IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

DC CRIMINAL APPEAL NO. 102 OF 2021

(Originating from Singida District Court in Criminal Case No. 78 of 2020)

LEONARD S/O NGARYA ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

JUDGEMENT

1/12/2021 & 13/12/2021

KAGOMBA, J

LEONARD S/O NGARYA (the "appellant") was convicted by Singida District Court for the offence of common assault contrary to section 241 of the Penal Code. He was sentenced to serve two (2) years in prison. Being aggrieved by both the conviction and the sentence, the appellant has filed this appeal setting forth the following grounds:-

1. That, the judgment of the trial court is nullity because the proceedings were not fully conducted in relation to the requirement of section 241 (1) of the Criminal Procedure Act, [Cap 20 RE 2019].
2. That, the trial magistrate erred in fact and law for convicting and sentencing the appellant based on the testimony of PW7 who is a medical doctor from Singida Regional Hospital without even proving his expertism on reading the X-ray picture.
3. That, the trial court erred in law and fact by not evaluating properly the defense evidence adduced by appellant in the trial court, the evidence if could be evaluated properly the decision would be otherwise.

4. That, the learned Senior Magistrate erred in law to convict the appellant by relying on contradictory evidence of the prosecution witnesses.
5. That, the trial court erred in law and fact by convicting and sentence appellant two years imprisonment basing on were assumption and not on the required test of proof in criminal case that is beyond reasonable doubt against the appellant.
6. That, the trial court erred both in law and fact in deciding the case in favour of the respondent based on the prescription result of CT SCAN and MRI which prove the extent of causing bodily harm while the same were not tendered and admitted before the court as exhibits.
7. That, the trial magistrate erred in law and fact in relying on the testimony of PW2 in respect of the prescription result of CT SCAN, MRI, X-RAY for admitting them as expert opinions while the witness is a mere school teacher.
8. That, the trial court's judgment is bad in law as it does not contain the points for determination and the reasons for him decision.

Based on the above eight (8) grounds, the appellant prayed the court to allow the appeal, quash the conviction and set aside sentence and thereafter release the appellant forthwith.

Before going deep into determination of this appeal, I find it imperative that a brief background of this case be told. This is a very saddening case either way. The appellant as a school teacher at Mangida Primary School, Mgange Ward, Ilongero, Singida, while in his daily routine of imparting knowledge to his students came across a group of students, other in a class

and other outside, who were making noise. He disciplined them by chastising them using stick on their buttocks. Unfortunately, one student who was PW1 during trial Clemencia John aged 13 years was injured. It was stated in evidence that she had a disc dislocation and she was taken for treatment to Benjamini Mkapa Referral Hospital in Dodoma and Muhimbili hospital where she was told to use lumber belt.

It is for causing such bodily injury to his student the appellant was convicted and now serving a two years jail term, a decision he challenges.

On the date of hearing, Mr. Ngunda and Mr. Nchimbi, learned advocate appeared for the appellant while Mr. Sarara, learned Senior State Attorney appeared for the respondent. Both the advocates for the Appellant and the Senior State Attorney representing the respondent were united for justice - sake in praying for the appeal to be allowed. They had somewhat different reason to justify their common prayer. However, before arguing the appeal, Mr. Ngunda prayed to amend S. 241 (1) in the first ground of appeal to read section 214(1) and was granted.

Mr. Ngunda preferred to argue the first ground of appeal separately while the 2nd and 7th grounds were argued jointly as it was for the 3rd and 4th as well as 5th and 6th grounds.

On the first ground, Mr. Ngunda submitted that the trial magistrate erred in the proceedings since the requirement of section 214 (1) of the Criminal Procedure Code [CAP 20 R.E 2019] were not fully observed. He argued that since the case was heard by Hon. Singano, SRM before passing

it over to Hon. Massawe, SRM, the succeeding magistrate should have stated reason for him to proceed with the case and the reason for previous magistrate not to proceed with the case, a requirement that was not met. Mr. Ngunda also argued that the succeeding magistrate should have asked both parties if they accept to proceed with him, as a magistrate.

The learned advocate for the appellant clarified that on page 25 and 26 of the proceedings, Hon. E. D. Massawe did not exhaust the requirement of section 214 (1) of the Criminal Procedure Act [Cap 20 R.E 2019] because after asking the parties if they were ready to proceed with hearing before him, the appellant was not ready but he proceeded nevertheless, and thus he caused injustice to the appellant.

