IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB- REGISTRY

AT IRINGA

PC CRIMINAL APPEAL NO. 10 OF 2023

(Originating from Criminal Appeal No 7 of Iringa District Court and arising from Idodi Primary Court in Criminal Case No 17 of 2023)

SIX GALE ..... APPELLANT

VERSUS

MWAJUMA PETRO ..... RESPONDENT

JUDGMENT

06th&29th March 2024

LALTAIKA, J.

The Appellant herein **SIX GALE** is in this court for his second appeal. He is dissatisfied with the decision of the District Court of Iringa at Iringa (first appellate court) in Criminal Appeal Case No. 07 of 2023 which upheld the decision of Idodi Primary Court in Criminal Case No. 17 of 2023. In light of procedural law governing criminal trials in Primary Courts, the Respondent herein was the Complainant while the Appellant was the Respondent.

To have a clear grasp of the matter, a brief historical backdrop is considered imperative. Parties are members of a pastoral community (herders) from Northern Tanzania. The duo, while in a different marriage

each, moved from their original homeland of Hanang in Manyara Region to Idodi, Iringa Region in search of greener pasture (literally) for their livestock. I have decided to highlight this affiliation because, like many if not all pastoral communities, this community is highly male dominated. I will come back to this point in the end of this judgment.

Having lost a spouse to natural death each, the duo started a relationship that would last for thirteen years and were blessed with two children. Whereas the appellantinsists that there was nevermarriage between them, the Respondent considers it illogical in the light of their culture to think of anything less than marriage. The controversy related to existence of marriage or otherwise is, in my opinion, beyond the purview of this criminal appeal. It was only alluded by the Respondent that a matrimonial appeal on these issues is in the District Court. To this end, I refrain from proceeding further that side.

Coming back to the matter at hand, it appears the Respondent was forced out (or left the Appellant in their matrimonial home), rented a room in the same village where she was staying alone. The appellant, however, in whose custody the two issues are, did not honour this form of separation. He would occasionally visit the Respondent in her rented room.

In one of such visits, the duo differed, and the appellant allegedly threatened the Respondent with violence. Specifically, it was alleged that he uttered the words **"Utakuja kuokotwa maiti yako na ya Augustino Mato."** [Someday people will collect your corpse and that of Augustino Mato]

To cut a long story short, the Respondent knocked the doors of Idodi Primary Court complaining that her life was in danger. As a result, the Appellant was arraigned and charged with one count of ThreateningViolence contrary to section 89(2) (a) and (b) of the Penal Code Cap 16 R.E. 2022. He was convicted as charged and sentenced to pay a fine of TZS 500,000 or serve a six-month imprisonment term. He opted for the latter.

Dissatisfied, the Appellant unsuccessfully appealed to the District Court of Iringa at Iringa. In this yet another attempt to protest his innocence, the Appellant has fronted six grounds of appeal. I have opted to paraphrase them as here under:

1. *Lack of proof beyond reasonable doubt.*
2. *Reliance on hearsay evidence*
3. *Contradictory evidence.*
4. *Not considering the defence evidence.*
5. *Not summoning material witnesses (neighbours).*

6. Not considering the defence evidence.

It is probably worth mentioning that it took quite a few days to complete the hearing of this appeal. The Respondent rarely showed up and when she did, she complained bitterly of her economic hardship and inability to afford bus fare from Idodi to Iringa Town where this Court seats. The Appellant, on his part, would sometimes come late citing bad roads and lack of regular buses plying from Idodi to Iringa. Nevertheless, after a few attempts, the court was able to hear from both parties and their version of the story is summarized below.

The Appellant, identifying himself as a resident of Idodi Village, recounted the history of his relationship with the respondent, noting that they were once lovers and had two children together, aged 10 and 7, who currently reside with him. He clarified that they were never married and now live separately, with his children expressing a preference to remain with him. Additionally, he disclosed that he has another wife.

Reflecting on the events leading to his court appearance, the Appellant detailed an incident from March 2023 when the respondent allegedly accused him of attempting to engage in sexual activity with her and threatening her life when she refused. He lamented the lack of

evidence presented during the court proceedings and expressed anguish over what he perceived as unfair punishment. He revealed that he had been fined TZS 500,000 or faced a six-year jail term, opting to pay the fine due to his age, and subsequently initiated the appeal process. Furthermore, he acknowledged being ordered to compensate the respondent with TZS 100,000 but admitted to not fulfilling this obligation.

