IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISSTRICT REGISTRY)

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 02 OF 2023

(Originated from Mlele District Court in Criminal Case No. 122 of 2021)

EMMANUEL LUSHONA NDAMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

12th December, 2023 & 15th March, 2024

MRISHA, J.

This is an appeal from the District Court of Mlele at Mlele (the trial court) before which the appellant **Emmanuel Lushona @Ndama** and one **Juma Mihangija @Machimu** who is not part of the present appeal, were charged with one count of Demanding property with menaces with intent to steal contrary to section 292 of the Penal Code [Cap 16 R.E. 2019] (the Penal Code).

It was alleged that on 14th and 15th of December, 2021 at Ilunde village within Mlele District in Katavi Region, with intent to steal, the appellant in cooperation with his co accused jointly and together demanded with menaces cash money to wit; Tshs 1,800,000/= from one Oscar Jackson so that they could not kill him.

On 21st December, 2021 the charge sheet was read over and explained to the appellant and his co accused who pleaded not guilty thereto. Consequently, the prosecution Republic called a total of four witnesses and tendered one documental exhibit to prove its case against them.

Verily, the appellant and his fellow were granted bail by the trial court, but they thereafter took to their heels. However, on 14th April, 2022 the appellant was apprehended and his bail was cancelled while the efforts to apprehend the then second accused could not reap any fruits. As a result, the case against the second respondent proceeded in absentia under section 226(1) of the Criminal Procedure Act Cap 20 R.E. 2019 (Now R.E 2022).

It is on record that apart from testifying against the then second accused person, the said four prosecution witnesses also testified against the

appellant who upon being found with a prima facie case, fended for himself as DW1. Ultimately, the appellant was convicted and sentenced to serve the imprisonment sentence for a term of five (5) years in jail.

The appellant is disgruntled with both conviction and sentence; he has thus, preferred the present appeal before this court through a Petition of appeal which contains two grounds of appeal, which can conveniently be mentioned as hereunder:

1. That the trial court erred in fact and law to convict the accused on the case which was not proved beyond reasonable doubt as per the requirement of the law.
2. That the trial court erred at law by convicting the appellant depending on the witness (sic) of the defence instead of depending on strength of the prosecution case.

The appeal was heard by way of oral submissions with the appellant being present without any legal representation while the respondent Republic was represented by Ms. Atupelye Makoga, learned State Attorney.

In the course of making submission, the appellant prayed to adopt his grounds of appeal in order to form part of his submission in chief. He also

prayed that his grounds of appeal be considered and his appeal be allowed so that he can be set free.

On her part, Ms. Atupelye Makoga submitted that she opposes the appeal and supports both conviction and sentence of the trial court. On the first ground of appeal, she argued that the prosecution Republic proved their case in accordance with section 3(2) of the Law of Evidence Act; she added that the prosecution side were required to prove the offence the appellant was charged with by proving three elements of the offence, namely one, the appellant intended to steal, two, demanding property of another person and three, using a threat in receiving property.

Continuingly, she submitted that the three elements were proved by PW1, the victim of the charged offence, who in his testimony narrated what had transpired between him and the appellant. That the appellant went to PW1 and informed him that there were some persons who had been sent to kill him; hence they want some money from him in order to change the mission.

The learned counsel referred the court to page 20 of the trial court typed proceedings and further argued that the evidence of PW1 was

corroborated by the evidence of PW4 and PW2 who are police officers maintaining that their evidence proved the offence of appellant charged with. To buttress her position, she cited the case of **Jonas Nkize vs Republic** [1992] TLR 213.

In regards to the second ground of appeal, the learned State Attorney backed the decision of the trial court based on the prosecution evidence which according to her, was watertight. She also referred the court to page 8 of the trial court typed judgment where the trial magistrate had the following to say,

> *"It is a principle that the accused cannot be convicted on his weakness of his evidence rather the prosecution case must prove the guilty of the accused".*

More so, she added that the trial court convicted the appellant after considering the evidence of PW1 whose evidence was corroborated by evidence of PW2 and PW4 and supported by documentary evidence, the appellant's (accused) caution statement which was admitted as exhibit "P1".

Lastly, she maintained that confession made by the appellant was the best evidence to be relied against him. To cement her stance, she cited the case of **Ally Mohamed Mkupa vs Republic**, Criminal Appeal No. 2 of 2008(unreported). She therefore, prayed for the dismissal of the appeal in its entirety.

