IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

PC CRIMINAL APPEAL No. 04 of 2020

(Arising from the District Court of Muleba at Muleba in Criminal Case Appeal No. 11 of 2019 & Nyamilanda Primary Court in Criminal Case No. 27 of 2019)

LUCY BISMARK ---------- **APPELLANT**

Versus

OCTAVIAN RWECHUNGURA ---------- **RESPONDENT**

JUDGMENT

13.05.2021 & 26.05.2021

Mtulya, J.:

Ms. Lucy Bismark (the Appellant) knocked the doors of this court on 13th November 2019 protesting the decision of the **District Court of Muleba at Muleba** (the court) in **Criminal Case Appeal No. 11 of 2019** (the case) which held that the Appellant did prove its case beyond reasonable doubt. In its reasoning, the court cited **Regulation 5 (1) of the Magistrates' Court (Rules of Evidence in Primary Courts) Regulations, GN. No. 66 of 1972**, which provides that in criminal cases, the court must satisfy itself to the guilty of an accused person beyond reasonable doubt.

As the Appellant was not satisfied with both the decision and reasoning of the court, he preferred the present appeal attached with

two (2) grounds of appeal, briefly, *viz*: the court erred in law and fact by allowing Appellant's witness to testify for the Respondent; and the court erred in law and fact to hold that the Appellant had not proved its case beyond reasonable doubt. When the appeal was scheduled for hearing on 13th May 2021, both parties appeared themselves in persons without any legal representation. As the parties were lay persons, were brief to the points in grounds of appeal as it was plain that they understand their dispute in this appeal.

The Appellant submitted that the primary court magistrate who sat in **Nyamilanda Primary Court** (the primary court) in **Criminal Case No. 27 of 2019** had changed her key witness in favour of the Respondent. According to the Appellant, he summoned before the primary court Mr. Mathias Charles Bishobo (Mr. Mathias), who was Kasindaga Village Chairperson in Kyabitembe Ward of Muleba District, but the learned magistrate ordered him to testify for the Respondent. The Appellant submitted further that Mr. Mathias was at the scene of the crime when the Respondent committed the offence of abusive language contrary to the in section 89 (1) (a) of the **Penal Code** [Cap. 16 R.E 2019] (the Code).

The Appellant's submission was protested by the Respondent who stated that Mr. Mathias was present at the scene of the event and heard the conversations between the Appellant and Respondent and testified on his part on what transpired on the fateful day. According to the Respondent, Mr. Mathias testified that the offence of abusive language was not committed as it was alleged by the Appellant.

I have scanned the proceedings of the **Primary Court** in **Criminal Case No. 27 of 2019**. The record of this appeal shows that on 18th February 2019, the case was scheduled for mention, and the Respondent was not present. The Respondent then was summoned to appear for hearing on 5th March 2019. On this day, the case was heard on prosecution side and the Appellant promised to call a witness to testify on her behalf in the following word: *Shahidi aliyesikia unanitukana nitamleta atoe ushahidi. Kwa leo sina shahidi naomba tarehe nyingine niweze kumleta*. The Prayer by the Appellant was granted and the prosecution hearing was scheduled on 11th March 2019. On this day, the Appellant did not invite her witness and prayed: *Kwa leo shahidi wangu kapata udhuru. Naomba tarehe nyingine niweze kumleta*. The prayer was granted and prosecution hearing was set on 18th March 2019.

However, it is not clear what transpired on 18th March 2019, as the record is silent. The case was then called for prosecution hearing on 10th April 2019 and both sides were present. On this day, the Appellant is recorded to

have closed her case: *Sina shahidi mwingine. Naomba kufunga ushahidi upande wa mashtaka.* This prayer was granted and the court ruled that the Respondent had the case to answer. The evidence of the Appellant was short and clear as depicted in the proceedings of 5th March 2019:

> *...ilikuwa tarehe 13/02/2019 muda wa saa saba mchana. Nilitukanwa na SU1 kwa kuniambia wewe ni Malaya Mkubwa. Kisa ni baada ya Mimi kwenda kumdai pesa yangu kwa bidhaa alizokuwa anachukua. Ni hayo tu.*

In his defence, which was also very brief, the Respondent was recorded to have stated that:

> *...ilikuwa tarehe 13/02/2019 nikiwa kazini kwangu na alikuja SM1 na alimkuta Mwenyekiti. Alidai hela yake, nikampa, akaondoka. Ni hayo tu.*

In order to substantiate his defence, the Respondent invited Mwenyekiti wa Kijiji cha Kasindaga (Kasindaga Village Chairman), Mr. Mathias to testify for him. On 15th April 2019, Mr. Mathias was summoned and appeared to testify as SU2. In his brief testimony, SU2 stated that:

> *Mnamo 13/02/2019 mida ya saa sita mchana, nilishuhudia SM1 akiingia dukani kwa SU1 akitaka hela yake kwa ghadhabu. SU1 alichukua pesa Tshs. 3,000/= akanipatia na*

nikampatia SM1. Baada ya siku mbili tulipata wito wa SU1 kushtakiwa. Ni hayo tu.

