IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 169 OF 2021

(Arising from criminal case No. 58 of 2021 in the District Court at Magu)

CYPRIAN JOHN.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

16th & 25th May, 2022

DYANSOBERA, J.:

The appellant herein was arraigned before the District Court of Magu in Criminal Case No. 58 of 2021 for the offence of grievous harm c/s 225 of the Penal Code [Cap.16 R.E.2019]. The particulars of the offence were that the appellant, on 10th day of April, 2021 at or about 22:26 hrs at Kikundi village within Magu District in Mwanza Region, unlawfully did cause grievous harm to Finias /o Makenika by stabbing him on his stomach with a bush knife as a result caused him to suffer bodily injuries.

After hearing four prosecution witnesses and the defence, the trial court convicted the appellant and sentenced him to 4 (four) years prison term.

The appellant now appeals to this court against conviction and sentence setting out, according to the petition of appeal, the following complaints:-

1. That, the trial court erred both in law and facts to convict and sentence the appellant on the weakest and doubtful evidence contrary to the standard of proof in criminal jurisprudence.
2. That the trial court erred in law and facts having made a finding that there was a fight between the appellant and the victim to impose such a heavy punishment otherwise and instead of substituting the punishment for the offence of affray.
3. That the trial court erred in law and facts for not being impartial by concocting evidence, composing and delivering a judgment on different dates from the exact date the same judgment was delivered contrary to the record

It was common cause at the trial that on 10th day of April, 2021 the appellant who is a security guard was at his duty station where PW 1, one

Fineas Mekanika was also at his business burning Compact diskettes and music. When the closing time approached, the appellant asked PW 1 to close his business but refused. An altercation and fighting ensued whereby PW 1 was thereby stabbed and wounded. PW 2 who was around came in assistance. The hounds of justice were informed and a PF 3 issued. PW 2 went to Sangabuye Health Centre and was treated by Mussa Jumanne Nguku, a clinical officer who filled in the PF 3 (Exhibit P 1). The appellant was arrested and subsequently arraigned in court.

In his defence, the appellant admitted to have been at the scene crime with PW 1 but denied to have stabbed him arguing that PW 1 might have fallen on the panga the appellant had on his loins.

The learned Resident Magistrate analysed the evidence and relying on some case laws on visual identification, found the evidence of PW 1 to PW 3 credible proving that the appellant had stabbed PW 1 and caused him grievous harm. He convicted the appellant and sentenced him accordingly.

At the hearing of this appeal, Mr. Adam Robert, learned Counsel represented the appellant whereas the respondent enjoyed legal services of Ms Fyeregete, learned State Attorney.

Arguing the first ground of appeal, Counsel for the appellant faulted the learned Resident Magistrate for basing his decision on the weakest and doubtful evidence. He explained that PW 1 told the trial court that after being injured with a knife, he went to the police and on the same date, i.e, 10.4.2021 went to the hospital. He argued that PW 2 who was supporting the evidence of PW 1told the trial court that after PW 1 was injured, he was taken to the hospital. Counsel for the appellant viewed this as an inconsistency which brought doubt in the case for the prosecution.

On another front, Counsel for the appellant questioned the veracity of PW 3 who treated the victim when he stated that he attended PW 1 on 18.4.2021 while PW 1 had told the trial court that he went to the hospital on 10.4.2021. Counsel for the appellant argued that there was no explanation on this inconsistency.

With regard to the wound PW 1 sustained, Counsel for the appellant was of the view that the extent of the wound of 2-3 centimetres long which PW 3 explained could not support the evidence of the prosecution witnesses that the appellant was stabbed with the knife rather, it supported the appellant's version that PW 1 might have fallen the panga the appellant had on his loins.

Submitting on the second ground of appeal, the learned Counsel for the appellant pointed out that after the trial court was satisfied that there was fight between the appellant and the victim, the trial court imposed a heavy punishment and argued that the proper offence would have been an affray and the trial court had to sentence the appellant under that offence. This court was urged to invoke the provisions of section 366 of the CPA and substitute or even impose a sentence which is lenient.

With respect to the third ground of appeal, Counsel for the appellant contended that the difference on whether the judgment was delivered on 24th August, 2021 when the appellant gave his defence and was sent to prison or on 24th September, 2021 as indicated on the typed judgment, is a clear indicative of bias and the court turning itself into the prosecutor.

