IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 118 OF 2022

(Arising from Criminal Case No. 379/2019 in the Resident Magistrate's Court of Arusha)

FRANK S/O KESSY..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

04/05/2023 & 15/06/2023

MWASEBA, J.

The appellant, **Frank S/O Kessy,** was charged with the offence of Grievous Harm Contrary to **Section 225 of the Penal Code** [Cap 16, R.E 2002] in the Arusha Resident Magistrate's Court at Arusha.

The facts of the case were unveiled by the prosecution that, on the 24th day of September, 2019 at Moravian Street within Arumeru District in Arusha Region, the appellant unlawfully caused grievous harm to one Andrew S/O Lubambe by shooting him using Pistol Glock SNS 412 on his right leg and caused him to suffer severe injuries.

The appellant denied any involvement in the commission of the crime and pleaded not guilty to the charge. He further raised a defence that he shot the victim while trying to defend himself from the victim who wanted to stab him with a knife.

At the hearing of the case before the trial court, the prosecution case was constructed on the testimonies of eight (8) prosecution witnesses and one (1) exhibit while a total of six (6) witnesses, fifteen (15) exhibits and one Identification (ID 1) concluded a defence case.

After the full trial, the trial magistrate was satisfied that the prosecution has proved its case beyond reasonable doubt, convicted and sentenced the appellant to condition discharge that he commits no offence for a period of six months under **Section 38 (1) of the Penal Code, Cap 16,** R.E 2002. He was ordered further to compensate the victim at the tune of Tshs. 1,500,000/.

In pursuit of his innocence, the appellant lodged the present appeal to this court stating five (5) grounds of appeal that:

1. *That, the trial Magistrate grossly erred in law and fact by disregarding the fact that the charge against the accused person was not proved beyond a reasonable doubt.*

2. *That, the trial Magistrate grossly erred in law and fact by ordering a compensation of Tshs. 1,500,000/= in the absence of proof of grievous harm.*
3. *That, the trial magistrate erred in law and fact by entertaining facts that are not prerequisites in the required standard of proof beyond reasonable doubt in deciding the alleged count.*
4. *That, the trial Magistrate grossly erred in law and fact by formulating her own count and convicted the appellant by wrongly invoking the doctrine of common assault contrary to the law.*
5. *That, the trial Magistrate erred in law and fact for failure to consider the evidence adduced by the appellant.*

When this matter came up for hearing, the appellant was represented by Mr. Kapimpiti Mgalula, learned Advocate, while the respondent, Republic, enjoyed the legal service of Ms. Eunice Makala, learned State Attorney. The matter was disposed of orally.

Supporting the appeal, Mr. Kapimpiti learned counsel, abandoned the 3rd and 5th grounds and decided to argue on the 1st, 2nd, and 4th grounds of appeal.

Submitting in respect of the 1st ground of appeal, Mr. Mgalula, learned counsel stated that the appellant was charged with the offence of grievous

harm, and the law requires the charge to be proved beyond reasonable doubt. He argued further that on page 6 of the trial court judgment, the trial Magistrate found that a charge was not proved beyond reasonable doubt, thus, its remedy was to dismiss the charge and not otherwise. He referred this court to the case of **John Makolobeya and Others vs Republic** (2002) TLR 296.

Regarding the 2nd ground of appeal, Mr. Kapimpiti, complained that as long as the charge against the appellant was not proved, the trial Magistrate was not required to impose such a huge amount of compensation.

Submitting on the 4th ground of appeal, Mr. Kapimpiti stated that the trial Magistrate changed the offence from grievous Harm to common assault, since the appellant would not be prejudiced if he is charged with a minor offence. He argued further that as there was no substitution of charge, it was wrong for the trial Magistrate to change the offence. More to that, the appellant was not given a chance to plea on a new charge. He referred this court to the case of **Richard Estomih Kimei and Another vs Republic**, Criminal Appeal No. 375 of 2016 (CAT at Arusha, Unreported), where the court held that the accused ought to know the nature of the

charges against him otherwise, he will be prejudiced. They prayed for the appeal to be allowed and the appellant to be acquitted.

Responding to the grounds of appeal, Ms. Makala supported the appeal partly and proceeded to support the conviction and sentence imposed to the appellant.

