IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

DC. CRIMINAL APPEAL NO. 50 OF 2022

(Originating from Tabora District Court in Criminal

Case No. 17/2021)

DANIEL KAWAWA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of Last Order:20/07/2023

Date of Judgment: 21/07/2023

MATUMA, J.

The appellant Daniel Kawawa stood charged in the District Court of Tabora at Tabora for **assault causing bodily harm** Contrary to Section 241 of the Penal Code, Cap. 16 R.E. 2019.

He was alleged to have assaulted one Yassin Ramadhan on the 6th February, 2021 during night hours by inflicting a cut wound to the left hand of the said victim by using a "***panga***".

During trial, the prosecution paraded four witnesses and tendered the PF3 of the victim.

The defence on its side had two witnesses who were the accused himself who is now the appellant and his wife one Veronica Paulo.

After a full trial, the trial court was satisfied that the prosecution case was proved beyond reasonable doubt. It thus convicted the appellant and sentenced him to serve a custodial sentence of five years. In addition to the custodial sentence, the appellant was ordered to pay compensation of Tshs. 500,000/= to the victim.

The appellant was aggrieved with the conviction, sentence and order of compensation hence this appeal with a total of four grounds mainly complaining that;

i. ***The prosecution case was not proved against him beyond reasonable doubts.***
ii. ***The trial court erred for not considering the defence of self defence and provocation.***
iii. ***The trial court did not consider the appellant's defence when composing Judgment.***
iv. ***The sentence imposed against him was manifestly excessive.***

At the hearing of this appeal, the appellant appeared in person while the Respondent/Republic was represented by Aneth Makunja and Eva Msandi learned State Attorneys. The appellant opted to respond to submissions by the learned State Attorneys.

M/S Aneth Makunja learned State Attorney having taken the floor opposed the appeal and argued that the case against the appellant was proved beyond reasonable doubts. She submitted that the victim testified

and shown his wounded hand to the court as reflected on record and his evidence was corroborated by PW2 who heard the victim screaming after having been cut by the appellant.

On the ground of self defence the learned State Attorney argued that the use of "panga" was an excessive reaction by the appellant to justify a self defence. On the ground of excessive sentence she asserted that the 5 years imprisonment and compensation to the victim at the tune of Tshs. 500,000/= is within the prescribed requirements of the law. She thus prayed the appeal to be dismissed.

In response, the appellant did not dispute injuring the victim. He insisted that all what he did was just a self defence against the victim who had invaded him and entered into his house and started to assault not only him but also his family. The appellant further argued that the victim's invasion was made in the night time in which it could have not been detected easily what weapon he had and what intention he had in mind and thus what he did was just to take necessary precautions in self defence. The appellant finalized his submission by crying for justice and questioning the learned State Attorney what she would have done had what befallen him by the victim occurred against her.

Having heard the parties for and against this appeal and gone through the records of the trial court, I find that there is no dispute that the appellant indeed inflicted the stated wound to the victim. That is evidenced by the prosecution's undisputed evidence of PW1, PW2 and PW3 who were at the crime scene.

In fact, the Appellant and his wife DW2 also conceded and testified to the effect that the appellant inflicted a cut wound to the victim on that material night. Thus, for instance at page 22 of the trial court Proceedings the appellant is recorded to have testified;

"I defended myself and protected myself, I cut off his hand and I went to report it to the police station."

His wife who testified as DW2 also testified at page 24 that:

"I know he was cut by panga . . . . . my husband was the one who injured Yasin."

In the circumstances of the evidence of both sides more so that of the defence and which was in material particular repeated by the appellant at the hearing of this appeal which amounts to an admission of the fact, I have no doubts that the prosecution proved the fact that the appellant really assaulted and injured the victim as he stood charged.,

The only question for determination is whether the appellant had a requisite ***"mensrea"*** to inflict such injuries to the victim to constitute an offence in accordance to the law.

Going through the evidence of both parties, it is undisputed fact that the inflicted injuries were done at the homestead of the appellant. It was the victim PW1 who went to the appellant in demand of Tshs. 6000/= and at times it is recorded Tshs. 5000/= for one Juma the bodaboda who had carried the appellant's sick child to hospital.

The appellant denied him such amount on the ground that at the time Juma taken him to hospital they were robbed and in the course of such robbery Juma took an advantage and stole his phone. In the circumstances he has instituted a case at the Police Station against the said Juma. He thus told the victim PW1 that Juma's claimed money shall be settled at police in the due course.

In the cause of such conversation, it is on record that one Magesa the brother of Juma appeared and demanded to know who has accused his brother at Police Station and the victim Yassin pointed out that it was the appellant. That prompted some arguments between the appellant and Magesa but PW2 Mr. Ramadhan Shahibu Ismail intervened as he himself testified at page 14 of the proceedings;

> *"Magesa came and asked Yasin, who had taken his young brother to the Police Station. Yasin told Magesa that it is Kawawa (the appellant)".*
>
> *After that Kawawa and Magesa started arguing, after a while Kawawa took his bicycle inside the house, I begged Magesa to leave as the case is at Police Station. Magesa left."*

When Magesa left the victim in this case took charge of the matter and started to insult the appellant as evidenced by the prosecution witness at PW2 at page 14 that; *"Yassin started to insult Kawawa."*

At the time Yassin (the victim) was insulting Kawawa who is the appellant in this case, the said appellant was just in his room as stated by PW2 at page 14; *"Kawawa was in his room"*

According to PW2 the victim was furious and wanted to fight the appellant. When he tried to stop him, the victim pushed him away twice;

"I stopped Yasin from fighting, Yasin pushed me twice but I continued to stop him."

