IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

PC CRIMINAL APPEAL NO 11 OF 2020

ASHA HASSAN_____APPELLANT

VERSUS

1. EMMANUEL MAGEMBE_____1st RESPONDENT
2. DORICA SANJURA_____2nd RESPONDENT
3. NYESEKO EMMANUEL_____3rd RESPONDENT

(Arising from the decision and orders of the district court of Musoma at Musoma, Hon. Marwa RM, in criminal appeal no 83 of 2019 dated 29.01.2020)

JUDGEMENT

Date of last order: 16.06.2020
Date of judgment: 31.07.2020

GALEBA, J.

In this appeal the appellant, **MS. ASHA HASSAN** is contesting the judgment that was passed on 29.01.2020 by the district court of Musoma, which decision dismissed her appeal she had filed there to challenge an acquittal of the respondents by the urban primary court at Musoma town. The charge in the primary court in criminal case no 722 of 2019 was that of threatening to kill as provided under **section 89(1) and (2) of the Penal Code [Cap 16 RE 202] (the Penal Code)**. The three respondents were acquitted by the primary court because, the appellant did not prove before that court how, the

respondents threatened to kill her by using an axe. The appellant was not satisfied with that decision therefore she filed criminal appeal no 83 of 2019 in the district court to challenge the decision of the primary court, but as stated above, the district court dismissed her appeal because after 1st respondent threated the appellant, he did not do anything more; he just left to his house. This is the decision that the appellant is challenging in this court.

The prelude to the disputed between the parties is that the appellant and the respondents are neighbors. The respondents are family members; the 1st respondent is the husband of the 2nd and the two are the parents of the 3rd. According to facts on record, it is that around 18.00 hours 08.11.2019 the 1st respondent went with an axe and started to cut a log of guava tree which had been fallen by him previously but whose ownership was disputed between the appellant the 1st respondent. When the appellant heard someone outside cutting the log "in dispute", she went out and inquired as to why the 1st respondent was cutting the log. According to all the 4 prosecution witnesses, when the appellant asked that question, the respondent retorted; ***"ukinichezea nitakuua"*** which literally means, ***"if you***

continue playing around me, I will kill you." According to the prosecution the 2nd and 3rd respondents did not threaten to kill the appellant, but they made funny of her and laughed at her. In the primary court, the respondents were all acquitted and the district court confirmed the acquittal. This confirmation is the main complaint of the appellant which he detailed in four (4) grounds of appeal.

As the decision on the 2nd ground of appeal might have an overriding effect on the whole appeal, I will start with that ground and see if it succeeds and if it will, the appeal will end there but if it will not, it will be necessary to resolve the other grounds of appeal, but for a moment I will first resolve the 2nd ground of appeal. That ground is to the effect that;

> ***"2. That the first appellate court erred in law and facts for acquitting the respondents basing on the fact that their words did not amount to threat at all upon the appellant."***

I will start with the 2nd and 3rd respondents. With respect to these respondents, no witness stated that any of them uttered a word of threat to the appellant not even the appellant herself. On appeal to this court, in respect of these two respondents, the appellant submitted as follows;

> ***"...Dorica and Nyeseko laughed. These two did not threaten me, they just abused me. They came later."***

With such submission, there is no way that the two lower courts would have held the two respondents liable. That is to say the two lower court's acquittal of these respondents is confirmed and the appeal in respect the 2nd and 3rd respondents is dismissed for want of merit.

As for the 1st respondent, the district court observed at page 3 of the judgment that;

> ***"I may agree, that the 1st Respondent uttered the word nitakuua, and indeed the word, I will kill you is a threat word. But according to her evidence, the 1st Respondent after saying these words to the appellant he left the place to his home. It is my finding that if really the Respondent gave threat, his act of going home indicated that he did not intend to intimidate the appellant or it was the end of the threat."***

Essentially that was the actual reason why the first appellate court concurred with the primary court and that is the very finding that the appellant is challenging in the 2nd ground of appeal. In the above passage, according to the 1st appellate court, after the 1st respondent had threated the appellant he was supposed to continue threatening her without living the scene, but because he left to his home after the threat, then he had no intention to intimidate the appellant. That reasoning is materially faulty. That reasoning is not only illegal but it is also illogical. The act of threatening was completed as soon as the threatening words were uttered. If the district court agreed, as I have demonstrated

in the above quotation, that the 1st respondent threatened the appellant, it was immaterial that the aggressor left immediately or he waited for a little more before he left. Committing the offence and leaving the scene had no relation; one act was criminal and the other was innocent. It was pointless as to what the 1st respondent did subsequent to the crime. That is to say, after the appellate court had made a finding of fact that the 1st respondent threated the appellant by word, for it that was enough; the court ought to have reversed the finding of the primary court by finding the appellant guilty and by imposing the appropriate punishment.

