IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 294 OF 2019

EDINA WILSON .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Shinyanga at Shinyanga)

(Mwaiseje, SRM-Ext. Jur.)

dated the 13th day of May, 2019
in
Criminal Appeal No. 60 of 2019

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JUDGMENT OF THE COURT

1st November, 2022 & 28th June, 2023

MWARIJA, J.A.:

In the District Court of Meatu at Mwanhuzi, the appellant, Edina Wilson was charged with and convicted of the offence of cruelty to children contrary to s. 169 A (1) and (2) of the Penal Code, Chapter 16 of the Revised Laws; that on 23/12/2017 about 19:00 hrs at Bomani Village within Meatu District in Simiyu Region, she ill-treated, one NS a child aged about six (6) years (hereinafter "*the victim*") by beating her

with a stick and a shovel on her head causing her to suffer injuries. The appellant denied the charge.

At the hearing, the prosecution relied on the evidence of two witnesses. On her part, the appellant did not give evidence or call any witness. When she was afforded the opportunity to give her evidence, she opted to remain silent.

Having considered the prosecution evidence, the trial court was satisfied that the case against the appellant had been proved beyond reasonable doubt. As a result, she was convicted and sentenced to fifteen (15) years imprisonment. As for the victim, she was awarded a compensation of TZS 100,000.00 which was ordered to be paid by the appellant after completion of her custodial sentence.

The appellant was aggrieved by the decision of the trial court and thus appealed to the High Court. The appeal, which was transferred to the Resident Magistrate's Court of Shinyanga and heard by Mwaiseje, learned Senior Resident Magistrate with Extended Jurisdiction (SRM-Ext. Jur.), was dismissed hence this second appeal.

The facts leading to the trial of the appellant may be briefly stated as follows: Until the date of the incident, the victim was living with the

appellant together with her two other children. On the material date (24/12/2017), the ten-cell leader of the area where the appellant resided, one Hawa Salum (PW2) went to the appellant's house. According to her evidence, she found there the appellant's children who informed her that the victim was beaten by the appellant who, after that incident, decided to lock her inside the house. As the victim was getting out of the house, PW2 observed her walking with difficulty, supporting herself by the wall because she could not see. Her face was swollen, had injuries on the eyes and the neck.

It was PW2's further evidence that, when she asked the victim on what had happened to her, she explained that she was beaten by the appellant on 23/12/2017 because of having urinated in the chicken's water container. She explained further that, before the beatings, she was forced to drink that urine. PW2 inspected the victim's body and found that it had swollen. She decided to inform two elders who, together with other neighbours, assisted her to take the victim to the hospital for treatment after having obtained a PF3 from the police. After her treatment, on the instructions of the police, PW2 stayed with the victim for four days. On the same date on which the incident was

reported to the police, the appellant was arrested at the market area where she used to conduct business of selling green vegetables.

After her arrest, the appellant was interrogated by WP 9225 PC Maria (PW1) who was at that time, the police officer responsible for Gender and Children's Desk at Meatu Police Station. In her evidence, the witness told the trial court that, the appellant confessed that she did beat the victim with a stick and thereafter, took a spade and used it to hit her on the face causing her to suffer a cut wound. According to PW1's further evidence, the appellant said that, she did so as a punishment to the victim because of her act of urinating in the chicken's water container, the habit which had allegedly persisted despite several warnings that she should abstain from it. It was PW1's further evidence that, the appellant confessed also that, before she did so, she forced the victim to drink the urine so as to deter her from continuing with that habit. The witness tendered the appellant's cautioned statement and the same was admitted in evidence as exhibit P2. She had earlier on also tendered the victim's PF 3 which was also admitted in evidence as exhibit P1.

In its judgment, the trial court found that the evidence tendered by the prosecution had proved the case against the appellant beyond reasonable doubt. It also relied on the appellant's act of remaining silent when she was called upon to make her defence. The trial court took adverse inference against her under s. 231 (3) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA).