On his part, the appellant said that he had nothing to rejoin, rather he reiterated his previous prayer to the court to consider his grounds of appeal, allow his appeal and set him free.

Having heard the rival submissions of both parties and authorities cited by the learned counsel for the respondent Republic and considered all the grounds of appeal as raised by the appellant, I am of the view that the issue for the determination is whether the appellant's appeal filed with this court has merit.

It should be remembered that in criminal cases the standard proof is on beyond reasonable doubt for the accused person to be found guilty and convicted of the offence charged. The prosecution Republic must prove all elements of the offence and the burden of proof rests throughout with the prosecution Republic. That means, the one who allege he must prove; See

Christian Kaale and Rwekiza Bernard v Republic [1992] TLR 302, where it was stated that:

> *"The prosecution has a duty to prove the charge against the accused beyond all reasonable doubts and an accused ought to be convicted on strength of the prosecution case."*

The onus of proof lies on the prosecution Republic to prove its case against accused beyond reasonable doubts whereas the accused has no burden of proving his innocence except in a few circumstances. This position was clearly stated in the case of **Milburn v Regina** [1992] TLR 27 where the Court held that:

> *"It is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases."*

In the present appeal, the appellant was charged with the offence of demanding property with menaces with intent to steal; that criminal offence stated under section 292 of the Penal Code Cap 16 R.E. 2019. The section states as follows:

"Any person who, with intent to steal any valuable thing demands it from another person with menaces or force, is guilty of an offence and is liable to imprisonment for five years."

The word *"menace"* has not been defined under the Penal Code, but at page 191 of the **Dictionary of Law**, 4th Edition, 2004, P.H. Collin, Bloomsbury Publishing Plc 38 Soho Square, London W1D 3HB, it has been defined to mean:

"a threat or action which frightens someone"

Also, under the same dictionary, the phrase *"demanding money with menaces"* has been defined to mean:

"crime of getting money by threatening another person"

Therefore, in simple words, the word *"menaces"* refers to serious or significant threats which involve intimidation. It can be both explicit and implicit threats of detrimental or unpleasant actions against another person.

For the accused person to be liable of the offence under section 292 of the Penal Code, three elements must be proved by the prosecution, as they

already been mentioned by the Ms. Atupelye Makoga, learned State Attorney. The **first** element is that the accused use threat which caused fear or intimidation; **two**, accused's act of demanding property belonging to another person and **three**, the accused had intended to permanently deprive the owner of that property.

In dealing with the grounds of appeal, I will apply the above mention principles to determine this appeal. On the first ground it is alleged that the appellant was charged with the offence of demanding property with menaces with intent to steal and the trial court convicted and sentenced him based on the offence charged with after the prosecution Republic had proved its case against him beyond reasonable doubts.

The question before this court is that, did the prosecution Republic prove the appellant's case beyond reasonable doubts?

As a first appellate court, I am duty bound to reevaluate the nature and quality of evidence adduced before the trial court and make findings of facts where there is misdirection and non-direction on the evidence. It is noteworthy to examine the records of the case in order to evaluate the evidence of the trial court for the purpose of determining whether the

prosecution Republic had really proved their case against the appellant case beyond reasonable doubt. I will consider the above three mentioned elements of the offence to see whether the prosecution proved their case beyond reasonable doubts.

PW1 testified that on 14.12.2021 around 15:00hrs, the appellant come to his home and claimed that he had been phoned by his friends who informed him that they were hired by one Ntawaji to assassinate PW1. To confirm that information, the appellant phoned them in presence of PW1 and gave the phone to PW1, then they demanded Tshs 3,000,000/= from PW1 while promising not to exercise the order.

They, however, bargained with PW1 and finally agreed to take from PW1 Tshs 1,800,000/=. Indeed, PW1 agreed pay such amount of money as he was afraid. This evidence is shown at page 20 of the trial proceeding; for the easy of reference, I wish to quote the relevant part as hereunder:

> *"I told the accused that I don't have Tshs 3,000,000/=, accused took the phone and started to bargain with them that they should reduce the amount at the end they agreed to take Tshs 2,000,000/=. I told the accused that I cannot afford paying Tshs 2,000,000/= At the end*

they agreed to accept Tshs 1,800,000/=. I agreed as I was afraid. I asked them to give me time to find the money."

