

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

(PC) CRIMINAL APPEAL NO. 2 OF 2021

(Arising from Criminal Appeal No. 17/2019 of Handeni District Court, Originating from Criminal Case No. 142 of 2019 of Mazingara Primary Court)

BETWEEN

MOHAMED SALUM.....APPELLANT

-VERSUS-

JUMA KIBAYA.....RESPONDENT

JUDGMENT

Date of Last order: 16/09/2021

Date of Judgment: 04/10/2021

AGATHO, J.:

The Appellant filed a criminal charge against the Respondent at Kabuku Primary Court in Criminal Case No. 142 of 2019. The Appellant alleged that on 20/05/2019 the Appellant's spouse Asia Athuman son Mohamed Mhina has mental illness (lunacy) and there was a plan to do some witchcraft to hunt the witch at the Appellant's home. The Appellant refused and as a result the Respondent verbally abused him (the Appellant) by uttering the abusive words "*mbolo yako*", "*mshenzi wewe*" and "*mchawi wetu wa Msikiti wa Samagamlezi*." The charge brought before

the Primary Court was the use of abusive language c/s 89(1)(a) of the Penal Code [Cap 16 R.E. 2002]. The Appellant gave testimony at the Primary Court as shown on pages 3-4 of the record of proceedings at the Primary Court as on pages 1-2 of the Judgment. The Appellant (SMS1) testified himself that the Respondent verbally abused him. The Appellant also brought F 4055 Police Detective Constable Rashid (SMS 2) who testified that he was not at the crime scene. He simply prepared the charge after receiving a complaint from the Appellant. The Court while citing the case of **Jonas Nkize v R [1992] TLR 213**, held inter alia that there was no prima facie case made to warrant the Respondent (accused person) to make his defence. It proceeded to acquit the Respondent.

The Appellant was aggrieved by the decision of Kabuku Primary Court and preferred an appeal to Handeni District Court in Criminal Appeal No. 17 of 2019. In that appeal who raised tow grounds of appeal.

- (1) That the trial Magistrate erred in law and facts to acquit the Respondent while the Appellant proved the case beyond reasonable doubt.
- (2) The, the Trial Magistrate erred in law and fact to acquit the Respondent without considering strong evidence adduced by the Appellant.

The District Court heard the Appeal and asked itself whether the charge was proved beyond reasonable doubt; and whether the evidence adduced by the Appellant was strong enough to convict the Respondent. On answering the first issue as shown on pages 2-3 of the District Court judgment, the Court was not convinced that the charge was proved beyond reasonable doubt because there was no witness other than the Appellant himself whose testimony could have been corroborated. The District Court consequently rejected the first ground of appeal. As for the second, the Court was also not satisfied that the Appellant had any strong evidence to convict the Respondent. The Court was of the view that the Appellant was the sole witness whose testimony was weak. This is shown on page 3 of the District Court judgment.

As shown hereinabove, this appeal originates from the judgment of Kabuku Primary Court in Criminal Case No. 142 of 2019 and the first appeal before Handeni District Court Criminal Appeal No. 17 of 2019. The Appellant lost in both cases. Aggrieved by the decision of the Handeni District Court, he decided to Appeal to this Court.

The case at Kabuku Primary Court ended in favour of the Respondent because the Appellant did not bring any witness who was present in the crime scene to prove his allegation that the Respondent used abusive

language against him (Appellant). The Appellant brought SM2 F. 4055 Police Detective Constable Rashid. The Police Officer who recorded the complainant's application. That is seen on pages 2 – 3 of Kabuku Primary Court Judgment.

The Appellant was dissatisfied with the Primary Court decision. He appealed to the District Court where just like Primary Court he lost on the ground that there was no evidence to convict the Respondent. The District Court evaluated the evidence on record, and it was satisfied that the Appellant lacked strong evidence to prove the case beyond reasonable doubt.

The Appellant also on page 2 of the District Court's Judgment decided to transfer the case to the High Court and after several days he requested the Court to give him copies of proceedings and judgment. The Appellant also said he would rely on the grounds of appeal and the Court should deliver the judgment. This is visible on page 2 of District Court judgment.

