IN THE HIGH COURT OF TANZANIA
AT BUKOBA

H/C CRIMINAL APPEAL NO. 1/2007

(Arising from Criminal Case No. 53/2005 Bukoba District Court)

YUNUSU S/O MAGAO ----------APPELLANT

VERSUS

THE REPUBLIC ----------RESPONDENT

JUDGMENT

18/9/2007 & 5/2/2008

Mussa, J;

In the District Court of Bukoba, the appellant was arraigned and convicted for grievous harm, contrary to section 225 of the penal code, chapter 16 of the laws. The particulars alleged that on the 3rd day of August, 2004 at Rwamishenye within the District of Bukoba, the appellant slashed one Egidius Josephat with a machete the result of

which he caused him grievous harm. Upon conviction, the appellant was sentenced to a term of seven years imprisonment. He is aggrieved and now appeals upon a petition comprised of seven points of grievance. The factual setting unfolding from the contested trial is simple and free of any controversy.

The case for the prosecution was made up of three witnesses from whom it is commonplace that the appellant and the alleged victim of the assault are neighbours. On that fateful day, around 11.00pm, Egidius (PW1) and his wife Imelda (PW3) were in deep sleep when, suddenly, the wife of the appellant was heard yelling from outside their residence. The couple opened their door following which the appellants' wife entered into their residence but it soon became apparent that the appellant was on her heels, armed with a machete. The way it appears, the appellant and his wife were in a row and; Egidius and Imelda, at least, pleaded with the appellant not to harm his wife. But no sooner had the intervening couple done so, than the

appellant turned his ware against them whereupon he slashed both Egidius and Imelda. Egidius sustained serious injuries on his right hand following which he was subsequently admitted into hospital for treatment. The police form No.3 which he produced as evidence indicates that the victim developed a complication termed chronic osteomyelites the result of which he was admitted into hospital with effect from the 26th day of August, 2004 to the 29th September, 2004. Egidius, otherwise, had sustained a fracture of the right arm. Thereafter, it was said, the appellant turned fugitive till when he was arrested at the hospital whilst in an attempt to level with Egidius.

Against this backdrop, there was not much in the appellants' defence who simply said he was arrested whilst at Bukoba Central Market, apparently, for no cause at all. As to the specific accusations against him, the appellants' response was, ironically though, stone silence. As it turned out, the learned trial Magistrate was impressed by the version as told by the prosecution and the defence was

rejected. The appellant was found guilty, convicted and sentenced to the extent indicated above.

The petition of appeal is, appallingly, unfocused but from whatever material I can discern from it the appellant is complaining, first, of the trial court improperly accepting the evidence of PW3 who was not in the list of prosecution witnesses; second, of the prosecutions failure to call Leticia, ostensibly, his wife; third, of the prosecution failure to produce the weapon allegedly used in the attack; fourth, the prosecution failure to call the police officer who investigated the case and; fifth, that the trial court erred, if understood him well, in acting on the word of the couple without recourse to independent evidence from some other source.

At the hearing, the appellant, unrepresented, adopted his petition of appeal and, if anything, echoed his complaint about the couple whom, he said, were biased against him; repeated his claim that PW3 was not among the listed witnesses in the aftermath of the preliminary hearing and;

additionally, alleged that the medical officer who made entries into the Police form No. 3 was a no show despite his calling for his testimony. Mr. Ndjike, the learned state attorney for the respondent Republic, fully supported the conviction submitting, in effect, that the evidence is overwhelming against the appellant and that the sentence was within the prescribed maximum.

Dealing with the first point of grievance, the same is, so to speak, wholly without substance. The witness being objected, namely, Prosper Protase (PW3) appears as No. 6 in the list of witnesses released by the prosecution in the immediate aftermath of the preliminary hearing and the appellants' complaint is, apparently, ill-gotten. The same goes to the grievance about the author of the PF3 not being called much as the record indicates that the appellant was addressed to the terms of section 240 of the Criminal Procedure Act following which he would not wish the medical officer availed.

Coming to the complaints about the prosecution not featuring some of the witnesses and the alleged attack weapon; I would say, it would have been neater and more appropriate if the prosecution had done so, that is, if such evidence was available. But while the prosecution is endowed with a duty to make available all witnesses as well as physical exhibits to establish the truth of a matter; it is not a requirement that it should produce a superfluity of witnesses or evidence and where the evidence adduced is adequate, one would have no cause to raise eye-brows on uncalled evidence. In the matter presently under my consideration, there was sufficient material furnished by Egidius and Imelda to the effect that the appellant attacked the couple as the latter were attempting to dissuade him from attacking his wife. The appellant was a neighbour well known to the couple and; unmistakely identified, I would say, with the aid of a lamp Imelda was holding.

With respect to the grievance about the couple being biased against the appellant and relating to their evidence,

coming from the same family, not being supported by confirmatory material from an independent source; with respect, the complaint is essentially one of questions of fact directed towards impeaching the credit of prosecution witnesses which should have been raised in the course of the trial. The one remarkable feature, from the standpoint of the case for the appellant, comparable to that of the dog which did not bark at night is that such matters pertaining to the appellants' complaint were not raised in the course of the trial and are being raised for the first time at this stage of the proceedings. It was, I would suggest, idle for the appellant not to put such questions to the couple as they were testifying and, indeed, just as vain to raise them at this stage.

Then, as indicated above, the appellant, if I understood him well, suggests that the couple, coming from the same roof, could have cooked up the evidence just to have a fix on him and that, therefore, there was need to look for confirmatory material from an independent source.

The irony is that the appellant does not specifically allude his incrimination to the existence of ill-blood between him and the couple or any of them. As regards the possibility of their cooking up the evidence simply because they come from the same roof; it does not dawn upon me that consanguinity necessarily qualifies a witness to interestedness and; certainly not in a case such as the present where no reason, let alone good reason, was advanced as to why these witnesses should have conspired to testify falsely against the appellant.

In the final event, I am satisfied, all factors considered in their totality, the incrimination of the appellant was established beyond any per-adventure and I fully associate with the conviction of the appellant by the trial court. The appeal against conviction is hereby, accordingly, dismissed.

Now, the only substantive point for consideration by this court pertains to the severity of the sentence. The appellant was a first offendor and stated in mitigation that

he had stayed in remand prison for quiet some period and that he had a family of a wife and three children depending on him. The learned trial Magistrate said he had taken into consideration the mitigating factors but did not specifically express why he imposed a sentence which is the maximum provided by the law. Given the situation, the sentence of seven years imprisonment which was on the high side, without elaboration, is reduced to a term of five years imprisonment. In fine, this appeal fails and partly succeeds to the extent indicated. It is so ordered.

K.M. Mussa
JUDGE
11/01/2008

5/20/2008
Coram: W.R. Mashauri – Ag. DR.
Appellant: Present
Respondent: Present
B/C: Bilauri

Delivered in court in the presence of the appellant this 05th day of February, 2008. Right of appeal to the court of appeal explained.

W.R. Mashauri – Ag. DR.
05/02/1008

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05/02/2008