

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

CRIMINAL APPEAL NO. 53 OF 2020

(Originating from Criminal Case No. 38 of 2019 in the District Court of
Nanyumbu at Nanyumbu)

HAMIDU HARID MKUCHENI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

2nd Aug. & 8th Oct., 2021

DYANSOBERA, J.:

In the District Court of Nanyumbu, the appellant, was charged with and convicted of doing grievous harm contrary to section 225 of the Penal Code, [CAP. 16 R.E. 2002]. It was alleged that on 19th April, 2019 at Chimika Village within Nanyumbu District in Mtwara Region the appellant unlawfully did cut MAUA D/O NJAIDI PANE on her head using a machete and caused her to suffer grievous harm.

The appellant denied the charge leading the case to proceed to a full trial. To establish its case, the prosecution marshalled a total of five witnesses and produced two exhibits. The appellant fended for himself. In the end, the appellant was sentenced to seven years term of imprisonment.

Brief facts in of the case for purposes of this appeal according to the record of the trial court is to the following effect. PW1 and the appellant

used to be love partners. Their relationship, however, atrophied sometime in 2018. On 19.4.2019 at 1900 hours, the appellant went to PW 1's home asking for a stay during that night. PW1 declined the appellant's offer. The appellant hauled to her filthy words threatening to do a bad thing to her. PW1 reported the matter to Chimika Village Executive Officer one Ausi Hamisi Mmuni (PW3) who responded by visiting her homestead and found the appellant there. He warned him against the bad behaviour he was exhibiting against PW 1 and advised him to find another woman. The appellant left but at 2000 hours he returned back to PW1's compound, now with a machete and uttered intimidating statements to PW1. Unable to bear it, she decided to go to Mukesh Yusuph (PW 2), the Chimika Ward Chairman. In company of PW 1, PW 2 went to PW 1's homestead and found the appellant. He told him that PW 1 was no longer in love of him. PW 2 advised the appellant to go home. The appellant left. While PW 2 was on the way, he heard PW 1 screaming and crying for help. He rushed back to PW 1, took a torch from her and shone it. He found that PW 1 was injured and mentioned the appellant as her assailant as he was armed with a machete. PW 2 took PW 1 to the Ward Executive Officer who issued a letter to PW 1 to go to Hospital for treatment. The appellant was found sweeping the floor and had a machete. He was apprehended and with a machete which had blood stains. The machete was admitted in court as exhibit P 1.

On 19th day of April, 2019 at 1200 hrs, Daud Amulima (PW5) attended PW1 who had fresh wounds oozing blood. The wounds had been

caused by a sharp object. PW 1, according to PW 5, was wounded on the head and back of her neck.

In his defence, the appellant generally denied to have committed the offence. He explained on the collapse of their love relationship in 2018 and the PW 1's request to revive it but which the appellant allegedly turned it down. This rejection, the appellant argued, caused PW 1 hatch an ill will against him. He argued that he was arrested by a man who had close relationship with PW 1. He challenged PW 1's evidence on the place the said assault is alleged to have taken place- whether inside or outside the house. He also argued that PW 2 did not testify to have seen and found him cutting PW 1. Further that PW 3 and PW 4 who were respectively, Village Executive Officer and PW 1's brother did not witness the event. He asserted that PW 5 did not interrogate him.

After a full trial, the trial court was satisfied that the prosecution had proved the case against the appellant. It convicted and sentenced him accordingly.

Aggrieved by the conviction and sentence meted out against him, the appellant lodged the current appeal raising the following grounds:-

1. That the offence was not proved beyond reasonable doubt as required by the law.
2. That the trial Magistrate erred in fact in the Judgment by failing to consider the defence of the appellant.

3. That the trial Magistrate failed to take into consideration the inconsistency of prosecution witnesses especially on the exact time and day when the alleged incident occurred.

At the hearing, the appellant appeared in person and without representation whereas the respondent was represented by Mr. Wilbroad Ndunguru, the learned Senior State Attorney.

