IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRINIMAL APPEAL NO. 53 OF 2020

(Arising from Criminal Case No. 390/2019 Kasulu District Court Before: C. A. Mushi, RM)

KIBUNDILA S/O MASIMANGO @ KIBU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

5th March,2021 & 12th March,2021

A. MATUMA, J

The appellant Kibundila s/o Masimango together with Nazareth s/o Philimon @ Naza, Ibrahim s/o Zuberi @ Zube and Daniel s/o Masambya were jointly and together charged for an offence of Grievous Harm contrary to section 225 of the Penal Code [Cap. 16. R.E 2002].

It was alleged that, the four accused persons on the 24th July, 2019 during night hours at Nyarugusu Refugees Camp within Kasulu District in Kigoma Region did use bamboo poles to assault one ADDY S/O SAVIMANA and caused him to suffer grievous harm on different parts of his body and more so maiming the left eye of the said victim.

After the full trial, the trial Court acquitted the three other accused persons but found guilty and convicted the appellant herein. He was then sentenced to serve a term of (18) eighteen months in jail. Aggrieved with such conviction and sentence, the appellant preferred this appeal with four grounds of appeal whose main complaints are: -

i. *That, there was no favourable conditions for proper visual identification as the intensity of light was not explained.*

ii. *That, there was discrepancy of evidence between PW1, PW2 and PW3 on his identification.*

iii. *That, the prosecution evidence did not prove the case beyond reasonable doubts.*

At the hearing of this appeal the appellant was present in person through visual Court being at Bangwe prison. The respondent was represented by Clement Masua learned State Attorney.

The appellant called this to acquit him as he lamented to have committed no wrong. In the first ground of appeal he complained that the conditions for identification was not favourable for correct identification. The learned State Attorney in opposing this ground submitted that PW1 the victim

explained the source of light to be solar which was fixed on the fence and that he was supported by the evidence of PW2 and PW3 who also explained on the source of light to be solar. He further argued that the crime took some time between 15 and 45 minutes.

The learned State Attorney explained further that the victim knew the accused persons by names and the appellant was properly identified in which the victim (PW1) described the crime and mentioned direct the appellant to have been the one who specifically assaulted him in the eye out of his companions and all people who gathered at the crime scene. He thus called this court to dismiss the claim about identification of the appellant.

On the 2nd ground the appellant claimed that the prosecution witnesses contradicted themselves on who were on the crime scene and the time of occurrence of the crime.

The learned State Attorney on his party was of the view that while it is true that PW2 and PW3 declared to have not identified the appellant on the crime scene but PW1 stated to have identified him and that is not a discrepancy because PW1 explained well the crime and how he identified the appellant who assaulted him to the extent of permanently destroying his eye.

On the 3rd ground the appellant argued that he wanted the T-shirt allegedly was being wore by the victim and in course of assault it sustained with blood, and the weapon allegedly was used in the assault to be brought but it was not. The respondent answered that the weapon and the T. shirt does not establish identity of the appellant and that there was direct evidence on record that, the offence was committed and that, the degree of the offence was grievous harm. Also, the doctor and the PF-3 which was tendered sufficed to establish the offence and the degree of the injury thereof. He prayed this ground to be dismissed as well.

Lastly, the appellant claimed that the prosecution case was not proved beyond reasonable doubt because he did not know the victim. The learned State Attorney responded that the prosecution case was proved beyond reasonable doubts as the appellant was properly identified by the aid of solar light and the appellant was not a stranger to the victim and the Medical Report revealed that the victim was indeed grievously injured.

After the appeal was argued on merit, the parties also argued on the sentence whereas the learned State Attorney asked this court in case of dismissal of the appeal to enhance the sentence due to the gravity of the assault which caused the victim to suffer permanent injury. He also called the court to award compensation to the victim.

In his rejoinder, the appellant maintained that he was not properly identified but in case the appeal is dismissed the sentence should not be enhanced as the one meted against him is enough.

Upon hearing the parties, going through the records of the trial court and the PF3 exhibit "A", I find that there is no dispute that the victim in this case was really invaded and assaulted to the extent that he suffered not only grievous harm but also was caused to suffer total blindness of his left eye which ruptured in the cause of assault. That is evidenced by all prosecution witnesses particularly the victim himself, PW2 and PW3 who responded to the crime for his help, the doctor PW4 one Willington Kabadi who attended the victim and the PF3 supra. Even the appellant did not dispute that the victim was not assaulted or that the crime is fictious.

The only issue before me is thus; whether the prosecution case was proved beyond reasonable doubts on the identity of the appellant.

I will start with the allegation that the conditions for proper identification were not favourable and thus the appellant could not have been properly identified.

In his evidence PW1 and the victim in this case, on the issue of identification of the appellant he started to explain his familiarity with the appellant. He stated to have known the appellant by his name as Kibundila

Masimango @ Kibu, knew him as a fishman in the locality, knew even the appellant's father who acted in the locality as a traditional healer. PW1 then explained the source of light and its intensity to be solar, the time the crime took to be 15 minutes, that before the assault they had interrogations and exchange of words.

