

IN THE UNITED REPUBLIC OF TANZANIA

THE JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC. CRIMINAL APPEAL NO.1 OF 2020

*(Masasi District Court Criminal Appeal No.14/2019, Original from Chikundi
Primary Court at Masasi Criminal Case No.13 of 2019)*

BETWEEN

MOHAMED SAIDI KATOPOLA.....APPELLANT

VERSUS

FATUMA HALFANI.....RESPONDENT

JUDGMENT

8th & 24th June, 2020

DYANSOBERA, J.:

The appellant, Mohamed SaidiKatopola was arraigned before Chikundi Primary Court for wounding and similar acts contrary to section 228(1) of the Penal Code Cap 16 R.E. 2002.It was alleged that "wewe MOHAMED S/O SAID @KATOPOLA unashitakiwakuwamnamotarehe 01/01/2019

majirayasaa 1:30 usikuhuko Namali Chikundi(w) Masai (M) Mtwara. Bilahalali ulimjeruhi FATUMA D/O HALFAN kwakumkata kata napangakichwani, mkonowakuliamkonowakushotonabeganinakumsababishi amajerahamwilinimwakekitendoambachonikinyume cha sheriazanchi". The appellant pleaded guilty and the matter went to a full trial upon which the respondent herein paraded two witnesses who testified as SM1- Zainabu Issa and SM2 -Salma Hussein. In a nutshell on 01/01/2019 and at 19:30 hours, a New Year eve the appellant went at respondent's resident and found her cooking. She greeted the appellant and asked him why he went at her premise at such moment. The respondent insisted to the appellant that he threatened to do bad things to her that is why she did not like him to go there during the night hours. There emerged some fracas between the appellant and respondent which eventually resulted into the respondent being wounded by the appellant. According to the testimonies of the respondent, "SU1" and "SU2" the appellant took a panga and cut the respondent at the head, left hand at her fingers, right hand back side and the neck. The respondent managed to run away but the appellant still cut her with the panga. SU1 raised her alarm but was threatened by the appellant who showed her a panga hence she calmed down. SU2 successfully made an alarm which convened the neighbours at the scene crime. Also, in the testimony of the respondent it is stated that her cellular phone dropped down and when the appellant saw people are convening he took her phone and run away to Morogoro. In addition to that the respondent was brought to police station of Ndanda where she was given a PF-3. Later on the respondent was sent to St. Benedict Hospital for

treatment. In her testimony the respondent tendered her PF-3 and payment receipts which were admitted as A1 and A2-24. In his defence the appellant called two witnesses who testified as SU1 one Belo Said Ibrahim and SU2 one Michael Millanzi. In general terms the appellant denied to have committed the offence of wounding and similar acts to the respondent. But he testified that he caught the respondent committing adultery with Andrea. The appellant further told the trial court that they convened a meeting with the guardian and relatives of the respondent regarding the issue of adultery where he forgave her and her relatives thanked the appellant. In addition to that the appellant testified that on 13/01/2019 he came back from Morogoro via Dar es Salaam to Chigugu village where he was arrested and brought to court. Besides that the appellant denied to have gone at the respondent's premise and he did not escape to Morogoro. SU2 told the trial court that the appellant found the respondent committing adultery and he went to Morogoro on 18/12/2019(sic) and came back himself on 13/01/2019. The evidence of SU2 had nothing to do with the defence of the appellant but he testified further on the how the appellant reported to his office and the correspondence he made to the appellant. After completion of the trial, the trial court rendered its judgment of which it found the appellant guilty and convicted him on the charged offence. At last the trial court sentenced the appellant to pay fine to the tune of Tshs.100, 000/= or serve a punishment of one year imprisonment. In addition to that the trial court ordered the appellant to pay compensation to the respondent at the tune of Tshs.1, 500,000/= which covered treatment expenses and pain suffered. The respondent was dissatisfied

hence appealed to the District Court of Masasi at Masasi. The appeal was based on the following grounds: "**One**, That the trial Magistrate erred in law and fact in disregarding the evidence of and its testimony adduced by PW1 and PW2 for a reasoned judgment.**Two**, that the trial Primary Court erred in law and fact for failing to consider the amount of harm that was caused by the respondent to the appellant. And **three**, that the trial Primary Court erred in law and fact in disregarding the medical expenses that the appellant has incurred from the injuries that she suffered after(sic) attacked by respondent". During the hearing of the appeal at the District Court the respondent's contest was mainly on the sentence imposed on the appellant which she claimed it to be a lesser sentence as compared to the wounds she sustained from the act of the appellant. The respondent further lamented on the indefinite time for payment of compensation order .Whereas, the appellant told the first appellate court that he was sentenced to pay fine at the tune of Tshs.100,000/= or to serve one year imprisonment term but he opted to pay a fine. On part of the fine he told the first appellate court that he was directed to pay a compensation to the respondent when he obtain money but up to that time he had no money and he promised to pay her on 30/9/2019.The appellant went further and stated that the amount claimed by the respondent had no receipt hence he prayed the first appellate to dismiss it. Having considered the parties' submissions the learned District Resident Magistrate delivered her judgment on which she entered a fresh conviction against the appellant and proceeded to take the mitigation of the appellant which was nil and finally she sentenced him to serve a term of three years imprisonment. In

addition to that the appellant was ordered to pay compensation to the respondent immediately after completion of his sentence. The appellant was aggrieved hence this appeal which is predicated on three grounds as follows:

"1. That the first appellate court erred in law and facts by finding the appellant guilty to the offence which I was also found guilty on by the trial court. This has resulted to double jeopardy which causes a great injustice to me. I was found guilty and sentenced by the trial court and the first trial court found me guilty again over the same offence. This has resulted to erroneous judgment.

