IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 117 OF 2020

(Originating from Criminal Number 30 of 2020 at Ileje District Court)

BROWN SIMON KAMINYOGE----------APPELLANT

VERSUS

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

JUDGEMENT

Date of Last Order: 24.08.2021

Date of Judgement: 04.10.2021

EBRAHIM, J:

The Appellant herein was charged and convicted for the offence of grievous harm **c/s 225 of the Penal Code, Cap 16 RE 2019**. It was alleged by prosecution that on 4th June 2020 around 00:00hrs at Nguluguru village within Ileje District in Songwe Region the appellant grievously harmed one Subira Kateko on her head by using a sharp object and caused her severe pain.

The brief facts of the case as could be discerned from the evidence on record is that the victim in this case, PW1 was one of the two wives of the appellant. On the evening of 4th June 2020, the fateful day, PW1 went to a pombe shop where she found the appellant. She sat at a distance from the appellant. The appellant ordered PW1 to come sit near him and she obeyed. Then she asked him to call one woman namely Eliza Swila who was believed to be having affair with the appellant. She did not do so and around 2100hrs she left. Later on around 00:00hrs when PW1 was asleep at home, the appellant went home and found PW1 sleeping in their daughter's room. The appellant took a stone and started hitting PW1. PW1 screamed and the other wife of the appellant came but the appellant continued to hit PW1. PW1 managed to escape and went to sleep at their son's kitchen.

The appellant denied his involvement but admitted that on the fateful night after coming back from the pombe shop he went home only to find PW1 sleeping at their daughter's room. He said he touched the hand of PW1 and tried to pull her into their bedroom but PW1 run towards the door where she hit herself. He did not

notice that PW1 had sustained injuries until the next day when he saw that PW1 had slept outside.

Prosecution called four witnesses. The trial magistrate after evaluating the evidence from both sides found the appellant guilty and sentenced him to 5 years imprisonment.

Aggrieved by the decision of the trial court, the appellant lodged an appeal in this court raising eight (8) grounds of appeal. However, those grounds of appeal can be condensed into two grounds of appeal that the defence case was not considered and that there was no evidence of the weapon used.

When the case came for hearing, the appellant appeared in person, unrepresented. The respondent was represented by Ms. Xaveria Makombe, learned State Attorney.

The appellant prayed to adopt his grounds of appeal. He prayed for the court to consider them.

Responding to the grounds of appeal, Counsel for the respondent stated that the grounds of appeal raised by the appellant are mainly on the complaint that his defence was not

considered. She prayed to adopt the contents of their counter affidavit to form part of her submission. she contended further that the appellant's defence was considered as reflected at pages 4-5 of the judgement. She contended further that the appellant denied to have beaten PW1 but said she had banged herself on the door. However, the appellant did not question PW1 how she was injured, hence his defence is an afterthought, contended Ms. Makombe. She referred to the case of **Martin Misara Vs R**, Criminal Appeal No. 428 of 2016. She responded on the supplementary grounds of appeal that the 1st and 3rd grounds of appeal are similar that there were other witnesses. She responded however that it was only the appellant and PW1 who were present at the time of the dispute and other people came later. Ms. Makombe, state also that they however called the VEO, PW3 and PW4 who saw the victim after being beaten. She further referred to **section 143 of the Evidence Act, Cap 6 RE 2019** that there is no number of witnesses required to prove a fact in issue. She contended also that the court did not rely on the hearsay evidence because PW1 and PW3 said the PW1 and the appellant were having matrimonial issues. She said even the

appellant said they were having matrimonial issues. As for the ground of appeal that the court was biased, counsel for the respondent argued that cancellation of bail does not mean that it was because of bias.

In rejoinder, the appellant reiterated his grounds of appeal and prayed for the sentence to be reduced.

I have followed the rival submissions and the bone of contention generally is whether prosecution proved its case on the required standard by law i.e., beyond reasonable doubt; and that defence evidence was considered.

In adjudicating the matter, I am abreast of the fact that this is the first appeal hence I am obliged without fail to subject the entire evidence into scrutiny in mind of the fact the trial magistrate had the opportunity to observe the demeanour of the witnesses.

PW1 testified before the court the ordeal she endured on 04.06.2020 after the appellant came back home from the pombe shop where she left him there. She said the appellant followed her inside their daughter's room, pulled her and started beating her by

using a stone. Despite being stopped by PW1's co-wife and the appellant's father, the appellant continued to beat PW1 until she jumped out the window and went to her son's house where she slept in the kitchen. The next day on 05.06.2020 she went to the hospital and endured four stitches on her head. She testified also that it was not the first time that the appellant was beating her and she had two times reported to Sange Primary Court and prayed for divorce but they were only separated. The Appellant did not cross examine PW1 on the fact that PW1 was beaten by him by using a stone or that they had marital issues and that PW1 had been to the Primary Court two times were they were separated for six months. It follows therefore that the fact that the appellant used to beat PW1 is true. **The hamlet Chairman, PW2,** told the court that when he was called to go to his house on 05.06.2020 he found PW1 accompanied with her daughter injured on the head and laying down in pain. He confirmed that he saw PW1's injuries on the head, mouth and eye. He decided to take her to the health centre. Responding to cross examination questions, he insisted that he saw the wounds sustained by PW1. Again, the appellant did not cross examine PW2 on the fact

that PW1 went to him and took her to get medical attention. **PW3, the brother of PW1** found PW1 at the hospital getting medical attention after hearing that she was injured by her husband. PW3 said at the Medical Center, PW1 told him that he was beaten by her husband, the appellant. He testified further that PW1 had gone to the Primary Court to seek for divorce but the matter was later settled out of the court and at one time PW1 went back home beaten by the appellant. The appellant did not cross examine PW3 at all. **PW4, the Assistant Clinical Officer** recalled to have received and treated PW1 on 05.06.2020 at around 1100hrs. He said PW1 told him that she was attacked by her husband and he stitched her four stitches on her head. He tendered PF 3- **Exhibit P1** which was admitted as **Exhibit P1** without objection.

