IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

(APPELLATE JURISDICTION)

RM. CRIMINAL APPEAL NO. 10 OF 2019

(Originating from Iringa Resident Magistrate Court Criminal Case No. 13 of 2018)

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

ABDUL MOHAMED OMARY NONDO .....RESPONDENT

Date of Last Order: 12/12/2019
Date of Ruling: 23/12/2019

JUDGMENT

KENTE, J

Abdul Mohamed Omari Nondo hereinafter simply referred to as the respondent, was charged before the Resident Magistrate's Court of Iringa with two offences namely publication of false information contrary to section 16 of the **Cyber Crimes Act (No. 14 of 2015)** and giving false information to a person employed in the public service contrary to section 112 (a) of the **Penal Code Chapter 16 Revised Edition 2002**. At the end of the trial, the trial court found that the respondent was not proved not only to have published the alleged information but also the falsehood

of the said information was not proved beyond reasonable doubt. The respondent was consequently cleared of the charges and acquitted.

The appellant the Director of Public Prosecutions is dissatisfied with the judgment of the learned trial Resident Magistrate and has come to this court to fault its validity. While Mr. Abel Mwandalama learned Senior State Attorney appeared to argue the appeal on behalf of the appellant, Mr. Kambole and Mr. Luoga learned counsel who had advocated for the respondent at the trial, have been retained to contest the present appeal.

According to the trial court's record, and this is common ground between the parties, on 7th March 2018 the respondent went to Mafinga Police Station where he met one Corporal Salim (PW1) who was then in the charge room office. He (respondent) introduced him to PW1 and reported to him that he had been kidnapped in Dar es Salaam by some unknown persons. Notably, before the reporting incident which finally gave rise to the respondent's prosecution, he had been in Dar es Salaam where the alleged abduction is said to have occurred during the late hours of 6th March 2018.

During the trial, it was the prosecution case that the respondent had on 7th March 2018 at Ubungo area within the City of Dar es Salaam, with

intent to deceive and mislead the public, published false information in a computer system through a telephone (number 0659-366125) presented in whatsapp claiming that he was at risk while knowing the said information to be false. That was in respect of the first count.

As for the second count, it was the prosecution's stance and accordingly particularized that, on 7th March 2018 at Mafinga Police Station, the respondent reported to one Corporal Salim (PW1) that he had been kidnapped by some unknown persons in Dar es Salaam, the information or report which he knew to be false. Needless to say, the respondent denied that allegation and, for the time being, I leave this matter for later. In the meantime I will revisit, albeit very briefly, the respondent's case as presented before the trial court.

In his defence, the respondent denied in the strongest possible terms to have committed the offences with which he stood charged. He said that at the time which is material to the occurrence of the incident culminating into his prosecution, he was a student at the University of Dar es Salaam and Chairman of an organization known as Tanzania Students Networking Program which *inter alia*, defends the rights of students. He said that on 6th March 2018 at about midnight, he was going to the home of his aunt who

lives at Ubungo Msewe. He then saw a car parked whereupon a person seated at the passenger seat called him. He said that, no sooner had he responded than he was suddenly hit from behind and forced to board the said car. He went on telling the trial court that, the attackers seized his luggage as they simultaneously ordered him to remain quiet. He claimed to have been beaten up and asked as to who was behind the intended demonstration which aimed at condemning the very unfortunate killing of one Aquilina who was a student at the National Institute of Transportation. The respondent went on telling the trial court that the kidnappers accused him with being used by politicians, particularly those belonging to the Chama cha Demokrasia na Maendeleo and one Mange Kimambi an outspoken critic of the government who apparently lives abroad in a seemingly self-imposed exile. From there he said, the kidnappers drove for quite a long time and finally abandoned him together with his belongings somewhere in the bushes. After the kidnappers left, he moved around and met some people who told him that, he was at Mafinga in Mufindi District. He said that he told them that he had been abducted from Dar es Salaam upon which one Samaritan led him to the Police Station at Mafinga where he recorded his statement. The respondent told the trial court and there is no gainsaying on the fact that at the Police Station, after recording his

statement, for some obscure reasons, the police seized all his belongings including his computer, telephone, identity card, health insurance card and his TNSP documents. He was interrogated and finally retained in lock up on the pretext that, that was for his own safety. From there onwards the Police would take him to Iringa Police Station, back to Mafinga and later on to Dar es Salaam as they quizzed him seeking to obtain from him the information concerning the death of Aquilina, and the person or persons who in fact were behind him. He said that while in Dar es Salaam, the Police accused him with participating in preparing the intended demonstration which was allegedly planned by Mange Kimambi and they also told him that, following the killing of Aquilina, he had on one occasion, demanded for resignation of the Inspector General of Police.

