IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

(PC) CRIMINAL APPEAL NO. 42 OF 1996

(From the decision of the District Court of KINONDONI at KINONDONI in Criminal Appeal No. 17 of 1996)

PRISCA LUMELINDA.....APPELLANT

VERSUS

ALLI MTEJE.....RESPONDENT

J U D G E M E N T

KALEGEYA, J.

This is a second appeal by one Prisca Lumelinda challenging the acquittal of Ally Mteje by Kinondoni Primary Court, which acquittal was upheld by the Kinondoni District Court. On the day fixed for hearing of the appeal, though served, Respondent failed to appear and the Appellant proceed to prosecute her appeal.

Before the Primary Court, Ally Mteje was charged with using abusive language c\s 89 of the Penal Code allegedly because (as per an unhappily worded particulars of the charge)

> "kwa nia ya makusudi ulimtukana PRISCA LUMERINDA kuwa anachukua nguo zenye (shahawa) nakuziweka ndani ulifanya hivyo huku ukijua ni kosa kisheria".

Facts undisputed are that the Appellant and Respondent are neighbours separated by a wall constructed by the former. For drainage purposes the Appellant's wall has an opening leading to Respondent's premises. The said opening was purposely devised to capture rain water flowing from neighbouring areas. As it transpired however, instead of capturing rain water only, dirty water including used condoms, Blood stained cotton wool, empty food cans and food left-overs started flowing as well through the

said opening into Respondent's premises. Attempts by Respondent to seal off the opening proved abortive as it was correspondingly being re-opened by the Appellant.

As regards the source of the present appeal, it was contended by the Appellant, that on one of such occassions, on 30\12\95, the Respondent hurled abuses to her to the following effect,

> "Kisimi cha mama yako na wazazi wako wote. Malaya mkubwa matambara yako ya shahawa unaleta kwangu".

The Respondent admitted the incident as regards the flowing of the dirty, sealing and re-opening as already detailed above but disputed having uttered the alleged words. PW2-4, supported the Appellant's story.

The Primary Court found that though there was some misunderstanding between Appellant and Respondent due to the opening in the wall through which dirty water flowed the latter never abused the former. The District Court confirming the Primary Court's verdict found that even if the words alleged were uttered there is no evidence to show that they were directed to the Appellant.

Among her grounds of Appeal, the Appelant complained that the learned Resident Magistrate erred in holding that if at all abusive language was used it was not established that it was directed to her, and that no evaluation of evidence was made.

Having carefully gone through the grounds of complaint and weighing the same carefully against the proceedings and judgment of the primary court and that of the District Court I have but to dismiss this appeal on the following grounds.

First, the complaint lodged before the primary court, the particualrs of which I have already quoted above, is at variance with what the Appellant and her witnesses allege to have been uttered by Respondent. Good sense would fail to see, if the words alleged by Appellants to have been uttered by Respondent were indeed uttered, why are they not substantially forming part of the complaint lodged before the court! Looking at the particulars of the complaint and the words alleged to have been uttered, all quoted in whole above, one is left with an insurmountable doubt as to whether the alleged words were uttered at all for the framer of the charge could not have left out the otherwise vividly offending words unless not disclosed by Appellant. From the sorrounding circumstances of this case, I am convinced that the Respondent did utter some words but the exact words uttered have not been clearly established.

Secondly, the charge is deplorably defective. Apart from simply mentioning S. 89 instead of S. 89(1)(a) the particulars should have revealed the exact words complained of. That apart, the particulars also ommitted showing an essential ingredient of the offence, that those words were uttered "in such manner likely to cause breach of the peace", which is an incurable irregularity (GULI TSAUNE V R (1967) HCD 440). I am aware of s. 37 (2) of the Magistrates' Court Act (Act 2 of 1984) that substantial justice has to be done without undue regard to technicalities, but, surely, a complaint which does make it clear to an accused person as to what he\she is actually charged with occassions failure of justice as it does not enable him (her to put forward the required defence).

