IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISRICT REGISTRY)

AT DAR ES SALAAM.

PC CRIMINAL APPEAL NO. 24 OF 2016

(Arising from Criminal Appeal No. 13 of 2016 of Temeke District Court)

ANASTAZIA SILVANUS.....APPELLANT

VERSUS

SOPHIA MWAIPUNGU.....RESPONDENT

Date of last order: ***20/11/2017***
Date of Ruling: ***19/02/2018***

JUDGMENT

I. ARUFANI, J.

The respondent, Sophia Mwaipungu filed Criminal Case No. 944 of 2015 in the Primary Court of Mbagala against the appellant, Anastazia Silvanus for an offence of using abusive language against her contrary to section 89 of the Penal Code Cap 16 R.E 2002. After hearing the respondent's evidence and that of her witness the trial primary court found prima facie case had not been established to the extent of requiring the appellant to make her defence in respect of the offence levelled against her and in the consequences dismissed the charge and acquitted the appellant.

The respondent was dissatisfied by the decision of the trial primary court and filed Criminal Appeal No. 13 of 2016 in the District Court of Temeke against the decision of the trial court. The District court of Temeke allowed the appeal of the respondent and ordered the case to be tried de novo. The appellant was aggrieved by the

decision of the District Court and decided to appeal to this court on the following grounds:-

1. That the District Court of Temeke erred in law and fact by concluding that the record of Mbagala Primary Court was imperfect.
2. That the District Court of Temeke erred in law and fact by delivering a judgment without providing proper reasons for arriving to the decision.
3. That the District Court of Temeke erred in law and fact by granting the respondent extension of time to file appeal while there was no sufficient reasons adduced in court by the respondent to justify the delay.

During the hearing of the appeal the respondent appeared in court in person and the appellant was represented by Mr. Charles J. Mugila, learned Advocate. By consent the appeal was argued by way of written submission. The appellant's learned counsel stated in his submission in relation to the first ground of appeal that, although the District Court of Temeke stated in its judgment that the record of the trial court was imperfect but no any specific clarification was given by the District court to support its decision. He argued that, the record of the trial court shows the proceeding was conducted properly and the court complied with the legal requirements as its judgment was based on the evidence adduced before the trial court.

He argued in relation to the second ground of appeal that, it is a mandatory legal requirement for the court or authoritative body which is determining rights of the parties to give reason for the

decision it has arrived. He argued that, although the District Court stated in its judgment that the proceedings of the trial court was imperfect but it didn't specify which part of the proceeding of the trial court was imperfect and if the alleged imperfection was fatal to the extent of requiring the case to be heard de novo. He argued in relation to the third ground of appeal that, the decision of the trial court was delivered in November, 2015 but the respondent filed in court her application for extension of time to appeal out of time on March, 2016.

He argued that, despite the fact that the respondent stated in her affidavit that she was sick but the document she tendered in court to support her application shows she was an out-patient from Mbagala Rangi Tatu and none of the said document indicated was issued by Temeke District Hospital as deposed by the respondent. He submitted that, the District Court of Temeke ought to have considered the said inconsistency before determine the application in favour of the respondent. At the end he prayed the court to allow the appeal and set aside the decision of the District Court of Temeke.

In response to the submission of the learned counsel for the appellant, the respondent argue the first and second grounds of appeal together and submitted that, the finding of the District Court that the matter be tried de novo was correct. She argued that, section 21 (1) (C) and (2) of the Magistrates' Courts Act, Cap 11 R.E 2002 allows a magistrate where he consider necessary to order the matter determined by a Primary Court to be heard de novo. She stated that, the District Court ordered the matter to be heard de novo after finding

there was contradiction in the record of the trial court. She argued that, the record of the trial court shows there are statements of Hadija, Jabiri and the trial magistrate as part of the evidence of the witness and that shows imperfection in the record of the trial court which warranted the District Court of Temeke to order the matter to be tried de novo.

She stated in relation to the third ground of appeal that, the appellant is misusing the precious time of the court as the application for extension of time was determined in Misc. Criminal Application No. 11 of 2016 and the appellant never challenged the same. She submitted that, the appellant cannot raise that ground in the instant appeal. She prayed the court to dismiss the appeal with costs for want of merit. In his rejoinder the learned counsel for the appellant reiterated to what he argued in his submission in chief and added that, he is very much aware of what is provided under section 21 (1) (C) of the Magistrates' Court Act which gives powers to the District courts to hear appeals from the Primary courts and order the matter to be tried de novo where is found there is a necessity to make such an order.

