IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 05 OF 2022

(Originating from Criminal Case No. 131/2020 in the District Court of Mpanda at Mpanda)

EMMANUEL JUMA @ MWASHIUYA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Last of Order:19/09/2022
Date of Judgment: 13/12/2022

JUDGMENT

NDUNGURU, J.

This appeal is the result of the decision of the District Court of Mpanda at Mpanda (trial court) whereas the appellant herein was arraigned before it for the offence of causing grievous harm contrary to section 225 of the Penal Code Cap 16 R. E. 2002 (before its amendment).

It was the respondent's case that on the 09th day of September, 2020 at Kigamboni area within Mpanda District in Katavi Region, the appellant did cause grievous harm to a victim known as Agnes d/o Samwel, by beating her on the head and the face by using an iron bar. As the

charge was read to the appellant, but he entered a plea of not guilty. As the matter went to a full trial, the trial court declared him guilty and hence convicted him, and thereafter sentenced him to serve seven (7) years imprisonment.

Aggrieved by that decision, the appellant rushed to this court holding his petition of appeal which consisted of five grounds as they are reproduced hereunder;

1. ***That, the case against the appellant was not proved beyond all reasonable doubt as required by the standard of law.***
2. ***That, the trial court erred in law, point and fact by convicting and sentencing the appellant relying on the prosecution's evidence while mis observed that there was a full of contradiction from the evidence adduced by the prosecution side.***
3. ***That, the trial court erred in law, point and fact by convicting and sentencing the appellant basing on the exhibit P1, P2, P3 and P4 which were admitted before the court illegally since the said certificate of seizure was not signed by any people as a witness to prove the allegations.***
4. ***That, your Lordship, the trial court erred in law, point and fact by convicting and sentencing the appellant relying on the exhibit P6(P3) while the appellant was not given a***

chance to dispute or to challenge it, since the appellant was not asked if he can object it as required by the law.

5. ***That, the trial court erred in law, point and fact to convict and sentence the appellant without considering the defense which was adduced by the appellant and ended drawing a null conviction for the appellant.***

Out of these grounds, the appellant prays for this court to allow his appeal and in that, quash the conviction and sentence penned against him and as a result be at liberty as he believes that he did not commit the offence he was charged with.

As the matter was scheduled for hearing, the appellant had no legal representation meaning he stood for himself, while the respondent was represented by Ms. Safi Kashindi Amani learned State Attorney.

The appellant was invited to submit for his five grounds of appeal and he opted to for this court to adopt to his grounds of appeal as his submission and prayed that his appeal be allowed.

On the other hand, Ms. Kashindi submitted that they resist the appeal and that she will respond to each ground of appeal as set in the petition of appeal. She submitted on the 1st ground that the evidence tendered in court satisfied the court that the case was proved beyond reasonable doubt, Agness Samwel (PW1) was the victim of the crime, and she testified the way the appellant attacked her. Ms. Kashindi added that

her evidence is at page 5 of the proceedings. And on that page, one would read on how PW1 held the appellant so that he could not escape, and Ms. Kashindi insisted that the evidence of PW1 is direct evidence as provided by the law of evidence.

Ms. Kashindi submitted further that the evidence of PW1 was corroborated by the evidence of Lucia Samwel (PW2) her sister, who slept in one house with the victim. The learned State Attorney stressed that it was PW2 who assisted PW1 to keep hold of the appellant, until further assistance arrived and that it was PW2 who took the iron bar from the appellant. Ms. Kashindi added that, the evidence of PW2 was corroborated with that of Frank Boniface Mweupe (PW4), whereas, his evidence was that he found the appellant being held by PW1 and PW2. She added that Hussein (PW5) is the neighbor of the victim, he had the confrontations and also rushed to the scene and assisted his neighbors to take the appellant to the police station.

The learned State Attorney submitted further that, PW6 is the medical officer who attended the victim and filled in the PF3 which was tendered and admitted as exhibit P6. In addition to that she said, PW3 was the police officer who received the victim at the police station and issued the PF3 to the victim. And therefore, such evidence proved the case against the appellant. Ms. Kashindi prayed for this 1st ground of appeal to be dismissed for being devoid of merit.

On the 2nd ground of appeal, she submitted that there is no any contradiction within the prosecution evidence. She argued that the 1st, 2nd, 3rd and 4th witnesses were the people present at the scene. There is no any contradiction in their evidence, and that this ground is also devoid of merit.

Submitting on the 3rd ground that the exhibits were illegally tendered. Ms. Kashindi argued that exhibit P1 was the certificate of seizure, while exhibit P2 was a tool known as pliers and that the tendering of the said exhibits, were properly tendered according to the law and that the respondent never objected them being tendered and therefore the appellant cannot talk about them being illegally tendered. Therefore, Ms. Kashindi prayed for the ground to be dismissed.

Submitting on the 4th ground of appeal, Ms. Kashindi said she holds that the appellant was given an opportunity but never objected.

On the 5th ground, the learned State of Attorney insisted that the court did take into consideration the defence of the appellant. She proceeded that the typed judgment shows clearly that the appellant was given an opportunity to make his defiance and he did so, meaning hiss defence was considered, however Ms. Kashindi stressed that even if the trial court had not done so, this court has power to go through evidence and make its finding and she referred this court to the case of **Jafari Mussa Vs. DPP**, Crim. Appeal No. 234 of 2019 (CAT) Unreported and she then prayed to this court that the appeal be dismissed.

