IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) CRIMINAL APPEAL NO. 4 OF 2021

(Arising from Criminal Appeal No. 53 of 2019 at Bukoba District Court and Original Criminal Case No. 642 of 2019 at Bukoba Urban Primary Court)

BENEZETH MARTIN---------- APPLICANT

VERSUS

PASCHAL MBAKILE----------1ST RESPONDENT

REVOCATUS LEONARD----------2ND RESPONDENT

RICHARD ERNEST----------3RD RESPONDENT

GODWIN MTAGUWA----------4TH RESPONDENT

JUDGMENT

Date of last Order: 21.03.2022

Date of Judgment: 01.04.2022

Hon. A.E. Mwipopo, J.

The appellant namely Benezeth Martin charged the respondents namely Paschale Mbakile, Revocatus Leonard, Richard Ernest and Godwin Mtaguwa in Bukoba Urban Primary Court for the offence of threatening to kill by words contrary to section 89 (2) (a) of the Penal Code, Cap. 16, R.E. 2002. The Primary Court after hearing the evidence from both sides delivered its judgment dated 25th

September, 2019 where the Court acquitted all respondents for the offence charged. The appellant was not satisfied with the decision of the trial Primary Court and he filed an appeal in the District Court which was dismissed on 27.03. 2020. The District Court upheld the decision of trial Primary Court. Once again, the appellant was aggrieved by the decision of the District Court and he filed the present appeal in this Court.

The petition of appeal filed by the appellant contains two grounds of appeal. The said grounds of appeal are as follows:-

1. *That, the trial Magistrate erred in law and facts for failure to adduce reasons for not believing appellant's case.*
2. *That, the trial Magistrate erred in law and facts for failure to appreciate that the appellant has proved his case beyond reasonable doubt.*

On the hearing date, Mr. Scarius Bukagile, Advocate appearing for the appellant, raised a point of law that the judgment of the trial Primary Court was not signed by the Magistrate and assessors. I perused the record before me and I was satisfied that the judgment of the trial Primary Court was not signed by the Magistrate and assessors. The omission is fatal and not curable. For that reason I asked both parties to address the Court on the omission.

The counsel for the appellant in addressing the Court said that the irregularity he observed in trial Primary Court judgment is fatal and vitiate the proceedings. He said that section 7 (1) and (2) of Magistrates Court Act, Cap. R.E 2002, provides

for the participation of assessors in the proceedings the trial Primary Court. For that reason, the proceeding and the decisions of the trial Primary Court are bad and prayed for the Court to nullify it. He went on to say that after the proceedings were nullified the Court has to order for retrial as the appellant's witnesses proved that the offence was committed and their evidence was sufficient to prove the offence against the respondents. He said that SM1 proved that he heard 1st Respondent asking other people around to kill the appellant as he is disturbing them. Even SM2 testified to have heard people saying that there is a day they will kill a person who was in their custody. These two key witnesses testimony was not regarded.

The counsel said that the trial Primary Court believed the respondents defence of alibi without production of notice of alibi contrary to section 194 of the Criminal Procedure Act. This failure of the trial court to credit prosecution case and believing defence case is against the law as it was held in **Goodluck Kyando v. Republic [2006] TLR 363** and in **Damian Ferdinand Kiula v. Republic [1992] TLR 16.** He said that the two cases he cited provides for the duty of the trial court to give reason for disregarding a testimony of any witness. He said the prosecution witnesses proved that the offence was committed by both respondents hence the order for retrial before another Magistrate is the proper remedy.

The 1st Respondent in addressing the Court of the omission said that the failure of the trial Magistrate and assessors to sign the judgment is fatal error. But, the evidence by prosecution witnesses was not sufficient to prove the offence as it was contradictory. SM1 testified that the 1st Respondent uttered words that appellant has to be killed. But SM2 who was together with the SM1 said that he heard somebody saying that the appellant has to be killed. SM2 who was with SM1 could have identified 1st Respondent even in dock if the 1st respondent was the one who uttered the words. SM2 said he did not saw the person who uttered those threatening words. Even the time they went to the area of incident differ. The 1st respondent said there was no need to issue notice of alibi as he was in his residence and the place of incident is very close to his house. The owner of the bar where the incident occurred stated that respondents were not at the area of the incident when the incident occurred. For that reason, the evidence was not sufficient to prove the offence against respondent, ordering retrial is to allow the appellant to fill in the gaps in his evidence.

The 2nd respondent said that the omission of the magistrate and assessors to sign the judgment vitiates the proceeding. He added that the court should not order retrial as the appellant in cross examination admitted that 2nd respondent was nursing his sick child who died few days later after the date of the alleged incident. The evidence of the owner of the bar where the incident occurred testified

that there were women at the area who had a meeting and for that reason appellant was asked to leave. There is no evidence at all to show that respondents were present at the scene of crime during the incident.

The 3rd respondent had no much to say than there is no evidence to prove that respondents uttered the alleged threatening words.

The 4th respondent said that there is contradiction in the evidence of SM1 and SM2 of the time they went to look for the cow which means they were not together at the scene of crime. He said that the appellant did not call to testify the person named Kanyankole whom appellant alleged they were together. Failure to call this witness raises a lot of doubt and the adverse inference has to be entered against the appellant.