The respondent claimed to have been tortured by the Police saying that at one time, he was stripped and photographed in .front of female Police Officers. He said that all along, he was being pressed to confess that indeed he was being used by Mbowe and Zitto for their own ends. The respondent said that he talked to the director of Criminal Investigation through the phone whereupon the DCI, as he is popularly known by his acronym, urged him to confess that indeed he was being used by Mbowe

and Zitto. The DCI allegedly pressed him to convene a press conference and tell the members of the public that he had in fact abducted himself, whatever that means. He said that when he refused to comply with their demands, the Police whisked him back to Iringa and charged him with the above mentioned offences.

In arguing the appeal Mr. Mwandalama Senior State Attorney, having abandoned the first ground of appeal, he begun by contending that the trial Magistrate erred both in law and in fact for his failure to hold that the prosecution side had proved its case beyond all reasonable doubt. The learned Senior State Attorney went on contending that the trial magistrate failed to hold that he was *functus officio* to decide otherwise in respect of the respondent's (then accused) statement (exhibit P7). Finally it was the learned Senior State Attorney's contention that the trial court erred both in law and in fact when it held that, the respondent was treated as a suspect right from the beginning and not as complainant while the investigation machinery was working according to law.

Expounding on the third ground of appeal, Mr. Mwandalama submitted that after the first trial Resident Magistrate (Mr. Mpitanjia – RM) had ruled that exhibit P7 contained the respondent's statement to the

police, the successor trial Resident Magistrate (Mr. Chamshama - SRM) who took over from him was *functus officio* to find and hold in his judgment that the said statement had not been made by the respondent. The learned Senior State Attorney faulted the trial Magistrate for allegedly overruling his fellow Magistrate with equal jurisdiction.

Submitting in reply Mr. Kambole learned counsel for the respondent maintained that, while the decision by Mr. Mpitanjia – Resident Magistrate was in respect of admissibility of exhibit P7, the finding by the succeeding Magistrate (Mr. Chamshama) was in respect of reliability and on the evidential weight to be accorded to the said exhibit. Mr. Kambole submitted therefore that the succeeding Magistrate would be *functus officio* only if the first Magistrate had made an order finally disposing of the whole matter before him. The learned counsel referred me to the case of **Malick Hassan Suleiman V. Serikali ya Mapunduzi ya Zanzibar 2005 TLR 235** in support of his stance.

For my part, I intend to be very brief and straight forward in my response. Without demur, I entirely agree with Mr. Kambole. It must be said, with respect to the appellant that, the role of the first trial Magistrate was to clear for admission of exhibit P7 into evidence. It was therefore still

open and indeed incumbent upon his successor to determine as he dutifully did, the extent or the degree to which the said exhibit could be trusted to be accurate or believable. That is what the learned successive Senior Resident Magistrate did in his judgment. Otherwise it would be an abdication of his duties and indeed prejudicial to the respondent if the successor Magistrate were to fell hook line and sinker for whatever is contained in exhibit P7. In this connection I would say that, upon being admitted into evidence, any document, just like any other evidence becomes a subject of judicial investigation aimed at determining its truth and reliability. While my research relying on the decided cases within our jurisdiction has not landed me on any authority dealing with a similar situation, courts in India have held that:-

> *"admissibility of a document is one thing and its probative value quite another – these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil".*

(See **State of Bihar & Others V. Sri Radha Krishna Singh & Others, AIR 1983 SC.**

