IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

PC CRIMINAL APPEAL NO 10 OF 2022

ERASTO LUBELEJE SOGODI.....APPELLANT

VERSUS

JOCTAN SHEDRACK MAJENJE ..... 1ST RESPONDENT

INNOCENT JOHN ROBERT.....2ND RESPONDENT

JUDGMENT

28/9/2022 & 28/10/2022

KAGOMBA, J

In this appeal, three grounds have been floated by the appellant to challenge the decision of the District Court of Mpwapwa delivered on 24/2/2022 in Criminal Appeal No. 12 of 2021 between the parties herein.

Apparently, the appellant is adamant and was all out to see that the law takes its course against the respondents whom he accused of threatening to kill him by words contrary to section 89(2)(b) of the Penal Code [16 R. E 2019] (now R.E 2022), (the "Penal Code"). It was alleged by the appellant before the Mpwapwa Urban Primary Court ("the trial Court") that on 5/8/2021 around 02:00hrs at Mzase area in Mpwapwa District within Dodoma region, the respondents herein threatened by words to kill him contrary to the cited provisions of the law.

Briefly, the appellant told the trial Court that on the said date and time, he was dressing his hair at a salon where he was informed that there were boys who were fabricating bricks on his plot, who turned out to be the respondents herein. Upon arriving at the plot, he asked them what they were doing on his plot. That, it was after asking them that question, they warned him not to ask them questions and even to approach them. That, as they were arguing, SM2 Edward Erasto Sogodi came about and joined him in the saga. That, he asked them the reasons for threatening him while the plot was his property, and that is when the 1st respondent threatened him by saying that if he dared to come near them, he would finish him. That, similar words were uttered by the 2nd respondent. That, thereafter he went to report the incidence at the office of the Village Executive, in a company of SM2.

The trial Court acquitted both accused persons on grounds that the appellant didn't prove his case beyond reasonable doubt. The District Court concurred with the finding for the trial Court. The concurrent decisions of the trial Court and the District Court, being the 1st appellant Court, have not appeased the appellant. The appellant's complaints are stated in the following three grounds of appeal filed in this Court: -

1. That, the 1st appellate Court erred in law and facts to hold that the appellant failed to prove his case beyond reasonable doubt.

2. That, the 1st appellate Court erred in law and facts to hold in favour of the respondents basing on weak, cooked and contradictory evidence adduced by the respondents and their witnesses.

3. That, the 1st appellate Court erred in law and facts to hold that there are hidden facts on part of the appellant.

Based on these grounds, the appellant prayed this Court to allow the appeal in its entirety.

The hearing of the appeal proceeded by way of written submissions. Robert Melea Owino, learned advocate drew and filed the written submissions in chief for the appellant as well as rejoinder submissions. The respondents drew and filed their submissions themselves, as far as the records could reveal.

In the appellant's written submissions, the following argument have been raised by his advocate in support of the first ground of appeal; Firstly, the 1st appellate Magistrate made a wrong analysis of evidence by referring to evidence of "SU 3" and "SU 4" as if they were witnesses for the appellant, on page 7 of the typed judgment, while they were, in fact, respondents' witnesses during trial. That, her conclusion was therefore arrived at through misinterpretation of the law and in contradiction with the decision in the case of **Jonas Nkize V. Republic** [1992] T.L.R 214 because the testimonies of "SU3" and "SU4" could not be a test of whether the appellant was able to prove his case beyond reasonable doubts.

Secondly, the evidence of the appellant as SM1 was corroborated by the evidence of Edward Erasto Sogodi (SM2) to prove that both prosecution

witnesses did hear the respondents threatening by words to kill the appellant.

Thirdly, that during cross examination, SM2 Edward Erasto Sogodi was able to identify the respondents by describing how they were dressed.

Fourthly, that the respondents never challenged the allegation that they threatened to kill the appellant as they didn't cross examine the appellant on his testimony. It's the learned advocate's argument that failure by the respondents to cross examine him amounted to admission of the main issue in controversy. He cited to this effect, the decision of the Court of Appeal in **Haruna Mtasiwa V. Republic,** Criminal Appeal No. 206 of 2018 (Unreported).

Fifthly, that the testimonies of SU1, SU2, SU3 and SU4 were inherently contradictory because while all the four witnesses claimed to be present at the scene of crime when the appellant arrived in a company of other people, yet three of them, being SU1, SU2, and SU4 stated that it was the 1st respondent herein who went to call one William Mazengo while SU3 testified that it was the appellant who did so.

With regard to the second ground of appeal, the learned advocate for the appellant submitted that the reasons upon which both the trial Court and the 1st appellate Court based their decision were strange and unknown to Criminal justice in our country. He elaborated by referring to excerpts from

the trial Court's typed judgment, on page 10, where the trial Magistrate stated:-

> *"Ni ngumu Kuamini watu ambao hawana ugomvi wala mabishano na wenye akili timamu waulizwe swali dogo tu hilo wawe wakali namna hiyo".*

Literary translated thus;

> *"It is inconvincible that people who have no prior dispute or argument and who are sane could have such a harsh reaction merely for being asked such a simple question".*

And on page 12, the trial Magistrate stated;

> *"Kwa mantiki hiyo ni salama kusema kuwa upande wa mashtaka kwa nia ya kupotosha Mahakama walitoa ushahidi wa uongo na kuita shahidi wa kutengeneza yaani SU2 ambaye hata hakuwapo eneo la tukio"*

Literary translated thus;

> *"For that reason, it is safe to conclude that the prosecution with intent to mislead the Court, adduced false evidence and imposed a witness i.e SU2 who was not present at the scene of crime".*

It was the learned advocate's submission that the above reasoning by the lower Courts were unfounded and wrongly driven. He once again bolstered his argument by citing the case of **Jonas Nkinze V. Republic** (Supra) to the effect that the Magistrate was bound to consider the evidence presented before him and not extraneous matters. He also cited the case of

Tatu Okomo V. Oloo Machango, Land Appeal No. 5 of 2013, High Court, at Mwanza (Unreported) in that regard.

Based on the above reasons, the appellant's advocate prayed this Court to change the concurrent findings of the two lower Courts, to allow the appeal and set aside the acquittal of the respondents.

In the written reply by the respondents, they saw no legal substance in the grounds of appeal. To them, the decision of the trial Court was brilliantly based on clear evidence that the respondents were just hired to fabricate bricks. They recalled the evidence of SU3 Elias Mwogope @ Chisaluni who negated the testimony of the appellant. That SU3 Elias Mwogope @ Chisaluni testified that he is the one who escorted the appellant to the scene of crime after being so requested by the appellant. That, in his testimony, he denied to hear the respondents uttering the alleged threats and was astonished to hear that the respondents were arrested by police for such allegations.

The respondents submitted that, on 13/08/2021 before the Village Executive Officer, the appellant's sole claim against them was about fabrication of the bricks on his plot. However, later before the police he changed his allegation by introducing the death threats utterances.

The respondents discounted the appellant's case by pointing out that SM2 Edward Erasto Sogodi was appellant's son and that he gave false

evidence which was largely challenged by the trial Court. They added that the only person who was with the appellant at the crime scene was none other than the said SU3 Elias Mwogope @ Chisaluni and not SM2. That, it was upon realizing this fact, the trial Court found that the appellant had not proved his case at the required standard, and therefore the respondents were acquitted.

On the other hand, the respondents distinguished the cases cited by the appellant's advocate for not being similar with the case before the Court. They prayed for dismissal of the appeal.

In his rejoinder, Mr. Owino, for the appellant maintained that the conclusion in the trial Court's decision was blanket and was not justified.