The appellant informed the court that he filed three grounds of appeal and had nothing useful to add.

On part of the respondent, Mr. Ndunguru resisted the appeal supporting both the conviction and the sentence. In opposing the appeal, he consolidated the first and third grounds of appeal and argued them together. It was his submission that the evidence adduced by the prosecution sufficiently proved the case beyond reasonable doubt. He clarified that PW1 (the victim) proved the assault and injury as was witnessed by PW2. He contended that PW 1's version was corroborated by the PF3 (Exhibit P2) tendered by PW5. He was of the view the evidence established that the victim was injured.

As to who injured the victim, the learned Senior State Attorney believed that there was ample proof that the person responsible was, undoubtedly, the appellant. He reasoned that the evidence of PW1 and PW2 sufficiently proved the culprit to be the appellant and was elaborative how he injured PW1. He submitted that the appellant met and threatened the victim by uttering threatening words. PW1 reported to PW2 who beseeched the appellant to leave the place. Though the appellant left the place, he went back and assaulted PW1.

On the issue of identification, the learned Senior State Attorney was of the settled view that identification was water tight since victim knew the appellant and had ample time of observing him. He further submitted that there was moon light and a torch. He cited the case of **Mohamed v. R**, 2006 EA (Kenya) to support his argument on recognition and identification. He pressed that the issue of time did not affect value of the evidence of the identifying witness and it is inconsequential. The first and third grounds of appeal are baseless, learned Senior State Attorney contended.

With respect to the second ground, Mr. Ndunguru conceded with the appellant that the defence evidence was not well considered but he believed that the failure did not occasion any miscarriage of justice and invited this court to look into the evidence in its totality. He prayed the appeal to be dismissed.

In very short rejoinder, the appellant stated that his grounds of appeal are self-explanatory and the evidence is clear.

Having gone through the trial court record, grounds of appeal and the submissions of the parties thereof, I undertake, in disposing of this appeal, to tackle two issues. One, whether the prosecution proved their case against the appellant beyond reasonable doubt. Two, whether the defence evidence was considered in arriving at the conclusion of convicting the appellant.

Before embarking on discussing the above issues, I have to remark that this being a first appellate court, it has the duty to re-evaluate the evidence gathered by the trial court and, when necessary, arrive to its

independent decision. This position has been emphasised by the courts on numerous occasions. For instance, in the cases of **The Registered Trustees of Joy in the Harvest v. Hamza K. Sungura**, Civil Appeal No.149 of 2017, **Japan International Corporation Agency (JICA) v. Khaki Complex Limited**, Civil Appeal No.107 of 2004(unreported), **Future Century Ltd. v. TANESCO**, Civil Appeal No.5 of 2009, to mention but a few.

As far as the first issue is concerned, the trial court convicted the appellant basing on the evidence of the PW1 which was corroborated by that of PW2, PW3, PW4, PW5 and exhibits P1 and P2. Strictly speaking, the evidence of PW 1 was cogent and compelling as reflected at page 9 of the typed proceedings of the trial court where PW1 testified that:-

"I know the accused Hamidu Haridi who was my boyfriend before the break up. On 18/04/2019 at the evening hrs was at home. At 19:00 hrs Hamidu Haridi came at my home asking to allow him stay. I refused him (sic) request. I then went to the VEO came to my home and told the accused that what he was doing was not good. At 19:00 hrs the Village Executive Mmuni was the one who came at my home. At 02:00 hrs the accused returned to my home carrying a machett(sic). He then said "Kwa sababu unanikataa mimi nakumaliza". The accused knocked my door. I then went to the Ward Chairman to report. The Ward Chairman was Mukeshi. The Chairman came that night, saw the accused and told him not to return at the house. The accused not go far. He just took hide at the nearby. As the Chairman took way, I went to relieve myself. I then saw the

accused by the help of room(sic) light. I also had a torch. Then the accused said would finish me. He then raised the machete and cut me on my head and back of my head. I identified the accused by moon light and my torch. I knew that it was Hamidu. I raised the alarm and accused run to his house. He was arrested that night. The Ward Chairman Mr. Mukesh turned up for help. I mentioned Hamidu as perpetrator immediately."

