IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CRIMINAL APPEAL NO. 5 OF 2020

(C/f Criminal Appeal No 24/2019, Originating from the decision of the Maji ya chai Primary Court, Criminal Case No. 273/2019)

EMASON EDWARD ..... APPELLANT

VERSUS

ALFRED MUSHI ..... RESPONDENT

JUDGMENT

19/04/2022 & 28/06/2022

KAMUZORA, J.

Emason Edward the Appellant herein, is challenging the decision of the District Court of Arumeru at Arumeru (the first Appellate Court) in Criminal Appeal No. 24 of 2019. The Appellant at the Maji ya Chai Primary Court (Trial Court) stood charged with the offence of wounding contrary to section 228(a) of the Penal Code Cap 16.

The facts of the case is such that, on 1st day July, 2019 at Makumira area the Appellant went to the Respondent's shop while having a knife in his jacket and after an argument with the Respondent he stabbed the Respondent on his thigh. The report was made to the

police station and the Respondent was issued with PF3 and went to hospital for treatment. At the trial court SM1, the Respondent herein tendered a trouser which was admitted as exhibit P1, four pictures, exhibits P2, P3, P4 and P5, various receipts admitted as exhibit P6 and PF3 admitted as Exhibit P7.

In his defence the Appellant stated that, they quarrelled with the Respondent due to the high volume of the radio by the Respondent. Then, they had a fight and the Appellant was arrested by the police alleging that he had stabbed the Respondent. The Appellant claimed that the Respondent must have stabbed himself. The trial court basing on such evidence concluded that the case was not proved in the required standard and acquitted the Appellant.

Being aggrieved by the trial court's decision the Respondent preferred an appeal to the district court which varied the trial courts decision and in lieu thereof found the Appellant guilty of the offence and proceeded to sentence the Appellant to serve a conditional discharge for a term of six months. The first appellate court further ordered the Appellant to compensate the Respondent to the tune of 100,000/= in addition to Tshs. 300,000/ that he lost as well as Tshs. 200,000/= for

medical and other costs incurred by the Respondent. Aggrieved, the Appellant preferred this second appeal on the following grounds: -

1. *That, the honourable 1st Appellate Court erred in law by calling and hearing new facts, evidence as a trial court.*
2. *That, the honourable 1st Appellate Court erred in law by hearing an appeal presented before it de novo and thus reaching into erroneous decision.*
3. *That, the honourable 1st Appellate Court erred in law and in fact by failing to examine the evidences and records from the trial court in determining the appeal brought before it thus ending up in a wrong and erroneous decision.*
4. *That, the honourable 1st Appellate Court failed to consider the contradictory statements given by the Respondent herein in relation to the injury alleged thus ended in erroneous decision.*
5. *That, the honourable 1st Appellate Court erred in law by faulting the decision of the trial court unjustifiably.*
6. *That, the honourable 1st Appellate Court misdirected itself in law while determining an appeal wrongly convicted and sentenced the Appellant herein without proof beyond reasonable doubt of the crime alleged.*

Despite summons being issued to the Respondent he did not enter appearance hence the appeal was heard only on one side of the Appellant. As a matter of legal representation, the Appellant appeared in

person with no legal representation and opted to argue the appeal by way of written submission.

Submitting in support of the 1st ground of appeal the Appellant referred page 2 of the judgment of the 1st appellate court and argued that, the court entertained new facts and evidence from the Respondent herein contrary to what was stated at the trial court. On the 2nd ground the Appellant stated that, instead of the 1st appellate court to deal with the merit of the appeal it tried the case de novo with no any justification to do so. On the 3rd ground of appeal, the Appellant submitted that, the evidence at the trial court clearly shows that there was a fight amongst the parties herein and the main cause of a fight being public nuisance which is from excessive volume of the Respondent's radio. That, there was no any object that was involved during the fight and the alleged knife was not seen by the Respondent or Rick who was present and close to the area of the fight. That, due to the fight the Respondent fell down and was injured but there is no knife used.

The Appellant submitted further that, it is a well-established principle of law that, the accused should benefit from a doubt where doubt exists in a criminal case. That, the one who alleges must prove beyond reasonable doubt but the Respondent failed to prove beyond

reasonable doubt. That, the photos presented at the trial court was full of doubt as they did not show the date when the same were taken. He added that, no receipts were tendered at the trial court showing that hospital bills were paid.

