

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SUMBAWANGA
AT SUMBAWANGA
PC CRIMINAL APPEAL NO. 01 OF 2022

(Originating from Mpanda District Court Appeal No. 2 of 2021, Mpanda Urban Court Criminal Case No. 57 of 2020)

MALISELINA KABITA.....APPELLANT

VERSUS

PATRICK KABANDA.....RESPONDENT

JUDGEMENT

Date of Last Order: 12/09/2022

Date of Judgement: 07/10/2022

NDUNGURU, J

The appellant unsuccessfully sued the respondent in a criminal case No. 57 of 2020 at Katumba Primary Court (trial court) for the offence of threatening to kill by words contrary to section 89 (2) (a) of the Penal Code, RE 2019.

It was alleged that on 24th day of December 2020 at 07:00hrs at Urwila village Mpanda District within Katavi Region Patrick Kabanda unlawfully threatened to kill the appellant telling him that "*kuna siku nitakuja kumfanyia kitu kibaya na kukuchoma kisu.*"

As hinted above, the respondent was acquitted.

Aggrieved by such decision, the appellant appealed to the District Court of Mpanda (the appellate Court). The appellate court upheld 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 1st appellate court grossly erred both in facts and law to hold that there is contradiction of evidence between PW1 and PW2 while there is no such contradiction.*
- 2. That 1st the appellate court grossly erred both in facts and law to hold that PW1 and PW2 did not testify on the offence charged.*
- 3. That the 1st appellate court grossly erred both in facts and law to hold that the appellant's case not proved beyond reasonable doubt.*

During the hearing of this appeal, both the appellant and the respondent appeared in person, unrepresented.

In support of her case, the appellant submitted that it is not true that there was contradiction between her testimony and that of her witness. That is because she testified that the respondent threatened to

kill her by words while holding knife and panga. Her witness also testified the same. Thus, there was no contradiction.

On the second ground, she submitted that the charge against the respondent was threatened to kill by words, it is what testified in court and nothing else, thus the evidence and charge tallied.

On the third ground, she submitted that the prosecution testimony proved the case beyond reasonable doubt.

In reply to the submission by the appellant, the respondent submitted the two courts below were correct. He resisted the appellant's appeal. Before the trial court having testified, the appellant testimony was read to her and asked if it was correct, she agreed and signed it.

Further he submitted that if it was not her testimony, she could have corrected it, the signing means she accepted it to be correct. Likewise, the testimony of her witness. Therefore, the court did not err in any way to dismiss the appellant's case for being not proved beyond reasonable doubt.

In rejoinder, the appellant contended that though the testimony was read to her but some of the facts in the judgement are extraneously not what transpired during the trial. She prayed this court to look

diligently at the proceedings and judgement of the trial court and allow the appeal.

Having heard rival submissions from both sides, the petition of appeal, it is now my duty to determine whether the appeal can stand.

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. The burden never shift to the side of the respondent.

As hinted above, the appellant instituted criminal case against the respondent for the offence of threatening to kill by words contrary to section 89 (2) (a) of the Penal Code, Cap 16 RE 2019. That on 24th day of December 2020 around 7:00hrs at Urwila village Mpanda District

Katavi Region accused unlawful threatened to kill the appellant by words that "*kuna siku nitakuja kumfanya kitu kibaya na kukuchoma kisu*". The trial court found the respondent not guilty of the offence, thus acquitted forthwith. Dissatisfied the appellant appealed to the District Court of Mpanda (first appellate court), where the it upheld the decision of the trial court. Aggrieved the appellant has lodged this present appeal.

Am also aware that it is on very rare and exceptional circumstance s the Court will interfere with the findings of fact of a lower court. See the cases of **Materu Laison and Another vs R. Sospeter** [1988] TLR 102 and **Amratlal Damodar and Another vs H. Jariwalla** [1980] TLR 31. In the case of **Amratlal Damodar and Another vs H. Jariwalla** [supra], the Court of Appeal held that: -

"Where there are concurrent findings of fact by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been misapprehension of evidence, a miscarriage of justice or violation of some principles of law or procedure."

Coming to this case at hand;

The statement of the offence reads:

Kutishia kuua kwa maneno kinyume na kifungu 89 (2) (a) cha Sheria ya Kanuni ya Adhabu, Sura ya 16, marejeo yam waka 2019.

Also;

The particulars of the offence read as follows:

"Wewe Patrick Kabanda unashtakiwa kuwa mnamo tarehe 24/12/2020 majira ya saa 07:00 huko katika Kijiji cha Urwila kata ya Urwila Tarafa ya Ndurumo wilaya ya Mpanda Mkoa wa Katavi kwa makusudi na bila halali ulimtishia MALISELINA D/O KABITA kwa kumtamkia kuwa kuna siku utakuja kumfanyia kitu kibaya na kukuchoma kisu"

In proving his case at the trial court, the appellant testified herself and her witness. She testified that on 24th day of December 2020 around 07:00hrs being accompanied by a person by the name of John arrived at her shamba and she found two persons cultivating and she asked them why they are cultivating on her shamba, but they kept quite and over the suddenly the respondent confronted her and then he uttered the words *"we maliselina unafanya nini shambani kwangu nitakuua na kisu na upanga huu, umeshazoea wengine mimi nitakuua"*

Her witness Joseph Lugukane testified that on 24th day of December 2020 around 7:00hrs in the morning he was heading to Urwila from town for the purpose of observing a farm. While on the way he found conflict whereby the respondent was catching the appellant also shaking her and lastly the respondent uttered the words "*we mama huwezi kunifanya kitu, naweza kukupiga, nitakuua na usinipeleke popote*" and the witness further stated that the respondent while uttering those words was holding a knife and machete.

Looking at the two versions testimony of the appellant and her witness they differ. The first version testimony of the appellant as a key witness stated that the respondent threatened to kill by using a knife and machete while her witness stated the respondent threatened to kill while holding a knife and machete.

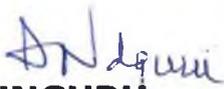
However, as regards the two versions of the testimony as highlighted above it is my firm consideration that the both testimonies appeared to prove the offence of threatening to kill by weapons not words. As rightly decided by the two courts below the testimonies of the appellant and her witness fell short of proving the offence of threatening to kill by words.

Further, my scrutiny of the particulars of the offence does not disclose the essential elements of the offence of killing by words as the word "killing" is missing in the particulars of the offence. That meaning the wording of the particulars of the offence had shortcomings in that they did not include the word "kuua" (killing) which is important ingredient of the offence of killing by words. As per the case of **Mussa Mwaikunda vs Republic** [2006] 387, it can be said the charge which laid the foundation of the case was defective, thus the respondent was not subjected to a fair trial despite the fact that the testimony against him fell shorting of proving the offence.

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

07.10.2022

Date - 07/10/2022
Coram - Hon. G.K. Sumaye -Ag DR
Appellant - Present
Respondent - Present
B/C - Mr. F. Haule

Court: Judgment delivered under my hand and seal of this court in presence of both, the appellant and Respondent today 7th day of October 2022.



SGD G.K. SUMAYE

AG, DEPUTY REGISTRAR

07/10/2022