

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

PC CRIMINAL APPEAL NO. 6 OF 2022

(Arising from Decision of Moshi District Court in Criminal Appeal no. 43 of 2022 dated 29/09/2022, Originating from Arusha Chini Primary Court in Criminal Case No. 43 of 2022)

ALICE JOHN..... APPELLANT

VERSUS

ALOYCE PATRICE.....RESPONDENT

JUDGMENT

15th & 26th May 2023

A.P.KILIMI, J.:

The appellant successfully prosecuted the respondent in a criminal case No. 43 of 2022 at Arusha Chini Primary Court (trial court) which is situated within Moshi District for the offence of common assault contrary to section 240 of the Penal Code, Cap.20 R.E. 2019.

At the trial it was alleged that on 9th day of May 2022 at about 14:00hrs at Newland area, Arusha Chini Ward within East Hai Division at Moshi District in Kilimanjaro Region, the respondent did assault the appellant by beating her using his hands and legs hence caused pain to her body.

The appellant consequently testified at the trial court how she was attacked and then paraded other two witnesses while the respondent defended together with one witness.

At the end the trial court convicted the respondent and discharged him under the condition that he should not commits any offence within six months. Furthermore, the trial court ordered the respondent to pay fifty thousand (50,000/= Tshs) as compensation.

Aggrieved by the decision of the trial court, the appellant lodged an appeal to the District Court of Moshi, basing on one ground which for essence of this appeal I restate hereunder;

"That the trial Magistrate erred in law and fact in considering the damages suffered by the claimant and order the respondent to pay a compensation of Tshs 50,000/= which is too minimal."

The first appeal having heard the parties in considering the above ground upheld the sentence awarded by the trial court but in respect to compensation was of the view that the trial court did not assess the damages to prove the amount awarded by the trial court, thus it quashed an order for compensation awarded thereto by the trial court.

This appellate court further advised the appellant that if she thinks that she has the right on damages occasioned to her, she is required to pursue her right through a civil suit where she can prove all the costs incurred.

Again, the appellant was dissatisfied, she then has preferred to appeal to this court basing on the following three grounds: -

- 1. That the trial Magistrate grossly erred in law and in fact in not considering the damages suffered by the appellant and ended up quashing the compensation ordered.*
- 2. That the trial magistrate grossly erred in law and in fact for failure to give severe sentence to the respondent while the offence done was severe.*
- 3. That the whole proceedings and judgement is tainted with illegality.*

In this second appeal, the respondent did not appear from the beginning, the effort to serve him was done effectively and acknowledged but he did not turn up in this appeal. Hence having considered so, I ordered this appeal to proceed ex-parte.

At the hearing of the appeal, the appellant stood herself and submitted that she has not satisfied because she went at KCMC Hospital where the CT

scan was required to taken, then she supplied the documents which required her to pay for it, which is 247,000/=but the trial court refused.

The appellant further submitted that, the amount awarded is very minimal, up to now she did not take it because it is nothing to her, because the costs used to treat herself is more than that, therefore she prays for respondent to treat and that is very important to her.

She further alleges that, she wonders why the respondent was prosecuted alone, but she knew he was not alone during the alleged criminal act, he was with his mother called Zainabu Mbagu, and she know she was removed in this case trickery.

I have considered the grounds of appeal, appellant's submissions and entirely perused the trial court and first appellate court. First, I have seen the first appellate court did not refer the real offence charged to the respondent at the trial court, the record of the trial court shows that the respondent was charged by the offence of common assault contrary to section 240 of the Penal Code and not assault causing actual bodily harm contrary to section 240 of the Penal Code which in fact this offence according

to the Penal Code is charged under section 241 and not 240. I thus find this was a misdirection of the first appellate court.

Second, back to the ground of appeals, I wish to start with the second and third ground of appeal due to their kernel. Above, I quoted the sole ground raised at the first appellate court, even if you observe the entire Judgment of the first appellate court dealt only with sentence and compensation which in fact is the ground raised and claimed for. The two grounds do not affect even the shadow of it. Thus, in my view these are new grounds to be raised in this second appellate court.

But, I am motivated to refer the case of **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 (unreported) the court had the following to say;

*"....the court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts.....This however, **does not mean that the court will not satisfy itself on the fairness** of the appellant's trial and his conviction"*

[Emphasis added]

Also, in the case of **Godfrey Wilson v. Republic** Criminal Appeal no 168 of 2018, the court cited with approval the case of **Hassan Bundala @Swaga v. Republic** on Criminal Appeal No. 386 of 2018 (unreported) when the court was confronted with the similar situation, stated as follows;

"It is now settled that as a matter of general principle this court will only look into the matter which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal"

I have considered these two grounds, as said above are new, but I have also taken care the evidence at the trial court, the evidence in record especially the testimony of SM1 and SM3 proved that during the incident the Appellant assaulted the appellant using hands, it is therefore my finding that the respondent was rightly convicted by the offence charged.

In respect to the legality and fairness of the sentence awarded, it is a trite law that sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong

material, or acted on a wrong principle. In my view having regarded the offence charged and the pain suffered, I am the settled opinion there is no justified reasons to fault the sentence awarded by the trial court.