During court's inquiry, SU2 stated that: *Hakuna mzozo uliotokea, isipokuwa SM1 aliondoka akimtukana SU1 kuwa atamtabua.* In its decision, the primary court found the Respondent not guilty of the offence and acquitted him. In its reasoning, the primary court stated that:

Mahakama inaona kwa SU1 hakumtukana SM1 kwa sababu ya SM1 kukosa ushahidi wa kile alichokitaja kuwa yupo mtu aliyesikia na mtu huyo hakumleta. Lakini SU1 alimleta SU2 kuthibitisha kuwa huakumtukana SM1. Upande wa mshtaka umeshindwa kuthibitisha kesi yake pasipo kuacha shaka lolote. Mahakama inamwachia huru mshtakiwa.

This decision and reasoning was not received well with the Appellant hence preferred **Criminal Case Appeal No. 11 of 2019** before the **District Court of Muleba at Muleba**. In the District Court, the court held that:

...the appellant submits that there was a change of witness. In measuring the weight of evidence, the number of witnesses does not affect the decision of a case rather the quality of evidence.

On my part, I think, I have displayed what is in the record of this appeal. The record shows that on 5th March 2019, the Appellant promised to call witness to testify on her behalf and the prayer was granted. However, on 10th April 2019, the Appellant prayed to close the prosecution and the prayer was granted by the primary court. No reasons were registered in the record, but during the hearing of the present appeal, the Appellant claimed that her witness was changed by the learned primary court magistrate to testify for the defence case.

This allegation of the Appellant is not reflected on the record. In any case, the record shows that the Appellant did not mention either name or title of a person he intended to call to testify for her. The practice of this court has been that where, for undisclosed reasons, a party in a case fails to call a material witness on her side, the court is entitled to draw an inference that if the witnesses was called to testify, he would have given evidence contrary to the party's interests (see: **Hemedi Saidi v. Mohamedi Mbilu** [1984] TLR 113).

Furthermore, the practice of this court has been that in measuring the weight of evidence, it is not the number of witnesses that counts most but the quality of the evidence. The precedent in **Hemedi Saidi v. Mohamedi Mbilu** (supra) categorically stated that:

In measuring the weight of evidence in such cases as the present one it is not, however, the number of witnesses whom a party calls on his side which matters. It is the quality of the said evidence. In this connection the evidence of a single witness may be a lot heavier than that of ten witnesses.

It is this issue of the weight of the evidence in this case that takes this court to the second ground of appeal where the Appellant submitted that she had proved the case beyond reasonable doubt. It is fortunate that this court displayed all that is reflected on record. Both parties admitted that at the scene of the crime there was third person hearing their conversations and was invited in the primary court as SU2 to testify on what happened. His testimony shows that: *Hakuna mzozo uliotokea, isipokuwa SM1 aliondoka akimtukana SU1 kuwa atamtambua*. In such circumstances it is unsafe to convict the Respondent in an offence of abusive language, which cannot be justified by evidences.

The rule of law has been that the burden of proof in criminal cases is on the prosecution side and the standard is beyond reasonable doubt (see: section 3 (2) (a) of the Evidence Act [Cap. 6 R. E. 2019] and precedents in **Said Hemed v. Republic** [1987] TLR 117; **Mohamed**

Matula v. Republic [1995] TLR 3; and **Horombo Elikaria v. Republic,** Criminal Appeal No. 50 of 2005). It is not the duty of the Appellant to prove its innocence. That is why the Court of Appeal in **Mohamed Matula v. Republic** (supra), categorically stated that:

> *In a criminal case, the burden is always on the prosecution. It never shifts and no duty is cast on the appellant to establish his innocence.*

I understand the Appellant during the appeal hearing was complaining of fabrications of evidences and change of her witness by learned primary court magistrate and was put under arrest for forty five (45) minutes without any justifiable cause on the 10th April 2019. All these allegations are not depicted on the record of this appeal and in any case this is not proper forum to settle the matter. This is not legal or judicial matter hence this court has no mandate. It is purely administrative or disciplinary issue. The proper forum to settle the matter is the **District Judicial Officers Ethics Committee** (the Committee) which is empowered to receive and investigate complaints submitted by members of the public on misconduct of the primary court magistrates.

As this court is also empowered under the **Constitution of the United Republic of Tanzania** [Cap. 2 R. E. 2002] and precedent in **Rev. Christopher Mtikila v. Republic**, Civil Appeal No. 45 of 2009, to advice individual persons and institutions on various matters, the Appellant is advised to consult the Committee and register her administrative complaints in search of her justice and justice of the learned primary court magistrate, who is not party in this appeal and cannot be afforded an opportunity to be heard.

Having noted the record is not reflecting what the Appellant claimed on the change of her witness in favour of the Respondent, and considering the evidences registered in the primary court do not prove prosecution case beyond reasonable doubt, I find the appeal to have no any merit whatsoever and accordingly dismissed. I therefore sustain both decisions of the lower courts, the Primary and District Court courts.

It is accordingly ordered.

F. H. Mtulya

Judge

26.05.2021

This Judgment was delivered in Chambers under the seal of this court in the presence of the Appellant, Ms. Lucy Bismark and in the presence of the Respondent, Mr. Octavian Rwechungura.

F. H. Mtulya

Judge

26.05.2021