IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 672 OF 2020

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT
VERSUS

FOCUS PATRIC MUNISHI .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Morogoro)

(Mgonya, J.)

Dated the 12th day of November, 2020
in
Criminal Session Case No. 11 of 2017

JUDGMENT OF THE COURT

12th & 25th July, 2022

KITUSI, J.A.:

The respondent, Focus Patrick Munishi was charged before the High Court of Tanzania sitting at Morogoro, with acts intended to cause Grievous Harm contrary to section 222 (a) of the Penal Code, Cap 16 as revised. It was alleged that on 15th September, 2016 at Tex Palace Hotel within Morogoro Municipality, with intent to disable, the respondent unlawfully assaulted one Najiva Geofrey Nzunda on her eye with a high heel shoe and consequently caused her to suffer permanent disability of the said eye. He was found guilty, convicted and sentenced to community service and ordered to pay the victim TZS 7,000,000.00 in

compensation. This appeal by the Director of Public Prosecutions (DPP) is against the sentence and order of compensation.

For what it is worth, we are going to briefly tell the background of the matter, and the main storyteller for the prosecution is Najiva Geofrey Nzunda (PW5). It is this; the respondent and PW5 were lovers from 2014 but, it seems, that relationship was not destined to be a fairy tale, because in 2016 it came to a tragic end.

The respondent was a widower, having lost his wife on 27/11/2013. PW5, was then aged around 32 years, a salaried employee, single and childless, so when she met the respondent in 2014, she saw prospects of a permanent union with him. That is quite natural, in our view. She testified that, the respondent had actually promised to marry her and start a family with her. However, as we shall later see from the respondent's account, he had no such intention and he denied ever promising her marriage. He stated that after his wife's demise, he had no intention of remarrying because, he said, he had small children left by his wife, to look after. So, things did not work out.

Back to PW5, she stated that she was giving the respondent a hand in parenting and even in advising his children on academic issues. She stated for instance, that she went out of her way to make a follow

up on employment opportunities for Happy Munishi, the eldest child of the respondent.

So, she stated, on the fateful day, she went to the respondent's office with two intentions. First to discuss the relationship with him. Incidentally, she had heard from the grapevine that the respondent was seeing another woman. She intimated that that was not going to be a big deal anyway, because she believed that the two of them would sort it out. Secondly, she had good news to deliver to the respondent concerning Happy's employment.

However, when PW5 walked into the respondent's office at Tex Palace Hotel, which he owns, he was surprisingly mad at her and he greeted her with the following words; "*Tena wewe nilikuwa nakusubiri sana, sasa leo nitakuonyesha.*" Meaning; " *I have been badly waiting for you, so today I will show you.*" PW5 testified that the respondent blamed her for disclosing to people the fact that he had an affair with a woman, while he did not want it known.

Furious at PW5, the respondent allegedly confronted her with a car key aiming to use it against her, but he only hit her face with a fist instead. There was a fracas, in the course of which the respondent grabbed one of PW5's high heel shoes she was wearing and hit her right

eye with it, the impact causing a severe injury on the eye. She bled so much and it was later confirmed by medical personnel, Florence Sekela Mwakila (PW1), Anande Obed Swai (PW3) both of Morogoro Regional Hospital and Paulo Nyaluke (PW4) of Muhimbili National Hospital, that PW5 had completely lost her right eye, which constitutes permanent disfigurement.

In defence, the respondent gave so much details of his affair with PW5 from their first encounter up to the fateful day, some of the details not quite relevant. He insisted however that he informed PW5 right from the beginning, that he was not going to marry her because of his affection with his children, but pointed out that PW5 would not accept that reality and let go. He said he decided to end the relationship, however he soon realized that his decision made PW5 harbor a grudge.

On the fateful day, PW5 went to his office uninvited, which surprised him because their affair had already come to an end. She used the following swore words, immediately upon entering his office. *"Ama zako ama zangu, umenisumbua sana kwa muda mrefu"* meaning that it was a doomsday for either of them because the respondent had caused her so much problem for a long time.

The respondent's account was that PW5 was the first to physically attack him. During the fracas that ensued, the respondent pushed PW5 out of the way and went out of the office locking her in. He said he did not know what happened to PW5 in the office when he went out and locked her in.

The High Court, (Mgonya, J) accepted the prosecution case and rejected that of the accused (the respondent) for not raising any reasonable doubt. As we indicated earlier, it convicted and sentenced him. The appeal raises two twin grounds, one complaining against the sentence and another complaining against the order of compensation. Ordinarily, the facts which we have set out in the preceding pages would not be relevant in an appeal challenging the sentence, but we are of the view that in the peculiar circumstances of this case, they are.