Submitting on the 1st and 2nd grounds of appeal, Ms. Makala argued that the appellant was charged with the offence of causing grievous harm, and the said act was witnessed by PW1 (the victim), PW2, PW3, and PW4. Thereafter, PW5 (the doctor) proved that PW1 was injured. She submitted further that since the court found the injuries to be minor, it substituted the offence and convicted the appellant with a minor offence as per **Section 300 (1) of the Criminal Procedure Act**. This provision gives power to the court to convict the accused on a minor offence. Further to that, the trial court was correct to order compensation as the victim (PW1) was injured.

Coming to the 4th ground of appeal, Ms. Makala supported this ground with the reason that the accused person was not given a chance to know the charge as it happened in the judgment. She referred this court to the case of **Richard Estomih Kimei** (supra) where the court substituted the charge of gang rape to rape without availing the accused with the chance

Makala

to defend himself. She therefore prayed for re trial so that the appellant gets his right to be heard.

In a brief rejoinder, Mr. Kapimpiti joined hands with the learned state attorney for the matter to be remitted to the trial court for re-trial so that justice can be seen to be done.

Considering the submissions from both sides and going through the record, the issue for determination in this matter is whether the appeal is meritorious or not.

Starting with the 4th ground of appeal, the appellant complained that the trial magistrate was wrong by changing the charge sheet from Grievous Harm to Common Assault without giving the appellant a chance to defend himself. The same was supported by the learned State Attorney for the respondent, who prayed for the court to order a re-trial for the sake of justice.

However, this court is of the firm view that a change of an offence in a criminal case is allowed by the law where the Magistrate or a judge finds that the evidence provided by the parties and its elements met the conviction of a lesser offence than the one the accused stands charged with. In those circumstances, the court may convict the accused person

on a lesser offence. This is well provided under **Section 300 (2) of the Criminal Procedure Act**, Cap 20 R.E 2022 that:

> *"Where a person is charged with an offence, and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."*

The above provision has been well clarified by the Court of Appeal in a number of cases including the case of **Mzee Thobisa Mohamed and Mohamed Kayoka vs Republic**, (2009) TLR No. 303 whereby the court stated that substitution of a conviction can only be done where the offence substituted is minor and cognate to the offence with which the offender was previously charged. In the case at hand, the trial Magistrate was correct to convict the accused in a lesser offence upon the finding that the ingredients of grievous harm were not met, but the ingredients of Common Assault. Upon revisiting the records of the trial court, this court noted that the appellant herein admitted to having injured PW1 with his gun when he was trying to protect himself, and that it was not intentional. However, the evidence shows that the victim had a knife so the appellant had to take other precaution to defend himself rather than shooting the victim. The act of shooting the victim amounts to use of excessive force

which cannot stand as a defence. More to that, PW4 (a doctor), after examining the victim, stated that he was injured on soft tissue only, the bones were not affected. The evidence from the doctor and Exhibit P1 (PF3) proved that the wound was a minor one, and it did not cause any disfigurement to the victim (PW1). Therefore, the trial Magistrate was correct to charge and convict him with the lesser offence of Common Assault under **Section 240 of the Penal Code**, Cap 16 R.E 2019 which provides that:

> *"Any person who unlawfully assaults another is guilty of an offence and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year."*

Having the above explained legal position, I find that the trial magistrate substituted the conviction according to the law and therefore the 4th ground lacks merit.

Regarding the 1st and 2nd grounds of appeal, the appellant complained that as the offence of grievous harm was not proved beyond reasonable doubt, the court ought to have dismissed the charge instead of changing to another offence and ordering a huge amount of compensation. As

submitted under the 4th ground of appeal, the trial Magistrate was correct to change an offence of grievous harm to a lesser offence of Common assault. However, regarding the issue of compensation, Mr. Kapimpiti argued that so long as there was no big harm to the victim, the amount for compensation awarded was too huge. I concur with his notion as it was proved by the doctor (PW5) that the injuries to PW1 was minor. Basing on that position I reduce the compensation from Tshs. 1,500,000/= which was imposed by the trial court to Tshs. 500,000/=.

For the reasons alluded herein, the appeal is partly allowed to the extent elaborated herein above.

It is so ordered.

DATED at **ARUSHA** this 14th day of June 2023.

N.R. MWASEBA

JUDGE