As stated above, the appellant was dissatisfied and thus preferred the appeal which was heard by the Resident Magistrate's Court of Shinyanga (Mwaiseje, SRM-Ext. Jur.). Upholding the decision of the trial court, the learned SRM-Ext. Jur. was of the view that, the evidence of PW2 as supported by exhibit P1 proved that the victim was beaten and caused to suffer grievous harm. The first appellate court was satisfied further that, the person who assaulted the victim was the appellant. It found also that, exhibit P1 was properly tendered by PW1 because she was the one who had that document in her possession. She cited the Courts decision in the case of **DPP v. Mirzai Pirbakhsh @ Hadji and Three Others**, Criminal Appeal No. 493 of 2016 (unreported) to support her finding.

With regard to whether or not the appellant was denied the right to be heard, which was one of grounds raised in the appeal, the learned SRM-Ext. Jur. agreed with the trial court that, from the circumstances under which the appellant decided to remain silent after having been informed of her right to give evidence in her defence, it cannot be said that she was denied that right, instead, the trial court properly invoked s. 231 (3) of the CPA.

In this appeal, the appellant has raised four grounds which may be paraphrased as follows:

1. *That, the learned first appellate magistrate erred in law and fact by misapprehending the evidence thus upholding the decision of the trial court which did not prove the charge beyond reasonable doubt.*
2. *That, the learned first appellate magistrate erred in law and fact in upholding the appellant's conviction based on the evidence of PW1 and PW2 which was a hearsay.*
3. *That, the learned first appellate magistrate erred in law in upholding the trial court's decision while the same was based on the*

evidence of the PF3 tendered by a person who did not make it.

4. *That, the learned first appellate magistrate erred in law and fact in upholding the sentence of fifteen (15) years imprisonment which, under the particular circumstances and the nature of the offence, is excessive.*

During the hearing of the appeal, the appellant appeared in person unrepresented while the respondent Republic was represented by Mr. Shaban Mwigole, learned Senior State Attorney assisted by Ms. Verediana Mlenza, also learned Senior State Attorney. When she was called upon to argue her grounds of appeal, the appellant opted to hear the respondent's reply submissions first and later on make a rejoinder.

Starting with the 3rd ground of appeal, it was the learned Senior State Attorney's submission that PW2 who was the investigator of the case was competent to tender the victim's medical report which is contained in PF3 (exhibit P1). She argued however, that the exhibit was wrongly acted upon by the trial court because, first, the same was not read out after its admission in evidence and secondly, s. 240 (3) of the Criminal Procedure Act was not complied with. The provision enjoins the

trial court to inform an accused person of his right to require that the maker of a medical report be summoned for cross-examination.

Ms. Mlenza argued further that, an omission to read out a document after its admission in evidence was also made in respect of the appellant's cautioned statement (exhibit P2). Because of those omissions, she urged the Court to expunge the victim's PF3 and the appellant's cautioned statement.

We agree with the learned Senior State Attorney that, from the record, after the admission by the trial court of exhibits P1 and P2, the same were not read out in court. The omission rendered the documents invalid. - See for instance, the cases of **Robinson Mwanjisi and Three Others v. Republic** [2003] T.L.R 218 and **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017, [2018] TZCA 361 [9 May 2018] (unreported). In the circumstances, we find that the documents were improperly admitted and thus hereby expunge them from the record.

With regard to the 1st and 2nd grounds of appeal, Ms. Mlenza argued that, although the evidence of PW1 and PW2 is partly hearsay because none of them saw the appellant beating the victim, they found

her with injuries and therefore, that circumstantial evidence together with the appellant's act of deciding to remain silent when she was called upon to give her defence, was sufficient proof that she committed the offence.

On the 4th ground, the learned Senior State Attorney opposed the contention by the appellant that the sentence of 15 years imprisonment meted out to her is excessive. According to Ms. Mlenza, even though the appellant was a first offender, given the prevalence of the offence, the maximum term of imprisonment of 15 years meted out to her was proper.

In her rejoinder, the appellant did not have much to say. She reiterated her plea of not guilty and urged the Court to consider her grounds and allow the appeal.

