IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 73 OF 2021

(Appeal from the decision of the District Court of Karagwe at Kayanga in Criminal Case No. 170 of 2018 before Hon. F.M. Kishenyi, RM dated 26/06/2019)

ABDULLATIFU LEONARD.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24/06/2022 & 08/07/2022

E. L. NGIGWANA, J.

The appellant herein Abullatifu s/o Leonard was charged with and tried for the offence grievous harm contrary to section 225 of the Penal Code [cap. 16 R: E 2019]

The facts which led to the appellant's arraignment are that, on 10th day of January, 2018 at Ibamba Village within Karagwe District in Kagera Region, the appellant did unlawfully cause grievous harm to one Siliacus s/o Justian. When the charge was read over and explained to the appellant, he denied the charge.

The trial was conducted and at its conclusion, the appellant was convicted and sentenced to serve a term of seven (7) years imprisonment. He was also ordered to compensate the victim at the tune of TZS. **10,000,000/=** (ten million shillings) for the injuries sustained.

Aggrieved by conviction, sentence and compensation order, the appellant appealed to this court. Initially, the appellant raised one ground of appeal which was coached as follows;-

> *"That the learned trial magistrate had grossly erred in law and fact to convict and sentence the appellant without giving him the right to call his defence witnesses"*

On 29th day of November 2021, the appellant with the leave of the court filed six (6) supplementary grounds of appeal. When the matter came for hearing, the appellant abandoned the 2nd supplementary ground of appeal. The appellant's supplementary grounds are as follows:-

1. *That the trial court fatally erred in law and fact to convict the appellant without the evidence of the eye witness.*
2. *N/A*
3. *That the prosecution side had not proved the case beyond reasonable doubt.*
4. *That the trial court erred in law and fact to convict the appellant basing on circumstantial evidence which does not irresistibly implicate the appellant with the alleged offence.*
5. *That, the trial court erred both in law and fact to punish the appellant twice.*
6. *That, the charge sheet was defective for failure to comply with the statutory requirement of the law.*

Wherefore, praying that this appeal be allowed, conviction quashed and sentence set aside.

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by Mr. Grey Uhagile, learned State Attorney. Having adopted the grounds of appeal, the appellant opted to initially hear the response from the learned State Attorney while reserving his right to rejoin, if a need to do so would arise.

In response, Mr. Uhagile from the outset stated that the respondent Republic was in support of conviction and sentence imposed on the appellant by the trial court.

Opposing the first ground of appeal, Mr. Uhagile argued that on 12/12/2018 before the opening of the defence case, the appellant told the trial court that he would call three (3) witnesses and tender one exhibit proving ownership of land. He added that the appellant testified on 24/01/2019, then the matter was adjourned to come for hearing on 15/02/2019 and summonses to call defence witnesses were duly issued to the appellant who was on bail.

Uhagile went on submitting that, on 15/02/2019 the appellant came with no witnesses, likewise on 21/02/2019 and 07/03/2019. He added that on 21/03/2019, the appellant told the trial court that he had no money to transport his witnesses, as result, the matter was adjourned to come for defence hearing on 04.04/2019, yet the appellant came with no witnesses and on that date, he prayed to close his case, the prayer which was duly granted.

Mr. Uhagile further said, in that premise, the first ground of appeal is baseless.

It is undisputed that the complaint rose by the appellant is that he was convicted and sentenced without being accorded an opportunity to call his defence witnesses. Indeed, I agree with Mr. Uhagile, learned State Attorney that this ground is devoid of merit. As correctly submitted by the learned State Attorney, the trial court record revealed that before the opening of the defence case, the appellant told the court that he would testify under affirmation and call three witnesses. The records further revealed that the appellant testified on 12/01/2019 and then closed his case on 04/04//2019 after being given an opportunity to call his witnesses but failed to procure them. Eventually, the appellant prayed to close his case, the prayer which was duly granted. In that respect, I proceed to dismiss the first ground of appeal for being devoid of merit.

