THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 102 OF 2019

(Original from judgement of the District Court of Lindi,

in Criminal Case No. 5 of 2019)

POLYCARP PATRICE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing on: 12/02/2020

Judgement on: 24/02/2020

NGWEMBE, J:

The appellant Polycarp Patrice was convicted and sentenced to serve custodial imprisonment for the period of six months by the District Court of Lindi . He was charged for causing grievous harm to one Ali Ben Membe, by stubbing him on his stomach, using kitchen knife, contrary to section 225 of the Penal Code Cap 16 R.E. 2002. Being aggrieved by the conviction and sentence of the trial court, the appellant ventured to appeal to this court armed with six grounds, which on the hearing date, the appellant

was represented by learned advocate Ms. Mziray who prayed to condense all six grounds of appeal into one that:

> *"the trial magistrate erred in law and facts in convicting the appellant without directing his mind that the prosecution failed to prove the case beyond reasonable doubt"*

According to the learned advocate, this ground comprised all six grounds of appeal preferred by the appellant.

This appeal traces back to 20th March, 2019 at Nditi Secondary School. The appellant was a Headmaster of the school, while the victim was a student of form three in that school. In the morning of the fateful date, the victim was in class but was called by the Head Master, the appellant, to go to his office, where the criminal act was committed, in the presence of other teachers. The source of the alleged criminal act was on allegations that the victim unlawfully, took school plates, including the plate he used for food. Thus, the appellant started beating him and later the victim was stabbed by a kitchen knife in his stomach, which act caused him unconscious.

Having narrated briefly the genesis of this appeal, now I proceed to summarize the arguments advanced by the learned counsels. Both parties were represented, while the appellant was represented by Ms. Anisa Mziray, the respondent/Republic was represented by Mr. Gideon Magesa State Attorney. In brief, Mziray argued forcefully, by raising a valid legal principle that, an accused cannot be found guilty if the prosecution failed to prove the accusations to the standard required by section 3 (2) (a) of

Tanzania Evidence Act. In respect to this appeal, she rightly, asked a fundamental question, that who stabbed the victim in the office of the Head Master? She answered by making reference to page 12 of the proceedings, whereby PW1 testified that the one who stabbed the victim was the Appellant. She contradicted that allegations, by raising doubt on that allegations, that in the room/office, there were six (6) persons including the victim. However, she argued that the prosecution called none of them to testify on that important evidential issue. Further, referred to the cardinal rule of evidence, that failure to call material witness an adverse inference may be drawn against. To comprehend her argument, she referred this court to the judgement of **Aziz Abdallah Vs. R, [1991] TLR, 71**.

Moreover, she referred this court to page 26 – 30 of the proceedings where the defence evidence was to the effect that the victim was the one who stabbed himself in his stomach. In the cause of struggle between the two (Appellant and Victim), that is when the victim stabbed himself in his stomach. Further argued that such piece of evidence is supported by PW4. In a way, the learned counsel, ventured to argue in alternative, that if the appellant was the one who stabbed the victim, then he did so, on self defence as per section 18 of the Penal Code. Thus, making the appellant innocent. She rested her argument by referring this court to the case of **R Vs Kerstim Cameroon [2003] TLR 84**.

In the adversarial side, the learned State Attorney, contested the appeal by advancing several useful legal principles. He commenced by submitting

that the appeal attracts high public interest, because the victim being a student of form three at Nditi Secondary School and while in school was inhumanly tortured by the appellant who was his Head Master (Respected as guardian of that student and caretaker of all students) of that school. The student was 18 years while the appellant was 36 years who with no cause at all, he tortured the student/victim. The victim being overwhelmed, by torture, he took a knife telling his teacher that do no longer touch me, however the appellant continued with torture, at last the appellant decided to stab him on the right hand side of the stomach.

Further, argued that both PW2 and PW3 were both medical doctors, testified that the victim was stabbed with sharp instrument. Thus, his intestine came out, hence was put under intensive care unit which same was authenticated by PF3. On the issue of self defence, the learned State Attorney disregarded it as irrelevant argument because in the room were more teachers of the said school and the appellant had no danger whatsoever.