Submitting for the 5th ground of appeal, the Appellant argued that, had the 1st appellate court properly directed its eyes to the evidence adduced at the trial court and evaluated those evidence the court could have reached into a conclusion as the trial court did. On the 6th ground the Appellant submitted that, it is evident that since the 1st appellate court could not see that weapon was involved in that fight, the alleged knife is an afterthought of the Respondent. He added that, in demanding for a revenge the Respondent procured a PF3 which its genuiness is also questionable as well as the photos which the Appellant claims that they were fabricated.

Basing on that submission the Appellant prays that the appeal be allowed and the conviction and sentence of the 1st appellate court be quashed and the trial court's decision be upheld.

I have clearly read the lower courts records, the grounds of appeal and the submission made in support of the appeal. I will answer jointly for the 1st and 2nd grounds of appeal as they relate to the issue of

rehearing the case de novo by the 1st appellate court. Upon visiting the records, I found that on the date the appeal was called for hearing before the district court the parties were sworn and gave their evidence that was recorded by the 1st appellate court. However, no cross examination was allowed from either of the parties and at the end there was a rejoinder. I agree that the 1st appellate court instead of allowing the parties to submit on appeal, it allowed the parties to produce fresh evidence and used such evidence in its decision. From page 1 to 2 of its judgment, the 1st appellate court analysed the evidence by the parties which was recorded during hearing of the appeal. The court also in order to reach to its decision raised new issues for the determination as opposed to the prior issues raised at the trial court and in fact made a determination of new issues applying the new facts adduced by the parties in reaching to its decision.

It is a settled principle of the law that at an appellate level the court is only allowed to deal with grounds of appeal raised against matters that have been decided upon by the lower court. See for instance the case of **Richard Majenga Vs Speciozal Syllivester,** Civil Appeal No 208 of 2018 CAT at Tabora (Unreported) which cited with approval the cases of **Hotel Travertine Limited and 2 Others Vs.**

National Bank of Commerce Limited [2006] TLR 133 and **James Gwagilo Vs. The Attorney General,** Civil Appeal No. 67 of 2001 (unreported). In **Hotel Travertine Limited and 2 Others** (supra) the Court stated that: -

> *"As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."*

For the above reasoning I agree with the 1st and 2nd grounds of appeal as well as the submission made thereof that 1st appellate court received new facts and evidence instead of hearing the parties' submissions on the grounds of appeal. Thus, the 1st and 2nd grounds of appeal are full of merit.

In determining the 3rd and 4th grounds the matter for the consideration is whether there was a proper analysis of evidence by the 1st appellate court. It is clear that before the district court four grounds of appeal were raised for determination. The grounds of appeal raised a question of analysis and consideration of evidence by the trial court in reaching its decision. After the 1st appellate court had analysed the evidence adduced on appeal, it went further by raising five issues for determination.

In answering those issues, the 1st appellate court did examine part of the evidence before the trial court but it also analysed the fresh evidence it received from the parties during hearing on the appeal. I thus agree with the Appellant's submission that, there was no proper analysis of evidence by the 1st appellate court. I therefore find merit in the 3rd and 4th grounds of appeal.

On the 5th and 6th grounds, the Appellant alleged that the 1st Appellate Court erred by faulting the decision of the trial court unjustifiably as it misdirected itself and wrongly convicted and sentenced the Appellant without proof beyond reasonable doubt. While I agree that the decision of the first appellate court can be faulted for basing on the wrong analysis of evidence, I do not agree with the submission that the case against the Appellant was not proved beyond reasonable doubt.

I understand that this is the second appeal for the matter originating from the primary court. Upon considering the legal position in addressing issues of facts on the second appeal, I am of the settled view that, this court can still step into the shoes of the first appellate court and evaluate the evidence for just determination of the factual matter. That was the position of the Court of Appeal in the case of **Omari Mussa Juma Vs the Republic**, Criminal Appeal No. 73 of 2005 CAT at

Tanga (unreported). In this case, the Court of Appeal of Tanzania cited with approval the case of **Salimu Muhando Vs the Republic** (1993) TLR 170 where the court held that,

> *"Where there are mis direction or non-direction of evidence the second appeal is entitled to look at the relevant evidence and make own findings of facts."*

As I have pointed out above the 1st appellate court did not discharge its duty of properly evaluating the evidence before it. In that, the first appellate court misdirected itself by evaluating new evidence instead of analysing the available evidence thus, this court undertake the duty to look into the evidence of the trial court and make findings of facts.