In my view, therefore, where a case is partly heard by one Magistrate and later on, due to some unavoidable circumstances the same case is reassigned to and finally heard and determined by another Magistrate, the successor Magistrate is not precluded or otherwise prevented from determining the weight to be accorded to, or otherwise probing into with a view to determining the reliability of the documentary exhibits received and admitted into evidence by his predecessor. To that extent therefore, I can find no legal justification and none was cited to me by Mr. Mwandalama for the proposition that, a Magistrate who takes over the trial from his successor is precluded from probing into and determining the evidential value of the documentary exhibits received and admitted into evidence by his predecessor. I would therefore hold that what the successor trial Magistrate did in his judgment was quite in order so far as he did not hold as inadmissible the document which was admitted by his predecessor.

Moving forward and going to the substance of the appeal itself, I now proceed to consider the second and fourth grounds of appeal which are in my view, inextricably interwoven. While the second ground of appeal faults the trial Magistrate for holding that the prosecution had not proved the respondent's guilt to the hilt, the second ground of complaint is against

the trial Magistrate's finding and holding that the respondent was treated as if he was a criminal suspect right from the outset.

As it will be noted, methodically the prosecution had sought to prove its case by presenting seven witnesses but, for the purposes of this appeal, I will only consider the evidence of the following material witnesses. These are two Police Officers based at Mafinga namely Corporal Salim (PW1) and Detective Corporal John (PW2) who were on duty on 7/3/2019 when the respondent went to report the alleged kidnapping. Others were Emmanuel Kisiba (PW3) the respondent's fellow student at the University of Dar es Salaam to whom the respondent sent a text message which is the subject-matter of the alleged publication of false information and Veronica Sylivester Fredy (PW4) a former school-mate and alleged lover of the respondent. Her evidence was briefly to the effect that she was communicating with the respondent at the time when he was allegedly in the hands of the kidnappers. This evidence was intended by the prosecution to demonstrate that, had the respondent been kidnapped, he could not have communicated so freely with his former school-mate-cum-lover. Finally was the testimony of Doctor Christopher Mbata (PW7) whose evidence was designed to show that the respondent was in good health a

fact which, in the opinion of the prosecution, ruled out any possibility of the respondent having been kidnapped.

Now as it seems, although there was no written evidence to that effect, there is no dispute on the issue of the respondent having reported to the Police at Mafinga on 7th March 2018. It also appears to me that despite the respondent's together with his counsel's seemingly lapse of memory, the fact that the respondent had sent a text massage to his fellow student one Emmanuel Kisiba (PW3) informing him that he was at risk was not in dispute throughout the trial. However, a controversy appears to arise in relation to the alleged publication of false information in the context of section 16 of the **Cyber Crimes Act (No. 14 of 2015)** and the falsehood or otherwise of the respondent's report to Corporal Salim (PW1) in view of the provisions of section 122 (a) of the **Penal Code**. For the respondent claims that he was kidnapped and that, on being released and set free by the kidnappers, he reported the same to the police at Mafinga Police Station while the appellant ruled it all out.

Section 16 of the **Cyber Crimes Act (No.14 of 2015)** under which the respondent stood charged, partly provides in clear terms that:-

"Any person who publishes information or date presented in a picture, text, symbol or any other form in a computer system knowing that such information or date is false, deceptive, misleading or inaccurate and with intent to defame, threaten, abuse, insult or otherwise deceive of mislead the public or counseling commission of an offence, commits an offence....."

Section 3 of the same Act defines the term "publish" to mean distributing, transmitting, disseminating, circulating, delivering, exhibit, exchanging, barter, printing, copying, selling or offering for sale, letting on hire of offering to let on hire, offering in any other way, or making available in any way.

Going by the allegations leveled by the prosecution side against the respondent together with the applicable law, it is certainly clear that in the first count, the prosecution was saddled with a duty to prove beyond reasonable doubt that:-

i). The respondent had published the alleged information.

ii). In publishing the said information, the respondent knew that it was false; and

iii). The publication was aimed at either defaming, threatening, abusing, insulting or otherwise deceiving or misleading the public or counseling the commission of an offence.