In rejoinder, the appellant insisted that his grounds of appeal be adopted as his submissions and that his appeal be found meritious and he be set at liberty.

It is my observation that in comparing all five grounds of appeal as filed by the appellant, only the 1st ground of appeal is enough to deal with appeal in its entirety. Therefore, the issue to be dealt with is to ***whether the case against the appellant was proved beyond the required standard of the law.***

To start off, I would like to genuflect on the fact that this court being the first appellate court, it has powers to reevaluate the evidence of the trial court and come to its own findings as it was held in the case of **Mwajuma Mbegu vs. Kitwana Amani (2004) TLR. 410** that: -

"A first appellate court has power to re-evaluate the evidence adduced at the trial and make factual findings therefrom....."

In doing so, I read through the trial's court record and in that, PW1 was the victim herself and she gave her testimony under oath that she was responding to the call of nature in the middle of the night but as she was returning back inside of her house, she saw a person moving, as she and the said person saw the victim's shadow and flashed her with a flashlight and warned her not to raise an alarm. As she got close to him, she rose and an alarm and the said culprit hit her on the by using an iron bar twice, the victim fell down but she was screaming for help until her sister arrived,

they got hold of the culprit until the victim's husband also arrived and no sooner the neighbor too arrived and the managed to get hold of the culprit.

PW1's testimony was corroborated by the testimony of PW2 (the victim's sister) and her testimony was corroborated by the testimony of PW4 (the victim's husband) and his testimony was corroborated by the testimony of PW5 (the neighbor). However, PW3 (Police Officer) confirmed that the victim was taken to Mpanda Police Station and he issued her with a PF3 so that she would be treated at the Katavi Referral hospital as she was injured and unable speak. PW3 also testified that the culprit of the offence was also taken to the police station where he issued a certificate of seizure (exhibit P1) and seized from him, a pliers (exhibit P2), an iron bar (exhibit P3) and certificate of release from Mpanda prison (exhibit P4) which were all not objected by the appellant during their admission in the trial court.

In addition to that, PW6 (medical officer) testified that while he was at his work station, he received a woman with a wound on her head and she was bleeding profusely, her clothes had blood stains, and he started treating her accordingly, and after a successful treatment, he filled a PF3 (exhibit P6) and discharged her.

In his defiance, the appellant testified before the trial court that he had love affair with the victim, and that he does not know who injured her but on that material date, they were together when a person arrived and

started blaming her that she had betrayed their love, and the two confronted each other but the appellant was defeated as number of people increased. The appellant testified that he sustained injuries and that he had to be taken to the hospital after being taken to the police station where he stayed in remand of three days and his health got worse, where he was issued a PF3(exhibit D1).

In the case of **Azizi Abdala vs Republic (1991) TRL 71,** cited with approval the case of **DPP vs Hester (1973) AC 296,** that: -

"....the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm or support that which is sufficient and satisfactory and credible."

In this case at, the testimonies of PW1, PW2, PW and PW5 corroborated to prove the incidence which occurred that fateful night as each witness testified that it was way past bed time and they had slept, contrary to the time the appellant told the trial court the event occurred. PW3 seized the weapons found in the possession of the appellant which were the pliers (P2) and the iron bar (P3) whereas, during its admission in the trial court, the appellant never objected to any.

Nevertheless, the appellant had the opportunity of cross examining all the witnesses who were summoned to testify against him. I noticed, what the appellant had testified as his defense was just an afterthought

because during the trial, he never cross examined any of the witness on the fact he raised of being lovers with the victim. The appellant had the chance of cross examining the victim and her husband during but he never asked them on the confrontation he had with the person who emerged and started blaming the victim for betraying their love affairs.

It was held in **Nyerere Nyague v Republic Criminal Appeal no 67/2010** (unreported) that: -

> *"As a matter of principle, a part who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness*
>
> *said."*

At this juncture, I am confined that the evidence against the appellant was sufficient to prove the offence of grievous harm as per the charge sheet, and therefore the prosecution side at the trial court had managed to prove the case against the appellant to the required standards of the law. It is my holding that this appeal has no merit before this court and in that I find no need of interfering with the findings made by the trial court.

However, the sentence given to the appellant was as per the Section 225 of the Penal Code Cap.16 R. E 2022, whereas it is unfortunate that the

law has only provided for the maximum sentencing of the offence of this sort. But keeping in mind, a maximum sentence should only be imposed when the offence comes close to the worst of its type. In **Regina v Mayera** (1952) SR 253, the court held that: -

> *"A maximum punishment is reserved for the worst offence of the class for which the punishment is provided. A court, in sentencing for an offence, should consider whether it may not be likely that far worse instances of the same class may in future come before it, and should keep some penalty in reserve in order to be able more severely to punish the greater offences. Thus it is undesirable to punish a first offender who steals a lamb with the maximum penalty.....for then no greater penalty can be inflicted on the hardened criminal, who steals an ox or a horse, or a number of sheep, unless he happens to come within the provision allowing a greater punishment in case of second or subsequent conviction"*

In this appeal, the learned trial Magistrate has not given the reason as to why he has opted to inflict a maximum sentence upon the appellant whereas the offence was not close to the worst in nature although it involved the use of a weapon. Notwithstanding that the provision has not given an option for minimum sentencing, considering the level of offence and mitigating factors of the appellant.

Under the circumstance, I proceed to reduce the sentence of seven (7) years imprisonment to four (4) years imprisonment whereas he has already served two (2) years.

Ordered accordingly.

D. B. NDUNGURU

JUDGE

13/12/2022