Now, were the explanations by PW1 of the circumstances in the crime scene enough for proper identification of the appellant? This question can easily be determined in line with the decision of the Court of Appeal in the case of ***Anuary Nangu and Kawawa Athumani versus The Republic, Criminal Appeal no. 109 of 2006*** which had similar facts to the case at hand. In it the court of appeal held that familiarity, long time taken in the commission of the offence, light at the crime scene and where the attack is proceeded with conversation are all favourable circumstances for correct identification;

> *'The conditions for identification in this case, as gathered from the evidence were favourabble. The complainant knew the appellants before, they were staying in the same village and there was moonlight. He was also able to identify the types of clothes the appellants wore.... It took sometime before the offence was committed as the attack was proceeded by a conversation'*

PW2 and PW3 as I have said earlier were very clear that the solar light at the crime scene was sufficient to see and identify a person. PW2 for instance during cross examination he replied; ***"It was sufficient light to identify a person"*** page 17 of the proceeding. In their respective defenses, all the accused persons including the appellant supported the evidence of these witnesses (PW2 and PW3). The appellant for instance at page 40 of the proceedings had these to say;

> *'I accept the evidence of PW2 since the crime was committed Infront of her door... I accept her evidence. I also support evidence of PW3 as he is sober and he was not drunkard'*

The evidence of PW2 which the appellant supported included the fact that at the crime scene there was sufficient Solar light to enable correct identification of a person. Therefore, the question of light and its intensity does not arise.

In the final analysis, it is my firm findings that the circumstances surrounding this case as herein above stated favoured correct identification as rightly argued by the learned state attorney, and the complaint thereof is hereby dismissed.

About identification of the appellant, I have no doubt that PW1 properly identified the appellant. As rightly submitted by the learned state attorney, the victim knew the appellant prior to the crime, the

attack was proceeded by conversation and there was sufficient solar light. Also, the victim was able to distinguish the roles of each of the attackers whereas he pointed out that out of them it was the appellant who assaulted his eye to the extent of the injury sustained.

In the case of ***Eva Salingo MT. 6222421 PTC Peter Magoti and MT. 62218 Paschal Mgawe V. Republic (1995) TLR 220,*** the court held that;

> *'Favorable circumstances for unmistaken identity and the fact that the accused is not a stranger to the witness it is sufficient to convict'.*

In the final analysis, I find the prosecution case to have been proved beyond reasonable doubt against the appellant and this appeal has been brought without any sufficient cause. The same is hereby dismissed. Regarding the issue of sentence, the learned stated attorney called for enhancement on the grounds herein above stated while the appellant maintained that the sentence of 18 months is enough in the circumstances of the case.

Under the provisions of section 366 (1) (a) (i)-(iii) (b) of the Criminal Procedure Act, [Cap. 20 R.E 2019], the High Court on hearing appeals is empowered to reduce or increase the sentence or alter the nature of the sentence. But for the court to vary the sentence the guidelines are set by

various authorities of the court of appeal including that of ***Rajabu Dausi v. The Republic, criminal appeal no. 106 of 2012.***

In that case the court of appeal held that sentencing is a dicretionary power of the trial court and the appellate court has no automatic right to alter or vary the sentence imposed by the trial court merely because had it been the court exercising the sentencing discretion, it would have imposed a different sentence. The court went on that;-

> *'The law is well settled that the circumstances in which the court can interfere with the sentence are those where, it is (a) manifestly excessive (b) based upon a wrong principle (c) manifestly inadequeate (d) plainly ıllegal (e) where the trial court failed or overlooked a material consideration (f) where it allowed an irrelevant or extraneous matter to affect the sentencing decision'*

In the instant matter the appellant was charged and convicted under section 225 of the Penal Code for an offence of grievous harm. Under the provision, the maximum penalt is imprisonment for seven years. At the trial, the appellant mitigated the sentence in that he had a pregnant woman and a family depending on him. And also that he suffered from epileptic. The trial court in sentencing the appellant stated to have considered the mitigating factors by the appellant and the agravated

factors bby the prosecution. The learned trial magistrate also stated to have considered the fact that the victim suffered permanent disability.

In my view despite of the fact that the learned trial magistrate stated to have considered the fact that the victim suffered permanent disability, she did not practically consider the same. This is because had she considered the penalty of a person causing another to suffer **permanent disability** or **maim** under section 222 of the Penal Code which is life imprisonment, she could realize that the appellant deserved a severe sentence and that charging him under section 225 of the Penal Code was just a favour to him by the prosecution. He could as well be charged under section 222 (a) on the same facts. The section provides that;

> *'Any person who, with **intent to maim, disfigure** or **disable** any person or **to do some grievous harm to any person** or to resist or prevent the lawful arrest or detention of any person:–*
>
> ***(a) unlawfully wounds or does any grievous harm** to any person **by any means** whatever;*
>
> *... is guilty of an offence, and **liable to imprisonment for life.'***

