THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA SUB – REGISTRY)

AT KIGOMA

PC CRIMINAL APPEAL NO. 2 OF 2023

NEMESI SAMSON..... APPELLANT

VERSUS

MAIKO FROLENCE..... RESPONDENT

(Arising from Kigoma District Court at Kigoma)

(MUSHI-SRM)

dated 12th day of June 2023

in

Criminal Appeal No. 05 of 2023

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JUDGMENT

30th November 2023 & 28th February 2024

Rwizile J.

The appellant was charged and convicted of the offence of assault causing actual bodily harm contrary to section 241 of the penal code [CAP 16 RE. 2022] at Mahembe Primary Court. The assault was inflicted upon the respondent, Maiko Florence, aged 7 years old. The appellant was arraigned but denied the charge. The prosecution tendered 3 witnesses, while the appellant was the sole witness for the defence.

The records show the offence was committed on the 28th of June, 2023 at around 1800hrs, where the respondent with his fellow children were found at a mango tree. While others escaped, the appellant caught the

respondent and started hitting him on different parts of his body, he also lifted him and threw him down with force leading to severe injuries

In his defence, the appellant stated that he found the respondent with other children under a mango tree collecting mangoes. The respondent was on the tree. Other children ran away while the respondent could not manage to escape, he was caught. His mother arrived and started provoking the appellant. According to him, he was then taken to court and charged with assault causing bodily harm.

After a full trial, the appellant was found guilty and convicted as charged. He was sentenced to a conditional discharge and ordered to pay compensation of 70,000.00 TZS. Aggrieved, he unsuccessfully appealed to the District Court. His appeal before the District Court, however, turned into a boomerang. The court reversed the decision of the trial court to a custodial sentence of 3 years in prison and payment of compensation to a victim of TZS 500,000.00. This therefore is a second appeal. He has advanced seven grounds to wit;

1. That, the district court grossly erred in law and fact when it vacated and set aside the sentence of the trial court by varying and aggravating the same hence convicted and sentenced the appellant to suffer a custodial sentence of three years while the respondent's appeal had no merits. Hence ungrounded judgment.
2. That, the district court of Kigoma being the 1st appellate court having jurisdiction to scrutinize the evidence grossly erred in law and fact when it held in favour of the respondent by reversing the judgment and committed the appellant to jail for

a term of three years while the offence alleged to have committed by the appellant was not proved beyond a reasonable doubt.

3. That, the district court grossly erred in law and fact by setting aside the order of compensation of TZS 70,000.00 which had already been effected by the appellant. Hence aggravated the same at the tune of TZS 500,000.00 without addressing reasons for such gross punishment to the appellant.
4. That, could the district court and the trial primary court take additional evidence and certify the same to the district court or hear additional evidence the same would have not varied the decision of the trial primary court by imposing such an aggravated custodial sentence on the appellant
5. That, the trial magistrate grossly erred in law and fact by vacating and setting aside the sentence imposed by the Mahembe Primary Court and substituting the same to a custodial sentence of three years in jail without giving an alternative fine to the appellant.
6. That, the district court erred in law and fact in its decision for failure to consider the appellant's mitigation at the trial on record which shows the appellant regretted to have done what he did ***"kosa nilifanya bila kujua nilikuwa namkanya mtoto kama watoto wengine".*** Hence the same could not have varied and imposed such a custodial sentence of three years in jail to the appellant.
7. That, in the circumstances of the case conviction and sentence imposed by the district court is not legally grounded.

At the hearing of this appeal, the appellant was under the service of Mr. Sogomba, a learned advocate, while the respondent was unrepresented but was assisted by his mother. The appeal was heard by written submissions.

The appellant jointly submitted on grounds 1,2,4,5 & 7, though submission was jointly, but it had segments. That the first appellate court did not scrutinize the evidence of the trial court properly, if it did, it could have realized that the offence was not proved and the proper remedy was to direct the primary court to take additional evidence. On the PF3, it was submitted that the doctor who filled it was to be called to testify.

The appellant also criticized the evidence of Yatawaishia Ramadhani, the mother of the victim, he doubted her evidence. He added that the prosecution case needed corroboration specifically from the children who were with the respondent collecting mangoes.

On the 3rd ground, it was submitted that it was not proper for the district court to raise the amount of the compensation even though the appellant had already paid compensation as directed by the trial court. He submitted that the district court erred in imposing a sentence without the option of a fine. Lastly, it was submitted on ground 6, that mitigation was not considered by the first appellate court when varying the sentence to 3 years in jail.

Opposing the appeal in the same way, grounds 1st,2nd,4th,5th, and 7th were argued together. It was submitted that the witness brought by the respondent was the one who saw the appellant assaulting the victim. The same also tendered PF3 and two medical receipts which were marked exh. P1, P2 and P3.

It was further submitted that the offence was proved, the appellant found the victim on the mango tree, beat him, and threw him on the ground. He kicked him by using legs on the back, stomach, and chest.

On raising the amount of fine from TZS. 70,000,00 to TZS 500,000.00, it was submitted that the first appellate court properly considered it. To him, evidence on record deserved an amount of penalty that was imposed by the appellate court.

Having gone through the submissions of both parties, the appellant made several complaints, he challenged the respondent's case as to have not been proved and that the evidence was not corroborated. It should be noted that the evidence tendered was done by the victim and his mother, therefore evidence of relatives.

At law, evidence of the relatives' court provided has to be believed by the trial court as held in the case of **Sospeter Ramadhani vs The Director of Public Prosecutions,** (CAT), Criminal Appeal No. 239 of 2019, on page 13, it was held that;

> *"There is, in this regard, a long and unbroken chain of decisions of the Court which underscores the fact that there is no provision of the law which prevents a relative or family member from testifying in cases involving relatives"*

The evidence of the respondent was corroborated by that of her mother. Therefore, there was no reason to disregard the evidence of the two witnesses. According to the appellant, it was necessary to summon the children who were with the respondent at the crime scene.

In the case of **Badwin Komba @ Ballo Appellant vs. R,** (CAT), Criminal Appeal No. 56 of 2003, on pages 12- 13, it was stated that;

"The burden of proof was upon the prosecution to prove the case against the appellant beyond all reasonable doubt."

Therefore, from the above principle, the prosecution is charged with the onus of proving the case. In doing so, it is at liberty to call any witnesses who may be fit to prove the case. This was the position in the case of **Geoffrey Kitundu @ Nalogwa vs R,** (CAT), Criminal Appeal No. 96 of 2018. Pages 21-22, where it was provided that;

"However, calling or not calling a witness to testify in court is within the mandate of the prosecutor."

Therefore, it was the wish of the respondent to call witnesses who were thought to make a good case for the prosecution. But that said and done, the evidence on record proved that grounds 1, 2,4,5, and 7 have no merit.

On the 6th ground, the mitigation of the appellant was not considered. This ground has no merit too, the same was considered though not reflected in the proceeding of the lower court. I agree with the respondent that the offence which the appellant was charged with, provides for the maximum sentence of 5 years in jail, but the punishment provided is 3 years. If his mitigation could not be considered, the maximum sentence could be imposed.

The remaining ground is the 3rd one. It is clear that sentence is the domain of the trial court, but for the sake of justice, there are some exceptions on which an appellate court can interfere with a sentence imposed by the lower court as in the case of **Zuberi Ally vs R**, (CAT), Criminal Appeal No 147 of 2015, on pages 4-5 where it was held that;

"First, we wish to reiterate that generally sentencing is the discretion of the trial court. An appellate court is not empowered to alter a sentence because if it had been trying the case, it might have passed a somewhat different sentence. However, an appellate Court like this one can only alter a sentence imposed by a trial court on the following grounds: -

(i) Where the sentence is manifestly excessive or so excessive as to shock. (ii) Where the sentence is manifestly inadequate. (iii) Where the sentence is based upon a wrong principle of sentencing (iv) Where a trial court overlooked a material factor. (v) Where the sentence has been based on irrelevant considerations, such as the race or religion of the offender. (vi) Where the sentence is plainly illegal, as when for example, corporal punishment is imposed for the offence of receiving stolen property. (vii) The period of time spent in custody awaiting trial.

The above are the criteria, once found, an appellate court may interfere with the finding of the lower court. The reason put forward at the first appeal when altering the sentence is stated as hereunder;

"Based on the above, I don't think if the respondent was fit to conditional discharge and compensation of 70,000/=, the offence committed by him is not just a mere offence it is un tolerated offence which involves the body of human being, imposing the lenient sentence to the accused committed such offence like respondent is obvious open a pandora box to the society members to commit the same offence by using the trial court as their shield, this court should not allow this. The respondent was to serve his sentence in jail to make a lesson to him and people of the like."

Based on the above I don't think the learned appellate magistrate had sufficient cause to interfere with the sentence. It was manifestly clear that the sentence was altered based on the perception of society without any sufficient reason. I, therefore, agree with the appellant, the first appellate court got it wrong.

Given the above, I find merit in this appeal. Therefore, the appeal is allowed. The sentence imposed by the first appellate court is set aside

ACK.RWIZILE

JUDGE

28.2.2024