IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

PC CRIMINAL APPEAL NO. 33 OF 2022

(Arising from the decision of the District Court of Tarime at Tarime in Criminal Appeal No. 55 of 2022)

BETWEEN

WAITARA MARARA BYANYERO ..... APPELLANT

VERSUS

TIMAS JOSIA SUNGURO ..... RESPONDENT

JUDGMENT

02nd & 07th March, 2023

M. L. KOMBA, J.:

This is the second appeal in which the appellant, **Waitara Marara Byanyero** appealed against the decision of the District Court of Tarime (the first appellate court) in Criminal Appeal No. 55 of 2022. At first, the respondent **Timas Josia Sunguro** was arraigned before the Primary Court of Tarime at Nyamongo (the trial court) for the offence of threatening to kill by using weapon "panga" (machete) contrary to section of 89 (2) (b) of the Penal Code [Cap 16 R.E 2019]. The respondent was alleged to commit the said offence on 08th February, 2022 at 09:00hrs by threatening to kill the appellant by using machete.

Upon full hearing at the trial court, it was found that the appellant successfully proved his case beyond reasonable doubt. The respondent

was convicted and sentenced to serve six months jail term. However, upon the respondent's appeal to the District Court of Tarime, the trial court judgment was not last, it overturned by the decision of the first appellate court and the respondent was ordered to be released.

The first appellate court decision was based on two issues; that the trial court was not properly convicted the respondent and that following expungement of exhibit M -1 (panga) the rest of evidence adduced before the trial court did not prove the offence charged with the respondent.

The first appellate court's decision was not pleased the appellant, he therefore brought this second appeal folded with three grounds to challenge it. The grounds read as follows;

1. *That, the first appellate court erred in law by addressing an issue on **suo motto** basis, concerning the Respondent was not convicted as per dictum of the law, however, the same was shown in the Primary Court judgment.*
2. *That, the first appellate court erred in fact by not adhering to appellant witnesses who adduced evidence that led to Respondents conviction.*
3. *That, the first appellate court erred in law and fact by allowing Respondents appeal based on exhibit M-1 tendering by appellant which was later expunged from the record to nullify proceedings and judgment of the trial court.*

During the hearing of this appeal, the learned advocates, Mr. Onyango Otieno and Mr. Paul Obwana represented both the appellant and respondent respectively.

Submitting in support of his appeal, the appellant's counsel, Mr. Onyango submitted that the first appellate court's Magistrate invited technicalities which had no impact and ended up to quash the trial court proceedings. The counsel submitted that the Magistrate said the appellant was not convicted and he referred page 9 of the trial court judgment and argued that the respondent was rightly convicted.

On the second and third grounds of appeal, the counsel submitted that, upon expungement of machete as an exhibit by the trial court, the first appellate court ought to consider the oral evidence. To buttress his submission the appellant counsel referred this court to the case of **Selemani Yahaya @ Zinga vs. Republic,** Criminal Appeal No. 533 of 2019 CAT at Dar es salaam.

Mr. Onyango submitted further that, the offence charged with the respondent was successfully proved before the trial court and interpretation of law and conviction was correct. The counsel was of the view that even in the absence of exhibit M-1, the remaining evidence was

water tight. He prayed the decision of Nyamongo Primary Court to be maintained and appeal be allowed.

Responding, Mr. Obwana, the respondent's counsel submitted that the appellant could not fault the first appellate court to raise the issue ***suo moto*** as the parties were availed with the right to discuss on the issue. The counsel was of the view that there was no miscarriage of justice done by the first appellate court. He was of the view that since the offence charged with the respondent was threatening to kill with weapon, to wit panga, the first appellate court was correct to hold that the exhibit of weapon used was the key element on proving the offence. He added that if the exhibit was expunged, then the offence cannot be said to be proved.

Regarding the case of **Selemani Yahaya @ Zinga (supra)** referred by the appellant's counsel, Mr. Obwana was of the view that the court should consider the oral evidence but in present case, the oral evidence has contradictions. He pinpointed out that before the trial court SM1 (the appellant) testified that *'.....alinisogelea akiwa na panga na kusema wewe ndio unaleta kiherere nitakuondoa uhai wako....'* But SM2 and SM3 stated that *'....wewe ndio kiherere nitakukata na panga....'* The respondent counsel argued that such contradiction of oral evidence cannot stand to prove the charge.

Mr. Obwana proceeded further, and submitted that the respondent was charged with the wrong provision of the law. He stated that section 89 of the Penal Code is about the weapon but the specific provision charged with the respondent is about fire arms. The counsel was of the view that because the respondent alleged to threaten to kill, then the relevant provision was section 89 (2) (a). Regarding this point the counsel invited the court to interpret the relevant section.

The counsel went further and argued that the evidence adduced before the trial court did not support the charge. He stated that, there are two different things, threatened by words and threatened by object. In present case there is nowhere it was stated that the respondent raised panga. There are only words and those words are contradicting. Mr. Obwana opined that the first appellate court was correct and prayed the appeal to be dismissed.

