"ORIGINAL"

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

(APPELLATE JURISDICTION)

PC CRIMINAL APPEAL NO. 10 OF 2019

(Original Criminal Case No. 27/2016, In the District Court of Singida at Singida)

MASENGA NTANDU ..... APPEALLANT

VERSUS

SHABANI MNJORI ..... RESPONDENT

JUDGMENT

02 & 16/08/2021

KAGOMBA, J.

The Appellant **MASENGA NTANDU** by Petition of Appeal filed on 27/03/2021 appealed to this Court against the whole decision of Singida District Court in Criminal Appeal No. 27 of 2016 which upheld the decision of Sepuka Primary Court in Criminal Case No. 41 of 2016. As such this is a second appeal on the matter whose

background is traceable from events which happened on 17/01/2016 at Ikungi Ward in Ikungi District in Singida region. In the afternoon of this eventful day, the respondent's son, Nuhu, suffered from a mental challenge which led him to doing all sorts of things not commonly done by a human being with sound mental health. Nuhu was mad and indomitable. He was running here and there at Ikungi neighborhood repeating the words "*nipeni panga niende Tabora*" which literary meant "give me a machete so that I travel to Tabora". Nuhu once fall down with foam coming out of his mouth as if he was dying. It needed a lot of efforts from his shocked and frustrated father as well as prayers from faithful Muslim neighbours to tame him. It was certainly not easy for the respondent to fathom the situation which, I think, looked like a nightmare to him.

In the midst of all the above events, it was alleged that the respondent went to appellant's house and knocked the door by using the gun which he was holding in his arms. It was further alleged that the respondent uttered insults to appellant's daughter, Fatuma, and asked her *"baba yako yuko wapi"* and also said *"leo ninamuua"* literary meaning *"where is your father?"* and *"I am going to kill him today"* respectively. The appellant was not at home when the respondent was alleged to have insulted and threated to kill him.

From the appellant's home, the respondent went down the road holding his son's arm and a gun in separate hands. He met with the appellant along the way where again it is alleged the respondent insulted the appellant and asked "*mmemfanya nini mwanangu?*" literally meaning "what have you done to my son?". Though not said directly, contextually it is was like the respondent was suspecting the appellant and another person or persons to have done something to his son, Nuhu. After asking that question to the appellant, the respondent is alleged to have told the appellant that "*ngoja nimfuate mwenzako, mwanangu akiharibika mtanitambua*", which literally means "let me go to your associate, if my son won't recover you will know me".

The above tale is briefly what caused the respondent to be summoned to answer a charge of threatening to kill the respondent by short gun. The respondent strongly denied the allegation, saying that he never met with the appellant on the eventful day. The respondent said while battling with his out-of–control-son, he had to run back home to pick his gun for safe custody at police station fearing that if Nuhu would pick it first he could use it to cause more breach of peace. He added however that while passing near appellant's residence Nuhu became more notorious and overpowered his father so much that the gun the father was holding fell down. One Jumanne Majengo picked it and helped with its safe custody until evening time when the respondent picked it from Mr.

Majengo back home. Fearing Nuhu could erupt again and use the gun, the respondent took the gun to Police station for safe custody on the next day i.e 18/01/2016. However, on 27/01/2016 the respondent was notified of a summons that required him to appear before Ikungi Primary Court on 28/01/2016. He said that he learnt of allegations against him at the Police station. The case was not heard on 28/01/2016 instead it was adjourned to 3/02/2016 when charges were read to him, but which he denied. The respondent was immediately thereafter held for another charge. This time it was alleged that he threatened to kill by gun another person, one Salumu Hassan. The second case had same particulars with regard to the date, time and even allegation of using the same gun. The only difference was the complainant. The respondent stated in evidence that the appellant was not appearing in court which led to dismissal of the case filed against him at Ikungi Primary court. He said the appellant turned to be a witness for Salumu Hassan in the second case which however ended up with victory for the respondent who was acquitted after being found not guilty. Apparently, it was after the Ikungi primary court case that the appellant filed this current case at Sepuka Primary Court against the respondent.

It was alleged before Sepuka Primary Court that on 17/01/2016 Shabani Mnjori, the respondent herein, unlawfully threatened to kill Masenga s/o Ntandu by using a short gun

contrary to section 89(2)(a) of the Penal Code, Cap 16 of the laws. Having heard the evidence adduced by witnesses for both parties, the Sepuka Primary Court acquitted the accused after finding that there was no credible evidence to incriminate him. The appellant appealed to the District Court of Singida in vain. The Singida District Court was convinced by the trial court assessment of the evidence. It found that the evidence adduced by the Appellant was tainted with doubts. The District Court cemented its position by invoking the decision in **Asha Ahmed Vs. R,** Criminal Appeal No. 50/200 (sic) where the High Court (Kimaro,J) held that:

> *"the accused person cannot be convicted basing on doubtful evidence".*

The District Court went on to dismiss the appeal with costs for being non meritorious and explained to the Appellant his right for further appeal to this court. The appellant has graciously taken this legitimate chance to have redress by filing this appeal.

The appellant in this appeal has submitted four grounds all based on the evidence, as follows:

1. *That, the appellate district court erred in law and in facts in dismissing the appeal without considering the fact that the respondent had threatened appellant with intent to annoy and or intimidate the appellant.*

2. *That, the appellate district court erred in law and in facts in upholding the trial court's decision without considering the witnesses' testimony that the respondent having being found at appellant premises holding a "Rifle" while saying inter alia; that 'Masenga uko wapi nikumalize' could have implicate respondent of the offence charged.*

3. *That, honorable appellate court having observed all the recorded evidence and testimonies before it should have quashed the trial court's decision, convict and sentence respondent of the offence accordingly.*

4. *That, honorable magistrate erred in law by not analyzing carefully the evidence given by the appellant and its witnesses given at the trial court.*

On the strength of the above grounds, the appellant prayed this court to allow the appeal and to quash and set aside the judgment of the Singida District Court and Sepuka primary court.

During the hearing the appellant was represented Mr. Mcharo, a learned Advocate while the respondent was unrepresented.

In his submission the learned advocate Mcharo urged this court to find that the words "*Masenga uko wapi nikumalize*" which were recorded on page 3 of the trial court's judgment as

incriminating and that the same should have been used to find respondent guilty. He also submitted that the fact that the respondent was found at the appellant's residence holding a rifle was also valuable evidence to incriminate the respondent. He further argued that PW2 Fatuma Ramadhani adduced evidence to the effect that the respondent asked about the whereabouts of his father while saying *"leo ninamuua"*.

The learned advocate for the appellant finally argued that if the court had analyzed the evidence adduced by the witnesses during trial, the court should have found the respondent guilty for what happened in Ikungi on 17/01/2016.

Mr. Shabani Manjori in his defence submitted that he had won in other different cases filed by the appellant on the same subject matter. He neither mentioned the case numbers nor the parties thereto. The respondent did not tell this court what exactly were the issues in those cases and decisions thereof. It would have been interesting for this court to see if the matter was *res judicata*. A relief was obtained after rejoinder by the appellant's advocate who explained that other cases were not connected to the case in hand.

The respondent however submitted that the primary court and the district court were right to acquit him as there were contradictions in the evidence adduced by the appellant's witnesses. He told the court that while he was accused of

threatening to kill by using "short gun" he has no short gun but has a rifle. He denied threatening the appellant and challenged the appellant to prove his allegations to this court.

Rejoining on the issue of possession of a gun, the appellant's advocate submitted that the respondent confirmed that he had a gun. He thus prayed the court to find him guilty. He added that the respondent also uttered threatening words when he met with the appellant's daughter (PW2) as shown in court's records. Such were the submissions of both parties.

After going through the pleadings and the submissions, this court has one main issue to determine. The issue is whether Singida District Court erred in upholding the decision of Sepuka primary court which acquitted the respondent.

Court records show that the respondent was charged for unlawfully threatening to kill the appellant by using short gun contrary to section 89(2)(a) of the Penal Code, cap 16. The charge section provides as follows:

> *S. 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.....is guilty of an offence and is liable to imprisonment for one year.*

It should be stated on the outset that the offence was a criminal one for which the appellant was required to prove its commission by the respondent beyond reasonable doubt. The evidence should be adduced to prove not only the act of threatening to kill but the threat so to kill should be by using gun and also the accompanying state of mind of the accused should be intentional. The particulars of the offence charged were as follows:

> *"Wewe Shabani Munjori unashitakiwa kuwa mnamo 17/01/2016 majira ya saa 10.00 jioni huko kijiji,kata, tarafa na (w) Ikungi na mkoa wa Singida kwa makusudi na bila halali ulimtishia mlalamikaji kumua kwa silaha bunduki aina ya short gun kinyume cha sheria".*

The above stated particulars can literally be translated thus: *Shabani Munjori you are charged that on 17/01/2016 at 4.00 pm at Ikungi in Singida region you intentionally threatened to kill the complainant by a short gun contrary to the law.*

In a twelve-page judgment, the trial court recorded and analyzed evidence adduced by five prosecution witnesses who were lined up to prove the case including the Appellant (PW1) himslef. The other witnesses were Fatuma Ramadhani (PW2) who is the appellant's daughter, Jumanne Saidi Ikhalah (PW3), Petro Mwalimu (PW4) and Mubila Mutiasi (PW5). Those who were present at the

appellant's residence when the respondent was alleged to have gone with a gun to threaten the appellant are PW2, PW4 and PW5.