On the 2nd and 7 grounds of appeal, it was Mr. Ngunda's submission that the Magistrate erred by relying his conviction on testimonies of PW7 and PW2 who testified on the prescription result of CT SCAN, MRI and X- Ray because PW7, a medical doctor, did not tell the court that he is an expert in reading X-ray pictures. He added, that PW2, a mere teacher, testified by describing CT SCAN, MRI and X–RAY without telling the Court if they had such expertise. It is Mr. Ngunda's argument therefore that the proceedings and the judgment show that the magistrate has relied on such testimonies, which is wrong.

Mr. Ngunda added that the CT SCAN and MRI were not tendered in Court as exhibits. He is therefore of the opinion that the evidence adduced by PW7 and PW2 did not meet the required standard and the trial magistrate ought to have taken it with great caution instead of relying on it, as he did.

Arguing on the 3rd and 5th ground of Appeal, Mr. Ngunda argued that the prosecution side failed to prove the case beyond reasonable doubt as required by the law because there was no proof of *mens rea* on the appellant during the commission of the alleged offence. Mr. Ngunda argued that according to the proceedings of the case, the appellant is alleged to have committed the offence while in his routine duties as a teacher. That, he chastised the victim (PW2) with intention to discipline her using a thin stick and applying reasonable force. He argued that even the number of students punished by the appellant was more than three, not the victim alone. He added that facts of the case show that there were forty students in the classroom who were making noise and he chastised all of them but only one got injured. It was his argument in this respect that, prosecution side had a duty to prove *mens rea* and that it was an error to convict the appellant basing on *actus reus* alone.

Mr. Ngunda further submitted that the trial magistrate erred by relying on the testimony of PW1 and PW3 which was contradictory. He argued that PW1 told the Court that the victim received four strokes from the appellant as per page 7 of the proceedings, while PW3 told the court that the appellant chastised the students two (2) strokes. Mr. Ngunda argued that such contradiction in the two testimonies give doubts on the reality of the event. As such, he argues, the trial magistrate had to take such evidence with caution instead of relying on it as sufficient to convict the appellant.

The learned advocate for the appellant referred to the case of **Jeremia Shimweta V. R,** Criminal Appeal No. 24 of 1981 reported as [1985] TLR 225 where the Court gave guidance that when there are contradictions in testimonies a magistrate is not supposed to rely on it but should take such evidence with great caution.

Submitting on the 7th ground of Appeal, Mr. Ngunda argued that the Magistrate gave judgment by basing on mere opinion of the witness without considering the reasons for the decision. He added that the trial magistrate has not given the reason for decision in his judgment as a result of the fact that the prosecution failed to prove the case. He minded up his submission by praying the court to allow the appeal, quash the conviction and set aside the sentence.

Mr. Sarara for the respondent submitted that the republic supported the appeal in principle. On the first ground of appeal, however, Mr. Sarara was of the view that while it is a legal requirement for magistrate to state reasons for not continuing with hearing of the case under section 214 (1) of the Criminal Procedure Act, [Cap 20 R.E 2019] the Court has to see if injustice has ensued or not.

On the main reason why, the respondent supports the appeal, Mr. Sarara submitted that the offence of assault causing actual bodily harm under section 241 (1) of the Penal code [Cap 16 R.E 2019] should be defined carefully. He said, since the word "harm" is defined under section 5 of the code to mean any bodily hurt permanent or temporary, and since in normal cause of duty teachers do administer corporal punishment to student and

thereby causing them such bodily hurt, there will be a lot of questions including whether or not school teachers are allowed to administer corporal punishment as they have always been doing.

It was Mr. Sarara's further view that the offence has to be carefully defined to avoid causing unnecessary implications to those who administer schools.

Mr. Sarara pointed out that on page 6 of the proceedings, PW1, Clementia John, who was inadvertently written as PW2, states the reason why the appellant punished her and other students. The appellant, is said to have punished the students because some were making noise. As such, he submitted, the appellant in his position found there was noise and he thus punished the students. It was Mr. Sarara's argument that evidence does not show that the type or manner of punishment changed from one student to the other, but was rather uniform.

It was Mr. Sarara's views that the offence of assault under section 241 (1) of the Penal Code [Cap 16 R.E 2019] was certainly intended for people other than teachers in their routine line of duties. He also probed the evidence and faulted it by not showing the connection between the strokes administered by the teacher and the harm that the victim suffered. He argued that the evidence did not show why only one student was injured while the type and magnitude of the punishment to all the student were the same. He added that, it is for such reason the respondent agrees with the submission of the appellant's advocate that there was no *mens rea* proved.