That being the case I find that the trial magistrate ought to have considered as a material fact and that the appellant had already been

favoured by the prosecution by the charging provisions though the particulars in the charge clearly disclosed allegations of maiming which was finally proved. Thus, the learned trial magistrate overlooked a material consideration as herein above stated. The victim is now a blind of one of his eyes. He will not see to the rest of his life by using that eye. His facial has been disfigured. Eighteen months jail term is manifestly inadequate. In the circumstances this is a fit case upon which the

principles for enhancement of sentence as per the case of ***Rajabu Dausi*** supra can be justifiably applied. I thus by considering the material facts upon which the offence was committed, the provisions of the penal law that accommodated the committed offence and the fact that the appellant was charged under section 225 of the Penal code and not 222 of the same, and that the sentence of eighteen months imprisonment in the circumstances of this case is manifestly inadequate, I hereby enhance the sentence against the appellant and order that he shall serve the sentence of five years in jail commencing from the date of his original conviction by the trial court.

In addition, thereto, he shall suffer three strokes of the cane on the date of his release from prison to keep his memory fresh of his deadly acts to the victim and rejoin the community with regrets.

Before I wind up, I would like just for academic purpose to comment on one legal doctrine that might have escaped the mind of the trial magistrate. This is the doctrine of common intention. According to the charge, facts and evidence on record, the victim was not assaulted by only the appellant. He was assaulted by a group of thugs whom he identified to be the appellant and three others herein above named. The rupture of the victim's eye in the cause of the assault predominated the

matter although the victim suffered other assaults from the group. As the appellant was specifically pointed out to have been the one who inflicted the final attack which caused the disfigurement on the face of the victim, the learned trial magistrate thought that other accused persons who were in companion of the appellant in the assault were not liable. This is well reflected in her considered judgment in which she was satisfied that the victim properly identified all the four accused persons and that even PW2 and PW3 tried to stop assaulting the victim but they were not the one who inflicted the deadly blow but the appellant;

> *'The remained question is who wounded PW1. As per evidence of the three prosecution witnesses,* ***it is undisputed facts on the fateful date, PW1 was wounded by one of the people who were in a group*** *as it was testified they were conducting patrol famously known*

as 'Walala rondo'. I said so because DW1 and DW2 admitted their presence at the crime scene. ***The victim also identified the four suspects*** *as the people who arrested him. Therefore* ***there was no mistake identity*** *and to cement that, the victim explained to this court how he is acquainted with the four suspects.....*

The suspects were not stranger to the victim, that is why he was even able to mention them and ultimately, they were arrested.

PW2 and PW3 ***who this court satisfied that they were telling the truth,*** *told this court that, while they* ***were talking to the first and third accused warning them not to continue assaulting the victim,..... PW1 identified the second accused (appellant) as a person who injured his eye.*** *During cross examination and during defence the second accused has nothing of relevance to challenge that testimony.* ***Therefore, this court was satisfied that he is the one who wounded the victim.***

From the foregoing decision it follows therefore that prosecution side have ***failed to prove the charge against the first, third and fourth accused persons.....*** *However,* ***the charge against the second accused person Kibundila s/o Masimango has been proved beyond reasonable doubt.....'***

From the afore quoted paragraphs in the judgment of the trial court, it is obvious that the learned trial magistrate was satisfied beyond

doubts that all the four accused persons were in a single group and jointly assaulted the victim, but that it was the appellant who inflicted the deadly blow which was subject to the charge. In the circumstances, it was imperative for the trial court to invoke the doctrine of common intention in which each and every participant to the crime is held liable for acts done by a fellow as it was held in the case of ***Deogratias Nicholaus @ Jeshi And Joseph Mukwano versus Republic, Criminal Appeal no. 211 of 2010,*** the Court of Appeal at Mwanza referring to the case of ***GodfreyJames Ihuya v R (1980) TLR 197*** that:

> *'To constitute a common intention to prosecute an unlawful purpose ... it is not necessary that there should have been any concerted agreement between the accused persons prior to the attack of the so-called thief. Their common intention may be inferred from their presence, their actions, and the omission of any of them to dissociate himself from the assault.'*

Therefore, under the doctrine whose spirit in under section 22 of the Penal Code, it is immaterial who inflicted the deadly attack, but that there was common intention by the attackers to execute an unlawful purpose and none of them disassociated himself from the intended crime. Just as I have earlier on said this was for academic purpose more so when the prosecution did not cross appeal.

Serve for the alteration of the sentence as herein above stated, the appeal by the appellant stands dismissed in its entirety.

Right of further appeal to the Court of Appeal of Tanzania is explained to the parties subject to the requirements of the relevant laws governing appeals thereto. It is so ordered.

A. MATUMA

JUDGE

12/3/2021

Court; Judgment delivered in the open court this 12th day of March, 2021 in the presence of the appellant in person and Mr. Clement Masua learned State Attorney for the respondent/ Republic.

Sgd. A. MATUMA

JUDGE

12/3/2021