Thirdly, the offence of abusive language c\s 89(1)(a) entails that the words uttered must not only be abusive but also must be uttered in such manner that is likely to be provocative leading into breach of the peace. Though the evidence shows that the Appellant and Respondent are neighbours it was clearly proved

that there is a wall separating them. There is no evidence showing where the Appellant was when the Respondent was allegedly uttering the words. In the premises, even assuming the words as per the charge "kuwa anachukua (Appellant) nguo zenye shahawa na kuziweka ndani" were uttered I am convinced that the contents of the said words and the circumstances in which they were uttered fall short of "in such manner as is likely to cause abreach of the peace" as prescribed under S. 89(1)(a) Penal Code.

For the reasons discussed above I uphold the acquittal verdicts arrived at by both court below. The appeal is accordingly dismissed.

(L. B. Kalegeya)
JUDGE
20\11\97

Delivered in the presence of the Appellant and Respondent today the 24th November, 1997.

At Dar es Salaam
24TH NOVEMBER, 1997

(L. B. Kalegeya)
JUDGE

I certify that this is a true and Correct of the Original Order, Judgment, Ruling.
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District Registrar
High Court of Tanzania
Dar es Salaam
Dated 24/11/97 at DSm

IN THE HIGH COURT OF TANZANIA

(Dsm District Registry)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 93 OF 1997

(Originating from Kinondoni District Court Civil Appeal No. 9\97 and Original Manzese Primary Court Civil Case No. 127\95)

HAMIS ATHUMANI.....APPELLANT

VERSUS

JUMANNE MAKAMBI.....1ST RESPONDENT
KONDO MALEMBELE.....2ND RESPONDENT
IDD KIWAMBA.....3RD RESPONDENT

R U L I N G

KALEGEYA, J.

This is a ruling in respect of an application for leave to appeal to the Court of Appeal and also for a certificate that there is a point of law involved in the intended appeal fit to be determined by the Court of Appeal. The Appellant is being represented by Mrs. Washokera, learned Counsel.

Hamisi Athumani, Appellant, sued the three Respondents, Jumanne Makambi, Kondo Malembele and Iddi Kiwamba for possession of a house allegedly left behind by his deceased brother, Juma Athumani. He lost in the primary court and his appeal to the District Court was dismissed. Concluding that the Manzese Primary Court and the Kinondoni District Court have not done justice to him he knocked at the doors of this court but his appeal was summarily rejected (Kileo, J.) for having no merits at all.

Upon scrutiny of the primary court record I have noted that there is defect apparent thereon that seriously affects the lower courts' proceedings. The Magistrate is shown to have invited and recorded the individual opinions of the assessors, and thereafter proceeded to compose a judgement which was not signed by the

assessors. This clearly violated Rule 3 of the Magistrate's Courts (Primary Courts) (Judgement of the Court) Rules, 1987.

Under rule 3, there is no recording of individual opinion of assessors except that the Magistrate is required to consult with the assessors, and if there is a unanimous decision as was the case here, he would proceed to compose a judgment which would be signed by both himself and the assessors. Legally there is no judgement of the court if it is not signed by all the assessors and Magistrate where there is a concensus on findings, or by a magistrate and one assessor (these being the majority) in case one dissents (whose dissenting views also would be recorded).

The consequences of this defect is to make the proceedings and judgement of both courts below a nullity (there is along list of authorities on this ie. (PC) Civil App.25\92 Pili Mungi vs Nina Justina Mbaga; (PC) Civil App.6\91 Ibrahim Said vs Salum Saidi Dsm (HC) Registry -unreported). They are so declared.

I am sure that this defect escaped inadvertantly the attention of the admitting judge when passing a summary rejection order. Had she seen this she would obviously have admitted the appeal.

In the premises leave is granted and the point of law involved is the violation of Rule 3 as indicated.

However, the above apart, I would advise that instead of appealing to the Court of Appeal, and, as the defect had not come to the attention of the judge when she made the order, in order to save time and expedite matters, the Applicant could prefer an application by way of review, for the High Court to review its decision because of this new revelation. I have so concluded

because most likely the Court of Appeal will declare the proceedings a nullity, sending back the parties to the primary court and that would be some months to come, a finding which would have been made earlier by this Court.

(L. B. Kalegeya)
JUDGE

Delivered on.....✓.....31/8/98