The above except tells that the PW1 was threatened by those persons and accepted to pay such amount of Tshs 1,800,000/=. He also testified that the appellant bargained with those persons through his phone and agreed to reduce the amount from Tshs 3,000,000/= to Tshs 1,800,000/=. This piece of evidence was not challenged by the appellant during cross examination because no question was posed by the appellant to dispute the fact that PW1 was threatened.

Again, there is evidence of PW2 and PW4 which corroborates the evidence of PW1 to the effect that they set a trap and instructed PW1 to call the appellant in order to meet at Ilunde center. PW2 testified that the appellant went to pick PW1 so that he could pay those men who were at the appellant's place. PW2 was with PW4 and the local militia. The appellant was apprehended by the police officer and matched to Ilunde Police Post for interrogation.

To put more weight on the prosecution's evidence, PW4 testified that he recorded a cautioned statement of the appellant around 1145 hours and

the appellant confessed that he was at Inyonga with his fellows namely Juma Machimu and Kulwa Ngadu, they had no money. They planned on how to find money and the appellant told his fellows that his neighbor, PW1 had a land dispute with one Ntawaji. They planned to threaten PW1 in order to get some money from him. The cautioned statement of the appellant was tendered in court and admitted as Exhibit P1 after objection been overruled.

According to the testimony of PW1, it is apparent that there is correlation between what was said by PW2 and PW4 and the caution statement which was admitted in court as exhibit which reveals that the appellant and his fellows who are Juma Machimu and Kulwa Ngadu, were involved in the same mission of demanding money from PW1 with threats and intent to steal.

I have gone through the typed judgment of the trial court and found that that the trial magistrate considered the fact that the evidence of PW1 was corroborated by the PW2 and PW4. On my side, I concur with the findings of the trial court that the testimony of PW1 was well corroborated by that of PW2 and PW4 which reveals that appellant and Juma Machimu were involved in the same mission of demanding money from PW1 with menaces

and with intent to steal. Hence, I cannot fault the trial court on its conclusive findings that indeed the appellant and one Juma Machimu committed the offence they were charged with before the trial court.

Therefore, it was correct to say that the evidence of PW1 was corroborated by that of PW2 and PW4. Indeed, exhibit P1 which is a caution statement of the appellant gives weight to the evidence of PW1. In the present appeal, it is apparent that the appellant caused fear or intimidation to the PW1 which an ordinary person encountered with similar circumstances would feel compelled to comply.

The degree of fear or alarm which a threat may be calculated to be produced on the mind of the person on whom it is intended to operate, may vary in different cases and different circumstance; See the case of **Republic v. Fulabhai Jethabhai Patel and another** (1946) 13 E.A.C.A 179. Thus, I am of the settled view that the prosecution side managed to prove their case against the appellant beyond reasonable doubts. That being said and done, I find that the first ground of appeal has no merits.

The second ground of appeal by the appellant is that the trial court convicted him based on his weak evidence instead of depending on the

strength of the prosecution's case. The learned State Attorney maintained that the decision of the trial court based on the prosecution evidence and the said evidence is watertight; she referred to page 8 of the typed judgment to support her proposition.

This ground need not detain me much. It is apparent from the typed judgment of the trial court that the trial magistrate first considered evidence of both parties including that of the appellant. This is shown at page 8 of the typed judgment as submitted by the learned State Attorney and I quote:

> *"It is a principle that the accused cannot be convicted on his weakness of his evidence rather the prosecution case must prove the guilty of the accused".*

The trial magistrate considered the principle of the law referred above when convicting the appellant based on the strength of the prosecution evidence rather than the weakness of defence evidence and found the appellant guilty of the charged offence, then went on to convict him accordingly based on the strength of the prosecution evidence including evidence of a victim PW1, evidence of PW2 who apprehended the

appellant, the evidence of PW4 who wrote caution statement of the appellant and confession of the appellant through his cautioned statement. In the premise, I also find no merit in the second ground of appeal and I dismiss it as well.

The above being said and done, I find that the present appeal is not meritorious. In consequence thereof, the same is dismissed on its entirety.

It is so ordered.

A.A. MRISHA
JUDGE
15.03.2024

DATED at **SUMBAWANGA** this 15th day of March, 2024.

A.A. MRISHA
JUDGE
15.03.2024