

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO.07 OF 2022

(Originating from the decision of the district court of Kwimba at Ngudu in Criminal Appeal No. 09 of 2020 and Primary Court Mwamashimba in Criminal Case No. 08 of 2020)

1. NYANDA MOSES

2. TULA MOSES

}

..... **APPELLANTS**

VERSUS

NGONGO MCHENYE RESPONDENT

JUDGMENT

8th and 24th June 2022

ITEMBA, J.

This appeal originates from Mwamashimba Primary Court. The appellants were charged with the offence of threatening to kill contrary to section 89(2)(b) of the Penal Code Cap 16 R.E [2019].

Facts of the case in brief are that; the respondent, Ngongo Mchenya who testified as SM1, told the court that on 25th August 2020 at around 1500 hrs the appellants went to his well to feed their cows. The 1st appellant was armed with stones, sticks and a machete while the 2nd had stones and a stick. That the 1st appellant used abusive language before the respondent's daughter and other people who came to fetch water. That one old man,



whose name was not mentioned, advised the respondent to leave the appellants and go home, still the 1st appellant followed him with the said weapons. That the respondent reported to the village executive officer. SM2. Simizi Malendeja had witnessed both appellant and the respondent at the scene but he did not mention that the appellant used any abusive language. He just saw that there were 'signs of intending to fight'.

The 1st appellant does not dispute being at the scene only that they argued about whether he should use the well or not. That; he only had a stick used for grazing cows. The second appellant had raised a defence of *alibi* that on the incident day, he was at his grandfathers' funeral.

Following such evidence, the appellants were acquitted by primary court, the respondent appealed to the District Court of Kwimba where the decision was revised. Both appellants were found guilty and were convicted and sentenced to pay a fine of **Tshs. 900,000/=** or in default to a **twelve months imprisonment**. In addition, the appellants were ordered to pay the respondent a compensation of **Tshs. 500,000/=**.

Upon being aggrieved by the said decision, the appellant have filed the present appeal with the following seven grounds:



1. *That, the appellate Magistrate erred in law by proceeding to hear and determine the appeal while the appellate Court had no jurisdiction, as the appeal was filed out.*
2. *That, the appellate magistrate erred in law by convicting the appellants while the charge was defective, as the statement of offence and particulars of the offence did not relate.*
3. *That, the appellate magistrate erred in law by convicting the appellants while the words which threatened to kill the respondent were not disclosed.*
4. *That, the appellate Court erred in law and fact by ordering the appellants to compensate the respondent with no proof damages and prayer to such effect.*
5. *That, the appellate Court erred in law by convicting appellants while the offence was not proved beyond reasonable doubt.*
6. *That, the appellate magistrate erred in law and fact by convicting the appellants in reliance on exhibit NO.1 (letter dated 27/08/2020 while it had no content in relation to the committed offence.*
7. *That, the appellate Court erred in law by failing to quash and set aside the Primary Court's judgment which acquitted the appellants before convicting them.*

When the matter was called up for hearing, the appellant was represented by advocate Anold Katunzi learned counsel, while the respondent appeared in person, unrepresented. Upon consensus by both parties, the appeal was



argued by way of written submissions. Both parties complied to the set schedule.

The issue herein is whether the appeal has merit. In order to determine that, I will start with the second ground of appeal. The appellant's counsel has submitted that the charge is defective because according to the statement of the offence the appellants are charged with threatening to kill but section 89(2)(b) of the Penal Code referred in the charge sheet is not related to threatening to kill. The respondent has not replied to this ground.

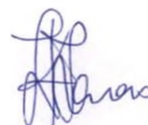
Section 89(2)(b) of the Penal Code states that:

"(2) Any person who-

(a) n/a

*(b) with intent to alarm any person discharges a firearm 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."*

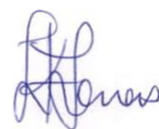
According to the provision of this section, the elements of offence have to support that the accused either 'discharged firearm' or 'committed any breach of peace' and the statement of offence have to be related to these particulars. However, the statement herein states 'threatening to kill'.



The case of **Musa Mwaikunda v Republic** (CAT) 2006 TLR 174 did set the minimum standard for fair trial and one of them being “the accused to understand the nature of the charge”. Going back to the chargesheet, as mentioned, the statement of offence states: ‘*kutishia kuua*’ which is threatening to kill. The section referred in the charge and the particulars of offence are neither consistent nor correlated. On the face of it, it cannot be established what were the charges against the accused an irregularity which makes the charge incurably defective. As the charge sheet is the one initiates a criminal case and as explained that the same was defective it could not have been relied to institute a case against the appellants.

In respect of the 1st ground of appeal, the appellant’s counsel submitted that the appeal which was filed before the District court was late by 8 days. The respondent has admitted that the appeal was filed out of time and further explained that the proper way to challenge the 1st appellate court was by way of revision and not appeal.

Having gone through the records, the judgement was delivered by the trial court on 6th October 2020 and the appeal to the District Court was filed on 12th of November 2020. There is a duration of 37 days in between.



The Magistrate's Court Act [Cap 11] R.E 2019 provides under section 20 (3) and I quote:

*'(3) Every appeal to a district court shall be by way of petition and shall be filed in the district court within **thirty days** after the date of the decision or order against which the appeal is brought.'*

Hence, the time limitation provided for filing an appeal is 30 days which means the appeal to the District Court was late, not by 8 days but 7 days.

The respondent has conceded that the appeal was filed out of time but he suggested that the appellants would have filed the revision instead of appeal. However, the issue of timing of filing an appeal before the court touches jurisdiction of the court, and it is a principle of law that issues affecting jurisdiction can be raised at any stage. See **Shahida Abdul Hassanal Kassam v Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported).

Section 20(4)(a) of the Magistrate Act (*supra*) allows the court to extend time but there was no application made for extension of time after the said 30 days have expired. I would therefore agree with the appellant's



submissions that the appeal which was filed before the District Court was out of time. Hence the said court had no jurisdiction to determine it.

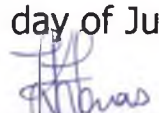
Having said that all the proceedings and findings of the District Court were a nullity. I find that the 1st and 2nd grounds suffice in disposing this appeal.

I therefore allow the appeal, quash and set aside the conviction and sentence respectively and order the immediate release of the appellants unless if held for other lawful cause.

It is so ordered.

Right to appeal explained.

DATED at **Mwanza** this 24th day of June, 2022.


L. J. ITEMBA
JUDGE
24.06.2022

Court: Judgement delivered at Mwanza this 24th day of June 2022, in the presence of the 1st appellant, Mr. Anold Katunzi, advocate for both appellants, the respondent and Mr. Pascal Alphonse, RMA.

