IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 117 OF 2021

(*Originating from the judgment of District Court of Kinondoni, Criminal Case No. 182 of 2021)*

ALLY OMARY MASENI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

16/2/2022 and 23/9/2022

LALTAIKA, J.

ALLY OMARY MASENI (hereinafter to be referred to as appellant) was charged before the District Court of Kinondoni with the offence of causing grievous harm contrary to section 225 of the Penal Code, Cap. 16 R.E.2019. The particulars that were laid in a charge sheet disclosed that on 11th day of December 2019 at Mbezi area within Ubungo District in Dar es Salaam, the appellant inflicted grievous harm to one Jerome Elisha after beating him.

To prove the charge the prosecution called six witnesses and tendered in three exhibits. The appellant, on the other hand, was the only witness for the defence side.

The brief facts of the case as gathered from the lower court records were that on 11th December 2019 PW1 was at his place of work at Mbezi bus stand when the appellant confronted him and tried to close the door of a commuter bus. PW1 opened the door so that passengers could board on the bus. The appellant closed the door once again and proceeded to hit PW1 on his face where he lost his teeth of his left side.

PW1 was then taken to Police station to obtain PF3 and shortly after to Mloganzila Hospital where he was admitted for three days before he was transferred to Muhimbili National Hospital and was admitted for another seven days. PW2 who witnessed the scene on the fateful day told the court that PW1 sustained injuries on his mouth. The same story was narrated by PW6 who had witnessed the appellant assaulting PW1 with a fist while PW1 was calling the passengers to board on his bus. He further told the court that he was among the people who took PW1 to hospital and then to hospital.

PW5, medical doctor from Muhimbili National Hospital who had examined PW1 and filled up the PF3, which was tendered in court as PE2, told the court that PW1's jaw was broken due to injuries sustained from the attack by the appellant. He went on to testify that he operated and discharged him on 17th December 2019. However, the medical doctor testified further, PW1 continued to attend outpatient clinic to enable the hospital to observe his condition.

On his defence the appellant told the court that there was a fight between him and PW1. He insisted that it was in the cause of the fight, out of heat of anger that he hit PW1 on the mouth. He told the court further that he did not expect that PW1 would sustain the injuries of that magnitude.

At the conclusion of the trial, the trial court found the appellant guilty of the offence and sentenced him to serve a four year's imprisonment term and pay the victim a compensation of TZS.1,000,000/= (One Million Shillings). Dissatisfied with the conviction and sentence, the appellant appealed to this court on nine grounds. For reasons that are apparent, I will not reproduce them here.

When this appeal was called on for hearing, the appellant prayed to argue the matter by way of written submission while the respondent's learned state attorney Ms. Christine Joas opted to reply orally. In his submission on the first ground of appeal, the appellant submitted that the trial magistrate had erred in law by relying on the discredited evidence of PW1, PW2 and PW6 who are closely related to the complainant. In that regard he faulted the trial magistrate for failure to draw adverse inference on the evidence of PW1, PW2 and PW6.

On the second ground, the appellant briefly submitted that exhibit P1 was recorded out of time prescribed by the law. On the third and fourth grounds, the appellant levelled his complain on the same exhibit that it did not comply with the procedural requirement for tendering of evidence. He further submitted that the trial court did not consider his objection on the admissibility of the said exhibit.

Arguing on the fifth ground, the appellant faulted the trial court that exhibit P2 was also tendered unprocedurally on the ground that he was not accorded with the right to challenge the same before it was admitted as evidence.

Arguing on the sixth ground, the appellant submitted that it was erroneous for the trial court to rely on the evidence of PW5 who attended the complainant appearing as Jerome Swai while he was also appearing as Jerome Elisha Swai in the trial court's proceedings.

On the seventh ground, the appellant submitted that the case was tried by three different magistrates without being given reasons for reassignment from predecessor magistrates to successor magistrate. Arguing on the eighth ground, the appellant submitted that the trial magistrate failed to properly analyse and evaluate the evidence from both parties. On the nineth ground, the appellant faulted the trial court for excessive sentence of four years and compensation of TZS.1,000,000 to the victim without considering his evidence that he was also insulted by the victim which led to the fight between them.

In response to the appellant's submission, Ms Joas submitted with reference to section 127(1) of the Evidence Act (TEA) that the law does not bar a testimony of a family member provided that she is a competent witness to testify. In that regard, Ms. Joas submitted that the witnesses were competent to testify as their relationship with the victim was not sufficient ground to disqualify them.