On his defence, the appellant admitting that he went to a pombe shop and came back home, said that at 00:00hrs he found his wife sleeping at their daughter's room. He touched PW1's hand trying to persuade her to go to their room but she resisted and tried to run outside the house where she banged herself on the door. The next morning, he did not notice that PW1 was injured and she slept

outside. He admitted being called by the VEO on the next day of 05.06.2020 and he was arrested on 06.06.2020. He denied beating his wife. Responding to cross examination questions, he admitted to have once beaten PW1 and that they were separated by Sange Primary Court for six months.

Having recapitulated the evidence from both parties, indisputably is the fact that the PW1 was injured on the night of 04.06.2020 going to 05.06.2020. PW1 testified to have been beaten by a stone by the appellant. PW2 testified to have seen PW1 with serious injuries on her head, mouth and eye. PW4 also testified to have treated PW1 from those injuries and was told by PW1 that she was beaten by her husband. PW2 said he called the appellant and the appellant admitted to have been called by PW2 though before they could meet he was arrested. PW3 testified also that he saw PW1 at the hospital injured. The Appellant said PW1 banged herself on the door. However, he admitted that he pulled her from their daughter's room after coming back from the pombe shop. He also said that he did not notice that PW1 was injured. Going by the testimonies of PW1, PW3 and the appellant himself, it is obvious that

the appellant had a habit of beating PW1 in such a way that PW1 had two times sought for divorce. The appellant admitted that they were separated by the court for six months. The appellant did not contest the fact that PW1 was injured by a stone. Bringing the issue that there was no evidence of a weapon used at the stage of appeal is an afterthought and I accordingly dismiss that ground of appeal. I further subscribe to the principle illustrated by the Court of Appeal in the cited case of **Martin Misara V R, (supra)** where it was held as follows:

"It is the law in this jurisdiction founded upon prudence that ***failure to cross-examine on a vital point, ordinarily implies the acceptance of the truth of the witness evidence****; and* ***any alarm to the contrary is taken as an afterthought if raised thereafter****..."* [emphasis is mine].

As to whether, the trial court considered the appellant's evidence, at page 5 of the typed judgement, the trial magistrate after considering the evidence adduced by both parties was of the firm views that the testimony of the appellant that she was injured by the door was false. I find no reason to fault his findings.

I am saying so because, the appellant in his defence admitted to have come home drunk and pulled PW1 from their daughter's room. The appellant even admitted to have at one time beaten PW1 and that they were separated for six months. It is also perplexing to learn that he knew that his wife slept outside and at the same time much as he saw his wife in the morning but could not see the injuries which were conspicuously seen by PW2, PW3 and PW4. Obviously, the appellant was lying. As the jurisprudential principle of this jurisdiction provides, a lie of an accused person may carry the prosecution case further. In considering the evidence of this instant case, I agree that it did. All in all, I also find no difficult in disbelieving appellant's evidence.

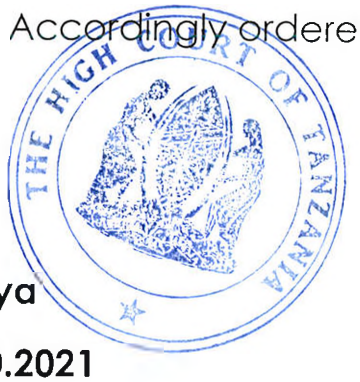
That being said, I uphold the conviction entered by the trial court. However, I have also considered the sentence of five years imposed by the trial court. Mindful of the position of the law that sentencing is the province of the trial court, but Court of Appeal in considering of the factors illustrated by the court of Appeal in the case of **Silvanus Leonard Nguruwe V Republic** (1981) TLR 66, can interfere with the sentence of the trial Court. Those factors are:

1. *The sentence imposed was manifestly excessive or*
2. *The trial judge in passing sentence ignored to consider important matter or circumstances which he ought to have considered.*
3. *The sentence imposed was wrong in principle.*

I agree that the trial court considered the factor that at the time of the commission of the offence, the appellant was drunk and one might say that the appellant admitted to have once beaten PW1. However, I have considered the fact that the purpose of sentencing is to rehabilitate. I have also considered the fact that the appellant in his mitigation stated that he has five children who are dependent on him and that he has an old mother and a father who are all dependents on him. Thus, in seeing that he has learnt his lesson, I am of a stance that two years in jail would be enough to teach him a lesson. In the circumstances therefore, I reduce a sentence from five years in prison to two years.

Thus, the appeal succeeds only to the extent that the sentence is reduced from five years in prison to two years from the date of sentencing at the trial court.

Accordingly ordered.



R.A. Ebrahim

Judge

Mbeya

04.10.2021