As regards the 1st ground of the appellant's supplementary grounds of appeal, Mr. Uhagile submitted that, the victim was invaded during the day by the appellant who was not a stranger to him; therefore, he was correctly identified by the appellant. Uhagile made reference to the case of **Goodluck Kyando V.R** [2016] TLR 365 that a witness deserves to be believed, unless there are reasons to disbelieve him/her. He added that the evidence of PW1 was corroborated by the evidence of PW2 who immediately arrived at the scene of crime to rescue the victim and took him to Hospital after being issued with the PF3.

Under the circumstances, I agree with Mr. Uhagile that the appellant was correctly identified at the scene of crime. I have also gone through the

appellant's cautioned statement which was admitted as exhibit P2, with no objection and found that, in the same, he clearly stated that the victim was not a stranger to him, and that he did injure the victim using a bush knife. In that premise, I agree with Mr. Uhagile that the 1st ground raised in the supplementary grounds of appeal is also baseless hence dismissed.

As regards the 3rd ground of appeal, Uhagile submitted that the case was proved beyond reasonable doubt. He added that the evidence of PW1 which was corroborated by the evidence of PW2, PW3 & PW4 was very strong to the effect that the offence was committed and it was committed by the appellant. Mr. Uhagile added that the expert evidence is also to the effect that the victim (PW1) suffered grievous harm, and that the appellant in his defence admitted to have harmed the victim, thus urged the court to dismiss this ground too.

It must be noted that, the cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt

Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019 provides;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

The High Court of Tanzania speaking through Katiti J (as he then was) in **JONAS NKIZE V.R [1992] TLR 213** *held that,*

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the

prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking"

The test applicable was well stated in the famous South African case of **DPP VS Oscar Lenoard Carl Pistorious Appeal No. 96 of 2015,** as follows;

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

The trial court has done its role whereas the matter is now in this court as the first appellate court. Describing the duty of the first appellate court, the Court of Appeal of Kenya in the case of **David Njuguna Wairimu vs. Republic [2010]** eKLR held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions.

We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also **Ally Patric Sanga versus R**, Criminal Appeal No.341 of 2017 CAT (Unreported)

In doing so, the appellate court must always bear in mind that unlike the trial court, did not have the advantage of hearing or seeing the witnesses testify, thus the guiding principle is that, a finding of a fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles. ***See OKENO V. R [1972] EA 32***

In the instant case, the trial court record is very clear that there is no dispute that the victim sustained serious injuries on 10/01/2018 at noon time. The victim's evidence is to the fact that he was injured by appellant when he was showing boundaries of the land he sold to him, the fact which was admitted by the appellant in his defense, but alleged that, they fought and he did so to defend himself.

Taking into account the ingredients of the offence Grievous harm in which the appellant stood charged, the prosecution had the duty to prove that;

a) The appellant caused injuries to the victim (PW1).

b) That the injuries amounted to grievous harm.

c) *That the grievous was unlawfully done.*

I have made a careful perusal of the trial court record and found that there is sufficient evidence from the victim (PW1), PW2, PW3 and PW4 that on

10/01/2018 the victim sustained serious injuries, the fact which was duly admitted by DW1.

The trial court finding is very correct, since it has been proved beyond reasonable doubt that the victim was harmed by the appellant.

Another question is whether the evidence was sufficient to prove beyond doubt that the injuries amounted to grievous harm. Examining the evidence of the expert (PW3), Assistant Medical Officer who attended the victim, this court is satisfied that the trial court was correct to find that the injuries amounted to grievous harm.

PW3 told the trial court that the victim was admitted at Nkwenda Health Center from **10/01/2018 up to 25/01/2018** because the injuries were very serious and capable of causing death if not effectively attended. He added that, the victim was further referred to Kagondo Hospital for further treatments.

