IN THE HIGH COURT OF TANZANIA

(SUMBWAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC CRIMINAL APPEAL NO. 5 OF 2023

(Arising from Criminal Appeal No. 5 of 2023 in the District Court of Sumbawanga at Sumbawanga and originated from the Primary Court of Muze in Criminal Case No. 128 of 2022)

MODEST CLAUDIO KILENGA..APPELLANT

VERSUS

MARANGASHI..1ST RESPONDENT

KONGORO MABURA...2ND RESPONDENT

JUDGMENT

14th March & 30th May, 2024

MRISHA, J.

This is a second bite appeal to this court by the appellant **Modest Claudio Kilenga** following his dissatisfaction with the decision of the District Court of Sumbawanga at Sumbawanga which was delivered by the said first appellate court on 22nd February, 2023 vide Criminal Appeal No. 05 of 2023.

Briefly, the appellant initially filed a Criminal Case No. 128 of 2022 with Muze Primary Court charging the respondent with two counts of Assault causing grievance harm contrary to section 241 of the Penal Code [Cap 16 R.E. 2022] henceforth the Penal Code, and Threatening to kill contrary to section 89(2)(a) of the Penal Code, as the second count.

In trial court, the respondent pleaded not guilty, thus the plea of not guilty was entered and to prove their case, the prosecution paraded three witnesses who testified before the trial court whilst the respondents fronted three defence witnesses to disprove the prosecution's case.

After a full trial, the trial court convicted 1st Respondent on the first count and acquitted him on the second while acquitting the 2nd Respondent on both counts after finding him not guilty. Following that decision, the appellant was disgruntled with the decision of the trial court and decided to appeal to the District Court of Sumbawanga at Sumbawanga (first appellate court).

When the appeal was scheduled for hearing, the respondents did not show up despite the fact that they were served with summons to appear. Thus, the appeal was heard ex parte and finally the ex parte judgment was delivered in which case the first appellate court upheld the decision of the trial court and dismissed the appellant's first appeal.

Being aggrieved with the decision of the first appellate court, the appellant filed with the court a petition of appeal containing three grounds of appeal which I propose to paraphrase as follow: -

1. That, the learned Senior Resident Magistrate erred in law and in facts by rejecting the appellant's grounds of appeal as he has expressed that the amount of compensation ordered by the trial court was little compared to the amount of expenses he had incurred for his treatment after being injured by the Respondents.
2. That, the learned Senior Resident Magistrate erred in facts by challenging the document as tendered exhibit M.1 to prove that the appellant was injured since the one who was supposed to challenge the document in trial court was the Respondent. Hence, it is clearly the justice was not done.
3. That, the contradictory evidence by the witnesses was supposed to be analyzed by trial magistrate, not during the appeal.

In the present case, it should be noted that when the matter was called on for hearing, and upon it been proved that the respondents had deliberately absented themself, the appellant urged the court that the ex parte hearing of the present appeal be heard by way of written submission. His prayer was granted and he

complied with the scheduled order of the court for him to file his respective written submission.

As indicated above, there were a total of three grounds of appeal raised by the appellant through his petition of appeal. However, I will not deal with all of them and will state the reasons shortly herein.

In his written submission the appellant submitted very briefly and paraphrase his ground of appeal. He started by arguing that the Resident Magistrate erred in and facts, as the amount ordered to be paid as compensation of the treatment was very little compared to the expenditure incurred. He further argued that the appellate court failed consider receipt and facts submitted by the appellant that proves expenditure incurred by the appellant on his treatment, accommodation and other expenses due to the injury he faced.

Again, it was the submission of the appellant that the first appellate court erred by challenging the exhibit M.1 that he intends to prove that he was injured by the respondent, he further argued that the respondent is the one to encounter the exhibit M.1 and not the first appellate court.

Moreover, he added that the contradictory evidence by the witness was required to be analysed by the trial court and not in the appeal.

It was the submission of the appellant that the appellate court failed consider the receipt and evidence of the appellant in order to determine the actual amount he incurred in his treatment. In winding up, the appellant humbly prayed to the court that his appeal be allowed, the proceedings, judgment as well as the orders of the trial tribunal be quashed and set aside with costs.