Resisting the appeal, Ms Fyeregete supported both the conviction and sentence. She believed that the prosecution evidence was strong and proved the case against the appellant beyond reasonable doubt.

With regard to the contradictions pointed out by Counsel for the appellant, the learned State Attorney refuted there being any contradictions between the evidence of PW 1 and PW 2 arguing that PW 2 was not led to state where PW 1 had passed before going to hospital.

Learned State Attorney, however, admitted the contradiction on the date when PW 1 went to the hospital and when he received treatment; that is whether it was on 10.4.2021 or 18.4.4.2021 but she was quick to point out that the contradiction was a minor one which did not go to the root of the matter, otherwise the contradictionarose due to passage of time. The learned Senior State Attorney insisted that it was not disputed at the trial that the victim was wounded and taken to the hospital.

On the second ground of appeal, it was submitted on part of the respondent that the record is silent on the presence of fight between the victim and the appellant, otherwise, Counsel for the appellant was testifying. She emphasised that the stabbing event was not rebutted but was admitted and that the evidence revealed the offence of causing grievous harm and not affray.

Reacting to the 3rd ground of appeal, learned Senior State Attorney admitted the confusion of the dates but explained that the same did not prejudice the appellant and that it was possible it was a typing error. Ms. Fyeregete concluded that the case against the appellant was proved beyond reasonable doubt.

In a short rejoinder, Counsel for the appellant insisted that there was fighting, PW 3 could not have forgotten the date otherwise the injury was not serious. He refuted there being a typing error and argued that the appellant was prejudiced as the difference of dates could impose serious consequences on the appellant's service of the sentence. He was insistent that there was partiality on part of the trial magistrate.

I have carefully perused the record of the trial court and the grounds of appeal. I have equally taken into account the submissions by learned counsel for the appellant and the learned State Attorney's.

As far as the first and 3rd grounds of appeal are concerned, the appellant's complaint was that the trial court erred both in law and facts to convict and sentence him on the weakest and doubtful evidence contrary to the standard of proof in criminal jurisprudence. In support of this argument, learned Counsel pointed out some inconsistencies and contradictions in the prosecution witnesses. In the third ground of appeal, the appellant, is through his learned Counsel, is questioning the impartiality of the trial court on the dates as to when the judgment was composed and delivered.

On her part, leaned State Attorney refuted there being any contradictions or inconsistencies telling the court that if any, they were minor and did not go to the root of the matter.

It is a settled principle of law that the onus of proof in criminal proceedings lies on the prosecution and such proof must be beyond reasonable doubt as elucidated in the case of **Jonas Nkize v.R** [1992] TLR page 216.

With regard to the first and third issues, It is true that in his evidence, PW 1 told the court that after being injured with the knife he went to the police and on the same date, i.e., 10.4.2021, went to the hospital. PW 2 who supported PW 1's evidence said that after PW 1 was injured, he went to the hospital. As rightly submitted by learned State Attorney, there was no any inconsistency in the evidence of these two witnesses which could bring any doubt in the prosecution case. Both PW 1 and PW 2 testified that after PW 1 was injured with the knife, he went to the hospital. Indeed, PW 1 was clear in his evidence that he went to the hospital via the police station where he obtained the PF 3. PW 2 was not led on passing at the police station when going to the hospital. I find the argument by Counsel for the appellant that there was inconsistency between PW 1 and PW 2 baseless.

It is true that while PW 1 said that he went to the hospital on 10.4.2021 and the PF 3 which was admitted in court as exhibit P 1 was issued at Kayenze Police Station on 10.4.2021, it is in record that PW 1 was received by PW 3 at the said health facility on 18.4.2021 at 23.09 pm and PW 1 was attended by PW 3 on 18.4.2021, the date exhibit P 1 was filled in. However, as rightly pointed out by learned State Attorney, there is no dispute that the victim, after he was injured, went to the hospital via the police station and obtained exhibit P 1. Equally, not disputed is the fact that the victim was attended at the hospital by PW 3 who filled in the PF 3. It was in PW 3's evidence that PW 1 was stabbed by a sharp object and PW 3 stitched him. The PF 3 filled in by PW 3was tendered in court and admitted in evidence without any objection from the appellant and was marked as exhibit P 1. With this factual basis, I find that these contradictions and inconsistencies pointed out by Counsel for the appellant did not tilt the strong and cogent prosecution case. In other words, these contradictions and inconsistencies did not affect the main substance of the prosecution case. I find the appellant's first ground of appeal having no substance.