On the defence evidence, the State Attorney argued that it was adduced by the appellant's co-teaches who had interest on the subject matter. Evidences of DW2 up to DW4 were so similar to the extent that same were prearranged testimonies. He urged this court to use section 300 and 366 of CPA to charge the appellant and convict him under common assault and sentence him accordingly. He rested by submitting that the appellant ought to be charged for attempt murder, but urged the court to confirm the conviction and sentence together with ordering compensation to the victim.

In brief rejoinder, the learned advocate rejoined that the issue is who stabbed the victim with knife, the prosecution evidence is divided, on one hand, that is, PW1 the appellant stabbed the victim, but PW4 alleged that the victim was the one who stabbed himself. On the application of sections 300 and 366, she responded that the sections used "may" which is optional not mandatory, thus the court may be pleased not to use them. Also the prayer for compensation should not be granted.

I think the rival arguments of learned counsels, in order to do justice of them and have proper analysis of those legal arguments, I have decided to reevaluate the whole evidences adduced during trial. Since this is the first appellate court, undoubtedly has a duty to treat as a whole and exhaustively, the evidence recorded by the trial court. This position was pronounced strongly in various precedents of the Court of Appeal, including in the case of **Shaban Amiri Vs. R, Criminal Appeal No. 18 of 2007; Prince Charles Junior Vs. R, Criminal Appeal No. 250 of 2014; and in D.R. Pandya Vs. R, [1957] E.A. 336.** In all these cases, the court repeated that the first appellate court, must reevaluate the evidence as a whole and exhaustively scrutinize them. Failure to do so, is an error of law. Similarly, in the case of **Leonard Mwanashoka Vs. R, Criminal Appeal No. 226 of 2014** (Unreported) the Court of Appeal held:-

> *"The first appellate court should have treated evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore, expected of the first appellate court, to not only summarize but also to objectively*

evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about"

This being the legal position, and this court being the first appellate court, I think, reevaluation of the whole evidence recorded by the trial court is inevitable, therefore, I proceed to analyze them seriatim.

It is on record at page 11 of the trial court's proceedings, that PW1 on 20/3/2019 in the morning was called by his Head Master in his office, which office was occupied by other teachers. While he was in that office, the appellant did beat him thoroughly on allegation of stealing school plates. Though he denied to have stolen them, but the appellant insisted that he stole those plates. Undoubtedly, other teachers were present when the appellant was interrogating the victim and beating him. Part of his evidence said

"He continued beating me using feast, legs and slapping me everywhere, he then kicked me using feast where I fell to a table where there were plates, bows also there was a knife which were being used by the school for kitchen purposes. I then took such knife. I hold it while insisting headmaster not to beat me anymore, but he didn't. He then pushed me in the wall and hold me. He then took that knife and tab me to my stomach. I fell down and became unconscious"

Likewise, PW2 and PW3 as medical doctors corroborated the assertion of PW1 that he had a fresh wound in a right side of his stomach and his intestine was outside. Together they conducted a big surgery to the boy where they found inside all organs were intact, but they found oozing of blood.

PW4 No. E 8581 D/CPL Boaz, testified in court purely on evidence related to what happened two days after the date of event. That on 22/3/2019 when he was in office, he was assigned to investigate the incidence of the appellant. The whole evidence was related to interrogation made to the victim and the appellant, since he was not an eye witness.

The defence case was blessed by four witnesses, including the appellant. On page 25 of the proceedings, the appellant testified that he confirmed that the victim was the one who stole the school plates. Thereafter, and in the presence of other teachers namely; Elici Kiyeyeu; Halima Namtema; Charles Mpangula; Magdalena Kishima; and Shaban Bosco, he called the student (Victim) and interrogated him. The appellant did beat the student and later the student went to the place where they keep utensils, he took knife threatened him and later stabbed himself in his stomach. The same evidence is repeated by the rest of defence witnesses who were co-teachers and subordinate to the appellant.