Exh.P2 (PF3) shows that the victim sustained a big cut wound on his right hand behind the palm which had the length of 14cm, width of 4cm and depth of 2cm, and that, tendons and ligaments were also affected.

The law clearly defines the term "grievous harm". Section 5 of the Penal Code Cap 16 R: E 2019 provides;

"*Grievous harm means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense".*

No doubt that the harm caused by the appellant falls within the meaning given herein above.

Another question is whether there was sufficient evidence on the trial court records to show that the grievous harm was unlawfully done. The evidence of the victim (PW2) is very strong that the harm was unlawful. The appellant in his defense alleged that he exercised the right to self-defense.

Reading carefully the evidence of PW1 and that of DW1, it is obvious that there was a land dispute between them, and the incident took place in the disputed land in which PW1 claimed that he sold to the appellant, but the appellant had not yet paid the whole agreed sum.

Certainly, the law gives any person the right to self-defense against any unlawful act or assault or violence to body. See section 18A (1) of the Penal Code Cap 16 R: E 2019.Nonetheless, section 18B (1) of the same Act provides that, in the exercise of the right to defense, a person shall be entitled to use only such reasonable force as may be necessary for that defense.

In the case at hand, the appellant chose to use a bush knife, and also chose where to cut. Nothing shows that the appellant sustained any injury or that his life or his property was in danger to prompt the exercise of the right to self-defense or to act the way he acted. In that respect, I agree with Mr. Uhagile that, the case had been proved beyond reasonable doubt, thus the third ground is also without merit, hence dismissed.

Arguing the 4th ground of appeal Mr. Uhagile submitted that the evidence adduced linking the appellant with the offence was not circumstantial

evidence but direct evidence. This ground should not detain me owing to the reason that the evidence adduced by the prosecution side was direct evidence, and not circumstantial as alleged by the appellant.

As regards, the 5th ground that the appellant was punished twice, Mr. Uhagile stated that there is nothing in the records showing that the appellant was punished twice. Indeed, I agree with Mr. Uhagile that the appellant was not punished twice for being sentenced to a custodial sentence and ordered to compensate the victim.

It is common knowledge that there are offences attracting compensation orders as per section 31 of the Penal Code Cap. 16 R: E 2019 and section 348(1) of the Civil Procedure Act Cap. 20 R: E 2019. The most important thing is to make sure that the order is very clear and precise and must show under which provision of the law is being made. See **SHISA SWEKE V.R** [2003] section 31 of the Penal Code.

"*In accordance with the provisions of section 348 of the Civil Procedure Act, any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence and the composition may be in addition to or in substitution for any other punishment*".

Section 348 (1) of the CPA provides;

"*Where accused person is convicted by any court of an offence not punishable with death and it appears from the evidence that some other person, whether or not he is the prosecutor or a witness in the case, has suffered material loss or personal injury in the consequence of the offence committed and that substantial compensation is,* ***in the opinion of the***

court, recoverable by that person by civil suit, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation, in kind or in money as the court deems fair and reasonable".

In the instant case, the appellant was ordered to compensate the victim (PW1) at the tune of ten million (**TZS. 10,000,000/=),** but the trial Magistrate did not cite the provision of the law under which the order of compensation was made, and there was no evidence of how the amount of compensation was assessed.

It is very unfortunate that the victim (PW1) was not accorded an opportunity to say anything, and likewise the appellant was not accorded an opportunity to say anything such as admitting the amount of compensation awarded. It is therefore apparent that, as regards the order of compensation the appellant was condemned unheard.

It is my considered view that the amount of TZS. **10,000,000/=** is a big amount of money which cannot just be awarded by the court without reasons or hearing both the accused (appellant) and the victim. Therefore, it is better for the victim/complaint to institute a civil suit in which the parties will be heard accordingly and thereafter, the court will have an opportunity to assess the amount payable as compensation.

In the event, the compensation order of TZS. **10,000,000/=** is hereby set aside. The victim (PW1) is at liberty to institute a civil suit in a court of law against the appellant for compensation.