The Respondent, identifying the Appellant as her former husband, recounted their history of divorce due to ongoing problems in their relationship. She disclosed undergoing three operations to give birth to their three children and expressed her inability to perform certain tasks due to health reasons. Despite her medical condition, she lamented that the Appellant did not comprehend her situation, including her struggle with a gynaecological illness that made sexual intercourse difficult. She detailed reporting the matter to village authorities, resulting in a directive for the Appellant to abstain from sexual relations with her, to which he initially agreed but later disregarded.

The Respondent narrated efforts to resolve their marital issues through the Ward Tribunal (Reconciliation Board), which proposed divorce

proceedings due to the Appellant's refusal to comply with property division. She noted his acknowledgment of their 13-year cohabitation but highlighted his failure to share any property. Following the Appellant's appeal to the District Court, she mentioned the court's decision for a retrial of the case, expressing her inability to manage the situation further.

Regarding a specific incident when the Appellant threatened her, the Respondent described his visit to her rented residence accompanied by their child, Eliza. She recounted his accusations of her involvement with the landlord, Mato, and cited the child's report to the Appellant about the threat directed towards her and the landlord. When Mato confronted her and attempted to evict her, she requested time to report the matter to the office. Subsequently, the Appellant's involvement led to a confrontation with the Village Executive Officer (VEO), resulting in his arrest.

Concluding her account, the Respondent emphasized her financial vulnerability and appealed to the court to assess whether she owed anything to the Appellant. She clarified that the mentioned threat was a singular occurrence.

In his brief rejoinder, the Appellant reiterated his stance, asserting that he had never encountered Eliza and emphasizing her absence during any summoning. He questioned the lack of witnesses to corroborate the accusations against him, particularly highlighting the inconsistency of the timing of the alleged offense, given their long cohabitation and the absence of prior incidents. Denying any past quarrels with the Respondent, he expressed profound resentment over the situation.

Clarifying their relationship status, the Appellant stated that there was no indication of marriage between them, pointing out that both he and the Respondent had previous spouses. He revealed that his wife had passed away years ago, with whom he had eight children. He described his relationship with the Respondent as that of lovers, not spouses, emphasizing that they did not reside together; rather, she would occasionally visit him while he lived with his children.

I **have dispassionately considered the rival submissions** in the light of the grounds of appeal.I will use the OWEP [Offence, Witnesses, Evidence and Principles] tool of analysis to clarify a few issues. The offence of threatening violence was originally a common law offence before it

found itself in penal statutes. It bears similar wording in many commonwealth countries. This means there are many cases from these jurisdictions to draw inspiration from. See for example the High Court of Uganda's case of **Keneth Walakirav. Uganda Crim. Appeal No 05 of 2023 (Kawumi J.)** expounding on section of 81(a) of the Penal Code of Uganda.

In our jurisdiction, the Penal Code (supra) enacts the offence in the following manner:

89.-(2) Any person who-

(a) with intent to intimidate or annoy any person, threatens to injure, assault, shoot at or kill any person or to burn, destroy or damage any property; or

(b) with intent to alarm any person discharges a firearm or commits any other breach of the peace, is guilty of an offence and is liable to imprisonment for one year and if the offence is committed at night the offender is liable to imprisonment for two years.

It should be noted that although it is common for the prosecution to formulate charges that cite both Section 89(1) and 89 (2) the two sections create two different offences. Whereas s. 89(1) is on disturbance and breach of the peace generally, s. 89(2) is very specific to threatening

violence. The learned first appellateMagistrate slipped into error by citing both sections in his judgement, that is 89(1)(2). This prompted me to go through the trial court records where I found that the citation was correct, and the learned trial magistrate confined himself to s. 89(2).

Coming back to the matter at hand, there are two elements that must be proved, beyond reasonable doubt, to warrant conviction for threatening violence that is (i) intent (ii) threat. The word intent here is used generally to refer to the *mens rea*. The accused must have intended to pronouns threatening words. In other words, a threatening statement did not come as an exclamation or an involuntary quip. It must be proved that the speaker meant what he said and said what he meant. For example, the statement **"lazima mtu afe leo"** [someone must die today] when used by sport funs, as a general rule, does not usually mean they intend to kill funs of their rival team.

