arrive at a conviction.

F Appeal allowed

Case referred to:

G (1) *R. v. Muhuzi Zaidi and another* [1969] HCD n. 249

JUDGMENT

H (Delivered 24 July 1998)

I MCHOME, J.: In Mwadui Primary Court of Shinyanga District, the appellant, Ndizu Ngasa, filed criminal charges of assault causing actual bodily harm contrary to section 241 of the Penal Code, against the respondent, Masisa Magasha. The trial court found the respondent

A not guilty and acquitted him. The aggrieved appellant appeal to the District Court unsuccessfully. This now is his second appeal.

In dismissing the first appeal, the learned Appellate Resident Magistrate held, *inter alia*:

B Since the learned trial court's decision seems to have been based on credibility or lack of it on the part of appellant I can not fault him, I being unable to reassess the parties credibility.

C With all due respect to the learned first Appellate Resident Magistrate, the first Appellate Court has the duty to reassess the evidence of trial court. In *Republic v. Mahuzi Zaidi and another* (1) Georges, C.J. (as he then was) held:

D As in all appeals it is the duty of the court to weigh the evidence and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect ... it must be borne in mind, however, that the appellate court in exercising its jurisdiction to review evidence and determine whether the conclusions of the trial judge should stand, should do so with caution. Where it is clear that the trial judge has plainly gone wrong and had failed to appreciate the weight or bearing of circumstances admitted or proved the Appellate Court should not hesitate to interfere.

F The appellant told the trial court that on 22 September 1997, he saw the respondent grazing his cattle in the appellant's field. When he asked him to remove his animals from there, the respondent got angry and hit him with a stick once on the waist. The appellant went home to report to his relatives, and later reported to the police. The latter gave the appellant a PF.3 and later preferred this charge against the respondent. The appellant called his ten-cell-leader who told the trial court that he witnessed the respondent assaulting the appellant. Apparently that witness, called Zaire, took no steps against the respondent. The PF.3 report states that the appellant had: (1) Internal soft tissue injuries (2) Mild oedema (3) Bleeding nose." And that the size of wound is not measurable, but that it is on the lower back.

A The respondent denied to have assaulted the appellant. He says the field he was grazing in was his grandson's and not the complainant's.

In rejecting the appellant's evidence the trial magistrate stated:

B ... Swali la kujiuliza ni kweli SM.1 alishambuliwa na mshtakiwa siku hiyo, na alimshambulia kwa sababu tu ya kutakiwa awaondowe wale ng'ombe....toka mle hazina ... Ushahidi wa mtu anayedai kushuhudia hili tukio unaiacha mahakama hii ikiwa na maswali mengi ya kujiuliza.

C (1) Kwa nini shahidi asishtuke na kitendo cha SU.1 cha kuchangia pale na amuulize SU.1?

D (2) Vipi shahidi asitoe msaada wowote au kutoa suluhu kitu ambacho mahakama hii inaamini ingeweza kuzuia SM1 na SU 1 wasichukue hatua ya kugombana?

(3) Kama kweli Zaire (SM.2) alikuwepo wakati wa tukio... vipi mlalamikaji asijali hata kumlalamikia tu badala yake akimbilie nyumbani...

E And earlier on in his judgment the trial magistrate stated:

F ... shahidi anaeleza kuwa ni kweli mlalamikaji alishambuliwa na mshtakiwa lakini hakuweza kueleza kama kweli mshtakiwa angeweza kuchukizwa na kule tu kutakuwa na mlalamikaji kuwatoa ng'ombe wake kwenye hazina... shahidi pamoja na kumuona mlalamikaji akishambuliwa na mshtakiwa lakini hakuna ni sehemu gani alipopigwa hakuna jeraha au uvimbe uliotoka na kupigwa fimbo haikutolewa mbele ya Mahakama ...

G In brief, the argument of the trial magistrate for discrediting the appellant's evidence is that the appellant did not report to PW2 his ten-cell-leader who allegedly was at the scene but instead ran home and reported to the police later, that PW2. was present but took no steps to separate or reconcile the two, that PW2 did not state what

H part of the appellant's body was struck and there was no wound or swelling. This line of argument was concurred with by the first Appellate Court and the appeal was dismissed. But that argument is flawed. Had the first appellate court properly directed itself, it would have

I found that the trial magistrate had clearly faulted in his evaluation

A of the evidence. The first Appellate Court had good cause for interference with the trial Court's judgment.

B First as to the place where the appellant was hit he says he was hit once. PW2 said he saw the respondent hitting the appellant on the "matakoni" (buttocks). So the trial magistrate quoted PW2 out of context when he said he did not state the part of the appellant's body that was hit with the stick. The non-production of the stick too is not the appellant's fault as the stick was the respondent's and the appellant was not its custodian.