He also argued that there is a likelihood that the victim had other problems which aggravated the harm he got.

Mr. Sarara argued further that apart from lack of intention to cause bodily harm to the victim, the appellant also was very remorseful and supported the victim's family with money for treating the victim. He argued that if there were issues with the appellant not administering well the punishment, that would call for the matter to be handed administratively and not criminally. For these reasons, Mr. Sarara did not support the conviction and sentence meted out to the appellant.

Having heard the submissions of both parties, this Court has to determine whether the Appeal is meritorious. As I stated earlier, this is a very suddenly case either way. It is not disputed that Clementia John a child student got injured to the extent of seeking medical attention in the country's referral hospitals of Benjamini Mkapa in Dodoma and Muhimbili in Dar es Salaam. This is very saddening. Also, it is not disputed that the reason why the appellant is in jail custody today and not at school teaching is an act of punishing his student for what evidence shows to be pure disciplining of students as is always the case in a teacher-students relationship in our country. This is equally saddening. Having said that, let me analyze the grounds adduced by the appellant's advocate, Mr. Ngunda as well as Mr. Sarara, learned Senior State Attorney, in support of the appeal albeit briefly.

On the first ground of appeal, the advocate for the appellant has cited the provision of section 214 (1) having granted his prayer to amend the provision of section 241 (1) mentioned in the first ground of appeal to read "section 214 (1)". This particular provision, states;

> *214 (1) "Where any Magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or in part any committal proceedings is for any reason unable to complete the trial or the committal proceedings within a reasonable time, another Magistrate who has and who exercises jurisdiction may take over and continues the trial or committal proceedings, as the case may be, and the Magistrate so taking over may act on the evidence or proceedings recorded by his predecessor and may, in the case of trial and if he consider it necessary, resummon the witness and recommence the trial or the committal proceedings"*

If the Court has to base on the pleadings in its decision, I find that the first ground of appeal lacks merit because all the requirements purported to be made under section 214 (1) of the Criminal Procedure Act [Cap 20 R.E 2019] are in fact not covered by this cited provision of section 214 (1). Simply, stated, the requirement to adduce reasons for not continuing with presiding over a case or for asking parties whether they are ready to proceed with successor magistrate are not covered, as requirement, under the above specifically cited provision of the law.

On the 2nd and 7th ground of Appeal, I agree with the appellant's advocate that it was wrong for the trial magistrate to rely on the testimonies of PW2 (correctly PW1) – Clementia and PW7, the medical doctor, on

translation of the contents of CT scan, MRI and X-ray without proof that they have sufficient expertise in reading and translating such type of evidence. While it can be understood that a medical doctor will have some knowledge about reading and translating such electronic imaging of human bodies, it is important for the Court to satisfy itself that the witness is possessed of sufficient knowledge on the subject he is giving evidence on. To the extent the expertise was lacking, the grounds of appeal have merit.

On the 3rd and 5th grounds of appeal, the learned advocate for the appellant raised a very basic issue touching on criminal responsibility of appellant. He raised the argument that the prosecution did not prove *mens rea* on the appellant during commission of the alleged offence, I have perused the judgment and the proceedings of the trial Court but I could not find anywhere the Court addressed itself on the element of *mens rea* accompanying the appellant's act of "assaulting" his student and causing actual bodily harm. It is basic, though sometimes forgotten, that with the exception of strict liability offences, the prosecution side has to prove not only that an act constituting an offence was committed or omitted but also that such commission or omission was accompanied by necessary state of mind, whether intention, negligence or recklessness so as to establish the offence.

All the prosecution witnesses so as to did not prove that the appellant intended or negligently or recklessly administered the corporal punishment to the victim and as a result caused her bodily harm. The offence of assault causing bodily harm is not one of those offences under strict liability

category. As such appellant's blamable state of mind needed to be proved for a lawful conviction to be established. In this case, it was not.

For the above reasons, I find the appeal meritorious. I should state that schools will be worst place for upbringing of the children of this nation if teachers, who innocently discipline students, are let to be treated as criminals for causing unintended accidental harm in their carrying out of daily duties.

Accordingly, the appeal is allowed, the conviction against the appellant is quashed and the sentence is set aside. The appellant is therefore set free to continue with his noble work accordingly to the law.

It is so ordered.

Dated at **Dodoma** this 13th day of December, 2021

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA
JUDGE