That as stated before, was in respect of the first count. In the second count, the prosecution had a herculean task of leading evidence proving once again, beyond reasonable doubt that:-

i). The respondent had given information to Corporal Salim (PW3)

ii). The said information was false.

iii). In giving the said information, the respondent had intended or he knew that PW3 would proceed to act on that information; and that,

iv). PW3 would on the basis of that information use his lawful power to the injury or annoyance of any person.

I have first and foremost asked myself whether there was any publication of the false information by the respondent to the public in this matter. With due respect to the appellant, the answer must be in the negative because firstly, there was no evidence showing that the message "I am at risk" was sent by the respondent and made available for all members of the public to read. The only thing the respondent did was to

just inform his fellow student (PW3) that he was at risk. One need not deploy any cannon of statutory interpretation in order to establish that communication of information to a single person does not amount to publication as envisaged under section 16 of the **Cyber Crimes Act, No. 14 of 2015.** Secondly, there was no conclusive evidence showing that the said message was sent at least to all whatsapp group members or participants. In these circumstances, it is increasingly apparent as I will hereinafter demonstrate that perhaps the Police might have been busy framing up the case against the respondent as to forget to remember that the offences which they were going to create and finally charge him with, were very technical and that they required thorough investigation together with a correct factual and evidential background.

Now, assuming but without accepting that the respondent had published the said information "I am at risk" can it be said, with any degree of certitude that what he communicated was false? And, could it have the effect of either defaming, threatening, abusing, insulting or otherwise deceiving or misleading the public or counseling the commission of an offence?

Now, while the Police appear to have concentrated on a very narrow interpretation of the word risk, the **Black's Law Dictionary, 8th Edition** (at page 1353) defines the term risk as one, the uncertainty of a result, happening or loss, the chance of injury, damage or loss especially the existence and extent of the possibility of harm; two, liability for injury, damage or loss if it occurs; three, (in the context of insurance) the chance or degree of probability of loss to the subject matter of an insurance policy; four, the amount that an insurer considers a hazard; someone or something that might be covered by an insurance policy and finally, the type of loss covered by a policy; a hazard from a specified source. Needless to say, even in common terms, the term "risk" has no single meaning. While the **Oxford Advanced Learner's Dictionary 8th Edition** at page 1323 places three meanings on the term risk, it defines the phrase "at risk" to mean in danger of something unpleasant or harmful happening.

It is therefore obvious that the term "risk" may be used with many shades of meaning. Moreover, one should remember that, as opposed to a common man in the street, the respondent had sent the disputed message to his fellow student at the University of Dar es Salaam. In my view, there can hardly be any gainsaying that the respondent might have not

necessarily and exclusively meant that he was himself in danger of something unpleasant or harmful happening to him. For what the respondent meant by that statement is open to interpretation. Even if what the prosecution maintained is what he meant, it does not necessarily follow, and there was no evidence to show that the said message could have the effect on the public as envisaged under Section 16 of the **Cyber Crimes Act.** There can hardly be any dispute that communication between two or more persons and the terms they use in such communication depends on various factors including among others, their level of education and professions. Having regard to all the circumstances of this case, with respect, I do not think that the police were justified in coming to the hurried conclusion that the respondent had meant and only meant that he was himself in danger and thereby deceived or misled the public. Moreover, if that is what he meant, as I shall hereinafter demonstrate, he had a justification.

When considering the appellant's case, the first point that becomes clear upon an examination of the evidence on record, is that the respondent was not kidnapped simply because:-

(a) He was communicating with his former school-mate and lover at the time which was contemporaneous with his kidnapping.

(b) He was in good health immediately after he was set free as was certified by Dr. Christopher Mbata (PW7).

In this connection, I have asked myself whether the above facts which were however not conclusively established, were sufficient enough for the Police not only to disregard the report made to them by the respondent but also to immediately turn him into a criminal suspect and finally prosecute him as they did. Is there anything specific which prevents a kidnapper from allowing his victim for whatever reasons to communicate with another or other persons? Is there anything which compels a kidnapper to ensure his victim is tortured so as to be in bad health before discharging and setting him free? For my part, I am convinced that if PW1 and PW2 had given the respondent a fair and just treatment by treating him with dignity, neutrality and trustworthiness, they would not have relied on such flimsy grounds as to dismiss his genuine complaints and quickly turn him into a suspect of giving a false report which I should say, with due respect, was an offence of their own making. In my opinion, the fact that the respondent had communicated with PW4 and that he was quite

healthy after he was set free by the kidnappers did not of itself, provide any warrant that he was not kidnapped at all. On this point, I have in mind the class of cases of kidnapping where the victims are allowed or even assisted to communicate with their relatives or friends as the kidnappers press for a ransom. We also have cases where the victims of kidnap were set free or returned absolutely unharmed. This goes to water down the position maintained by the prosecution which as amply demonstrate here in above, clearly stands on quick sand.

Given the way the respondent was treated upon contact with the Police at Mafinga Police Station, there is no doubt that he and his complaint were not taken seriously. In short, what comes out clearly from the evidence is that, there were no meaningful investigation efforts that were taken by the Police to achieve the best possible solution to the respondent's complaint.

Now, according to Order No. 309 (2) (a) & (b) of the **Police General Orders**, all necessary police action must be taken as soon as a report of a criminal incident is made and such action shall not be delayed while the report is being recorded. However, the order goes on stipulating, delays in recording are permissible where, as it was in this case, a report of the

criminal incident made is in respect of cases of emergence when urgent police action is necessary to prevent, among other things, the escape of criminal suspects.

In that view, given the nature of the incident which was reported by the respondent at Mafinga Police Station, it was incumbent upon PW1 and PW2 in collaboration with other Police Officers, to first and foremost try to establish the identity, trace and finally apprehend or cause the apprehension of the alleged kidnappers. However, to everybody's dismay and as if the police had already made up their minds, the respondent was not believed right from the outset. This explains the genuine complaint by the respondent's counsel together with the correct observation subsequently made by the learned trial Magistrate in his judgment that the respondent was treated as if he was a criminal suspect right from the beginning.

Moreover, the evidence of PW1 and PW2 who, I should also say, with due respect that they were seemingly the witnesses who had their own interests to serve in this case, clearly shows that the Police officers at Mafinga were neither prompt nor efficient. As stated before, after the respondent had reported to them, they could not take any appropriate

action geared towards catching the alleged kidnappers. For instance there is no evidence suggesting that they informed their counterparts in the neighbouring Districts and Regions who could probably put road-blocks across the high way and seek to arrest the suspects. To put it in a nutshell, I dare say, but not without regret, that on the basis of the evidence on record, instead of being a victim of crime as he ought to have been, the respondent's status was swiftly changed into a victim of procedural injustice. I confess that, I have found it impossible to resist the temptation to observe, though not necessarily with any degree of exactitude that, given the facts and the circumstances obtaining in this case, the approximate reality is that the respondent could have been prosecuted just to cover up the truth. This theory is not founded on quicksand and the reason for the above observation is not farfetched. It is given credence by the fact that, while it is a common feature in all police investigations especially in respect of all complicated offences in our country that they normally take long to conclude, in the present case, the respondent who was certainly tired and haggard, having gone through what could have been so far the most trying moments of his life, was suspected to be a liar and hurriedly kept under police custody immediately after he reported to the police to have been kidnapped. This in my view, points to nothing but a

cover up. With all due respect, it was artificial for the Police in such a serious case of kidnap not to believe what the respondent had told them, without conducting any investigations. By any standards, the probability of a foul play was very high in this case and it is plain for all and sundry to see. For, if the Police had failed to find any grain of truth in the respondent's report, why did they not let him go and take time to conduct investigations before they could, if necessary, simply close his case for lack of evidence as they normally do? With due respect, the unsympathetic attitude which was demonstrated by the police at Mafinga in this case was hardly consistent with the common practice by the members of our Police Force upon receiving a complaint from a victim of crime. What they did was not pleasing at all as it was not the orthodox way of handling victims of crime.

Having regard to the seriousness and indeed the heinousness of the offence of kidnapping together with an insidious recent trend towards offences of this nature in our country, it hardly needs to be emphasized here that the police should have taken the respondent's report more seriously. Ironically however, while in any civilized society like ours kidnapping ranks among the outrageous offences, for the reason best

known to themselves, and apparently in total forgetfulness or disregard of the adage that "don't scratch your shoe when it is your foot that itches", the police appear to have had their own predetermined decision which made them to develop cold feet or purposely decide to down-play the respondent's report. As it turned out, having made their own finding on investigations not even started, they embarked on quizzing the respondent several times moving him from one Police Station to another before they finally charged him in court.

Notably, the fact that the respondent was suspected of giving false information and consequently kept under custody immediately after he reported to the police and that his complaints were simply consigned into oblivion remained substantially uncontroverted throughout the trial. All along it was alleged, without any sense of professionalism or at least the fear of God, that the respondent was retained simply because of his own security! For my part, I cannot be sold for such a flimsy explanation. For I do not think that any court of law, properly so called, should take the explanation that the respondent was retained simply for his own security with any degree of seriousness. To say the least, the respondent in this case was a victim of dereliction of duty by the police, pure and simple. And

when put together, what our reputable Police Force did in this case creates apprehension over the vitality of their criminal investigation department to deal with an insidious trend of cases of kidnapping. Conversely, it also gives impetus to the kidnappers to continue with their sinister plans with the confidence that, in the end, they would never be recompensed for their wrong doings.

Before I conclude this judgment, I wish to register my grave misgivings about the relatively dramatic events culminating in the respondent's prosecution. If it is true, but I should hastily say that I do not want to believe that the respondent was really subjected to the rigours of these charges simply because of his being overly critical to some members of the Police Force or the suspicion that he was being used by some politicians especially those from the opposition as he consistently maintained throughout the trial, then the prosecuting agency is reminded that:-

> *"People wielding any sort of power over others should be careful not to bring in private and personal idiosyncrasies in public decision making as this would lead to unjust results...."*

(See **Republic V. Mt 12153 L/CPL Wagenyi [1983] TLR 141.**

Otherwise, we will be genuinely accused of having seen it coming but having done nothing when we will reach to the most undesirable stage for which I am driven to recall and echo the observation made by Korosso, J (R.I.P) in the case of **Mafumba Jilawaji V. Budu Mnyagolya [1992] TLR 310 at 314** where he pungently warned our law enforcing organs thus:-

> *"Time may one day come in not a distant tomorrow when these humble citizens of this free land will screw up their courage and then provoke the wisdom of the Judges by calling upon them to adjudicate between them and the Government on suits based on malicious prosecution by law enforcing officers".*

It common knowledge that, grave responsibility is placed upon everybody in the law enforcing and public prosecution offices. It is their duty to investigate crimes, arrest and finally prosecute or cause the prosecution of all transgressors of the law but at the same-time, they must never lose sight of the need for fairness to the suspected offenders or whoever comes before them. For the fair administration of criminal justice in Tanzania is not the exclusive domain of the courts. The Police and the

Directorate of Public Prosecution are also very important and indeed in dispensable role prayers.

With the above remarks and for the above-stated reasons, I do find that, all in all, there was no other rational explanation for the respondent in this case, taking into account his unassailed record of a sound state of mind, to have suddenly emerged from wherever he might have been and gone to report to the Police Station at Mafinga that he had been kidnapped from Dar es Salaam and dumped at Mafinga while knowing or having the reason to believe that, he had not. I also find that on the evidence on record, there is nothing showing conclusively that the respondent had sent a message informing the public in general that he was at risk. What is more is that, even if he had sent it, no witnesses were called to give evidence on the general reaction of the members of the public after receiving the said message. But most importantly and as stated earlier, the only thing the respondent did was to just send the said message to his college-mate which was neither an offence under any of our laws nor sinful. As the Latin maxim goes, *Nulla poena sina lege*, I would for these reasons find, like the learned trial Magistrate, that the appellant's guilt had

not been proved at all leave alone being proved beyond reasonable doubt. I would therefore dismiss this appeal in it's entirely, as I hereby do.

It is so ordered.

DATED at IRINGA this 23rd day of December, 2019.

R. M. KENTE
JUDGE