It is recorded in the trial court proceedings and judgment that there were contradictions between testimonies of PW2, PW4 and PW5. While PW2 told the trial court that the respondent knocked the door using the gun while she was inside and that upon opening the door the respondent insulted her while saying "*baba yako yuko wapi*" "*leo ninamuua*", PW4 said the daughter (PW2) was outside the house but ran away and locked herself inside. This is contrary to what PW2 stated in her evidence. PW2 stated that she was inside the house when she heard someone knocking the door using the gun. She never said that she was outside the house and then ran and locked herself inside. The trial court doubted PW2's testimony particularly on how she knew that the door was being knocked by using a gun while she was inside the house. PW4 also contradicted PW2 by saying that he heard no insults from respondent at all. PW5 also did not hear any insults from the respondent and went further to contradict PW4 by saying that while he was at the appellant's residence PW2 was not there at the scene. Such were contradictions in testimonies which, no doubt left holes in the prosecution evidence for which the trial court found it uncomfortable to convict the respondent with such doubts. In the case of **Abuhi Omary Abdallah & 3 Others v. Republic**, Criminal Appeal No. 28 of 2010, Court of Appeal, Dar es Salaam (Unreported) held:

"Where there is any doubt the settled law is to the effect that in such a situation an accused person is entitled as a matter of right to the benefit of the doubts".

The first appellate court as stated earlier found substance in trial court's analysis of evidence. I find no reasons to differ with concurrent findings of the lower courts.

Apparently, there was contradiction even on the type of the gun the respondent is accused of using to threaten the appellant. Those who drafted the charge were confident enough to state that it was a short gun. Alas! It wasn't. It was a rifle. Even if this may not be a point of major contention, yet it adds to the fact that the evidence adduced to prove the charge was truly wanting.

It is trite law and very basic principal of criminal responsibility that for an offence of threat to kill someone by using gun to be established, both the act of **threatening to kill by gun** and the accompanying state of mind of the accused person should be proved. In this particular case evidence has shown that the respondent went to the appellant's house. The testimony of PW2 Fatuma Ramadhani that the respondent uttered threatening words *"baba yako yuko wapi, leo ninamuua";* the testimony of PW4 that the respondent uttered the words "*Masenga uko wapi nikumalize*", and the testimony of PW5 that the respondent knocked the appellant's door by using gun and then went away eastwards, apart

from the contradictions observed, did not prove threat to kill by using short gun as per the charge preferred against the respondent.

The contradictions cited in the trial court's evaluation of prosecution evidence, could only help the trial court to doubt credibility of entire prosecution evidence in light of the fact that the parties had another land conflict between themselves which could be linked to the case in hand.

The trial court in analyzing the evidence on page 8 to 10 of the judgment found no evidence showing how the respondent used the gun to threaten the appellant. A mere carrying of the gun without using it to threaten anybody can not be sufficient to incriminate anyone. The case of **Ibrahim Karume v. Republic,** Criminal Appeal No. 636 of 1969 which was cited by the trial court in similar regard is relevant. In this case it was held that an act by the accused person of going to the complainant's house with machete without evidence that he went with such machete for ill intention or that he had intention to use the same at that residence shall not amount to threatening.

I have carefully gone through the case records and it's my finding that the respondent went to the appellant's house with a gun. While there were threatening words adduced in evidence, such as *"mwanangu akiharibika mtanitambua"* in the testimony of the appellant (PW1) or *"leo nitamuua"* stated by PW2, or *"Masenga uko*

wapi nikumalize" as stated by PW4, there is no evidence of threatening to kill by using the gun as per the preferred charge. There is simply no nexus between the threat and the use of gun. The guilty of the accused person can only be established upon proof of the charge or charges, and not otherwise. The respondent was charged of threatening to kill the appellant by short gun not by words. The learned advocate for the appellant urged this courts to find the words uttered by the respondent and the fact that the respondent went to appellant's residence with the gun was enough evidence to incriminate him on the offence charged. We hold that a mere holding of the gun without using it to threaten anyone is not enough to establish the offence of threatening to kill by gun.

On the threatening words allegedly uttered by the respondent, we hold that there were contradictions and inconsistencies as to what exactly the respondent said to threaten the appellant or whether he said anything at all. The trial court gave the respondent the benefits of the doubts for such contradictions, which was perfectly right in criminal justice.

Since section 5(2) of the **Magistrates Courts (Rules of Evidence in Primary Courts) Regulations, 1972**, GN No. 66 of 1972 requires that an accused person should be acquitted if the evidence adduced does not prove the offence, the decision of the Sepuka Primary Court was correctly upheld by the Singida District

Court. The only thing the Singida District Court did not do was re-evaluation of the evidence, which is a duty of the first appellate court. This shortfall however did not occasion any injustice to the parties.

In the upshot, the appeal is dismissed for lack of merit. The judgements of both lower courts are hereby upheld accordingly.

ABDI S. KAGOMBA

JUDGE
16/08/2021

Judgment delivered in Chambers this 16th day of August 2021 before Advocate Mcharo for the Appellant and Shabani Mnjori, the Respondent. R.M.A R.A. Mahmoud was also present.

Right of appeal to the Court of Appeal duly explained.

ABDI S. KAGOMBA
JUDGE
16/08/ 2021