Arguing the appeal, Mr. Nassoro Katuga, learned Senior State Attorney, submitted that the sentence of community service was inadequate in view of the gravity of the injury caused. He insisted that for a sentence to be meaningful, it should cause regret on the offender by making him feel the pinch and that it should cause the others to fear similar consequences. He submitted that the sentence of community service would not achieve that purpose, and suggested an imprisonment

term of 10 to 15 years because, he pointed out, the provision under which the respondent was charged attracts a sentence of life imprisonment. Mr. Katuga was not very clear in his response to our probing whether, we would be justified in imposing custodial sentence to a person who has completed serving his sentence. We had in mind the provisions of rule 11 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), which empower the Court to suspend the carrying out of a sentence, pending hearing and determination of an intended appeal. On reflection however, we think that rule applies to an offender who seeks suspension of sentence imposed against him and would not apply to the DPP. At our probing, Mr. Katuga conceded that the court has discretion to impose any of the sentences provided under Chapter VI of the Penal Code.

Mr. Katuga made more or less similar arguments in relation to compensation, suggesting that we be pleased to make an order of payment of TZS 100 million as compensation. He stood by this view even when his attention was drawn to the fact that there is a pending civil suit in which the victim is claiming payment of TZS 1.4 billion from the respondent.

In response, Mr. Majura Magafu learned advocate for the respondent submitted that it is an embarrassment and it constitutes enough punishment for a man of the respondent's age and social stature, to do community work under supervision. He submitted further that such punishment has the potential of deterring others who may come across the respondent working on public roads and schools. He was of the view that since the respondent had completed serving the sentence, he could not be subjected to another mode of sentence. According to him, this Court would only interfere with that sentence if it were illegal. As for the compensation, the learned counsel submitted that it is open for a victim to prefer a civil suit if she considers the same to be inadequate, which is what she has already done.

That the powers of an appeal court in dealing with sentence imposed by the courts below are restricted, is not a new territory. In **Fatuma Nurdin v. Republic,** Criminal Appeal No. 418 of 2013 [2014] TZCA 188 (28 October 2014), the Court stated the following, citing the case of **Patrick Matabaro @ Siima and Another v. Republic,** Criminal Appeal No. 333 of 2007 (unreported):-

> *"It is settled law that an appellate Court has a limited role in sentencing. The governing*

principles that must be taken into consideration are as follows :-

(i) Sentencing is a function that the legislature entrusts to the trial judge (or magistrate as the case may be);

(ii) The sentencing decision is a decision made in the exercise of a discretion;

(iii) An appeal court may only intervene where the exercise of the sentencing discretion is vitiated by error, such that there has been no lawful exercise of that discretion;

(iv) Then an appeal court may decide for itself what the sentence should have been."

In urging us to interfere with the sentence imposed by the High Court in this appeal, the learned Senior State Attorney made reference to none of the above principles, nor did he suggest that the learned trial judge wrongly exercised her discretion. It was clear from his address that he considered custodial sentence to be the only punishment that would be commensurate with the gravity of the offence. With respect, that is not necessarily correct in our view and we shall demonstrate soon.

The record before us leaves us in no doubt that in imposing the sentence, the learned trial judge informed herself of the peculiar background of this case, which we have set out at length a while ago. She also demonstrated her awareness of principles of sentencing, and that a sentence should serve one of the following purposes namely, to deter, to prevent, to reform or to retribute. It is relevant, in our view, to note that at some point after the tragic injury of PW5, the respondent offered an olive branch through her relatives and even contributed money to her hospital bills. Since the learned judge took all these relevant factors into consideration, we cannot intervene just because we could have imposed another and heavier sentence. In **Mohamed Ratibu @ Said v. Republic**, Criminal Appeal No. 11 of 2004 (unreported) we cautioned against intervening in sentencing on the ground that the superior court would have imposed a heavier sentence. We stated: -

> *"It is a principle of sentencing that an appellate court should not interfere with a sentence of a trial court merely because had the appellate court been the trial court it would impose a different sentence. In other words, an appellate court can only interfere with a sentence of a trial court if it is obvious that the trial court has*

imposed an illegal sentence or acted on a wrong principle or had imposed a sentence which in ***the circumstances of the case*** *was manifestly excessive or clearly inadequate". (emphasis supplied)*

Mr. Magafu correctly submitted that this Court would be justified in interfering if the sentence imposed was illegal and there is no suggestion that the sentence of community service imposed on the respondent is illegal. With respect, Mr. Katuga having conceded that the judge could impose any of the sentences provided under Chapter VI of the Penal Code, his view insisting on custodial sentence, stands on weak ground. In view of all that, we have no basis for interfering with the judge's exercise of discretion because there is no argument that she did not exercise it judiciously. [See **Mbogo v. Shah** [1968] EA 93 followed in many of our decisions including **Yege Gawe v Republic** Criminal Appeal No. 45 of 2019 (unreported)]. Besides that, we cannot impose another form of sentence when the respondent has completed serving another form of sentence.

In the circumstances, the appeal against sentence has no merit. Similarly, the appeal against the order of compensation is without any merit because under the provision of section 348 of the Criminal

Procedure Act, the victim may prefer a civil suit where upon proof, she may claim an entitlement to more. What Mr. Katuga suggested as adequate compensation needs to be dealt with in a civil suit.

Thus, this appeal is dismissed for want of merit.

DATED at **DAR ES SALAAM** this 21st day of July, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of July, 2022 in the presence of Mr. Tumaini Mafuru, learned State Attorney for the appellant and Mr. Majura Magafu, learned counsel for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL