

IN THE HIGH COURT OF United Republic of TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO: 241 OF 2016

(From Criminal case no 320/2015 at the Resident Magistrate's Court of Dar es Salaam
at Kisutu)

SAED KUBENEA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MASABO, J.:-

The Appeal before me originates from the Criminal Case No 320/2015 at the Resident Magistrate's Court of Dar es Salaam at Kisutu where Saed Kubenea, the Appellant herein, was successfully sued for using abusive language contrary to section 80(1) of the Penal Code [Cap 16 R.E 2002]. Aggrieved, he filed this appeal against the conviction and sentence. In his grounds of appeal he complained that the trial erred by: failing to analyze the issues framed; entering judgment without analyzing evidence on record; convicting the appellant on the basis of weakness of defence case; failing to analyze whether the words allegedly used by the accused were abusive and and holding that the issue of independent witness has no legal basis.

When the appeal was called for hearing, the appellant was represented by Mr. Peter Kibatala, learned Advocate whereas the Respondent Republic was represented by Ms. Christine Joas, Learned State Attorney.

Mr. Kibatala opened his submission by consolidating the 1st, 2nd, 3rd and 5th grounds which meant that the grounds were reduced into three, namely consolidated ground No. 1, 2, 3 and 5 as first ground and ground 4 as second ground and ground 6 as third ground. On the consolidated ground No. 1, 2, 3 and 5 he submitted that the trial court misdirected itself by failing to address itself to the issues it had drafted. He reasoned that in page 15 to 16 of the judgment the court framed issues but it later abandoned them and proceeded unguided thereby making general statement that it has scrutinized the evidence without indication of the evidence which it scrutinized. He reasoned further that the court erred by making reference to submission which are irrelevant in arriving at the decision. In a nutshell, Mr. Kibatala's bone of contention on this issue is that the trial court fell short of scrutinizing the evidenced tendered in court as it only reproduced the testimony of the parties and rendered no thorough analysis to show that indeed the allegation leveled against the appellant were proved. In support he cited the case of **R v Kerstin Cameroon** [2003] TLR 84 where it was held that the guilty of the accused is not proven if the explanation is the one that is reasonable. He added further that the Appellant gave uncontroverted testimony of the events transcending into the charges against him and that no weight was attached to his testimony. On the 4th ground he argued that the trial court erred by holding that the defence is very weak because as a matter of principle conviction cannot be based on the weakness of the defence case. The court had a duty to analyze the words uttered if any to see if they are at all offensive. With regard to the 6th ground Mr. Kibatala

faulted the trial court for its failure to appreciate the need for independent witness and relying only on prosecution witness who were on one way or the other connected to the complainant who was the Appellant's political rival. He also faulted the court for ignoring the fact that the incidence happened in the course of political rivalry hence the utterance of the impugned words if any ought to have been considered in that context.

On her part Ms. Joas vehemently resisted. She argued that the trial magistrate correctly analyzed the evidence from both sides and gave the verdict in page 16 of its judgement. She argued that the trial court was justified in its finding because the word "Kibaka" is by its nature abusive not only to the complainant but to any other person. On the 4th ground she argued that the court did not base its finding on the weakness of evidence tendered by the appellants but convicted the appellant on the basis of testimony lead in court by the prosecution and that this is evident in page 16 of the judgment where the court held that the prosecution has managed to prove their case beyond reasonable doubt. Regarding the 6th ground of appeal she submitted that the issue of an independent witness is immaterial because what matters in law is the credibility of a witness. On the justification that the words were altered in the course of political campaigns, she reasoned that being political rivals does not in any way justify the use of abusive language against one another hence the appellant cannot use this fact as a justification or defence.

In rejoining Mr. Kibatata raised an entirely new ground concerning the legality or otherwise of the conviction. Ordinarily a party is not at liberty to introduce a new ground at this stage. He/she is expected to rejoin his submission in chief. However, considering that the issue raised concerned the propriety or otherwise of the judgment which is the centre of this appeal, this court found it just to allow Mr. Kibalata to address the court on this issue while also according Ms. Jaos the right to respond. Addressing the court Mr. Kibatata argued there is no conviction as the judgment does not comply with section 312 of the Criminal Procedure Act, Cap 20 RE 2002 as it does not state the specific provision under which the appellant was convicted. In reply Ms Jaos did not object the anomaly but argued that, the mistake is minor and curable under section 388 of the Criminal procedure Act.

Considering that the bone of contention in this point centres on the validity of conviction dictates that, it be resolved prior to determining the grounds raised in the memorandum of appeal. Upon perusal of the judgment I have found merit on the issue raised by Mr. Kibatata in that the conviction part does not state the specific law under which the appellant was convicted. The issue for determination is therefore whether or not the conviction above complies with the requirement under section 312(2) of the Criminal Procedure Act, Cap 20 RE 2002 and if so, whether the defect and minor and curable under section 388 as submitted by the learned State Attorney. For clarity I will reproduce both provisions. For better understanding of section 312 (2) I will also reproduce section 235 with which it is usually read together to form the intended meaning.

235 (1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code

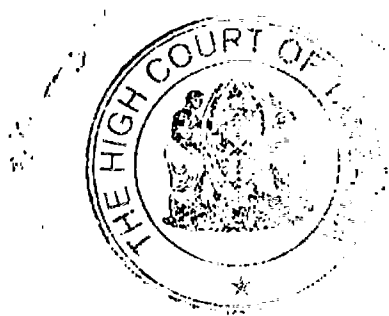
312 (2) In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.

This provisions have been interpreted in a number of decisions including in **Kelvin Myovekla v R** Criminal Appeal No. 603 of 2015 (CAT) (Unreported); Shaban **Idd Jololo & 3 others v R** Criminal Appeal No. 200 of 2006(CAT); and **Fredrick S/o Godson & Jacob s/o Daniel v R** Criminal Appeal No. 88 of 2012 (CAT) Unreported; The position of the law as well stated in these authorities is that section 312 imposes a mandatory requirement that the trial court must enter conviction. There is however a slight difference between the above case and the instant one in that in most of the cases cited above, the trial used the words "found guilty" instead of conviction while in the instant case, the word "convict" has been used. The question would then be, is this omission a minor one and curable under section 388 as suggested by the learned State Attorney. In **January Alhaji and Patrick Sarpis Msuya v R** Criminal Appeal No. 77 of 2016 the Court of Appeal held that section 388 of the Criminal Procedure Act can not be invoked to cure

the defect in section 235 as its words are couched in mandatory terms. Section 312(2) provides the content of the conviction. That, pursuant to this provision a conviction must specify the offence of which the accused stands charged as well as the section of the Penal Code or other law under which the accused person is convicted. The omission of any of these elements obviously renders the conviction incomplete. In the foregoing, since the omission to state the law offends a mandatory requirement of the law, section 388 cannot be invoked to cure the defect.

Accordingly, I order that the judgment be remitted to the trial court for the trial magistrate to enter a proper conviction. Upon a proper conviction been entered the appellant will be at liberty, if he finds it appropriate, to process a fresh appeal.

Dated at **DAR ES SALAAM** this 16th day of October 2019



J. MASABO
JUDGE