In view of the above endeavors, it is my considered opinion the two grounds, are not proper to be entertained, because are new grounds of appeal which were raised at the appellate court without any justification as observed above, thus I hold this court lacks jurisdiction to entertain them. (See the case of **Haji Seif v Republic**, Criminal Appeal No.66 of 2007 (unreported)).

Now, in respect to the first ground, the appellant is claiming that the compensation awarded by trial court was very minimal but not only that the first appellate court ended up quashing it.

It is trite law that the circumstances under which compensation is payable are first; The person entitled should have suffered material loss or personal injury, second; Compensation would be recoverable by civil suit, and Third; Such compensation would be such as the court deems fair and reasonable, which must connote an inquiry and the opportunity given to a

convicted person to present his case. (See the case of **Selemani Misuri v. Republic, [1973] LRT 9.**

The first appellate court acknowledged the above requirements but with respect, misdirected in the proper approach. Awarding of compensation depends the circumstances or facts of the case in disputes. According to the legal requirements above, when put on the facts of this case, the issue to be answered is whether the appellant suffered personal injury. According to the judgment which reiterated the evidence tendered at page 6 stated;

"Katika Ushahidi wa SM1 ambaye ni mlalamikaji, amesema alipigwa na mshatakiwa ngumi na mateke hali ambayo imepelekea kupata majeraha kifuani. SM1 alitoa kielelezo P1 ambayo ni P3 ambayo imeeleza kwamba mlalamikaji alipata majeraha madogo/laini katika kifua, kichwa na miguu yalitokana na kupigwa na kitu butu"

The record reveals the above said in PF3. According to the above state, I am of the considered opinion that the trial court was right to award compensation to the appellant for the above personal injury she sustained. The facts that the respondent paid for treatment in my view does not

exonerate this right to be awarded by the court, since compensation in the circumstances like this case, assessment of actual costs is not necessary but depends the view of the trial court to the injury sustained, thus cannot be gauged on criteria of awarding damages as in civil suit. That is why, it is trite law a Criminal court is not the proper forum for determining the right for claiming damages, only civil court, via a civil suit can determine such matter. (See the case of **Tatu Kiungwe v. Kassim Madai** (2005) TLR 405.

I understand why the appellant say the compensation awarded by the trial court was minimal, but the trial court was very clear and did labour to explain, at page 7 of the Judgment stated that;

"Mlalamikaji ameeieza kwamba bado hajapona na kuna vipimo anafanya lakini hoja hii mahakama haijaridhia kwani hajaleta uthibitisho wa matibabu unaoendelea au vivuli vya vipimo alivyoeleza kama X- Ray. Hivyo mahakama haijapata ushahidi kwamba matibabu yanaendelea au bado hajapona hasa ikiangaiwa katika kielelezo P1 ambacho ndicho kilichotoa maelezo kuhusu mlalamikaji kwamba ameumia."

The above quotation shows that she was continuing with treatment, thus, the trial court awarded the said compensation according to the circumstances and evidence available by then. The above take me also to the second requirement, it is undoubtful that the said compensation awarded to the appellant would be recoverable by civil suit. As said in criminal compensation remain to be under domain of the court after considering the injury, this assessment usually is not specific. Therefore, when the victim needs to be restored in the same position as would have been in, as if she had sustained no injury, he or she has to seek the remedy for damages via civil suit. That is the rationale behind the principle that, trial in a criminal case, does not bar the victim to file a Civil suit against wrong doer for payment of damages, he suffered in the course of the alleged criminal act. (See the case of **Razia Jaffer Ali v Ahmed Mohamed Ali Sewji and Five Others** (2006) TLR 433).

On the premises and from what I have endeavored to discuss above, it is my considered opinion the first appellate court misdirected and wrongly quashed the order for compensation made by the trial court. Nevertheless, the trial court order for compensation to the appellant was 50,000/= Tshs. As per evidence above on record, I am of considered opinion the said

compensation was fair and reasonable. I order the same be paid to the appellant forthwith.

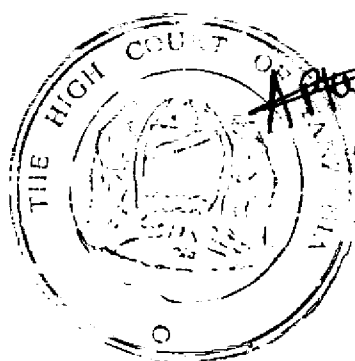
In the event and for the reasons herein above stated, I find merit in the first ground to that extent. I accordingly proceed to quash the Judgment of the first appellate court (District Court Judgment) and restore Primary Court Judgment.

The appellant is therefore advised if she has further claim extra than the amount awarded by the trial court, which arises from the injury she sustained, should pursue her right through a civil suit, where she can prove all the costs incurred therein.

From the foregoing, appeal is partly allowed, and the decision of the trial primary court is hereby restored. The case file be returned to the Primary Court of Arusha Chini for execution.

It is ordered accordingly.

DATED at **MOSHI** this 26th day of May, 2023.



A.P.KILIMI

JUDGE

26/5/2023