

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SUMBAWANGA
AT SUMBAWANGA
PC CRIMINAL APPEAL NO. 03 OF 2020

*(Originating from Criminal Appeal No. 2 of 2020 from District Court No. 71 of 2020
from Mpanda Urban Primary Court)*

MAGRETH YAHAYA.....APPELLANT

VERSUS

ANTON FELIX.....RESPONDENT

JUDGEMENT

Date of Last Order: 19/07/2022
Date of Judgement: 20/09/2022

NDUNGURU, J

The appellant successful sued the respondent in a criminal case No. 71 of 2020 for the offence of threatening to kill contrary to section 89 (2) (a) of the Penal Code, RE 2019. The respondent was found guilty, convicted and consequently sentenced to serve six months in jail in default to pay fine to a tune of Tshs. 100,000/=.

Aggrieved by such decision, the respondent appealed to the District Court of Mpanda. The District Court of Mpanda reversed the decision of the trial court.

Dissatisfied with the outcome of the decision of the District Court of Mpanda, the appellant has lodged this appeal with petition of appeal comprised three grounds which are hereunder quoted: -

- 1. That the appellate court erred in law by delivering a judgement which contain different dates of its delivery.*
- 2. That the appellate court erred in law and fact to conclude that the case against the respondent was proved beyond reasonable doubt at the trial court.*
- 3. That the appellate court erred in law by framing itself another issue which was not preferred by the respondent in his petition of appeal and not giving parties enough time to address on it during the hearing.*

During the hearing of this appeal, the appellant had a legal service of Mr. Lawrence John, learned advocate whilst respondent appeared in person, unrepresented.

Mr Lawrence John in his submission prayed to abandon the 1st ground of appeal and remained with 2nd and 3rd grounds.

As regards the 2nd ground Mr John submitted that the case before trial court was proved beyond reasonable doubt. He submitted that before the trial court the respondent never resisted the evidence

produced by the appellant. The respondent never cross examined on the important facts, thus he conceded. He referred the case of **Khaji Manelo Bonye vs The Republic**, Criminal Appeal No. 338 of 2008, CATC, unreported.

Further, he submitted that the evidence of the appellant before trial primary court proved the charge against the respondent. The evidence was not opposed by the respondent. The respondent questioned only on the house girl which was not a subject in the case. Thus, the appellate court erred to hold that the case was not proved.

As regards third ground, Mr John submitted that 1st appellate court raised the issues *suo motto* and denied the parties right to be heard on those issued. That the appellate court raised were only four, but the appellate court did not determine some of the grounds. He referred to the case of **Revocatus Mugisha vs The Republic**, Criminal Appeal No. 200 of 2020.

In response, the respondent submitted that he has testified before the trial court that the appellant is his wife and he has not done any cruelty to her. He got surprise with the case that he threatened to kill her. He found the decision of the District Court was correct.

Having heard rival submissions of both sides, the question for determination is whether the appeal has merit.

In criminal litigations, the prosecution is duty bound to prove any case beyond reasonable doubt, as it was held in the case of **John Makolobela, Kulwa Makolobela and Eric Juma @ Tanganyika vs Republic** [2002] TLR 296, by the Court of Appeal, that,

"A person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilty beyond reasonable doubt"

Criminal litigation at the level of primary court, the one with the duty to prove the case beyond reasonable doubt is the complainant who instituted the case.

As hinted above, the appellant instituted criminal case against the respondent for the offence of threatening to kill contrary to section 89 (2) (a) of the Penal Code, RE 2019. That on 07th of February 2020 the respondent was convicted and sentenced to imprisonment for six months in default of payment of Tshs. 100,000/=.

The particulars of the offence were as follows:

*"Wewe Anton s/o Felix unashtakiwa kuwa mnamo tarehe 10/01/2020 majira ya saa 07:00 huko maeneo ya Kasimba kata ya Ilembo Tarafa ya Misunkumilo wilaya ya Mpanda Mkoa wa Katavi kwa makusudi na bila halali ulimtishia MAGRETH YAHAYA kuwa **utamua** na **siku zake zimebaki chache** kitendo ambacho ni kinyume na sheria za nchi hii."*

In proving his case the complainant (the appellant) testified herself, she had no witness. She testified that on 10/1/2020 in the morning she was handcuffed by the respondent and she was dragged to the sitting room, then to sleeping room. That she was hit to the bed and was forced to have sexual intercourse in front of the children. That the respondent uttered to her the words that "*siku zake za mwisho zimebaki chache*" (her last days are few).

The offence of threatening to kill is set out in **section 89 (2) (a)** of the Penal Code as follows;

Any person who,

With intent to intimidate or annoy any person, threatens to injure, assault or shoot at or kill any person or to burn, destroy or damage any property.....is guilty of an offence...

It is the finding of this court that the evidence adduced by the appellant as highlighted above did not disclose the offence charged as depicted in the charge. The appellant merely testified the words the "*siku zake za mwisho zimebaki chache*" as alleged uttered by the respondent while the charge in the particulars of the offence uses the word "***kumuua***" and "***Siku zake za mwisho zimebaki chache.***"

As rightly determined by the District Court the words used by the appellant in her testimony are ambiguous, did not disclose the offence of threatening to kill.

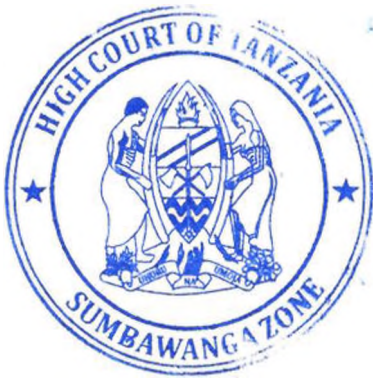
It was a contention by the learned counsel for the appellant in his submission that at the trial court the respondent never resisted the evidence by the appellant. However, as I have pointed out above the appellant evidence fell short of proving the offence of threatening to kill. It is the principle of the law that the burden of proving in criminal litigation never shift from the prosecution/complainant to the accused except in rare cases. Thus, this ground of appeal is dismissed.

As regards the 3rd ground, learned counsel for the appellant contended that the District Court raised issues suo motto without affording parties chance to be heard. Unfortunately, those issues alleged raised by the District Court were never brought to the attention of this

court. Looking at the judgement of the District Court the trial magistrate merely condensed the grounds of appeal by the appellant into two issues which she went dealing with them in order to determine the entire appeal. Also, this ground of appeal is devoid of merit.

In the premise, I find the appeal before me lacks merit, the same is dismissed in its entirety.

It is so ordered.




D. B. NDUNGURU

JUDGE

20.09.2022