On pages 2 – 3 of District Court Judgment the District Court evaluated the evidence on record and concluded that the charge was not proved beyond reasonable doubt and the Appellant was the sole witness

without any other corroborating evidence or eyewitnesses. The appeal was dismissed. That is conspicuous on page 3 of the District Court judgment.

The Appellant was yet dissatisfied, and he appealed further to this Court outlining three grounds of appeal:

- (1) That, the Handeni District Court's Magistrate erred in law and fact by failing to convict the Respondent herein due to the strong evidence of the Appellant.
- (2) That, the Handeni District Court's Magistrate erred in law and fact by failing to evaluate strong evidence adduced by the Appellant to prove his case.
- (3) That, Handeni District Court's Magistrate erred both in law and fact by failing to impose orders for compensation to the Respondent so that he compensate the Appellant for the offence which is straight forward that it was really committed by him and sufficient and clear evidence was produced by the Appellant in the Trial Court.

On the date fixed for hearing, the Appellant refused to make submissions on the grounds of appeal. He stated he relies on the grounds of appeal and prayed that the Court order the Respondent to file his written submissions

and thereafter to pronounce judgment. The Respondent did not file any written submissions. Instead, he filed what he called Default Notice in which he alleged that the Appellant has failed to file his written submissions. Nevertheless, the Court went on examining the grounds of appeal in the Petition of Appeal and its reply thereto.

To determine the merits of the appeal (the grounds of appeal), the Court examined the lower Courts proceedings and their judgments. The evidence on record examined to make informed decision. In line with the grounds of appeal raised, the Court asked itself the following questions:

- (1) Whether the Handeni District Court's Magistrate erred in law and fact by failing to convict the Respondent herein due to the strong evidence of the Appellant.
- (2) Whether the Handeni District Court's Magistrate erred in law and fact by failing to evaluate strong evidence adduced by the Appellant in proving his case.
- (3) Whether the Handeni District Court Magistrate erred by failing to impose orders for compensation to the Respondent so that he compensates the Appellant for the offence.

The parties were ordered to write submission on the appeal. The Appellant adopted his grounds of appeal as they are in the Petition of Appeal.

The Respondent filed the reply to the Petition of Appeal and no submission on appeal. He supplied the Court with what he called Default Notice. Such document cannot move this Court. It is as good nothing.

Consequently, the Court determined the Appeal basing on the ground of appeal and in the Petition of Appeal and the reply to that Petition of Appeal. This Court has drawn the following findings:

- (1) That he (Appellant) had strong evidence to convict the Respondent. This is not true. I have looked at the proceedings and judgment in the Primary Court and District Court. I could not see any convincing evidence to convict the Appellant. He who alleges must prove [Section 110 the Evidence Act, Cap 6 R.E. 2019]. This was also held in the case of **Abdul-Karim Haji v Raymond Nchimbi Alois and Joseph Sita Joseph [2006] TLR 419**. Moreover, the standard of proof in criminal cases is beyond reasonable doubt [Section 3 (2) the Evidence Act, Cap 6 R.E. 2019].

- (2) The Appellant claimed that the District Court failed to evaluate evidence. I should state from the outset that the evidence adduced at the Primary Court was that of the Appellant and Police Detective Constable Rashid who wrote statement/complainant. In addition to that, the testimony by the Appellant is not corroborated by any eyewitness or other witnesses.

Therefore, the allegations that the District Court did not evaluate is incorrect. It looked at the record of trial Court proceedings though not properly/regularly cited in the judgment of District Court. But that does not mean that the Appellant adduced any convincing evidence in the Primary Court. I have looked at the records of the Primary Court and the District Court. I have not seen strong evidence to prove the Appellant's allegation.

That the District failed to impose compensation order. I would say if the case was not proved beyond reasonable doubt there can neither be conviction nor sentence be it fine or imprisonment. Thus, compensation claim is also unfounded.

Conclusively, the case was not proved beyond reasonable doubt. Again, a case is not proved by mere allegation. Rather, it is proved by evidence. I find this appeal to lack merits, and I dismiss it.




U. J. AGATHO

JUDGE

04/10/2021

Court: Judgment delivered today 04/10/2021 in the presence of the Appellant and the Respondent.




U. J. Agatho

JUDGE

04/10/2021