The above being the submissions of the appellant in relation to his grounds of appeal, I am of the opinion that the issue which requires my determination is whether the present appeal has merits.

It has to be noted that, the cardinal principle in criminal cases places on the shoulder of the prosecution a burden of proving the guiltiness of the accused beyond all reasonable doubts. This position was stated in the case of **Jonas Nkize v Republic** [1992] T.L.R 213 where the Court of Appeal held, inter alia, that: -

> *"The general rule in criminal prosecution is that the onus of proving the charge against the accused beyond reasonable doubts lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable and is a peril not worth taking."*

Both the trial court and first appellate court have done their roles whereas the matter is now before this second appellate court for determination. The law is well settled that the second appellate court cannot adjudicate on grounds of appeal which were not raised and determined in the first appellate court. This position was clearly stated in the case of **Samwel Sawe v Republic**, Criminal Appeal No. 135 of 2004, where the Court of Appeal held that:

> *"A second appellate court, we cannot adjudicate on matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athman v R [2004] TLR 151*** *the issue on whether the Court of Appeal may decide on matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal therefore, struck out."*

The above position applies to the present case, this case is originated from Primary Court of Muze, where the appellant was disgruntled with the decision of the trial court, then appealed to the District Court of Sumbawanga where he was dissatisfied with the decision of that first appellate court, hence decided to prefer

his appeal to this court as a second bite. At the first appellate court, the appellant filed his appeal with two grounds of appeal. The two grounds of appeal were framed in Kiswahili language as follows: -

*"**SABABU ZA RUFAA***

Mimi Modest Claudio Kilenga ninapinga Hukumu ya Mheshimiwa Hakimu Mkazi wa Mahakama ya Mwanzo Muze iliotolewa tarehe 18 Novemba, 2022 katika kosa la shambulio la mwili na kutishia kuua kwa sababu zifuatazo: -

1. *Kwamba, Mheshimiwa Hakimu alikosea kisheria na haki katika hukumu yake kwamba kosa la kutishiwa kuua hakuna uthibitisho kutoka kwa mashahidi wao walioutoa Mahakamani.*
2. *Kwamba, Mheshimiwa Hakimu alikosea katika Haki kwa kuamua nilipwe fidia ya shambulio la mwili kiasi cha Tsh 50,000/= bila kujali gharama za matibabu na usafiri wa magari, ni dhahiri kwamba sikutendewa haki.*

HITIMISHO

Naiomba Mahakama yako Tukufu kutengua Uamuzi wa Mahakama ya Mwanzo na kuangalia upya kiwango cha fidia na adhabu dhidi ya wajibu rufaa kwakuwa siyo mara yao ya kwanza kunitendea vitendo vya ukatili..."

From the above cited grounds of appeal, it is clear that the two grounds of appeal indicates that the appellant challenged the first appellate court erred in law and facts to decide that the appellant's witnesses failed to prove the offence of threatening to kill.

The second ground of appeal is that the first appellate court erred in law to decide that the appellant be paid compensation of Tsh. 50,000/= for grievous harm without considering cost incurred of medical treatment and transportation. For the ground of appeal to stand to the second appellate court, the appeal must have been raised as a ground of appeal to the first appellate court or there is a point of law the second appellate court can entertain the appeal.

In the present appeal the appellant has raised three grounds of appeal to challenge the decision of the first appellate court, but after a careful perusal of the grounds of appeal raised, I have observed that only ground one of the appeal was raised during hearing of the appeal by the first appellate court. Generally speaking, ground 2 and 3 of the appellant's appeal have been improperly raised because they are new and based on facts. In the circumstance, ground 2 and 3 of appeal are accordingly struck out.

Regarding the first ground of appeal that the amount ordered to be compensated was little compared to the money he spent for his medical treatment, the

appellant through his written submission argued that he spent a lot of money on his medical treatment which covered for accommodation and other expenses due to the injury caused to him by the respondents. Hence, it is his argument that based on such circumstance, he deserves to get more compensation than what the lower courts had ordered.

