

IN THE HIGH COURT OF TANZANIA

AT MBEYA

ORIGINAL JURISDICTION

(Mbeya Registry)

CRIMINAL APPEAL NO. 16 OF 2001

(Original Criminal Case No. 106 of 2000 of
the District Court of Chunya)

RASHID S/O SALEHE NZUNDA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

MACKANJA, J.

The appellant was charged with, and was convicted on his own plea of guilty of, doing grievous harm C/s. 225 of the Penal Code. According to the admitted facts the appellant and his wife live at Igundu Village in Chunya District. The appellant left home on 15th September, 2000, for a journey to Usangu Village. He left his wife Christina Kazibwe, behind. He returned home two days later, that is on 17th September, 2000. It was at 9.00 p.m. when he arrived home. Surprisingly, he found a man sharing company with his wife in their house; the man turned out to be the complainant. It is stated further that the appellant's wife fled and left the appellant grappling with the man he suspected to have either stolen his love or was about to do so. The appellant had stabbed the intruder twice in the chest when the appellant's neighbours arrived to stop the fight. Appellant in his confessional statement to the Police the appellant stated that he stabbed the complainant because in the course of the struggle the latter held the former by the neck in an attempt to strangle him. This was not disputed. If that be the position, it is the law that the appellant was entitled to arrest the complainant and to use all necessary and lawful force to subdue resistance. He had to effect the arrest because apart from suspecting adultery, the appellant also suspected the complainant to be a criminal. For while he gave chase to the complainant he shouted "thief, thief". In these circumstances the trial court erred when it failed to consider the appellant's statutory right to use reasonable force to effect the arrest of a man whose mission was not disclosed to the trial court.

The appellant is complaining that the sentence of two years imprisonment was, in the circumstances of this case, manifestly excessive. On his part, Mr. Mulokozi, learned Senior State Attorney, argues that, since the maximum sentence in a crime of this nature is seven years imprisonment, the two years' custodial sentence the trial court awarded the appellant

was justified in the circumstances of this case. It is his view that although provocation could be a mitigating factor when considering sentence, the sentence was lawful.

I have given due weight to learned Counsels arguments but, with due respect, I am not that the trial court could have awarded the sentence it gave if it had also considered the appellant's right to arrest a man who emerged from his house and put up a fight. By and large it is the complainant who is to blame for what his mischief brought to him. I, therefore, find the sentence to be on the high side.

In the result the appeal against sentence conviction is dismissed. The appeal against sentence is allowed. Consequently the sentence is so reduced as to amount to the immediate discharge of the appellant from prison.

Judgement to be delivered by the Registrar on 17th September, 2001.

J. M. MACKANJA

JUDGE

10/9/2001

Date: 17/9/2001

Coram: M.G. Mzuna, Ag. DR.

Appellant: Present.

For Respondent: Mr. Malata - State Attorney - Present.

C/C: Agripina.

Court: Judgement delivered this 17th day of September, 2001 in the presence of the parties.

(Sgd.) M. G. Mzuna

Ag. District Registrar

17/9/2001

CERTIFIED TRUE COPY OF THE ORIGINAL JUDGEMENT.

DISTRICT REGISTRAR