In supporting his reasoning the 1st appellate court cited the case of **REPUBLIC VERSUS MUSTAPHA SANDIRI [1990] TLR 120.** However that decision is distinguishable because, in that case, this court was construing the provisions of section 319(a) of the Penal Code which section provides as follows;

> ***"319. Any person who willfully and unlawfully sets fire to–***
>
> ***(a) any building or structure whatever, whether completed or not;***
>
> ***(b) n/a***
>
> ***(c) n/a***
>
> ***(d) n/a***
>
> ***is guilty of an offence and is liable to imprisonment for life."***

That section relates to setting fire on buildings or structures, it is not threatening to kill someone. So that authority is distinguishable. The section we are dealing with in this case is section 89(2) of the Penal Code which is on abusive language, brawling and threatening violence. It provides as follows;

> ***"89 (2) Any person who–***
> ***(a) with intent to intimidate or annoy any person, threatens to injure, assault, shoot at or kill any person or to burn, destroy or damage any property; or***
> ***(b) with intent to alarm any person discharges a fire-arm or commits any other breach of the peace, is guilty of an offence and is liable to imprisonment for one year and if the offence is committed at night the offender is liable to imprisonment for two years."***

This court is aware of the settled position of the law that an appellate court shall not interfere with the concurrent findings of two lower courts unless the two courts (1) completely misapprehended the substance, nature and quality of the evidence resulting in an unfair conviction or (2) where there were misdirection and or non-directions on evidence see **SALUM MHANDO VS R [1993] TLR 170** and **OMARI MOHAMED CHINA AND 3 OTHERS VS R CRIMINAL APPEAL NO 230 OF 2004 CA DSM UNREPORTED.** In this case the 1st appellate court made a finding of fact that the appellant was threatened by the 1st respondent, but the court misdirected itself that after threatening the appellant,

the 1st respondent was not supposed to leave. That is why this court is confortable to interfere with the concurrent findings of the two courts below.

It is the finding of this court therefore that indeed the 1st respondent threatened the appellant to kill her in terms of the above section, and the criminal act was complete and therefore legally punishable. Therefore this court finds the 1st respondent guilty of the offence of threatening to kill the appellant and accordingly it hereby convicts him under the provisions of section 89(2) (a) and (b) of the Penal Code read together with section 29(c) of the **Magistrates' Courts Act [Cap 11 RE 2019] (the MCA).**

Z. N. Galeba
JUDGE
03.08.2020

PREVIOUS CRIMINAL RECORD;
Nil

MITIGATION

Mr. Emmanuel Magembe; I am a father and I have children depending on me. On 06.08.2020 my son is marrying in Moshi and on 15.08.2020, there is a wedding ceremony in

Musoma and also my other son Modestus Masinde Magembe is at the University of Dodoma pursuing medicine, he is depending on me and also I have a grand daughter who is in nursing school in Geita, she is depending on me too. I also have a family to take care of and I have problems with my eyes, I once had an operation of both eyes. That is all.

Z. N. Galeba
JUDGE
03.08.2020

SENTENCE (COMMUNITY SERVICE ORDER)

In making this Community Service order or Sentence, I have considered that the 1st respondent is a neighbor of the appellant and they are likely to continue to be neighbors. This sentence is essentially meant to send a message to the 1st respondent that, every person in community is protected by law from threats. The other point considered in sentencing the 1st respondent is that courts and all other participants in criminal justice delivery system are in a move to reduce congestion is prisons. Also as much as possible prisoners must be useful to the community and also we

need to impose punishments which ensure that a prisoner does not dodge his family and parental responsibilities.

Although the sentence provided by law is one year imprisonment because the offence was committed during the daytime, but having complied with the provisions of section 3(9) (a) (b) and (c) of **the Community Service Act No. 6 of 2002 (the Community Service Act)** and as the 1st respondent has consented to the community service punishment in lieu of imprisonment, this court under the provisions of section 27 (2) of the Penal Code read together with section (3)(a) and (b) of **the Community Service Act,** makes the following orders;

1. The 1st respondent is hereby sentenced to provide community service as provided by the **Community Service Act** read together with the **Community Service Regulations 2004, GN no. 87 of 2004.**

2. The said community service shall be provided for a term of six (6) months effective the date of this order.

3. In providing the community service under this Community Service Order the 1st respondent shall be supervised by any community service officer assigned

to Mara region and shall at all times comply to directives of that officer or of any person that the community officer may appoint to supervise the 1st respondent.

DATED at MUSOMA this 3rd August 2020

Z. N. Galeba
JUDGE
03.08.2020

Court; This judgment has been delivered today on 03rd August 2020 in the presence **MS. ASHA HASSAN**, the appellant, **MR. EMMANUEL MAGEMBE, MS. DORICA SANJURA** and **MS. NYESEKO EMMANUEL**, the 1st, 2nd and 3rd Respondents respectively. Present was also **MS. AGRIPINA MEKABA** one of the Probation Officers, for Mara Region.

Z. N. Galeba
JUDGE
03.08.2020