As regards the 6th ground, Mr. Uhagile submitted that the charge was not at all defective as alleged by the appellant. The same met the standard of a formal charge. This ground also should not detain me since drafting of a charge is a matter of law. No charge shall be valid unless it complies with the requirements of sections 132 and 135 of the CPA. In particular, section 132 provides that:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The appellant stood charged with the offence of grievous harm under section 225 of the Penal Code. The said provision is specific as it states the elements of the offence grievous harm. For easy reference, let the charge speak for itself;

IN THE DISTRICT COURT OF KARAGWE

AT KARAGWE

CRIMINAL CASE NO.170 OF 2018

REPUBLIC

VERSUS

NAME: ADULLATIFU S/O LEONARD

TRIBE: NYAMBO

AGE : 38YRS

RELIGION: ISLAMIC

OCCUPATION: PEASANT

RESIDENCE: KITWE VILLAGE

STATEMENT OF OFFENCE

GRIEVOURS HARM Contrary to section 225 of the Penal Code [Cap 16 R:E 2002]

PARTICULARS OF OFFENCE

Abullatiffu s/o Leonard is charged on 10 day of January 2018 at Ibamba Village within Karagwe District in Kagera Region did unlawfully cause grievous harm to Siliacus s/o Justinian on his arms by using a panga.

Sgd by PP

Station: Karagwe

Date: 08/05/201"

Reading the herein above reproduced charge, it is not difficult to know that the same was not defective as alleged by the appellant, thus the 6th ground is also devoid of merit, hence dismissed.

Another issue which I find myself indebted to address is the question of sentence. In this case, the appellant stood charged under section 225 of the Penal Code Cap. 16 R: E 2019 which provides that;

"*Any person who unlawfully does grievous have to another is guilty of a felony,* ***and is liable to imprisonment for seven years*****".**

With no doubt, the term **"liable"** used in the herein above provision connotes that the court has discretion to impose a lesser sentence depending on the circumstances of each case.

In this case, upon conviction, the appellant was sentenced to serve seven **(7) years imprisonment.** However, the trial Magistrate ought to have read the said section together with section 170 (1) of the Criminal Procedure Act Cap. 20 R: E 2019 which provides.

170- (1) *A subordinate court may, in cases in which such sentences are authorized by law, pass any of the following sentence-*

(a) Imprisonment for a ***term not exceeding five years;*** *save that where the court convicts a person of an offence specified in any of the schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimums sentence of imprisonment shall not be carried into effect, executed or levied until the record of the case, or a certified copy of it has been confirmed by judge;*

Provided that, this section shall not apply in respect of any sentence passed a senior Resident Magistrate of any grade or rank"

A glance at the trial court proceedings reveals that the said proceedings were presided over by a judicial officer of the rank of a resident Magistrate. It is undisputed that this rank is lower than that of a Senior Resident Magistrate. A Senior Resident Magistrate is a rank whose sentencing powers are capped to five years imprisonment while sentencing powers of a Resident Magistrate are capped to 12 months, as any other sentences save for the minimum sentence provided for by the law, shall not be carried out before being confirmed by the High Court.

By imposing a sentence of (seven) 7 years, the trial magistrate exceeded his statutory sentencing powers.

In the premise, I revise the sentence and substitute it with a sentence of five years imprisonment. Save for the variation of sentence, and the order of compensation set aside with the direction that victim (PW1) is at liberty to institute a civil suit in a court of law against the appellant for compensation, the appeal is dismissed for want of merits.

It is so ordered.

Dated at Bukoba this 8th day of July 2022.

E. L. NGIGWANA

JUDGE

08/07/2022

Judgment delivered this 8th day of July 2022 in the presence of the appellant, Mr. Amani Kilua, learned State Attorney for the respondent Republic and Ms.Tumaini Hamidu, B/C.

E. L. NGIGWANA.

JUDGE

08/07/2022