IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 12 OF 2022

JOSEPH S/O KASEYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Kalambo at Matai)

(N. K. Temu, RM)

Dated 11th day of January 2021

In

Criminal case No. 115 of 2021

JUDGMENT

14/06 & 13/07/2022

NKWABI, J.:

Despite his defence being supported by a defence witness, the trial court convicted and sentenced the appellant for grievous harm contrary to section 225 of the Penal Code, Cap 16 R.E. 2019. Offended by the conviction and sentence to one year imprisonment without an option to fine, the appellant instituted this appeal. He was minded to upset such conviction and sentence.

In this court the appellant is brandishing four grounds of appeal as follows:

1. That the trial court magistrate erred in law to convict the appellant of the offence of grievous harm while the offence was not proved beyond reasonable doubt.
2. That the trial court Magistrate erred in law and fact to inflict a custodial sentence of 12 months which is higher without considering the circumstances in which the offence was committed without an option of a fine.
3. That the trial court Magistrate erred in law and fact to convict the appellant with the offence of grievous harm without taking judicial notice of the existence; and, considered the decision of the very same court (Hon. R.M. Rugemalira – SRM) in Criminal Case No. 116 of 2021 whereby the complainant in this case Gashi Mwigulu who was the accused in that case (Criminal Case No. 116 of 2021 was convicted and sentenced on his own plea of guilty of two offences namely malicious damage to property and assault causing actual bodily harm which he committed against the appellant in very same transaction which the offence which the appellant was charged, convicted and sentenced. Having pleaded guilty and bearing the nature of the offence alleged to have been committed by the appellant against him, it renders the arraignment and prosecution of the appellant unjustified and unsound

in the eyes of the law as the complainant admitted to have committed the offences against him.

4. That the trial court Magistrate erred in law and facts for its failure to consider the defence case at all hence convicted the appellant on the weakness of the defence.

The appellant implored this court to allow the appeal while quashing the same. The 12 months imprisonment term be set aside, else a fine sentence be imposed instead. He further prayed for any other reliefs this court finds fit and just to grant.

During the hearing, the appellant appeared in person, unrepresented while the respondent was duly represented by Ms. Safi Kashindi Amani, learned State Attorney.

Evidently, the Appellant did not wish to beat around the bush. In his submission in chief, he merely prayed his grounds of appeal be adopted as his submissions.

The respondent, through Ms. Kashindi was unimpressed by the appeal as she objected the appeal and supported the appellant's conviction and sentence imposed on him.

Ms. Kashindi argued with some force that the 4th ground of appeal which is in respect of the claim that his defence was not considered is unmerited. She contended that the trial court considered the whole evidence and decided correctly. She was of the view that the defence was considered. She referred me to the case of **Jafari Musa V. Republic,** Criminal Appeal No. 343/2019 Court of Appeal of Tanzania at page 11 to the effect that this court may appraise the defence of the appellant. So, it is not fatal where a defence is not considered as an appellate court may appraise it, she pointed out, yet the trial court considered his defence. She stressed, this ground of appeal be dismissed.

Submitting on the 3rd ground of appeal, Ms. Kashindi maintained that the same has no merit as there were two different cases. In another case the appellant pleaded guilty. The offences are different. She asked this court to dismiss the ground of appeal.

Turning to the 2nd ground of appeal which is in respect of the sentence, Ms. Kashindi strongly maintained that the ground of appeal is baseless. Ms. Kashind was of the view that under section 225 of the Penal Code, the appellant could be sentenced to 7 years imprisonment, there is no option to fine. She prayed that this court decides that the sentence imposed on him is too lenient.

On the 1st ground of appeal which is that the charge was not proved beyond reasonable doubt, Ms. Kashindi was of the firm view that the ground of appeal is without merit. To her, that was because the victim testified on how the appellant assaulted him. The appellant assaulted him (PW1) by using a panga (machete). She insisted the evidence of the victim is corroborated by testimonies of other witnesses. She prayed the 1st ground of appeal be dismissed and ultimately the appeal be dismissed.

To close his submissions, the Appellant contended that the evidence on the respondent was contradictory. He then prayed this court to do him justice.

I have closely considered this appeal and in my view, the 3rd and 4th ground of appeal joined with the 1st ground of appeal dispose of the appeal in favour of the appellant.

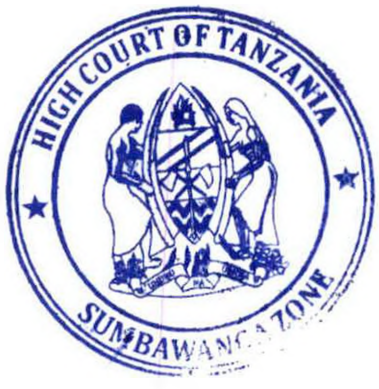
In the evidence that is in the court record, it appears that the appellant is a peasant as well as he keeps livestock. On the fateful day, the appellant was from a market going home. He found the PW1 grazing his heads of cattle in the farm of the appellant hence destroying crops. That PW1 keeps livestock is evident in the very evidence of PW1. The appellant tried to drive away the heads of cattle of PW1 from his farm. There upon, the appellant was assaulted by PW1. That is evidenced by the proceedings in Criminal case No. 116/2020 in the very District Court where PW1 was convicted in his own plea of guilty to the charge which had two offences, one in respect of malicious damage to property and assaults causing actual bodily harm to the appellant in this appeal. PW1 was ordered to pay T.shs 45,000/= as compensation to the appellant in this appeal and was ordered to pay T.shs 100,000/= as compensation for treatment of the appellant from the injuries PW1 in this appeal inflicted upon the appellant in this appeal.

In the circumstances, I am tempted to think and I resolve so, that whatever the appellant did to PW1 causing the injuries that are described in the PF3 exhibit P. 1 to be harm, were as a result of self defence and defence to property of the appellant. The property are the crops destroyed which PW1 was ordered to pay compensation. Had the appellant used excessive force, then he could be found liable. But the description of the injuries made in exhibit P.1 does not suggest that the appellant applied excessive force. Had the trial court closely considered the defence of the appellant and taken judicial notice of the proceedings in criminal case No. 116 of 2021 in the very District Court before R. Rugemalira, SRM, the trial court would have not convicted the appellant.

That said and done, I quash the conviction against the appellant. I then proceed to set aside the sentence of 12 months imprisonment meted out by the trial court against the appellant. I am aware that the appellant has ever completed serving his custodial sentence, as such I do not make any order as to his release as such order would have been overtaken by events. The appeal is allowed.

It is so ordered.

DATED at **SUMBAWANGA** this 13th day of July 2022.



J. F. NKWABI

JUDGE