With regard to the testimony of SM2 Elias Mwogope@ Chisaluni, the learned advocate rejoined that the respondents' assertion that the said Elias Mwogope refuted the allegation of threats, in a way corroborated the appellant's evidence that the respondents did threaten to kill him.

Mr. Owino refuted the allegation that the appellant changed story when at police station. He also capitalized on respondents' non-denial of the testimony of SM2 Edward Erasto Sogodi, on his identification of the respondents by the clothes they were wearing. And, as to the cited cases being distinguishable, Mr. Owino rejoined that the respondents didn't show how the cases were different. Briefly, this is what makes up this case.

After considering the above submissions the issue is whether the appeal is meritorious.

On the first ground of appeal the issue of proof of the appellant's case has been raised and argued upon. In fact, this is the central issue in this appeal. While the appellant has told this Court that he managed to prove his case beyond reasonable doubt, by relying on the testimony of SM2 Edward Erasto Sogodi, and his own evidence, the respondents paraded four (4) witnesses who gave a complete denial of the charge against the respondents.

As correctly submitted by Mr. Owino for the appellant, this Court being the 2nd appellate Court cannot interfere with the concurrent finding of the lower courts unless there are misdirection or non-direction on law or evidence. (See **Director of Public Prosecutions V Jaffari Mfaume Kawawa** (1981) T.L.R. 149).

In this matter, it is the finding of both lower Courts that the prosecution side did not prove the case beyond reasonable doubt. Did it?

I have perused the proceedings and judgments of both lower Courts and it is my finding that, apart from lapses here and there in the testimonies, by and large, the finding of the trial Court was supported by the evidence that was adduced. While the two prosecution witnesses, namely; SM1 (the appellant) and SM2 Edward Erasto Sogodi adduced evidence to the effect

that the appellant was at the crime scene alone, but later was joined with SM2, who was passing by on his way to school, and that SM2 also heard the utterances of threats from the respondents, the evidence led by the two respondents, namely; SU1 Joctan Shedrack Majenje and SU2 Innocent John @ Robert and that of SU3 – Elias Mwogope @ Chisaluni as well as SU4 George Behewa gave a rather different but very coherent account as to how they reached the scene of crime, whom they met and what happened thereat.

SU3, for example, narrated that he was with the appellant (SM1) at a hair salon and was later called by SM1 by phone to follow him where he was. That, SM1 even ordered a motorcycle to pick SU3 to the scene of crime where the respondents were fabricating bricks. SU3 testified that while at the scene of crime he didn't hear those threats from the respondents.

The testimony of SU3 was to a large extent corroborated by the testimony of SU4 George Behewa and was in line with the testimonies of SU1 and SU2 regarding how the entire episode unfolded. Under such circumstances, while on one side the testimonies of SM1 and SM2 looked *prima facie* credible to the extent of the trial Court finding the respondents with a case to answer, the evidence of SU1, SU2, SU3 and SU4 proved the innocence of the respondents and created reasonable doubts as to whether the appellant was with SM2 at the scene of crime and whether the respondents did threaten to kill the appellants by words bearing in mind the testimony of SU3 who didn't hear such threats.

In the case of **Edson Simon Mwombeki vs The Republic,** Criminal Appeal No. 94 of 2016, Court of Appeal of Tanzania at Mwanza, where the Court of Appeal followed its earlier decision in **Goodluck Kyando V. R**, [2006] T.L.R 363 it was held that;

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness".*

The Court of Appeal went on to say the following on page 15 of the typed judgment in **Edson Simon Mwombeki** (supra) thus;

> *"Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses".*

In this case, all the witnesses gave evidence under oath but ended up giving highly polarized testimonies in support and denial of the charges. Under such circumstances, conviction would not be safe. As shown above, the case against the respondents was not proved beyond reasonable doubt. Accordingly, I uphold the decision of the District Court and consequently, the appeal is dismissed for lacking in merit.

Dated at **Dodoma** this 28th day of October, 2022.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA
JUDGE