The second element is not as difficult to interpret. In short, the statement alleged to have been uttered must be threatening. It must also be interpreted literally unless it is an idiomatic expression that is well known. A reasonable person should consider such words threatening. For example, the words "nitakupeleka mbinguni" [I will send you to heaven] do

not necessarily mean someone has been threatened with death. In the matter both the trial and first appellate courts found the expression **"Utakuja kuokotwa maiti yako na ya Augustino Mato"** threatening. I agree.

On witnesses, it cannot be overemphasized that credibility of witnesses for the offence of threatening violence is vital. Since anyone can simply claim that they have been threatened with violence, a court of law must be critical. For example, if the victim is more powerful than the alleged perpetrator to the extent of defeating logic, it would be safer not to trust such a Goliath accusing a David. In the case of **RESPIS S/O REMY v. REPUBLIC.** Criminal Appeal No. 63 OF 2021, this Court, (Ndunguru J.) found logically impossible that a civilian *Mwananchi* could threaten to kill a fellow citizen and a District Commissioner in the latter's office.

It should be noted that although the offence of threatening a person employed in public service (contrary to section 101 and 35 of the Penal Code) is distinct from the offence of threatening violence generally, the elements are the same.

Still on Witnesses, I must admit that unlike the trial court, this court and the first appellate court have not had the privilege of observing the

demeanour of witnesses. However, the appellant and the alleged victim provided their version of the story as summarized earlier. It does not take much thought to realize that the respondent stands in a precarious condition. Experts of gender-based violence (GBV) have constantly reminded us that while some progress has been made in fighting against GBV in our country, much remains to be done among pastoralist communities. The appellant appears powerful and domineering. The respondent must have endured more than the average person can bear before reporting the matter to village and ward authorities.

On evidence, the appellant's main complaint is that there was weak evidence that he threatened the respondent. I must say that I have read with admiration the analysis of evidence of both sides by the learned trial Magistrate. The first appellate Court whose task was akin to rehearing of the case (See **LEORNARD MWANASHOKA V. REPUBLIC** Crim Appeal No 226 of 2014 CAT) played its role impressively and came up with the following finding.

> *"As to the issue of weak evidence as complained by the appellant, I have gone through the tendered evidence and observed that, evidence adduced by the respondent at the trial court was not weak and it had*

corroboration with that of the witness who was her landlord, but the appellant was the one who ha (sic!) weak defence and uncorroborated as said by the respondent as what he testified was different from what his witness testified."

This brings me to the principles' part. It is elementary criminal law that the standard of proof for all criminal cases is beyond reasonable doubt. The term proof beyond reasonable doubt has not been defined in statutes. In the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219 the CAT held that

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."

The evidence adduced in the matter at hand as discussed above, leaves no possibility in favour of the appellant. As I conclude, I am inclined to state albeit in passing that penal statutes of other countries particularly the United States contain an offence that is probably high time it is imported to Tanzania. The offence is stalking. It means: "**the willful, malicious, and repeated following and harassing of another person that threatens his or her safety.**"(See Meloy JR, Gothard S:

Demographic and clinical comparison of obsessional followersand offenders with mental disorders. **Am J Psychiatry** 152:258-263, 1995)

I say Tanzania needs an Anti-Stalking law because, as we have seen in the matter at hand, the Respondent complained bitterly that although they had separated with the Appellant and were living in separate streets for several years, the Appellant would still, more often than not, "check on her" and demand sexual intercourse. This, in my opinion, goes beyond threatening violence. Both men and women must be free from "the willful, malicious, and repeated following and harassing" of aperson theyformerly had an intimate relationship. The Cybercrimes Act of 2015 is equally devoid of a specific section on Cyber stalking even though section 23 on cyberbullying may, arguably, be construed as covering some aspects of cyber stalking. Said and done, I dismiss the appeal in its entirety.

It is so ordered.

E.I. LALTAIKA

JUDGE

29/04/2024

Court

Judgement delivered this 29th day of April 2024 in the presence of both the appellant and the respondent who have appeared in person, unrepresented.

E.I. LALTAIKA

JUDGE

29/04/2024

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE

29/04/2024