With such furiousness of the victim, he overwhelmed PW2 and managed to enter into the appellant's room and it is when he was cut as stated supra. PW2 heard the victim's cry from inside;

"I heard sound of something cut off, I heard Yasin saying my hand . . . . after two minutes Kawawa came out holding a panga."

The evidence of this witness and that of PW3 Mariam Ally which are similar is tallying with the appellant's defence to the effect that it was the victim who invaded him inside his house that night and started to fight not only him but also his family;

"Yassin pushed my pregnant daughter and wanted to follow me into the room. I thought the victim had no good intentions, I defended myself and protected myself, I cut off his hand . . . ."

With all these even the trial court was in doubt whether the appellant's ***mensrea*** to the commission of the offence was proved beyond reasonable doubts. It held at page 6 of the judgment;

"But I could find no clear evidence of malice aforethought on the part of DW1. It is not clear what intention DW1 had when he assaulted PW1. It is not clear whether he wanted to kill him or

cause him grievous bodily harm or whether he simply wanted to punish him out of anger."

With such findings of the trial court, it is obvious that the trial Magistrate found that the mensrea was not proved. I also find the same. The appellant did not have intention to injure the victim. That is why he always avoided the fight between him and Magesa and later between him and the victim in this case by leaving them outside of his house and went to lock himself inside. Had the victim not entered inside the appellant's house the offence could have not been committed. Therefore, all what the appellant did against the victim inside of his house was a self defence and a defence of his family.

In his defence the appellant made it clear that even the coming of Magesa at his home was due to Yasin the victim who called him by phone in his presence;

"He took the cell phone and he called someone and said Yule fala tayari ameshafika hapa nyumbani kwake."

It is when Magesa came and Yassin pointed him to that man as stated supra. The evidence shows that at the time the victim went to the appellant, the appellant was not at his home but he waited him the act which resulted into all what happened as explained above. We are not told whether Juma had sent the victim to demand the money from the appellant or the victim decided to move himself suo motto and without any justifiable cause.

Under section 18, 18A (1) (a) (b), 18B (1) of the Penal Code Cap 16 R.E 2022, the appellant enjoined the right to self defence and defence of his family and or property. Any reasonable man could not leave Yassin to oppress his family the way he did, insult them as he did and even injure them as he did by pushing down the appellant's pregnant daughter in the presence of the appellant. The circumstances happened in this case demanded the reaction the appellant took and such reaction is protected under the law supra.

I have tried to ask myself whether the appellant used excessive force as argued by the learned State Attorney but I did not find any piece of evidence to that effect. Excessive force can be determined by looking on the facts of the case as to whether the accused had no any reasonable ground to use the force he used. We don't merely look on the weapon used. We look into the facts as a whole. In the instant case, the victim was so furious to the extent that even PW2 could not stop him to invade and fight the appellant.

He went to the appellant to demand the money not belonging to him and by using force. He invited some third party (Magesa) to join him in confronting the appellant, used several abusing words to insult the appellant. The appellant having left him outside and take refuge inside his house, the victim followed him therein to confront him. What could be expected by any reasonable man under the circumstances! The use of force to restrain him from continuing with his unlawful actions at the homestead of the appellant was thus inevitable. He got what he deserved

and that is why he only stopped his unjustifiable actions after the reaction he got from the appellant.

I therefore agree with the appellant that he exercised a self defence and such defence was wrongly neglected by the trial court.

In the case of **Said Kigodi @ Side vs republic, Criminal Appeal No. 281 of 2009** (unreported) the Court of Appeal held that:

> *"We are of the firm view that the defence of provocation is available to a suspect who kills at spur of the moment; in the heat of passion before he has time to cool down"*

In the instant matter the appellant had no time to cool as whatever he did to avoid the victim was futile until when he reacted. Therefore, the act of the appellant to injure the victim was prompted by victim's himself. It is only what people used to say; ***"The world is not fair"*** This is because he who deserved to stand trial stood in the witness dock and he who deserved to stand in the witness dock stood in the accused' box.

Since the mensrea was not proved it was wrong to find the appellant guilty as in criminal cases both actus-reus and mens-rea must be proved for one to be found guilty.

I find that the prosecution case was not proved to the required standard for want of mensrea on the part of the appellant as what he did was just an exercise of a self defence.

I therefore allow this appeal. The appellant is hereby acquitted of that offence and I order his immediate release from custody unless otherwise

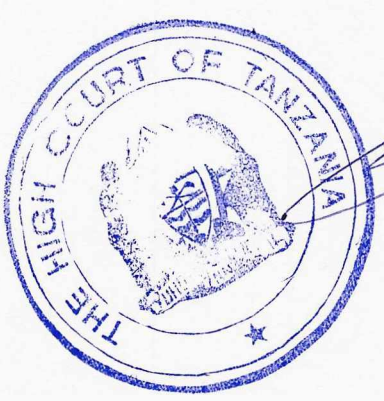
held for some other lawful cause. The order of compensation is as well set aside. The right of further appeal is hereby explained. It is so ordered.

MATUMA

JUDGE

21/07/2023

COURT; Judgement delivered in chambers in the presence of M/S. Aneth Makunja and M/S Suzan Barnabas learned State Attorneys for the Republic and the appellant in person. Right of appeal explained.



MATUMA

JUDGE

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