When the first appellate court gave reasons to deny to order the respondents to pay the compensation of Twelve million (12,000,000/=) claimed by the appellant; the first appellate court held at page 9 of the impugned judgment that, and I quote:

> *"I find no justification taken by the trial court to award the appellant Tzs 50,000/= considering this is a criminal case. There is no evidence establishing that the appellant was supposed to be awarded compensation on the said tune, speculation and conjunctures in not business of the criminal court. Thereof, what does justice demand on this? The appellant failed to pursue his right beyond standard, hence the respondent must be favoured."*

As a second bite appeal, I am aware that in practice, concurrent findings of the two subordinate courts cannot be readily interfered with unless there is mis-direction or non-directions on the evidence by the first appellate court. See ***DPP***

v Jaffari Mfaume Kawawa *[1981] T.L.R. 149 and* ***Goodluck Kyando v Republic.,*** *Criminal Appeal No. 118 of 2003 CAT Mbeya* (unreported).

Considering the above position, an appellate court can only interfere with the findings of the subordinates' court where there are compelling circumstances. These are such as where there is misdirection, non-direction, misapprehensions or miscarriage of justice. Also see **Bakari** ***Abdallah Masudi v Republic,*** *Criminal Appeal No. 126* of *2017* and ***Ally Mpalagana v Republic,*** *Criminal Appeal No. 213 of 2016* (both unreported).

In the present case there is misdirection on the order made by the first appellate court regarding compensation awarded by the trial court which this court has seen the need of interfering the order made by the first appellate court on its denial to uphold compensation awarded by the trial court.

It is a common knowledge that there are offences which attracts compensation orders as per section 31 of the Penal Code and section 348(1) of the Criminal Procedure Act Cap 20 R.E. 2022 (the CPA). In exercising that right the court may order a person who is convicted of an offence to make compensation to any person injured by his offence or suffered material loss.

Section 31 of the Penal Code provides that:

"In accordance with the provision of section 348 of Criminal Procedure Act, any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence and the compensation may be in addition to or in substitution for any other punishment."

Again, section 348(1) of the CPA, provides that:

"Where accused person is convicted by any court of an offence not punishable with death and it appears from the evidence that some other person, whether or not he is the prosecutor or a witness in the case, has suffered material loss or personal injury in the consequence of the offence committed and that substantial compensation is, in the opinion of the court, receivable by that person by civil suit, the court may in its discretion and in addition any other lawful punishment, order the convicted person to pay to that other person such compensation, in kind or in money as the court deems fair and reasonable."

From the above provisions of the law, the court my allowed to order compensation in kind or in money on the case of criminal nature where the victim has suffered material loss or personal injury in the consequence of the offence accused convicted; however, the substantial compensation is in the opinion or discretion of the court to exercise fairly.

Back to our present case, the appellant was awarded compensation of 50,000/= by the trial court, when the appeal was determined by the first appellate court, the compensation awarded by the trial court was denied with the reasons that no justification was made by the trial court to award compensation, no evidence was established by the appellant.

In my view, the award of 50,000/= as compensation injured by the 1st Respondent is fair and justifiable because, the 1st appellant was convicted with the offence of assault causing grievance harm and the appellate court confirm conviction that means the appellant was injured. Indeed, the law allows the court to award compensation where the accused is convicted with the offence charged except the punishment is not a death punishment. The punishment of the offence of Assault causing grievance harm is not among of the offence is punishment is death penalty.

Therefore, it is my considered view that the amount of Tzs 50,000/= awarded by the trial court is justifiable amount and the trial court exercised it discretion wisely and fair. Nevertheless, if the appellant thinks that the awarded amount of compensation is small compared to his medical expenses, it is advisable that he institute a civil suit in which both parties will be heard accordingly and thereafter

the court will have an opportunity to assess the amount to be paid as compensation.

Therefore, due to the above stated reasons, I partly allow appeal and uphold decision of the decision of the trial court in relation to the order of compensation awarded to the appellant.

It is so ordered.

A. A. MRISHA
JUDGE
30.05.2024

DATED at **SUMBAWANGA** this 30th day of May, 2024.

A.A. MRISHA
JUDGE
30.05.2024