Arguing on the second and third grounds of appeal jointly, Ms. Joas submitted that when the exhibit was tendered before the trial court the appellant did not object the for the same to be tendered as exhibit,

bringing that ground at the appellate stage Ms. Joas submitted that it was an afterthought. She invited this court to visit the testimony of PW4 as reflected at page 17 and 18. Ms. Joas expounded that the appellant was arrested on 17th December 2019 and his cautioned statement was recorded on the same day from 13:00 hrs to 13:45. She therefore finds these grounds without merit.

On the fourth ground, Ms. Joas submitted that the prosecution is at liberty to decide which witness to compel. She explained further that during the trial when PW4 mentioned the role of Castro the appellant did not object. Ms. Joas is therefore, of a considered view that since the appellant did not object during the trial he agreed with the same. She thus submitted that this ground of appeal lacks merit.

On the fifth ground, Ms. Joas, while referring me to page 18 of the typed proceedings when PW5 the medical doctor prayed to tender the exhibit, contended that the appellant did not raise any objection. The learned Senior State Attorney is therefore, of the view that the appellant was accorded with the right to challenge the exhibit before it was admitted in evidence but failed.

Arguing on the sixth ground, Ms. Joas submitted that the appellant's complaint is on the discrepancy of names. She insisted that the PF3 indicated that the victim was Jerome Swai whereas in his testimony PW2 mentioned the victim as Jerome Elisha Swai. In that regard, Ms. Joas is of the view that since Elisha Swai are the surnames there was no problem because Jerome Elisha Swai and Jerome Swai are one and same person.

On the seventh ground, Ms. Joas submitted that change of magistrate without informing the appellant did not prejudice the

appellant's right to fair trial. The learned Senior State Attorney contended that the fact that the case was re-assigned to three different magistrates who continued with the hearing without giving reasons for re-assignment is not fatal. Ms. Joas is therefore of the view the ground of appeal lacks merit. On the eighth ground of appeal Ms. Joas submitted that it is evident from the proceedings that the evidence was properly analysed by the trial magistrate.

On the nineth ground, Ms. Joas submitted that the sentence for causing grievous harm is seven years imprisonment. She went on to submit that the trial magistrate sentenced the appellant to four years imprisonment while it was proven by the evidence of PW1, PW2 and PW5 that the appellant had injured the victim. In that regard, Ms. Joas is of the view that the trial magistrate erred by imposing the term of four years imprisonment. She urged me to vary the sentence from four to seven years imprisonment.

Premised on the submission of both parties, my task is to consider the merit of this appeal. I will proceed to ponder my discussion as submitted by the parties.

To start with the first ground of appeal, the appellant has faulted the trial court for considering the evidence of PW1, PW2 and PW6 who are closely related. Let me say that it is trite law of this jurisdiction that every person is competent to testify in court unless there are factors that the court would consider such witness incompetent to testify. In that regard, the fact that PW2 was PW1's brother cannot disqualify him from giving his testimony provided that he was a competent and credible witness to testify.

As rightly submitted by Ms Joas, section 127(1) of the Evidence Act, Cap 6 R.E.2019, is crystal clear on this. The section reads:

> *"Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause".*

Guided by the above provision of the law and going by the record of the trial court, PW2 had explained what transpired at the material day. His testimony cannot be discredited simply because he is PW1's sibling. I am also guided by the decision of the Apex Court in the case of **Fred Mathias Marwa vs Republic**, Criminal Appeal No.136 of 2020, CAT at Musoma, thus:

> *"Admittedly, it is true that PW1, PW2 and PW3 were family members; that PW1 and PW3 were siblings and PW2 was their mother. However, the common thread among them is that they all witnessed the incident from different vantage positions and that their respective testimonies were relevant. Whether their evidence could ground a conviction, like any other evidence, depended on their credibility and reliability irrespective of the relationship between each other"*

In the instant case the court analysed the evidence of each witness in accordance with his competency and credibility. There was nothing wrong for these family members to testify. To this end, the first ground of appeal lacks merit.

Turning to the second, third and fourth grounds of appeal jointly, it is the appellant's argument that the trial court erred in law by admitting and relying on exhibit P1. The appellant's complaint is centred on four issues, **one** the cautioned statement was taken out of time prescribed by

the law, **two** he was not accorded with the right to challenge it, **three** the prosecution failed to summon the witness who was present when the cautioned statement was recorded.