The evidence on record leaves no doubt that on the fateful morning of 20/3/2019, the student/victim was in his class room studying. That he was called to the Head Master's Office, where he entered, found the Head

Master and other teachers, including DW2, DW3 & DW4 among others. Likewise, it is undisputed fact that the appellant did beat the victim in presence of other teachers in his office. More so, in that office there were utensils including knife. The said knife was used to stab the stomach of the victim. Also that student was stabbed and lost consciousness in the office of the appellant in the presence of other teachers. I think, these are undisputed facts according to the evidence on record. However, the glaring questions for consideration are; **first** who stabbed the victim? **second** under what circumstances the victim was stabbed? **three,** whether the beating of the student was proper in fact and in law? four, whether the trial court applied the law properly in finding the appellant liable to the offence of grievous bodily harm to his student.

I am inclined to the arguments advanced by the defence counsel, that the glaring question in this appeal is who stabbed the victim? To answer this question, PW1 testified so strongly that indeed when he was in his class room, was called to the office of the Head Master, where he was interrogated, beaten thoroughly by using steaks, feast and legs. That he did fall down and happened to defend by holding a knife found in the same office, which knife was used for kitchen. Notwithstanding, the appellant used the same knife to stab him. On the other hand, the appellant admits to beat the victim and later the student took knife and threatened him in the presence of other teachers, including DW2, DW3 and DW4. In turn he decided to stab himself. One may ask, how can a student of 18 years, threaten his Head Master in the presence of many other teachers, men and women and in a confined room full of matured teachers. What did those

teachers do when they saw such threat from a form three student aged 18 years threatening a good number of teachers in their office? I think there are more questions to ask in the circumstances of that occasion, before arriving to the conclusion. These questions have no answers in the proceedings and judgement, and I do not intend to invent any answer.

Unfortunate, the evidence adduced by the appellant and other teachers, say eye witnesses, have nothing useful than replica to one another's evidence as if they had prearranged evidence. Thus, I find difficulty to buy in when compared with systematic evidences of the victim, which was supported by PW2 & PW3 - the medical doctors.

In the circumstances and the evidences on record, leaves no doubt, the appellant failed to use commonsense, wisdom, skills and psychology taught in colleges on how to handle difficulty students. If it is true that the student was found with stolen plates and that his parents confirmed on it, the appellant could order his parents to come with those stolen plates as evidence? If the allegations were true and bearing in mind the boy was within the age of a child and approaching maturity, the appellant and other teachers could take him to a nearest police post or station for professional interrogation. Unfortunate, the appellant opted to use his mussels to the expenses of life of the victim's life.

The learned State Attorney submitted that those teachers who witnessed the beating of the victim, their evidences should not be taken seriously because, themselves failed to apply commonsense, wisdom and psychology

they learnt from colleges. Rather, they ought to be co – accused as accessories before and after the fact. In the case of **Andrea Nicodemo Vs. R, [1969] HCD 25,** the court discussed in detail on accessory after the fact and held:-

> *"To be convicted as an accessory after the fact, an accused not only must know or have reason to know about the offence, but must take steps for the purpose of enabling the offender to escape punishment"*

The circumstances of this appeal, those teachers who were present when the student was badly beaten and that the steps taken to hide the truth of exactly what happened amounted into assisting the offender to escape liability.

Of course, undoubtedly and as rightly submitted by the appellant's counsel, it is a settled principle of law that an accused person has no duty to prove his innocence and conviction cannot be based on the weakness of the defence case, but always conviction must be found from unshakable evidence of the prosecution, linking the accused with the offence committed. Likewise, in this appeal, no dispute the appellant was the one who called the victim to his office, beat him in the presence of other teachers and knowing that in his office there was knife and other kitchen appliances. It is on record that the appellant struggled with the student against that knife, before he could stab him in stomach. DW2 was firm in her evidence that the student took knife and pointed to the accused. *"We teachers stood. We feared so much"* DW3 was likewise brief that "*He took*

a knife and stub himself in his stomach" Similar evidence was repeated by DW4. Such piece of evidence leaves a lot to be desired because under normal circumstances, reasonableness dictates that those teachers should have stopped not only their fellow teacher, but also the student from holding and or using leather weapon (knife). Instead no clear explanation is forthcoming from them, instead merely alleged to have been threatened/feared without taking any positive step or action.