Respecting the third ground of appeal, it is true that there is variance of the month in which the judgment was delivered, that is whether it was in August or September. The typed judgment indicates that it was signed on

24th day of September, 2021. However, it is in record that the original handwritten judgment was signed on 24th August, 2021. Likewise, the Warrant of Commitment was signed on 24th August, 2021 when the judgment was delivered as indicated in the original handwritten judgment. As rightly argued by the learned Senior State Attorney, the variance must have been a typing error which, in my view, is minor error. It is my finding that the variance or rather the contradiction was not fundamental as to cause any prejudice to the appellant and was, therefore, inconsequnsequential to the conviction and sentence.

In the second ground of appeal, the appellant is complaining that the trial court erred in law and facts that, having made a finding that there was a fight between the appellant and the victim, he imposed such a heavy punishment otherwise and instead of substituting the punishment for the offence of affray. Ms Fyeregete told this court that the presence of fight is not part of the record. With due respect to learned State Attorney, I think she did not read well and understand the judgment of the trial court. In his judgment, the learned Resident Magistrate, admitting the presence of the fight between the appellant and the victim, at p. 3 of the typed judgment, observed that:-

'It is undisputed that the act was done at night (between 10: 26 pm onwards) and both accused and victim engaged in a fight and they were close to themselves even to identify themselves'.

As rightly submitted by learned Counsel for the appellant, there was a fight between the appellant and the victim. This fight culminated into the victim being wounded.

Now, the issue for determination is whether there was an affray. Mr. Adam Robert was emphatic in his submission that, in the circumstances of the case, the proper offence would have been an affray and that the appellant was supposed to be sentenced on the offence of affray.

With due respect, I am unable to buy the argument advanced by learned Counsel for the appellant. In the first place, the appellant was not charged with affray but causing grievous harm. Second, the offence of affray has ingredients which are totally different from those of causing grievous harm. There is no doubt that affray is a public order offence and section 87 of the Penal Code [Cap. 16 R.E. 2019] describes what an affray is. It is provided thereunder that:-

'87.-

any person who takes part in a fight in a public place is guilty of an offence and is liable to imprisonment for six months or to a fine not exceeding five hundred shillings'.

To prove the offence of affray, therefore, the following ingredients must be established. One, there must be fighting together of two or more persons. Two, the fighting must occur in a public place. Three, the fighting must cause a terror to persons lawfully there and four, the fighting must involve disturbance of the peace.

In the case under consideration, it was amply proved that the appellant and the victim fought and the appellant stabbed the victim with a knife thereby causing a harm described as grievous as defined under Section 5 of the Penal Code. Clearly, no affray could said to have been committed and the appellant could not have been sentenced under the provisions of section 87 as he had not been charged with that offence and convicted of the same. The appellant was rightly sentenced under Section 225 of the Penal Code. The appellant's second ground of appeal falls away.

In my analysis of the evidence I am satisfied that the prosecution sufficiently proved that PW 1 sustained grievous harm. This is according to the evidence of the victim which was also supported by PW 2 who eye witnessed the wounding and PW 3 who medically examined the victim.

Since the harm was neither justified, authorised nor excused, it was unlawfully caused. The guilt was unshakably pointed by the prosecution to the appellant. The defence did not raise any doubt.

With that evidence, I am satisfied that the ingredients of both charged offences were proved and the conviction cannot be assailed. The appeal against conviction is devoid of merit.

As to the appeal against the sentence, I find that the trial court properly exercised its discretion in sentencing the appellant. There is no gainsaying that in sentencing the appellant the trial court took into account the level of involvement of the appellant and the impact on the victim. The sentence of four years term of imprisonment was not, in the circumstances of the case, excessive and needs not interference by this court. The appeal against sentence is also dismissed.

In the final analysis, this appeal lacks any merit and is dismissed in its entirety. The sentence imposed on the appellant is confirmed.

W.P. Dyansobera

Judge

25.5.2022

This judgment is delivered under my hand and the seal of this Court on this 25th day of May, 2022 in the presence of the appellant and Ms Margareth Mwaseba, learned Senior State Attorney for the respondent.

Rights of appeal to the Court of Appeal of Tanzania explained.

W.P. Dyansobera

Judge

25/05/2022