While Ms. Joas considered the appellant's submission as an afterthought, in addressing the first issue, I was probed to revisit the record of the trial court. As per the records, PW3 testified that he received instructions from his commander to go and arrest the appellant at around 1:00PM. It took him approximately 15 minutes to accomplish this. I have also gone through the exhibit P1. It reveals that the appellant started giving his statement at around 1:10 to 1:45 PM. In that regard, I hold that the cautioned statement was taken within four hours in accordance with section 50(1)(a) of the CPA.

Moving on to the second ground, the appellant has faulted the trial court for not giving him the opportunity to challenge exhibit P1 prior to its admission in evidence. It transpires from the record that the appellant was asked by the court if he had objection and he replied that he had no objection. As rightly submitted by Ms. Joas, it is not true that the appellant was not accorded with the opportunity to challenge the said exhibit.

And lastly on the issue to witness, section 143 of the Evidence Act does not provide for a particular number of witnesses to testify. In that regard, the prosecution is at liberty to call the witness who may be competent and credible to prove its case depending on the circumstances of each case. There is no limitation given by the law on the number of witness and whom to compel to testify before the court. I am therefore, of the considered view that these grounds of appeal lack merit. I am fortified by the case of **Chacha Marwa @Nyaisure vs Republic**,

Criminal Appeal No.243 of 2018, CAT at Mwanza where the Court held that;

> *"Regarding the number of witnesses required to testify in court is well settled under section 143 of the Evidence Act, [Cap 6 R.E. 2002; now R.E. 2019] that there is no specific number of witnesses required to prove the fact in issue. What is required is the credibility of witnesses and not their number"*

On the fifth ground, the appellant complained that he was not accorded with the right to challenge exhibit P2 the PF3. I have gone through the trial court records. It is my finding that that the appellant was accorded the right to challenge the same. However, he indicated that he had no objection. I, therefore, find this ground of appeal devoid of merit.

On the sixth ground, it is the appellant's submission that there is a discrepancy on the victim's names as it appears on the PF3. He submitted that the complainant's names were recorded as Jerome Swai but when PW1 was giving his testimony before the trial court he introduced himself as Jerome Elisha. Ms. Joas, on her part, submitted that Jerome Swai and Jerome Elisha is the same person namely the victim. It is my considered view that the appellant ought to have stated how that prejudiced his right, thus I also find this ground of appeal without merit.

On the seventh ground of appeal, I have gone through the records, and I entertain no doubt that the reasons for the successor trial magistrate who determined the case to its final disposal were given by the assigning magistrate. With regards to failure to analyse the evidence that was before the trial court, this probed me to go through the judgment of the trial court. It is my considered view that the trial magistrate analysed the

evidence from both parties in reaching to its decision. I therefore find this ground of appeal without merit.

Lastly, on the nineth ground of appeal, the appellant faults the trial court for imposing excessive sentence of four years imprisonment and a fine of TZS.1,000,000/= without considering the appellant's defence that they were fighting. On her part Ms. Joas is of the considered view that the offence attracts seven years imprisonment. In fact, she faulted the trial magistrate for not implementing the sentence as per the law. I agree. The sentence for causing grievous harm according to section 225 is seven years. The relevant provision provides that,

> *"Any person who unlawfully does grievous harm to another is guilty of an offence and is liable to imprisonment for seven years".*

Admittedly, although the sentence is created by the statute itself, there are other factors which the court should consider in sentencing the accused person. These include mitigating factors, the time spent in remand and whether the accused is first offender. It is also important to note that an appellate court cannot interfere with the sentence unless there are compelling reasons to do so. Case law has developed the conditions in which the appellate court may interfere with the sentence imposed by the trial court. In the case of **Joseph Komanya vs Republic**, Criminal Appeal No.56 of 2021, the court held:

> *"It is a laid guiding principle at law that an appellate court including the Court of Appeal, must not interfere with the sentence which has been assessed by a trial court. Unless such sentence is illegal or the sentencing court followed a wrong principle or failed to take into account important mitigation factors such as that the convicted person is the first offender, the period he spent in custody before being convicted and sentenced, his age, and health and other*

meritorious extenuating circumstances like the fact that, the convicted person readily pleaded guilty to the offence and there by demonstrating remorse"

Guided by the above case laws, I am fortified that the trial magistrate took into consideration the mitigating factors raised by the appellant. It is my considered view, therefore, that the trial magistrate had taken cognizance of all factors mentioned above in sentencing the appellant. In the final analysis, I find this appeal devoid of merit. I hereby dismiss it.

It is so ordered.

E.I. LALTAIKA

JUDGE

23.09.2022