IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC CRIMINAL APPEAL NO. 38 OF 2020

(Appeal from the Judgment the District Court of Tarime at Tarime in Criminal Appeal no. 47 of 2020)

ROBI KENEDY..... APELLANT

VERSUS

VAILET OOKO..... RESPONDENT

JUDGMENT

5th July and 26th July, 2021

MKASIMONGWA, J.

Vailet Ooko, the respondent herein was arraigned before the Primary Court of Tarime District at Shirati for the offence of using abusive language contrary to Section 89 (1) (a) of the Penal Code. It was alleged by the complainant one Robi Kenedy that, on 18/03/2020 at around 11.00Hrs at Buriri village within Tarime District the respondent used abusive language against her.

After full trial of the matter the Primary Court found the respondent not guilty and she was accordingly acquitted. The appellant was aggrieved by the decision of the trial Court hence lodged an appeal before the District Court of Tarime at Tarime. The appeal which was registered as Criminal Appeal no. 47 of 2020 was not successful. The appellant still dissatisfied by

the decision of the District Court she came to this Court armed with Memorandum of Appeal challenging it. The appeal to this court consists of four grounds namely in verbatim;

1. *That the trial court and 1st Appellate court misdirected themselves in there (sic) findings on believing that the appellants witness one Eliza d/o Kenedy was couched to state her evidence she produced before the court, this caption was wrongly admitted, not proved.*
2. *That both lower courts erred in law and in fact when refused (sic) to consider the evidence tendered by Eliza Kenedy a witness aged 14 years who was present when the accused person uttered the said words that ndiyo maana unatombwa na mtoto wako wa darasa la sita, tena unafirwa pia kuma la mama yako, the said evidence was very strong to support the case and when the trial court refused to consider the same was to loosen the case on the side of the appellant.*
3. *That the lower courts erred in law and facts to admit the cooked evidence of the accused person that on 18/3/2020 she was at Kenya without proving the same.*
4. *That basing on the lack of legal bases on the respondent who had no even a single witness to support her defence, the decision passed in his favor was a poor finding and for that, the judgment was based on unfair hearing, as both courts (magistrates) have acted as witnesses to the accused rather than legal actors.*

Before proceeding further with the matter I find it material worth to show the material facts of the case one can apprehend from the evidence on record. They are as brief as that: On the 18/03/2020 the respondent was on her way to Shirati and the appellant called and informed her that her (Respondent) children had destroyed the appellant's properties. That is when the respondent uttered abusive words against the appellant stating that: *"ndio maana unatombwa na mtoto wako wa darasa la sita , unafirwa na kuma la mama yako".* The appellant alleged that the respondent said those words in the presence of her daughter (PW2). In defense the respondent stated that on the material date she was not around as she had travelled to Kenya on 16/3/2020 and came back to the village on the 20/03/2020.

On the date when the appeal came before me for hearing, the appellant enjoyed the legal services of Mr. Godwill Mweya (Advocate) whereas the respondent appeared in person. However, before hearing of the appeal commenced something strange happened. The respondent sought to speak an indigenous language implying a claim that she could not speak English or Kiswahili. After listening to the learned Advocate's submission on the issue of language, the court ruled out that the hearing should proceed and the parties were allowed to use Kiswahili and or English.

In his submission on the first ground of appeal, Mr. Mweya stated that the District Court misled itself when it confirmed the trial's court holding that the evidence of Eliza Kenedy (PW2) (appellant's daughter) was cooked while her evidence was direct evidence as she was present when the incident took place. He added that in terms of Section 127 of the Law of Evidence [Cap 6 R.E 2019], Eliza is a competent witness.

On the third complaint that courts below erred in law and facts to admit the cooked evidence of the Respondent that on 18/3/2020 she was at Kenya without proving the same, Mr. Mweya submitted that during trial of the case against the Respondent the later did not bring any evidence such as bus tickets to support her statement that on the material day she was actually in Kenya. Therefore, on appeal for failure to substantiate the defence, the District Court ought to have revised the decision of the trial Primary Court.

Lastly on the fourth ground of appeal, the learned advocate submitted that the lower courts had played the role of a witness when they held that the respondent was in Kenya and not at the scene of crime on the material day. Mr. Mweya prayed that this court sets aside the judgment of the District Court confirming that of the Primary Court which was to the effect that the Respondent was not guilty. In lieu of it this Court finds the respondent guilty of the offence he was charged with.

When the respondent was asked to reply to the submissions made by the learned advocate she still spoke in unknown language and the Court took it that she had nothing in reply save for what is stated in the filed Reply to the Memorandum of Appeal. That marked the end of the submission by the parties.

I have attentively gone through the submissions as well as the records laid before me in this matter. In substantiating the first ground of appeal the appellant's counsel submitted that according to the law Eliza Kenedy (PW2) was a competent witness. Therefore, the first appellate court did mislead itself when it upheld the finding by the trial court that the evidence given by the witness was just a couched one. In its decision the trial court found the witness (PW2) not a credible one. Being the court of first instance, the Primary Court had the advantage of hearing, seeing and assessing the demeanor of the witnesses. In that premise it is a trite law that appellate court can not interfere with the trial court's decision on the credibility of the witness unless there was miscarriage of justice and the trial court is supposed to state the reason for not believing that evidence. There are a plethora of decisions on this matter. Just to mention a few; In the case of **Bakiri Saidi Mahuru v. R:** Criminal Appeal No. 102 of 2012 at page 6 the Court cited the case of **Omary Ahmed v. R** (1983) TLR 32 (CAT) where the court held;

"The trial court's findings as to credibility is usually binding on an appellate court unless there are circumstances on the record which call for reassessment of credibility".

See also, **Jacob Tibi Funga v. R (1982) TLR 125; Antonio Dias Calderia v. Frederick Augustus Gray (1936) 1 ALL ER 540; Seif Mohamed E. L Abadan v. R:** Criminal Appeal No. 320 of 2009 (unreported). In the case at hand the trial court which had the advantage of seeing the demeanor of Eliza Kenedy reasoned in the judgment that Eliza was coached on what to say and that she crammed it hence unable to properly answer the questions she was asked. As such the Court did not consider her testimony. Having stated this Court is of a firm view that the first ground of appeal is devoid of merit and it therefore, fails.

In the third ground of appeal the appellant complained that the respondent did not bring any bus ticket to prove that she had travelled to Kenya. I have gone through the court's records and this issue was not first raised and considered for determination in the first appellate court. Therefore, this court will not detain itself as it was not raised before. This ground is also devoid of merit and it also fails.

As to the complaint that the court below turned themselves to be witnesses when they found and held that the respondent was in Kenya, I have gone through the courts' records and it is the respondent who stated

that she had gone to Kenya for burial ceremony of her aunty and that she returned back to her home village on the 20th of March 2020. That evidence given by the Respondent and which is on record eroded the contention by the appellant which constituted the fourth ground of appeal. Therefore, that ground of appeal is also devoid of merit and is accordingly dismissed.

In fine, since all grounds of appeal are devoid of merit, this appeal is hereby dismissed.

DATED at **MUSOMA** this 26th day of July, 2021.

E. J. Mkasimongwa

JUDGE

26/7/2021