In considering the above discussion, I perused the trial court records to see whether the case was proved beyond reasonable doubt. The Appellant was charged for the offence of unlawful wounding contrary to section 228 (a) of the Penal Code Cap 16. The facts reveal that on the material date of incident on 01/07/2019 the Appellant attacked the Respondent and stubbed him with a knife on his right thigh. The Respondent's evidence reveals that, they had a fight with the Appellant who stubbed him with knife. He tendered the trousers which

he was wearing on the date of incident and the court acknowledged seeing blood and a hole on the right thigh of the trousers. The Respondent also tendered photos showing the injury sustained. His evidence was supported by SM3 and SM4 who claimed to have seen the Appellant taking a knife from his jacket and stabbing the Respondent whilst in their course of fighting. The PF3 was tendered to support that evidence and it indicated that the Respondent sustained injuries caused by the sharp object. The PF3 also indicated that the Respondent was sent to hospital the same date and he sustained injury that was inflicted few hours meaning that, the injury was sustained during the fight between the Appellant and the Respondent. The Appellant did not deny the fact that there was a fight between him and the Respondent. He only claimed that he did not stub the Respondent and did not know what injured the Respondent. His evidence was supported by two more witnesses who claimed that they were present during the fight but did not witness the Appellant stubbing the Respondent. However, SU2 claimed to have seen the Respondent bleeding after the fight but claimed that he did not know what injured him.

The trial court made a finding that there was no proof that the Respondent was stabbed with a knife and proceeded on acquitting the

Appellant. The trial court made analysis of the photos and PF 3 and concluded that they were not enough evidence to prove that the Appellant injured the Respondent. The trial court also found that there was no witness who saw the Appellant holding a knife or who saw the Respondent with blood meaning that there was no enough evidence to prove that the Appellant stubbed the Respondent.

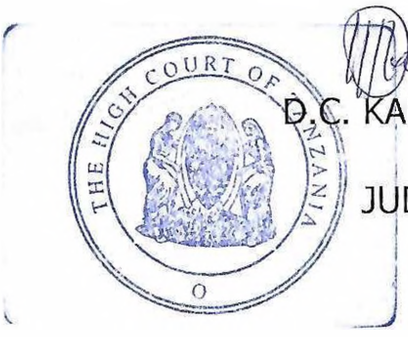
From the analysis of evidence before the trial court, this court is satisfied that the trial court misdirected itself to conclude that there was no evidence showing that the Respondent sustained injuries during the fight. The evidence by the Respondent himself reveal that he sustained injury during the fight. The trial court did not state why the evidence of the Respondent was ignored or could not be considered as proving such fact. Apart from that, the respondent tendered the trouser he was wearing on the date of incident, still the trial court did not state categorically the relevance of such evidence. Apart from that, while the trial court consider that no witness who testified to have seen the knife or the Respondent injury, it is in records that SM3 and SM4 who were present at the scene claimed to have seen the Appellant holding a knife and he stubbed the Respondent. They also saw the Respondent bleeding and this is found at page 7 to 8 of the typed proceedings of the

trial court. Such version is also supported by the defence witness SU2 who claimed that he saw the Respondent standing while his right leg bleeding. Thus, the conclusion by the trial court that no one saw the Respondent bleeding is an invention of evidence not in record.

With the above analysis, it is clear that the evidence that was presented before the trial court was clear proving the offence against the Appellant. There is undisputable evidence that the Appellant had a fight with the Respondent and in course of that fight the Respondent was injured. The witnesses who were present at the scene claimed to have seen the Appellant stubbing the Respondent with a knife and he sustained injuries. He was sent to hospital and the PF3 reveal that he sustained injury caused by sharp object in which a knife is among the sharp objects. The fact that the knife was not recovered cannot be construed as failure to prove the injury. It is in record that the Appellant was not arrested at the scene, thus there was time for him to get rid of the weapon used to commit the offence. That being the case, it is clear from the evidence that the Respondent's evidence was water tight to prove the case against the Appellant. It was wrong for the trial court to disregard the Respondent's evidence and consider the case not proved.

In the upshot, irrespective of the errors done by the first appellate court in receiving new evidence, this court upon going through the evidence before the trial court is satisfied that the same proved the case against the Appellant beyond reasonable doubt. I therefore sustain the conviction against the Appellant for the offence of unlawful wounding contrary to section 228(a) of the Penal Code. I see no reason to vary the sentence passed by the first appellate court except for compensation order which need be pursued by civil suit. It is so ordered.

DATED at **ARUSHA** this 28th day of June, 2022



D.C. KAMUZORA

JUDGE