In his rejoinder, the counsel for the appellant said that it was not possible to call Kanyankole to testify against 1st respondent who is his landlord. He said that there was no contradiction of the time SM1 and SM2 went to the kraal. All witness stated that the time of incident was around 22:00 hrs. He added that there is no proof that 3rd respondent was at hospital at the time of incident or that respondents were not in the scene of incident. SM2 evidence show that it was the 1st Respondent who uttered words that the appellant has to be killed. This is a fit case for the Court to order for retrial.

As it was stated by all parties, the judgment of the trial Primary Court was not signed by the Magistrate and assessors who drafted it. The omission is fatal and it vitiates the proceedings. This is provided under paragraph 37 (2) of the Third Schedule to the Magistrates Court Act, Cap. 11, R.E. 2002. The said provision make it mandatory for the judgment to be signed by the Magistrate. Also, rule 3 (2) of the Magistrates' Courts (Primary Courts) (Judgment of Court) Rules, G.N. No 2 of 1988 provides that it is mandatory for the Magistrate and members of the Court to sign the judgment of the Court where all members of the Primary Court agree on one decision. The rule 3 (2) reads as follows:-

> *"3. (2) if all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members."*

The above cited rule makes it mandatory for the decision or judgment of the court which is reached upon agreement by all members of the Court to be signed by all the members.

As I stated earlier herein, the judgment of the trial Primary Court was not signed by the Magistrate or assessors. The said judgment shows that it was reached upon agreement on one decision by all members of the Primary Court. The said judgment was supposed to be signed by the Magistrate and all assessors. Apart from being mandatory requirement of the law, failure of the Magistrate to sign judgment of the Court make it impossible to authenticate who drafted the

said judgment. If the authenticity is questionable, the genuineness of such judgment is not established and thus there is no proper judgment before this Court. This vitiates the whole proceedings and decision of the trial Primary Court.

The counsel for the appellant has prayed for the Court to quash the proceedings and decision of the trial Primary Court following the omission and to order for retrial for the reason that the evidence by appellant's witnesses was sufficient to prove the offence against all respondents. On their part, all respondents were against the prayer for retrial for the reason that the appellant's case was not sufficient to prove the offence. In normal circumstances retrial is ordered where the original trial was illegal or defective. But, where the interest of justice does not permit retrial shall not be ordered. This position was stated in **Fatehali Manji v. Republic, [1966] EACA 343**, where the Court held that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

The Court of Appeal took similar position in the case of **Eliah John v. Republic**, Criminal Appeal No. 306 of 2016, Court of Appeal of Tanzania at Arusha, (Unreported), where it held that:-

> *"In the end, like the learned Senior State Attorney, we don't think it is proper and in the interest of justice to order a re-trial on account of the prosecution evidence on record being very weak [see Saidi Shabani vs. Republic, Criminal appeal No. 206 of 2008 (unreported)]. An order of re-trial will definitely pave way for the prosecution to fill up the obtaining gaps which will therefore occasion an injustice to the appellant."*

From above cited cases, the settled position is that retrial is not ordered where prosecution evidence on record is not sufficient to prove the offence against the accused person.

After examining the evidence on record, I hesitate to order retrial in this case for the reason that the evidence by prosecution (appellant) witnesses failed to prove the offence of threatening to kill the appellant by words against all respondents. In this case it is the appellant who filed complaint before the Primary Court. The charge shows in the particulars of the offence that all respondents threatened to kill the appellant by words. The evidence from the appellant who testified as SM1 does not show at all if the threatening words were uttered by the respondents. The appellant did not say in his testimony that respondents threatened to kill him. It was during questions by the Court where the appellant

What has to be done is for the evidence of identification to be watertight without possibility of mistaken identity. In the case of **Said Chaly Vs. Republic**, Criminal Appeal No.69 of 2005, Court of Appeal of Tanzania at Mwanza, (unreported), held that:-

> *"We think that where a witness is testifying about identifying another person in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or stranger. "*

The incident in this case occurred at night hours around 22.00hrs outside the bar of SU3. There was a group of people according to evidence of the appellant when he was answering the question asked by the trial Court and that there was electricity light outside the bar. Appellant did not say the intensity of the said light if it was sufficient to allow identification of the suspects. SM2 said nothing about the presence of light or the source of light and its intensity in the area during the incident. He said nothing if he knew the 1st respondent before the incident as he was not the resident of the area. In such situation where there are several doubts in the appellant's case, ordering retrial is allowing the appellant to fill in gaps for the weakness found in his case. It is not proper and not in the interest of justice to order a retrial as the order will prejudice the respondents.

Therefore, the proceedings of the Bukoba Urban Primary Court and Bukoba District Court are quashed together with their decisions and the respondents are discharged accordingly. It is so ordered.

A.E. Mwipopo

Judge

01/04/2022

The Judgment was delivered today, this 01.04.02022 in chamber under the seal of this court in the presence of the appellant and the 1st, 2nd, 3rd, and 4th respondents.

A. E. Mwipopo

Judge

01/04/2022