As said earlier, PW 1's evidence was fully supported by that of PW 2 and PW 3 who were called by PW 1, warned the appellant to leave PW 1 alone and find another woman. It was amply proved that PW 1 was wounded by the machete and PW 2 was clear that while apprehending him, he found him with that weapon which was blood stained. The machete the appellant was found with was admitted in evidence as exhibit P 2.

Regarding the complaint on the date of the commission of the offence, PW1 and PW2 were clear that the offence was committed on 19th day of April, 2019. The evidence of PW1 was also crystal clear that before the occurrence of the offence the appellant had gone to her seeking to have a love affair with her in the night of 18th April, 2019 and that by the time, it was in the evening. PW 1, PW 2 and PW 3 maintained that on 19th April, 2019 the appellant invaded PW 1 and cut her with exhibit P. 2 causing her grievous bodily harm as evidenced by PW 5 who established that PW 1 had fresh wound oozing blood and that the wound had been caused by a sharp object.

With the available evidence, I am satisfied as was the trial court that the appellant was amply identified at the crime scene and was the actual perpetrator of the offence.

Any inconsistency, if at all it existed was, in my view minor which did not go to the root of the matter. I am supported in this by what was stated in the case of **Marmo Slaa Hofu and 3 Others v. Republic**, Criminal Appeal No.246 of 2011(unreported) where the Court succinctly observed that:-

"Normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions or inconsistencies, embellishments or improvements on trivial matters which do not affect the case for the prosecution should not be made a ground on which the evidence can be rejected in its entirety."

On the complaint of difference on the time of commission of the offence, the evidence on record clearly supported the particulars of offence that the offence was committed at 0300 hrs. This is clear from the evidence of PW 2 who arrived at the crime scene immediately after P W 1 had raised an alarm after she had been assaulted. This is what PW 1, the victim had asserted. This complaint is baseless.

As to the complaint that the learned trial Magistrate did not consider his defence evidence, I think the complaint is misplaced. The record of the trial court clearly shows that the learned Senior Resident Magistrate

objectively considered the defence evidence vis – viz the prosecution evidence. For instance, at page 5 of the typed judgment of the trial court, the learned trial Magistrate is recorded to have said:-

"The accused's version that he was framed in this matter as a revenge for turning down PW1 chances of reunion, this court find the same as an afterthought. I am holding the view since it is on record that the accused went to victim's house two times before. PW2 told the court that he pleaded with the accused to go from the place since he was no longer needed and in fact he pretended to go. Had his version were true, one would wonder if he refused her back, what moved him to go to her home that night. My conclusion is that he still had a desire with. Hence his defence is accorded with no weight."

The above excerpt needs no more exploration. The complaint that the defence was not considered fails.

With the above analysis of the evidence, I am satisfied that the conviction was properly arrived at and this court cannot fault the finding thereon.

Respecting the sentence, I think the learned trial Magistrate exceeded his sentencing jurisdiction as per section 170 of the Criminal Procedure Act, [Cap. R.E. 2019]. The cited section requires the trial Magistrate to impose a sentence not exceeding five years save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment. Since the

offence the appellant was facing is not a scheduled offence, the sentence of seven years imprisonment was beyond the legal jurisdiction of the trial Resident Magistrate. It needs interference. Accordingly, appeal against sentence is allowed to the extent that the sentence of seven years imprisonment is reduced to that of five (5) years term of imprisonment.

In resume, the appeal against conviction is dismissed. The appeal against the sentence is allowed to the extent explained above.

It so ordered.



W.P. Dyansobera

Judge

8.10.2021

This judgment is delivered under my hand and the seal of this Court this 8th day of October, 2021 in the presence of the appellant in person and Mr. Paul Kimweri, the learned Senior State Attorney for respondent/ Republic.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge

