**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MWANZA SUB-REGISTRY)**

**AT MWANZA**

**CRIMINAL APPEAL NO. 27 OF 2022**

***(Original Sengerema District Court Criminal Case No. 28 of 2021)***

**ZAITUNI MSOLINA..... APPELLANT**

***VERSUS***

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**11th July & 16th August, 2022**

**DYANSOBERA, J.:**

The appellant Zaituni Msolina stood trial along with Felician s/o Kasheka (2nd accused) before the District Court of Sengerema in Criminal Case No. 28 of 2021 charged with four counts as follows. The appellant was charged alone in the 1st, 2nd and 3rd Counts while the 2nd accused was charged in the 4th Count.

In the 1st Count, the appellant was charged with conspiracy to commit an offence while in the 2nd Count the same appellant was charged with transmission of offensive communication by means of application service contrary to section 118 (a) (b) and (c) of the Electronic Postal Communication Act, No. 3 of 2010. The allegations giving rise to the charge in the 2nd Count were that the appellant on 29th day of January, 2021 in between 0830 hrs

and 0930 hrs at Sengerema Town within Sengerema District in Mwanza Region, by means of application service namely WhatsApp knowingly created a transmission of comment which is offensive in character with the intent to abuse one Theopista d/o Ngolo, to wit, she created a comment in WhatsApp Group namely Sengerema Mpya which says: *kum-add huyu katika hili kundi ni kutuvurugia kundi, kundi la umoja wa vijana alilivuruga mwisho likakosa muelekeo lipolipo tuu!! Kazi yake kubwa huwa ni kuwainbox watu kuwaeleza migogoro ya familia yake tuu na kuwapandikiza watu chuki. Aende zake huko, Hanaga Habari yoyote. Kuna mama mmoja alishavurugika akili, yaani mtu yanamkuta ya kumkuta mpaka anakuwa anatamani kusimulia kila mtu habari za maisha yake anachanganyikiwa kuokota makopo.*

She doesn't consider the law in place before writing the comment and posts.

In the 3rd Count, the appellant was charged with publishing a prohibited content contrary to section 5 (2) (a) (b), 10 (a), 12 (b,) (k)(i) which is read together with Section 18 of Electronic and Postal Communication (Online Content) Act, 2018. The particulars in this Count alleged that the appellant, 29th day of January, 2021 in between 0830 hrs and 0930 hrs at Sengerema Town within Sengerema District in Mwanza Region, by means of application service namely WhatsApp knowingly created a transmission of comment

which is offensive in character with the intent to abuse one Theopista d/o Ngolo, to wit, she created a comment in WhatsApp Group namely Sengerema Mpya which says: *kum-add huyu katika hili kundi ni kutuvurugia kundi, kundi la umoja wa vijana alilivuruga mwisho likakosa muelekeo lipolipo tuu!! Kazi yake kubwa huwa ni kuwainbox watu kuwaeleza migogoro ya familia yake tuu na kuwapandikiza watu chuki. Aende zake huko, Hanaga Habari yoyote. Kuna mama mmoja alishavurugika akili, yaani mtu yanamkuta ya kumkuta mpaka anakuwa anatamani kusimulia kila mtu habari za maisha yake anachanganyikiwa kuokota makopo.*

She doesn't consider the law in place before writing the comment and posts.

In the 4th Count, the 2nd accused was charged with failure to take a corrective measure for prohibited content c/s 5 (f), (g) which, read together with section 18 of the Electronic and Postal Communication (Online Content) Act, 2018. In this Count, the prosecution alleged that the 2nd accused, on 29th day of January, 2021 between 0830 hrs and 0930 hrs at Sengerema Town within Sengerema District in Mwanza Region, did failed to take corrective measures for objectionable contents as founder of a WhatsApp Group namely Sengerema Mpya.

After hearing three prosecution witnesses and the defence, the trial court found the case against the appellant in the 1st Count and that of the 2nd accused in the 4th Count not proved to the hilt. It acquitted them on the said counts. The same court, however, was satisfied that the case against the appellant in the 2nd and 3rd Counts was proved beyond reasonable doubt. The appellant was, in consequence, convicted and sentenced in those two counts to pay a fine of Tshs. 5, 000,000/= or in default of payment of the fine, to serve twelve (12) months term of imprisonment on each count. The sentences of imprisonment were ordered to run concurrently.

The appellant now appeals against conviction and sentence on three grounds set out in the petition of appeal as follows: -

1. That the learned trial magistrate of Sengerema District Court erred in law and fact by holding that the appellant was guilty on the 2nd count while there was no sufficient evidence to prove beyond reasonable doubt.
2. That the learned trial magistrate of Sengerema District Court erred in law and fact by holding that the appellant was guilty on the 3rd count for publishing a prohibited content while the said content was not a prohibited content in nature.

3. That the learned trial magistrate of Sengerema District Court erred in law by sentencing the appellant to pay a fine of Tshs. Five Million or serve 12 months' imprisonment for each count without convicting the appellant in the said counts.

At the time of hearing this appeal, the appellant was represented by Mr. Erick Katemi, learned Counsel while Ms. Margareth Mwaseba, learned Senior State Attorney stood for the respondent.

Arguing in support of the appeal, Mr. Erick Katemi made the following submission. With regard to the 1st ground of appeal, he contended that there was no sufficient evidence to ground conviction in the second count. Citing section 118 (a) (b) and (c) of the Electronic Postal Communication Act, No. 3 of 2010, learned Counsel informed the court that the prosecution failed to prove following ingredients of the offence.

1. There must be a person who will create, make or facilitate message.
2. There must be communication which is an offence menacing offence in character.
3. The message that has been sent must aim to annoy, abuse, threaten or harass.

It is the learned Counsel's argument that the message was not offensive in character, rather it was a mere comment and the case against the appellant

was a mere concoction due to the hostility that developed between the appellant and PW 1 as the latter's husband had sired a child with the former.

On the second ground, it was argued on part of the appellant that the prohibited content alleged in the charge sheet did not meet the test as clarified under rule 12 of the Regulations and that it was not proved that the message was calculated to offend an individual or mislead or deceive the public. In short, counsel for the appellant maintained that the contents of the message did not fall within the ambit stipulated by the law.

Resisting the appeal, Ms. Margareth Mwaseba was of the view that the case against the appellant was proved beyond reasonable doubt. She said that the ingredients in the second count were proved and explained the circumstances which indicated the proof including the appellant's admission of owning the cell phone and the WhatsApp used to send the message. Further that the appellant's cautioned statement rendered credence to the prosecution case. She buttressed her argument by calling upon the court to take into account that the trial court saw the witnesses testifying and assessed their demeanours.

In his rejoinder, learned Counsel for the appellant reiterated his submission in chief.

I have perused the trial court's record and taken into account the grounds of appeal and the rival submission of the parties. I have equally considered the law on which the appellant's convictions were pegged.

In convicting the appellant, the learned Resident Magistrate observed at p. 16 of the typed judgment as follows:

> *'In considering the **weight of evidence** ? above and discussion, it is my findings that the accused is guilty in the 2nd and 3rd count and hereby convict for the offence of Transmission of Offensive Communication by means of Application Service c/s 118 (a) (b) and (c) of the Electronic and Postal Communication Act No. 3 of 2010 in the second count, and Publishing a Prohibited Content c/s 5 (2) a b, 10 (a), 12 (b), (k) (i) read together with Section 18 of the Electronic and Postal Communication (Online Content) Act of 2018.....'*

As far as the first count is concerned, it is indicated in the charge sheet that the appellant, by means of application service, namely WhatsApp **knowingly**, created a transmission of comment which is offensive in character **with intent** to abuse Theopista d/o Ngolo.

The comment in question was couched in the following terms: -

> *'kum-add huyu katika hili kundi ni kutuvurugia kundi, kundi la umoja wa vijana alilivuruga mwisho likakosa muelekeo lipolipo tuu!! Kazi yake*

*kubwa huwa ni kuwainbox watu kuwaeleza migogoro ya familia yake tuu na kuwapandikiza watu chuki. Aende zake huko, Hanaga Habari yoyote. Kuna mama mmoja alishavurugika akili, yaani mtu yanamkuta ya kumkuta mpaka anakuwa anatamani kusimulia kila mtu habari za maisha yake anachanganyikiwa kuokota makopo.*

Having analysed the evidence with circumspection, I am in no doubt that, according to the evidence, the appellant was conversing with the 2nd accused and the message was not aimed at PW 1, rather it was a two-way conversation between the appellant and the 2nd accused.

This is clear from the evidence of the prosecution witnesses and even from the appellant's cautioned statement. For instance, PW1 at p 18 is recorded to have told the trial court thus:

*'On 29.01.2021 at around 8:40 hrs up to 0900 hrs I was on safari from Sengerema to Mwanza. On my way I received a message showing that I was included in a group known as Sengerema Mpya. It was a Vodacom number. A group was of WhatsApp'.*

Then at p. 19, PW 1 is recorded to have stated:

*'...soon after there came a message that kum-add huyu katika hili kundi ni kutuvurugia kundi, kundi la umoja wa vijana alilivuruga mwisho*

*likakosa muelekeo lipolipo tuu!! Kazi yake kubwa huwa ni kuwainbox watu kuwaeleza migogoro ya familia yake tuu na kuwapandikiza watu chuki. Aende zake huko, Hanaga Habari yoyote. Kuna mama mmoja alishavurugika akili, yaani mtu yanamkuta ya kumkuta mpaka anakuwa anatamani kusimulia kila mtu habari za maisha yake anachanganyikiwa kuokota makopo. The message was sent by Zaituni Msolina. I knew that it was from Zaituni Msolina because I was having her phone number for some time.*

*I knew the message was targeting on me because was the only new member to be added on that material date and time'.*

On his part, P W 2: G. 5052 D/Cpl. Sharack, a police officer who investigated this case, is recorded at pp. 22 and 23 of the typed proceedings to have testified as follows: -

*'The complainant was Theopista Ngolo. She was complaining about being defamed/humiliated via WhatsApp. I summoned the complainant and she told me how she was humiliated by the 1st accused person. She also gave me a number of the admin. of such group-Segerema Mpya. She showed me the SMS* ***sent by the 1st accused person****. The number of the phone was of Boniface s/o Katalebya. I made a follow*

*up and found the founder was Felician Kasheka. Admin was Zaitun Msolina, Boniface Katalebya and Felician Kasheka. I found Boniface Katalebya and he told me that the* ***1st accused did send the phone numbers of the complainant to Boniface so that he could add her in the group. He did add the complainant.***

PW 2 then saw that people started to chat concerning the addition of the complainant in the group. We looked for the 1st accused and conduct an interrogation with her. It was his further evidence that the 1st accused confessed that she added the complainant through abusive language to her and finally removed her from that group. Here is a cautioned statement.

Now, the appellant's cautioned statement reads in part as follows:

*'Nakumbuka mwezi wa kwanza tarehe 29/2021 majira ya saa 0700 hrs nilimpigia simu Boniface hakupokea kwa lengo la kumsalimia lakini baada ya muda kidogo alinitumia SMS kwenye namba yake ya Halotel akaniambia nimpigie. Nilimpigia na tuliongea mambo mengi ya chama.* ***Baada ya hapo nilimwambia kuna dada muongeze kwenye Group na akawa ameniambia tuma namba, nikamtumia namba ya simu 0754453945 nikamwambia anaitwa Theo. Baada ya kumwambia alikubali kumwongeza. Ilipofika saa mbili kasoro ndipo***

***alipomwongeza kwenye hilo group. Mimi nilimwambia Boniface amwongeze kwa nia njema. Nilipoongea na Kasheka kuwa dada yako nimemuadd kwenye group akaniambia kuwa unakosea ataanza tena kuingia inbox kwa watu kukuchafua group liharibike kama la umoja wa vijana. Mimi ni rafiki yangu sana lakini sijamuongeza. Naepusha migogoro.***

***Baada ya hapo ndipo nilipoandika kwenye group kuwa:***

*Kum-add huyu ktk hili kundi ni kutuvurugia kunid, kundi la umoja wa vijana alilivuruga mwisho likakosa mwelekeo lipolipo tu!! Kazi yake kubwa ni kuwa-inbox watu kuwaeleza migogoro ya familia yake tu na kuwapandikiza watu chuki. Aende zake huko hanaga habari yoyote ya maana.*

*Baada ya kuandika hayo nilimuondoa kwenye kundi.....'*

Besides, After careful consideration of the prosecution evidence which was particularly the evidence of PW 1, PW 2 and PW 3 which was corroborated by the caution statements of the appellant I am satisfied that the case against the appellant was not proved beyond reasonable doubt. The reasons for my finding are not far-fetched.

First, with respect to the 1st ground of appeal, the charge sheet in the 2nd count has a serious shortcoming in that in the 2nd count the appellant was charged with transmission of offensive communication by means of application service contrary to section 118 (a) (b) and (c) of the Electronic Postal Communication Act, No. 3 of 2010. The particulars of offence did not support the charge under paragraphs (a) (b) and (c) of section 118 of the Electronic Postal Communication Act, No. 3 of 2010 because the above provisions create different categories of offences. For instance, section 118 of the Act which is on Obscene Communication provides under paragraphs (a), (b) and (c) thus:-

Any person who:-

(a) By means of any network facilities, network services, applications services or content services, knowingly makes, creates, or solicits or initiates the transmission of any comment, request, suggesteion or other communication which is obscene, indecent, false, menacing or offensive in character, with intent to annoy, abuse, threaten or harass another person,

(b) Initiates a communication using any applications services, whether continuously, repeatedly or otherwise, during which communication may or may not ensue with or without disclosing

his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address,

(c) By means of any network services or application service provides any obscene communication to any person, or

(d) .....(not relevant)

Commits an offence and shall, on conviction, be liable to a fine not less than Five Million Tanzania Shillings or to imprisonment for a term not less then twelve months, or to both and shall also be liable to fine of Seven Hundred and fifty thousand Tanzanian Shillings for every day during which the offence is continued after conviction.

This means that the charge was defective for being 'a duplex charge in that three distinct offences were contained in the same count. In other words, the prosecution was not sure of which offence the appellant was alleged to have committed.

Even if, for the sake of argument, the charge was proper still the conviction could not lie. As rightly submitted by the Counsel for the appellant, the ingredients of the charged offence were not proved. Aside that, the culpable mental states required to establish criminal responsibility of the offence in the second count were not proved to the required standard. These culpable mental states are **knowingly** and **with intent.**

By way of elaboration, a person acts *knowingly*, or *with knowledge*, with respect to the nature of his conduct when he is **aware** that his conduct is reasonably certain to cause the result while a person *acts intentionally* or *with intent* with respect to the nature of his conduct or to a result of his conduct when **it is his conscious objective or desire to engage** in the conduct or cause the result.

The prosecution failed to prove these culpable mental states to the required standard. This disposes of the first ground of appeal'

With regard to the second ground of appeal which is in respect of the 3rd count, this ground need not detain me. In that third count the appellant was charged with publishing a prohibited content contrary to section 5 (2) (a) (b), 10 (a), 12 (b,) (k)(i) which is read together with Section 18 of Electronic and Postal Communication (Online Content) Act, 2018. I think the framer of the charge sheet meant Electronic and Postal Communication (Online Content) Regulations, 2018. If that is the case, then the appellant was charged with an non-existent law. The Electronic and Postal Communication (Online Content) Regulations, 2018, Government Notice No. 133 published on 16th March, 2018 were revoked and replaced by The Electronic and Postal Communication (Online Content) Regulations, 2020, Government Notice No. 538 published on 17th July, 2020. The former regulation 12 is no longer in law

books. There is now Third Schedule which is more expanded and contain more detailed list of prohibited content.

Since the appellant was charged with a non-existent law, the conviction and sentence were, to that extent, a nullity. The second ground succeeds.

Since the third ground of appeal was abandoned, I see no need of discussing it.

The upshot of this is that I find this appeal with legal merit and I allow it. I quash the conviction and set aside the sentences. I order that unless lawfully held for other causes, the appellant should be set at liberty forthwith.

**W. P. Dyansobera**
**Judge**
**16.8.2022i**

This judgment is delivered at Mwanza under my hand and the Seal of this Court on this 16th day of August, 2022 in the presence of the appellant and Mr. Nestory Joseph, learned Advocate, holding brief for Mr. Erick Katemi, learned Counsel for the appellant. The respondent is absent.


**W.P. Dyansobera**
**Judge**