D The trial Court also argues that there was no wound or swelling. Hitting by a stick does not necessarily inflict a wound or a swelling. Bodily harm does not necessarily have to amount to a swell or a puncture of the skin. The PF.3 report which I have quoted earlier shows that the appellant had "internal tissue injuries" on the lower back. This corroborates the testimonies of PW2 and the appellant that he was hit at the waist or buttocks.

E With the injuries stated in the PF3, both Lower Courts ought to have considered why the appellant should have decided to let the one who inflicted those injuries on him go scot free and instead frame up the respondent.

F The other flawed argument is that by just being told to remove his cattle the respondent would not have become so angry as to beat the appellant. But if the respondent was grazing in what he believed was a field he had the right to graze in, surely being asked to remove his cattle angered him. Reacting by hitting the appellant with a stick once is not unnatural at all. Only that it is unlawful as it amounts to taking the law in one's own hands.

H The fact that PW2 took no steps when he witnessed the assault hardly makes any difference. He is no policeman. Some people are cowards. They do not want to interfere with other peoples' quarrels. One of the quarelling parties may turn against him. Some people have been killed while trying to separate fighting people. This fear

A applies to anyone whether he be a ten-cell-leader. So the non-intervention by PW2 does not prove him a liar.

B It is also argued that the appellant should have complained to PW2 instead of going home and then reporting to the police. There was no need to report to PW2, as the latter was present when PW1 was beaten. It was natural for the appellant to go home and report to his relatives and then to the police after seeing PW2 taking no steps despite the assault being committed in his presence. So had both Lower Courts properly directed themselves on the evidence of the appellant, PW2, the ten-cell-leader, and the PF.3 report these would have sufficed to arrive at a conviction. As I pointed out earlier, the fact that the respondent had a claim of right, apparently better than the appellant's over the grazing field does not justify him to assault the appellant.

E For these reasons I allow this appeal and quash both Lower Courts judgments and set aside the respondents acquittal. Instead I find him guilty of assault causing actual bodily harm as charged. I sentence him to TZS. 5 000 fine or six months jail in default. The respondent to pay the appellant TZS. 5 000 as compensation.

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**AUGUSTINO LYATONGA MREMA v. SPEAKER OF
THE NATIONAL ASSEMBLY AND THE ATTORNEY
GENERAL**

H
HIGH COURT OF TANZANIA
AT DAR ES SALAAM

(Katiti, J.)

MISCELLANEOUS CIVIL APPLICATION No. 36 OF 1998

I *Constitutional Law – Separation of Powers – Court action to enquire into a decision taken by the National Assembly in the course and as part of*

parliamentary proceedings – Whether the action contravenes the doctrine of separation of powers. A

Parliament – Powers, privileges and immunities of Parliament – Whether Court may question an action taken by the National Assembly – Article 100(1) of the Constitution and section 12 of the Parliamentary Immunities, Powers and Privileges and Immunities Act 1988. B

High Court – Jurisdiction of the High Court – Jurisdiction of the High Court to enforce basic rights guaranteed under the Constitution – Whether High Court sitting with a single judge has jurisdiction to hear and determine any matter relating to the enforcement of basic rights guaranteed under the Constitution – Section 10 of the Basic Rights and Duties (Enforcement) Act 1994. C

D The applicant, a Member of Parliament, was attending and participating in the deliberations of the budget session of the National Assembly when, on 24 June 1998, the assembly passed a resolution suspending him from further attendance at and participation in the budget session going on. He filed a petition in the High Court challenging the competence of the assembly, led by the Speaker, to suspend him from Parliament. The petition averred, *inter alia*, that the suspension contravened rules 50(2), 43 and 45 of the Parliamentary Proceedings Rules 1988 and, therefore, also contravened articles 13(1), 13(6)(b), 21(1) and 26 of the Constitution that guarantee equality before the law, freedom of association, the right to participate in public affairs, the duty to guard and obey the Constitution and the right to institute proceedings to safeguard the law and the Constitution. While the petition was pending, he filed this application seeking an order to stay the implementation of the resolution to suspend him from Parliament pending hearing and determination of the petition. A preliminary objection was raised against the application advancing the grounds that under article 100(1) of the Constitution, the High Court had no jurisdiction to question parliamentary proceedings, and that a single judge of the Court could not determine any matter under the Basic Rights and Duties (Enforcement) Act 1994, save for what is provided for under section 10 of the said Act. E F G H

I **Held:** (i) Unlike the British Constitution which is not written, our Constitution is written and stresses on human rights; it is therefore a right and a duty of our judges to have regard to the broad objective of any statutory obligation and also to have regard