2. That the first appeal court erred in law and in facts by convicting me to three years term in prison by failing to pay compensation to the respondent without the execution order ordering me to pay the compensation. Thus arriving to erroneous judgment.

3. That the first appeal court erred in law and fact by not considering that I had already paid the fine and set free by the trial court thus arriving to erroneous decision."

At the hearing of the appeal on 15.6.2020 both parties appeared in person and unrepresented. The appellant submitted that he filed three grounds for appeal and had nothing useful to add.

In response the respondent submitted that the judgment was proper and she was dissatisfied with the judgment of the primary court which she

appealed the District Court where the appellant admitted and promised to pay the costs of treatment. The respondent went on and submitted that she had a complaint on the costs for treatment on 30th the appellant promised but he defaulted by not appearing though he sent another person and asked for another date of 7.10.2019. The appellant did not attend for another time and the matter was adjourned to 8.10.2019 when the appellant went to the magistrate and when the case was called he was nowhere to be found. Thus the magistrate sentenced him to three years term of imprisonment in absentia. The respondent before concluded her submission she submitted that the appellant was apprehended and sentenced and in addition to that she submitted that the appellant was justly convicted.

In his rejoinder the appellant submitted that he did not abscond and it is true that he promised to pay but due to financial crisis he failed to fulfill his promise though he reported to the court clerk. The appellant went on submitting that he managed to pay fine. He further argued that the treatment cost was Tshs.300,000/= and the magistrate added Tshs.1,200,000/=. Besides that the appellant submitted that the judgment was given on 3.5.2019 and he was given 45 days within which to appeal and he was ready to pay but he failed due to reasons which are beyond his control and the reasons known by the respondent. The appellant further submitted that he depends on agriculture and the money managed to get was used to fund their daughter (Amina) who was in form four. At last the appellant submitted by praying that this court do justice and he has

nobody to assist him and the respondent was also at fault. They are spouses and have children to bring up.

I have considered the submissions from the parties and find that there are two issues for my determination. **One**, the first appellate court re-convicted the appellant on the same offence which he was convicted by the trial court whether fatal in law. **Two**, whether the punishment of three years imprisonment was right while the appellant had already paid a fine of Tshs.100,000/=.

As regards the first issue, it is clear from the record and rightly submitted by the respondent that the first appellate court convicted the appellant on the offence of wounding and the similar acts contrary to section 228(1) of the Penal Code (supra) as seen at page two of the typed judgment of the first appellate court. For the easy of reference I quote the second paragraph of page 2 of the judgment as follows:

"I find him guilty and I convicted (sic) him under section 228(1) of the penal code cap 16 of R.E. 2002."

To my understanding the District Court of Masasi sat as an appellate court which had a duty to resolve the grounds of appeal filed by the respondent. The first complaint which the first appellate court ought to address itself was whether the trial court disregarded the evidence of PW1 and PW2 in arriving at the reasoned judgment. Also, it had to resolve the issue of harm sustained by the respondent whether it was considered by the trial court in punishing. And lastly, it had to determine whether the trial court

disregarded the medical expenses incurred by the respondent in treating the injuries suffered due to an attack by the appellant. The appellate magistrate absconded her duties and rather convicted the appellant as if she was exercising her original jurisdiction over the offence of which the appellant was charged with. To signify this position the appellate magistrate went further to take the mitigation of the appellant which was nil due to the fact that the appellant was absent when judgment was delivered. In addition to that, no reason was provided by the learned appellate magistrate in arriving at her conclusion of convicting the appellant on the offence of wounding and similar acts contrary to section 228(1) of the Penal Code (supra).

Besides that, the District Court of Masasi did not sit as a revision or supervisory court as to the Law of Magistrate Act, Cap 11 R.E. 2002 of which upon exercising its revisionary power she could have done what she did. At my conclusion I find what was done by the appellate magistrate was totally wrong and was only supposed to uphold the decision of the trial court or quash the proceedings and set aside the sentence entered by the trial court. The act of the appellate magistrate was fatal which vitiates her proceedings and sentence of three years imprisonment.

As depicted herein above the second issue of this appeal is resolved by a view that the appellate magistrate imposed a new sentence of three year imprisonment while the appellant had already fulfilled the conditions of paying a fine and was set free by the trial court. It is also my settled view that the appellate magistrate did not provide her reasons for varying the

sentence which the trial court punished the appellant. If the appellate had assigned her reasons it could have been given me a backbone .Thus failure to assign the reason to vary sentence entered by the trial court is fatal irregularity.

The first appellate court ought to go beyond in assisting the respondent in order to obtain her compensation from the appellant. As matter of practice the appellate magistrate ought to advise the respondent to file a civil case against the appellant so as to meet the order of the trial court on compensation at the tune of Tshs.1,500,000/= .Undoubtly,I argue the respondent to pursue her right of being paid her compensation by the appellant through filing a civil case in the primary court.

From the foregoing reasons I am of the firm view that the appellate magistrate did not direct her mind properly in exercising her appellate jurisdiction but rather assumed and exercised the original jurisdiction which she had not been vested by the law.

Eventually, I find merit in the appeal and I hereby allow it, quash the re-conviction of the first appellate court and set aside the sentence of three (3) years imprisonment to the appellant. In addition to that I upheld the decision of the trial court and its orders. I order the immediate release of the appellant from the prison unless he is continually lawfully held.

It is accordingly ordered.

Dated at Mtwara in Chambers this 24th day of June, 2020



W.P. DYANSOBERA

JUDGE

24/06/2020

Court: Delivered at Mtwara in Chambers on this 24th day of June, 2020 in the presence of both parties (virtually).

Right to appeal to the Court of Appeal explained.



W. P. DYANSOBERA

JUDGE

24/06/2020