

IN THE HIGH COURT OF TANZANIA

AT TANGA

(PC) CRIMINAL APPEAL NO.8 OF 2006

(Originating from Criminal Appeal No.5 of 2005 Korogwe

District Court original case 365/05 Mombo)

MANSOOR MBURA.....APPELLANT

VERSUS

JUMA MSAGATI.....RESPONDENT

4/6/08 & 11/7/08

JUDGEMENT

Shayo, J.

This appeal is against the decision of Korogwe District Court in Criminal Appeal No.5/2005, which emanated from the original Mombo Primary Court Criminal Case No.365/2004. The appellant, Mansuri Mbura was charged and convicted of Criminal trespass c/s. 299(a) and using abusive language c/s 89(1)(a) of the Penal Code. He was sentenced to a fine of Tshs.6,000/= or four months in default for criminal trespass and Tshs.10,000/= for using abusive language or six months in default. The complaint against him was lodged in the trial court by one Juma Msagati the respondent, that the appellant had unlawfully and with intent to intimidate and annoy the complainant/respondent entered into the land premises of the complainant and dug it and further that he insulted him which act was unlawful.

The trial court after a full trial, unanimously was satisfied by the evidence of the respondent and his two witnesses SM.1 – SM.3 where upon it came to a finding that the complainant's case was proved beyond reasonable doubt, hence the conviction and sentence. The appellant felt aggrieved by the decision of the trial court, so he appealed to the District Court. The District Court dismissed the appeal on the grounds that there was sufficient evidence in support of the charge against the appellant. Dissatisfied, he now appeals in this court. This is therefore a second appeal.

I have carefully perused the record of proceedings in the trial court and the first appellate court, and of course the appellant's memo of appeal. On the evidence as adduced before the trial court, there is no doubt that the charge of criminal trespass was fully supported by the evidence of the complainant – SM.1 and his two witnesses – SM.2 and SM.3. It was to the effect that the appellant had hired two boys who were found digging the land premises of the respondent as an initial stage to build a house. The trial court unanimously came to a decision that the evidence was cogent and sufficient to prove the charge against the appellant beyond reasonable doubt. This decision was upheld by the first appellate court.

That was infact a concurrent finding of fact by the two lower courts which this court will have no justifiable reasons to interfere. The finding of fact was actually based on the credibility of the complainant's witnesses – SM.1 – SM.3. There is nothing to suggest that the trial court misinterpreted the evidence or misdirected or non directed itself on the evidence nor can it be said that the trial court clearly went wrong. The appellant's conviction and sentence on the first count of criminal trespass was therefore properly reached. I will not disturb it.

However, the conviction and sentence on the second count of using abusive language was rather wanting. On my anxious scrutiny of the charged count No.2 the particulars of the offence runs as follows, I quote:-

".....baada ya kuingia kwenye eneo la Juma s/o Msagati ulimtukana na kwa kumwambia mshenzi mkubwa na mpumbavu kitendo ambacho ni kinyume na sheria."

Which in English reads – after entering the area of Juma s/o Msagati you insulted him he was a big barbarian and stupid which act was contrary to the law.

Relating to the above particulars of the offence with the wording of section 89(1)(a) of the Penal Code will no doubt reveal that the words "in such a manner as is likely to cause a breach of the peace" which initially controls section 89(1)(a) of the Penal Code, are absent in the particulars of the offence.

For avoidance of doubt, section 89(1)(a) of the Penal Code provides as follows:-

89(1)(a) Any person who uses obscene abusive or insulting language to any other person in such a manner as is likely to cause a breach of the peace; or
(b).....
is guilty of an offence and liable to imprisonment for six months."

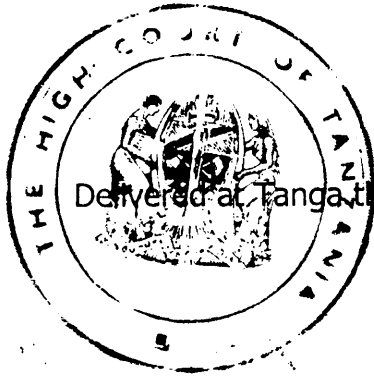
There is no doubt that the words "in such a manner as is likely to cause a breach of the peace" is an essential ingredient of the offence of abusive language and therefore it is necessary that such averment must be made in the particulars of the offence. In the absence of such averment, the charge is rendered incurably defective. The appellant (accused there) may not have understood the charge against him.

In the case of **Edward Opiyo s/o Arguro V.R. (1968) HCD No.55** in which the words: "with intent to defraud" in an offence of obtaining by false pretence c/s 302 of the Penal Code were absent in the particulars of the offence, the High Court quashing the relevant conviction, held:-

"..... and absence of the words "with intent to defraud" are fatal to conviction, since the accused may not have understood the charge against him. The false pretence must be set out in the charge with sufficient certainty."

On the strength of the above, the omission of the words "in such a manner as is likely to cause a breach of the peace" in the second count greatly diminished the essence and substance of the charge against the appellant. He may not have understood the charge against him. The conviction on the second count was therefore misconceived. The same is hereby quashed and the sentence set aside. The appellant should be refunded Tshs.10,000/= paid as fine.

In the upshot this appeal is partly dismissed and partly allowed. It is so ordered.



A.A.M. SHAYO, J.

27/6/2008

Delivered at Tanga this 11th day of July, 2008.

A.A.M. SHAYO, J.

11/7/2008.

For Appellant:- Present in person.

For Respondent:- Present in person.