In rejoinder, Mr. Onyango reiterated his submission in chief and he added further that the word to ***"cut"*** and to ***"kill"*** has the same meaning. He argued that the contradictions identified by the respondent counsel is minor and does not go to the root of the case. Regarding the provision of section 89 2 (a) and (b) he submitted that there is the use of the word

shoot but there are words that threat to breach peace, thus the respondent was charged by the correct provision.

Having been passing through the petition of appeal and heard the submissions of the parties, the issue which I am called on to determine here is whether the present appeal is meritorious.

Starting with the first issue on whether the respondent was not properly convicted with trial court, without hesitating I am joining hand with the respondent's counsel that the respondent was not properly convicted. Referring to page 9 paragraph 1 of the trial court judgment it is evidenced that respondent was not properly convicted with an offence charged with. The paragraph recites as follows;

> *'....mahakama inaona upande wa mashtaka umeweza kuthibitisha shtaka dhidi ya mshtakiwa pasipo shaka lolote na hivyo inamtia hatiani mshtakiwa* ***TIMASI JOSIA SUNGUBO*** *kwa kosa la kutishia kuua kwa silaha k/f 89 (2) (b).'*

From the above excerpt, in English it means that the court has found that the prosecution has been proved their case beyond reasonable doubt, thus the accused person **TIMASI JOSIA SUNGUBO** is convicted with an offence of threatening to kill by using weapon contrary to section 89 (2) (b). However, the concern of the first appellate court on this issue is the word ***"guilty"*** (that the trial court was not found the respondent guilty),

that does not bother me, my concern is that the trial court did not mention the law which the respondent was convicted with. The trial court ended up to cite the provision which the respondent was convicted with but did not mention in which law.

In the case of **George Patrick Mawe & 4 Others vs. Republic,** Criminal Appeal No. 203 of 2011 (unreported) at page 4 the Court of Appeal observed;

> *'In the case of conviction, the judgment shall specify the offence of which and the section of the Penal Code or other law/the accused person is convicted and the punishment to which he is sentenced'.*

The effects of the failure to observe the mandatory provisions of the laws and hence not properly convicting the accused are that, the failure becomes fatal and an incurable irregularity, which renders the purported judgment and imposed sentence a nullity.

A case in point is that of **Hassan Mwambanga vs. R,** Criminal Appeal No. 410 of 2013 (unreported) where the Court of Appeal held that:

> *"It is now settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the purported judgment and imposed sentence a nullity, and*

the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction".

I now going to determine the 2nd and 3rd grounds conjointly as they interrelated. The issue here is whether the remained evidence is sufficient to convict the accused after expungement of exhibit M-1 by the trial court.

It is well settled that whenever relevant exhibit expunged from the case the court should consider the oral evidence. See **Selemani Yahaya @ Zinga vs. Republic (supra)** and **Basilid John Mlay vs. Republic,** Criminal Appeal No. 306 of 2018 CAT at Arusha.

In our case at hand, the respondent was charged with an offence of threatening to kill by using weapon, machete, contrary to section 89 (2) (b) of the Penal Code and the said weapon used was tendered and admitted in trial court as exhibit M-1 but later was expunged in judgment for not being seized and stored in accordance with the law. The appellate court ruled out that the remaining oral evidence was no sufficient to warrant the respondent's conviction. I agree with that position.

When perusing the evidence adduced before the trial court, I found that the evidence of SM1 (the appellant), SM2 and SM3 are contradicting each other. SM1 testified before the court that the respondent told him that he will ***kill*** him because he is acting knowing too much (*ana kiherehere*)

while on the other hand SM2 and SM3 testified that the respondent told the appellant that he will ***cut*** him because he is acting knowing too much.

Basing on the charge the respondent was faced, that testimonies of SM1 and SM2 and SM3 meant two different things. The testimony of SMI suggests that the respondent threaten **to kill** the appellant while the statement of SM2 and SM3 propose that the respondent threaten to **injure** the appellant and not to kill him. The discrepancies portrayed in the prosecution evidence before trial court is not minor as submitted by the appellant's counsel, it goes to the root of the case. The variance in their testimony raises the question whether it is real respondent threatened to kill the appellant by using panga.

It is settled position that a contradiction can only be considered as fatal if it is material going to the root of the case. See **Sebastian Michael & Another vs. DPP,** Criminal Appeal No. 145 of 2018.

On the other issue regarding the relevance of provision which the respondent was charged with, I find it pertinent to refer the whole provision of section 89 (2) of the Penal Code. The section provides;

> *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; or*

*(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.*

Without using much effort, the law is clear that the section concerning about threatening to kill a person is section 89 (2) (a) and not section 89 (2) (b) as the respondent was charged with. Therefore, it is correct that the respondent was also charged with the wrong provision of the law.

In conclusion, for the reasons I endeavor to explain above, I find the appeal is without merit and I dismiss it.

It is so ordered.

M. L. KOMBA

JUDGE

07 March, 2023