In such circumstances, the learned State Attorney, invited this court to employ sections 300 and 366 of Criminal Procedure Act to amend the trial court's orders. I have carefully, considered that prayer in line with the referred sections, I am convinced that the only subsection which is applicable in the circumstances of this appeal is section 366 (1) (b) which give room to this court to make any amendment or any consequential or incidental order that may appear just and proper. However, let me discuss the nature of charge itself before accepting the prayers made by the State Attorney.

The appellant was charged for Grievous Harm contrary to section 225 of the Penal Code. The Penal Code, defines Grievous Harm to mean:

> *"any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense"*

According to this definition, undoubtedly the appellant was charged with a special category of assault i.e. assault which has caused the victim grievous harm contrary to section 225 of the Penal Code. Are the facts in this case compatible with the above definition? As the definition of grievous harm shows, a harm to be classified as grievous, it must amount to a maim or amount to a dangerous harm. In the present appeal the complainant/victim was stabbed in his stomach until his intestine came out, to rescue his life he had to undergo an emergency large surgery of his stomach as per PW2 and PW3, which evidence was likewise, supported with defence witnesses that they took him to hospital and had stomach surgery. The act itself amounted into a dangerous harm and the scar caused by that knife and the surgery shall remain permanent, thus compatible to grievous harm contrary to section 225 of the Penal Code.

In the case of **Sebastian Gilbert Vs. R, [1970] H.C.D 281, and Lucas Vs. R, [1970] H.C.D 298** the court discussed at length what constitutes a grievous harm, at the end concluded that the circumstances, like this appeal amounted into grievous harm. Indeed the boy was luck to survive otherwise, he could have died and the appellant could have charged accordingly. Therefore, the boy will have a permanent scar for the rest of his life, always reminding him the sufferings, pain and disability for the rest of his life, I think justice demand to have second consideration.

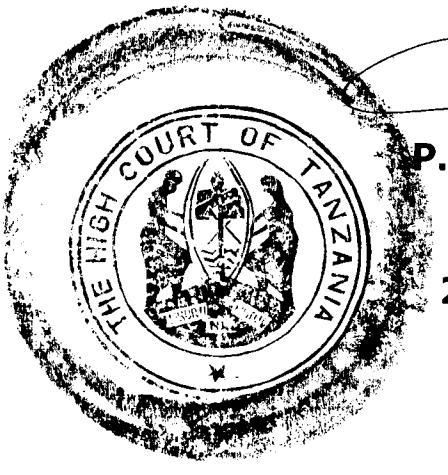
The trial magistrate only sentenced the appellant to serve six months' imprisonment, while the maximum sentence for the offence committed is seven years. Though the learned State Attorney tried to convince this court

to consider increasing the punishment according to the gravity of the offence committed, yet I do not think, long imprisonment in jail changes the behaviors of the wrongdoer. Alternative punishment, sometimes, makes more sense than imprisonment.

In totality and all what I have so far said, I find the trial magistrate passed a lenient sentence contrary to the gravity of the offence committed. However, I do not intend to disturb that conviction and sentence meted by the trial court, rather I would add that the victim deserve compensation for the sufferings, pain, and permanent disability. Therefore, the appellant upon completing his imprisonment shall immediately, compensate the victim Ally Ben Membe a total of shillings two million (TZS 2,000,000/=) only.

I Accordingly Order.

DATED at Mtwara this 24th day of February, 2020



P.J. NGWEMBE

JUDGE

24/02/2020

Date: 24/2/2020

Coram: Hon. A.K. Rumisha, DR

Appellant: Present and represented by Ms. Mziray, Advocate

Respondent: Ms. Makala, State Attorney

B/C: Mariam Mshana – RMA

Ms. Makala Eunice, State Attorney: I represent the Respondent. The Appellant is present and represented by Ms. Anisa Mziray. The mater for Judgement, we are ready.

A.K. Rumisha

Deputy Registrar

24/2/2020

Court: Judgement prepared by Hon. Ngwembe, J. is delivered today by me in the presence of Appellant represented by Ms. Anisa Mziray and presence of Ms. Makala Eunice, State Attorney for the Respondent. Right of appeal duly explained.

A.K. Rumisha

Deputy Registrar

24/2/2020