He stated that, the submission by the respondent that the record of the trial court was imperfect as it contain some contradiction in its paragraphs 3 and 4 that is a new argument as the District Court never referred to the said paragraphs in its judgment. He argued that, even though is a new argument but the record of the trial court in the mentioned paragraphs contain the evidence of the respondent and Regina Mtema together with the answers to the questions asked by the trial court's magistrate and

the court assessors and there is nowhere the statement of Hadija, Jabiri and the trial Magistrate is featuring. He submitted that, the record of the trial court is properly and correctly made in compliance with the requirement of the law. He submitted that, the respondent failed to establish her case and finally he repeated the prayer he made in his submission in chief.

The court has carefully considered the submission of the counsel for the parties in relation to the grounds of appeal filed in this court by the appellant and it has also gone through the record of both lower courts. The court has found the way the grounds of appeal are framed it is proper to deal with the first and second grounds together and thereafter I will finish with the third ground if need will arise. As rightly submitted by the learned counsel for the appellant it is true that the District Court of Temeke ordered the trial Primary Court to hear the case of the parties de novo after arriving to the finding that, there was an imperfection on record of the trial court in relation to the evidence adduced before the said court. The court has found as rightly argued by the learned counsel for the appellant the Magistrate of the District Court did not give any clarification or explanation as to what imperfection he observed in the record of the trial court which made him to order the matter to be tried de novo.

The court has considered the submission of the respondent that there is contradiction in the record of the trial court but after going through the whole record of the trial court I have failed to see any contradiction in anything contained in the said record. The submission by the respondent that there is a statement of Hadija,

Jabiri and the Magistrate in the record of the trial court has been found by this court is misconception because the mentioned persons were court's assessors and the trial court's magistrate. The mentioned officers of the court are allowed under Rule 35 (3) of the third Schedule (The Primary Court Criminal Procedure Code) to the Magistrates' Courts Act to put questions to the complainant and his or her witness.

The court has found as rightly argued by the learned counsel for the appellant what is appearing on pages 3 and 4 of the proceeding of the trial court referred by the respondent in her submission is the answers of the respondent and her witness to the questions put to them by the court and the courts' assessors as required by the law and not the statement of the mentioned court's officials as argued by the respondent. The court has gone through the evidence adduced before the trial court to establish the charge of using abusive language levelled against the appellant and find as rightly decided by the learned trial Magistrate there was no sufficient evidence to establish a prima facie case for the appellant to be required to make his defence to the charge preferred against her.

The court has found as stated by the respondent, (SM1) and corroborated by her witness Regina Mtema, (SM2) the appellant is not the one uttered abusive language against the respondent but the same was made by one Wile who was in the bar of the appellant. To the view of this court a mere fact that the mentioned person was uttering abusive language against the respondent while in the bar of the appellant cannot make the appellant responsible to the offence

alleged to have been committed against the respondent. Even if it would be said while the said person was making the said abusive language the appellant did not take any action to stop him but that cannot make him criminally liable for the offence committed by the said another person as the person who was supposed to be charged is the person who was uttering the said abusive words against the respondent and not otherwise.

The court has considered the evidence of Regina Mtema (SM2) who stated before the trial court that, when Wile was insulting the respondent the appellant was acting like a fan (Shabikia) of the said Wile and find that cannot be used as a sufficient evidence to establish the appellant would have been found he committed the offence levelled against her because of mere being a fan of the wrong doer. The court has arrived to the above finding after seeing there is no sufficient evidence to corroborate the evidence of Regina Mtema to establish the appellant was an accomplice to the offence alleged to have been committed by Wile. In the circumstances the court has failed to see any imperfection or contradiction in the record and decision of the trial court as stated by the District Court Magistrate in his decision and submitted by the respondent in her submission.

Having arrived to the above finding the court has found there is no need of dealing with the third ground of appeal as whatever decision which will be arrived in relation to the said ground will not overturn what has been stated by the court in relation to the first and second ground of appeal of the appellant. In the consequences the court has found the District Court of Temeke erred in law and fact by

nullifying the decision and proceeding of the trial court and ordering the case to be tried de novo on the ground that the record of the trial court was imperfect without showing which imperfection he discovered in the record of the trial court which authorized him to arrive to the above stated decision.

In the upshot the appeal is hereby allowed, the decision of the District Court of Temeke made in Criminal Appeal No. 13 of 2016 is quashed and the decision of Mbagala Primary Court made in Criminal case No. 944 of 2015 is accordingly restored. This being a criminal matter the court is not making any order as to costs which was prayed for by the appellant. It is so ordered.

Dated at Dar es Salaam this 19th day of February, 2018.

I.ARUFANI
JUDGE
19/02/2018