We have carefully considered the submissions made by the learned Senior State Attorney in opposition to the 1st and 2nd grounds of appeal. We respectfully agree with her that the evidence which the prosecution relied on is entirely circumstantial. The crucial issue for our determination is therefore, whether or not that evidence had sufficiently proved the appellant's guilt. The principle as regards the application of

circumstantial evidence was reiterated in *inter alia*, the case of **Shabani Mpunzu @ Elisha Mpunzu v. Republic,** Criminal Appeal No. 12 of 2002 (unreported). In that case, the Court observed as follows:

> *"It is a settled trite principle of law that in a criminal case in which the evidence is based purely on circumstantial evidence, in order for the court to found a conviction on such evidence, it must be satisfied that the evidence irresistibly points to the guilt of the accused... to the exclusion of any other person".*

- See also the cases of **Hamidu Mussa Thimoteo and Majid Mussa Thimoteo v. Republic** [1993] T.L.R 125 and **Shabani Abdallah v. Republic,** Criminal Appeal No. 127 of 2003 (unreported).

In the case at hand, the evidence of PW1 and PW2 to the effect that the victim was found with injuries which were serious such that she needed urgent treatment was not challenged by the appellant. When she was addressed by the trial court in terms of s. 231 (1) (a) and (b) of the CPA, the appellant was recorded to have replied as follows:

> *"I will defend my case on oath. I will not call an advocate (sic) and I will call Kelvin Ngwesa and ...[the victim's uncle]".*

On the date of her defence however, when she was called upon by the trial court to give her defence, the appellant decided to remain silent.

It is not disputed further that, the victim was under the appellant's care and on the date of her arrest, she left her in the house and went to do her business at the market area. She did so leaving the victim without any assistance notwithstanding that she was suffering from injuries sustained on her neck and eyes which caused her to temporarily lose vision.

All these facts lead irresistibly to the conclusion that, it was the appellant and not any other person who committed that cruel act to the victim. We therefore, agree with the finding of the courts below and hold that, there was sufficient circumstantial evidence proving the charge against the appellant. Her conviction was therefore, well founded. The 1st and 2nd grounds of appeal are thus dismissed.

On the sentence, given the fact that the appellant was a first offender and considering her mitigation, it is our considered view that, the first appellate court erred in upholding the maximum sentence of 15 years imprisonment meted out by the trial court to the appellant. The court ought to have considered not only the aggravating factors but also

the mitigating factors, particularly that the appellant was a first offender. As observed in the case of **Nemes Myombe Ntalanda v. Republic**, Criminal Appeal No. 1 of 2019 [2021] TZCA: 513 [24 September 2021] (unreported):

> *"It is trite law that, in sentencing, the trial court has to balance between aggravating factors which tend towards increasing the sentence awardable and mitigating factors which tend towards exercising leniency. See:* ***Bernard Kapojosye v. The Republic,*** *Criminal Appeal No. 411 of 2013 (unreported)".*

In the case at hand, although in her mitigation, the appellant prayed for leniency on the ground that she had two children who depended on her, that she was suffering from chest and foot pains and although according to the prosecution, the appellant was a first offender, the trial court did not consider any of those mitigating factors. Of course, the appellant exhibited cruelty to the victim but the mitigating factors ought also to have been considered. It is obvious that the awarded sentence was in the circumstances, excessive. In that respect, we allow the 4th ground of appeal and reduce the sentence to

ten (10) years imprisonment commencing from the date of her imprisonment.

In the event, save for variation of the sentence, the appeal is dismissed.

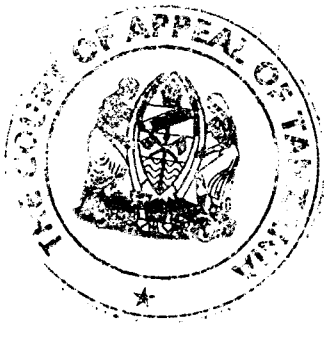
DATED at **DAR ES SALAAM** this 23rd day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of June, 2023 in the presence of appellant in person and Mr. Luis Boniface, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL