THE JUDICIARY OF TANZANIA

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT SONGEA

(CORAM: HON. UPENDO MADEHA)

CRIMINAL APPEAL NO. 000009000 OF 2024

AGREY CHARLES NOMBO ..... COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF

VERSUS

REPUBLIC ..... RESPONDENT / DEFENDANT

JUDGMENT

Fly Notes

Nil

Facts

The Appellant, filed this appeal faulting both conviction and sentence given by the District Court of Nyasa which onvicted and sentenced him to serve four years imprisonment for the offence of grievous harm contrary to section 225 of the Penal Code (Cap. 16, R. E. 2022) and ordered him to pay TZS 1,000,000.00 as compensation to the victim.

Ratio Decidendi

Nil

29th of May 2024

Hon. MADEHA.:

To begin with, the Appellant, Aggrey Charles Nombo, before the District Court of Nyasa was charged, convicted and sentenced to serve four years imprisonment for the offence of grievous harm contrary to section 225 of the *Penal Code* (Cap. 16, R. E. 2022). In additional to the sentence of four years imprisonment, he was also ordered to pay TZS 1,000,000.00 as compensation to the victim.

Briefly, it was alleged by the prosecution that, on 14th December, 2022, at night hours, the Appellant and Philipo Adelbert Haule (PW1) who was the victim, were at a lounge taking alcohol (beer). The prosecution evidence shows that the victim (PW1) and the Appellant (DW1) are close friends and on the fateful day they were together. While at the lounge, conflict started between them over the bottles of beers which were bought by the victim. The lounge guard ordered them to go out to resolve the conflict. When they were outside the lounge the Appellant was found holding a knife in his hand and in a blink of an eye, he started stabbing the victim on various parts of his body causing serious injuries. The victim was badly injured on the palm of the

left hand, the left shoulder, the neck and in the abdomen and the small intestine protruded out. The victim screamed asking for help and he was bleeding and his clothes were full of blood stains.

According to the testimony given by the lounge security guard, he saw the victim lying on the ground while the appellant was on top of the victim stabbing the victim with the knife and he managed to remove the Appellant and he saw the small intestine hanging out of the victim's abdomen. The victim was then taken to the Police Station and later at Mbambabay Health Center for treatment and in the course of treatment he undergo an operation and he was latter referred at Songea Regional Referral Hospital.

According to the testimony given by PW3, the Assistant Medical Officer working at Mbambabay Health Center and the PF3 which was admitted as exhibit during trial, the victim sustained multiple wounds which were caused by sharp object in different parts of his body and he was bleeding, his clothes soaked with blood. The cut wound on the left side of the abdomen was about four centimeters and the victim's small intestine was protruding out. The wound at the left wrist joint was about 6cm long, 4cm wide and 2cm deep and that at the right-side shoulder was 2cmx2cmx2cm. His testimony was corroborated by that given by PW2, a doctor and co-worker of PW3, PW4 who saw the victim at the scene of crime and a Police Officer (PW5) who saw the victim when he was given a PF3 for treatment.

In his defence, the Appellant (DW1) admitted that on the fateful day he was with the victim at the lounge enjoying cold drinks. While at the lounge, at around 01:00 hours, he went to the washroom for a short call and left his bottle of a drink at the table. When he was back, he found his drink was missing and when he asked the lounge attendant, he was informed that it was taken by the Appellant. A conflict arose between them and in the course of it they started fighting each other and, in his effort, to defend himself he took a bottle of beer and stabbed the victim in different parts of the body and he was also badly injured and he went to get treatment at the hospital after obtaining a PF3 from the Police Station. His evidence was corroborated by the testimony given by DW2, DW3 and DW4, that the Appellant attended at the health Center where he was attended as an outpatient.

In general, the Appellant was trying to raise the right to self-defence to rescue him from liability. From the testimony given by both parties, the trial Court found the prosecution to have proved the charge against the Appellant and he convicted and sentenced him as stated above. Dissatisfied with the decision of the trial Court, the Appellant has preferred this appeal on the following grounds of complaints:

1. *That, the trial Court erred in law and fact in convicting the Appellant while the charge was not proved beyond reasonable doubt.*
2. *That, the trial Court erred in fact and law in convicting the Appellant despite the defence raised by the Appellant which was also corroborated by the prosecution witnesses.*
3. *That, the trial Court erred in fact and law in convicting the Appellant without considering the defence evidence.*

At the hearing of this appeal the Appellant was represented by Mr. Dickson Ndunguru, the learned advocate whereas Ms. Esther Mfanyakazi, the learned State Attorney appeared for the Respondent.

In his submission in support of the appeal, the Appellant's learned advocate opted to argue this appeal generally. He contended that the charge against the Appellant was not proved to the requires standard of proving beyond reasonable doubt. He submitted that on the available evidence, the Appellant was exercising the right of self defence that was to be considered since there was a fight between the Appellant and the victim. He was of the view that in such circumstances, the offence of grievously harm was not proved. He further contended that, the evidence shows clearly that both the victim and the Appellant were drunk and they sustained injuries and wounds. He submitted that the victim was the one who started beating the Appellant and the Appellant was exercising self-defence. To substantiate his stance, he referred this Court to the decision made in the case of the **Republic vs. Emmanuel Michael @ Chege**, Criminal Session No. 21 of 2021 and in the case of **Apronia Mathew vs. Republic,** DC. Criminal Appeal No. 12 of 2022, which shows the circumstances where the defence of self defence can be applied.

He argued that, since in this appeal it was the victim who attacked the Appellant first and taking into consideration that there was a quarrel between them. He added that, failure to consider the defence of the accused person is a fatal irregularity as it was stated in the case of **Hussein Idd vs. Republic** (1996) TLR 283. He contended that, if the trial Court would have considered the defence raised by the Appellant it would have not convicted him for the offence he was charged with. He emphasized that, the evidence given by both parties shows that the Appellant and the victim were all drunk and, in such circumstance, it was difficult to establish malice aforethought as were not sober and all what they were doing were influenced by alcohol.

He stated further that, the prosecution failed to prove the charge against the Appellant since the lounge attendant was not called to testify before the trial Court believing that if she would have called to testify, she would have testified against the prosecution. Mr. Dickson Ndunguru invited this Court to draw adverse inference for the prosecution's failure to call important witness without any good reason. Lastly, he prayed for this Court to allow this appeal and find the Appellant is not guilty for the offence he was convicted with and set him free from the term of imprisonment ordered by the trial Court.

On the other hand, Ms. Esther Mfanyakazi resisted this appeal and she prayed to submit the second and third grounds of appeal collectively. She started with the first ground and she contended that the trial Court convicted the Appellant for the offence of grievous harm contrary to section 225 of the *Penal Code* (supra) after being satisfied that the prosecution side proved its case beyond reasonable doubt. She submitted that, for the offence of grievous harm to be proved, the prosecution has to prove three elements; *one* is that the accused caused injuries to the victim; *two,* that the injuries amounted to grievous harm, and *three* the grievous harm was unlawfully done. She argued that the first element was proved since even the Appellant himself in his testimony never denied to have caused injuries to the victim who was his good friend. Also, the Appellants testimony was corroborated by that given by PW2 who proved that he saw the Appellant while on top of the victim who was badly injured with a sharp object and sustained multiple wounds in different parts of the body including in the stomach and the small intestine was protruding out. Also, PW3 who is the doctor proved that the victim was injured and his testimony was corroborated by exhibit PE1 which is the PF3 of the victim which shows the extent of the cut wounds that PW1 sustained which amounted to grievous harm and those injuries were seen by the Court during trial. On the last element of whether the injuries were unlawful caused, she argued that the evidence shows that they were unlawful caused.

On the defence of self defence, she argued that, from the testimony of PW1, it was the Appellant who attacked the victim and as a result the fight started between them and that was not disputed by the Appellant during trial since he never cross-examined on that aspect which implies that he agreed that he was the one who attacked the victim. Ms. Mfanyakazi argued that, failure to cross-examining a witness in important matters relevant to the facts means acceptance of the facts. To cement her stance, she made reference to the decision of the Court of Appeal in the case of **Hatari Msharubu @ Baba Ayubu vs. Republic,** Criminal Appeal No. 590 of 2027. She emphasized that the right of self-defence is not applicable on the facts of the charge against the Appellant in this case.

Ms. Mfanyakazi argued further that, for a person to use the right of self-defence, there must be the use of reasonable force as stated in section 18B (1) of the *Penal Code* (supra) but the evidence in this case clearly shows that there was the use of excessive force which is not allowed in exercising the right of self defence. She averred that, taking into consideration on the available evidence, the Appellant was not using self-defence but he intended to cause death or grievous harm to the victim. On the cases cited by the Appellant's advocate, she argued that they are distinguishable to the facts of this case and they are not binding this Court since they are decision of this Court.

On the issue of failure to call the lounge attendant to prove who was the owner of the bottles of beer which were the source of their fight, Ms. Mfanyakazi contended that the case which the Appellant was facing before the trial Court was grievous harm and not to prove to whom the bottle of beer belonged to. She added that, according to the *Law of Evidence Act*, (Cap. 6, R. E. 2022), the law provides specifically that no number of witnesses is required to prove any fact.

With regard to the second and third grounds of appeal, Ms. Mfanyakazi argued that, the trial Court evaluated the evidence tabled before it properly before reaching to the decision it made. She added that, even if there were some testimonies which were not considered it is not fatal since and this being the first appellate Court it can re-evaluate the evidence given by the parties before the trial Court and come into its own findings if need arises. To buttress her stance, she referred this Court to the decision made in the case of **Kaimu Saidi vs. Republic,** Criminal Appeal No. 391 of the 2019, in which the Court of Appeals of Tanzania stated that it is the duty of the first appellate Court to re-evaluate the evidence of the trial Court and come up with its decisions where necessary.

Finally, he submitted that, the trial Court convicted and sentenced the Appellant after being satisfied that the prosecution evidence incriminating the Appellant and the case been proved beyond reasonable doubt and she prayed for this appeal to be dismissed and the trial Court's conviction, sentence and orders be uphold.

In his rejoinder submission, Mr. Dickson Ndunguru submitted that the injuries sustained by the victim were not unlawful caused by the Appellant since the Appellant was exercising his right to of self-defence due to the fact that both the victim and the Appellant got injuries as it was testified by PW2 and PW4. He contended that the third ingredient for the offence of grievous harm was not proved.

On whether the force used by the Appellant against the victim was reasonable or not, he argued that he is of the view that, on the circumstances of the available evidence, the force used by the Appellant was not excessive.

He invited this Court also to believe that the force applied by the Appellant was reasonable and find that he is not liable for the offence he was convicted with.

Finaly, he stated that failure to consider the defence evidence is fatal and the case cited by the learned State Attorney is distinguishable to the circumstance of the present case and the trial Court's failure to consider the defence evidence vitiated its decision.

Having heard the submissions from the counsel for both parties, I wish to state that, in determining the merit or otherwise of this appeal, I will deal with all the grounds of appeal all together as the learned advocate for the Appellant did. The submissions made by the Appellant's advocate in this appeal are only angled on two main issues. *One* is on the issue of the right to self-defence and *two* is on the trial Court's failure to consider the defence evidence.

Basically, in this appeal looking at the original Court records, it is true that, when the charge was read to the Appellant, he denied committing the offence he was charged with. However, in his defence, he testified that the offence was committed as the result of a fight between him and the victim of the offence. The prosecution evidence shows that the Appellant was found lying on the victim's body and stabbed him with a knife in various parts of the body.

To use the right of self-defence to exclude the accused person from criminal liability, Courts must consider whether the forced used was reasonable. See section 18B (1) of the *Penal Code* (supra). Reasonability of the force used can be determined by the level of force applied by the accused person to protect oneself from imminent harm or danger or using only as much force as is necessary to fend off the threat. Also, it can be determined by the immediacy of the threat and its proportionality.

The trial Court's original records shows that there was a fight and the Appellant used a knife to inflict multiple wounds into the body of the victim. This happened in the second time of fighting after the first being rescued by the lounge security guard and the Appellant remained outside the lounge waiting for the victim while holding a knife in his hand. There was a gap of time between the first attempt and the second one which gave the Appellant enough time to refreshed his mind before stabbing the victim with a knife. In such circumstances, I find that the Appellant used excessive force and self-defence cannot be applied.

Therefore, I am unable to go along with Mr. Dickson Ndunguru, the Appellant's advocate that, the trial Court failed to consider the defence of self-defence because the force used was excessive. I concur with the submissions made by the learned State Attorney for the Respondent that the trial Court correctly ignored the right to self defence since it was excessively applied.

The second issue is whether the Appellant was intoxicated, I have made a perusal on the trial Court records and find there is no evidence to prove that the Appellant was intoxicated but that he wanted to take the victim's beers. There is no evidence to prove that the Appellant was drunk. I am of the view that, even if the Appellant was drunk, that defence was to be raised before the trial Court and not at appellate stage. Therefore, the question of intoxication has no leg to stand in this appeal. The Appellant's presence at the lounge is not a proof that he was drunk.

On the issue of the trial Court's failed to consider the defence evidence, I am aware that, the provisions of sections 231 and 235 of the *Criminal Procedure Act (Cap. 20, R. E. 2022)*, requires Courts to give opportunity to the accused person to give his defence upon a case to answer being established by the prosecution side. The latter provision requires the trial Court to compose judgment after hearing both parties. It is a trite law that, a trial Magistrate is imperatively required to consider and properly evaluate the evidence given by both parties so as to arrive at a fair conclusion. Failure to do so may be a clear indication that there was no fair trial. See the decision of the Court of Appeal of Tanzania in the case of **Kaimu Said vs. The Republic**, Criminal Appeal No. 391 of 2019 (unreported).

The Appellant's learned advocate has argued that, in this appeal the trial Court failed to consider the defence evidence which vitiated its decision. But the Respondent's learned State Attorney submitted that, failure to consider the defence evidence is not fatal since the first appellate Court has power re-evaluate the entire evidence and come up with its own decision.

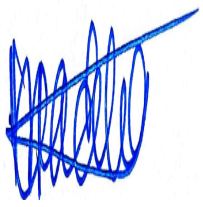
In fact, this being the first appellate Court has power to consider the evidence given before the trial Court and come up with its own decision. This stance was well elaborated by the Court of Appeal of Tanzania in the case of **Siza Patrice vs. Republic**, Criminal Appeal No. 19 of 2010 (unreported) the Court categorically stated that:

"We understand that it is a settled law that a first appeal is in the form of a rehearing. As such, the first appellate Court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary."

However, in his submission, the Appellant's advocate has failed to state categorically which piece of the defence evidence was not considered. On my part, having gone through the original records in this appeal, I have noticed that, in its decision, the trial Court properly considered the evidence given by both parties and found the prosecution to have proved the case beyond reasonable doubt and proceeded to convict and sentence the Appellant to serve four years in prison. Thus, I find the complaint that the defence evidence was not considered is unfounded and the third ground of appeal is dismissed.

In the final event, I find this appeal is barren of merit and it is dismissed. The conviction, sentence and orders given by the trial Court are upheld. Order accordingly.

Dated at **SONGEA ZONE** this 29th of May 2024.



UPENDO MADEHA

JUDGE OF THE HIGH COURT