IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

(PC) CRIMINAL APPEAL No. 06 OF 2022

(Arising from the decision of Bunda District Court in Criminal Appeal No. 10 of 2021)

SAMWEL OKEYO ..... APPELLANT

Versus

CHRISTOPHER ZACHARIA ..... 1ST RESPONDENT

NYAMIS DICKSON ..... 2ND RESPONDENT

JUDGMENT

A.A. MBAGWA, J.:

The respondents, Christopher Zacharia and Nyamis Dickson who are husband and wife were arraigned before the trial court (Primary Court of Bunda Urban) on a charge of threating to kill contrary to section 89 (b) of the Penal Code [Cap. 16 R.E. 2019].

The particulars of offence reveal that, the duo on the 28th May, 2021 around 17:00 hours at Bunda-Store Street within Bunda District in Mara Region, willfully and unlawfully did threaten to kill the appellant by uttering to him that they would hire persons to cut him by using machete.

When the charge was read to the respondents, they pleaded not guilty. In a bid to prove the respondents' guilt, the appellant testified as PW1 while his witness, one Emmanuel Stephano testified as PW2. The appellant alleged that, on the material date and hours, he went to the Street Chairman to lodge his complaints against the first respondent. He and the Chairman went to the respondents' house. Upon reaching there, the second respondent came out and asserted that, the appellant was his enemy and wondered why they went there. She then started to throw abusive words. When the Chairman left, the first and the second respondents approached the appellant and told him that they would hire people to cut him by using machete. In addition, PW2 testified that, on the material date and hours, he was watching football training nearby Miembeni Primary School when he heard quarrel in which someone was saying that people would be hired to cut him using machete. He said that he tried to take away the appellant but he refused. PW2 continued that the second respondent insisted that, that was the only way, as he had been trailing them. PW2 concluded that, when he came to know that the source of all of that is a woman, he decided to leave the place.

In defence, the 1st respondent who testified as DW1 was brief in his defence. He denied to have not been at the place on the date and time when the alleged offence was committed, as he travelled to another village and upon his return, he was arrested by peoples' militia men. The 2nd respondent testified as DW2. She admitted that, on the material date the appellant together with the Chairman went to her house. They asked her on the whereabout of the 1st respondent, her husband. She told them that, he had travelled. They asked her again as to when he was expected to return, and she replied that she had no idea as DW1 had gone to construct his father's house. PW1 said that he wanted to take his child, and that is when the conflict escalated. She said the appellant wanted to beat her, but the Chairman told him to leave the place. After passing three days, his husband returned and was arrested along with her.

Having heard the parties, the trial court raised one issue to the effect namely 'whether the complainant has succeeded to prove his complaint beyond reasonable doubt'. The court after assessing the evidence, came to the conclusion that, the appellant did not successfully prove his complaint hence acquitted the respondents.

The respondents' acquittal did not amuse the appellant. He appealed to the District Court of Bunda. In his petition of appeal, he raised two grounds to wit:

1. *That the trial court erred in law and fact by acquitting the respondents while the prosecution proved the case against them beyond reasonable doubts*
2. *That, the trial court erred in law and fact by failing to critically analyze the water tight evidence adduced by the complainant.*

The first appellate Court having heard the parties, dismissed the appeal on the ground that the respondents were charged under the non-existent provision of the law that is section 89(b) of the Penal Code [Cap. 16 R.E. 2019].

Aggrieved with the decision of the first appellate court. The appellant filed a petition of appeal containing grounds which were all faulting the first appellate court for holding that the respondents were charged under non-existent provisions and without affording him an opportunity to be heard on that aspect.

It is worth noting at this particular stage, the respondents were nowhere to be seen and hence, the appellant could have not served them with a summons. By the order of this Court dated 24/08/2022, the appellant served

them through publication in the widely circulated local newspaper i.e., Uhuru Newspaper dated 21st September, 2022. As such, the matter proceeded ex-parte. During the *ex-parte* hearing, the appellant fended for himself and prayed the Court to consider his grounds of appeal and allow the appeal.

Upon reading all the three grounds, it is clear that the appellant seeks to fault the 1st appellate court for dismissing the appeal on the basis that the respondents were charged under non-existent provision of law. Upon canvassing the record, it is clear that the first appellate court raised and determined the issue of appropriateness of the charge during composition of the judgment. As a result, the parties were not heard on that. This was a fatal ailment taking into consideration that the right to be heard is fundamental right, its breach has the effect of vitiating the proceedings and its resultant decision.

In **Director of Public Prosecutions v Rajabu Mjema Ramadhani**, (Criminal Appeal No. 223 of 2020) [2023] TZCA 45 (23 February 2023) TanzLII, the Court of Appeal held that:

> *"...it is a rule against a person being condemned unheard. Any decision arrived at without a party getting an adequate opportunity to be heard*

is a nullity even if the same decision would have been arrived at had the affected party been heard..."

Then the Court added that:

"...we once again wish to remind learned judges and magistrates who exercise powers of appeal the Court's repeated pronouncement and guideline in various decisions on the procedure to be followed when they discover a new issue in the course of composing a judgment or a decision as we did in the case of ***Ausdrill Tanzania Limited vs Mussa Joseph Kumili and Another****, Civil Appeal No. 78 of 2014 (unreported). In that case, the learned judge discovered that an affidavit was defective when composing a judgment and dealt with that issue without hearing the parties. The Court stated that:*

"That being the case, we hasten to say that the learned judge did not apply the correct procedure. We are of the settled view that after she had observed the said defect, she ought to have stopped composing the judgment and re-summon the parties with a view of requiring them to address her on the point. Only then that she could have properly continued writing the judgment."

While taking into consideration the above binding position of the law, I am of the view that, the decision of the first appellate court cannot be left to stand. As such, I cannot proceed to determine the appeal on merits. I hold that, the decision by the first appellate court is a nullity.

In exercising my power of revision under section 31(1) of the Magistrates' Courts Act [Cap. 11 R.E. 2019], I hereby nullify and quash the judgment of District Court (the 1st appellate Court). Consequently, I set aside the order of the dismissal order.

In the event, I remit the record for the first appellate Court (District Court of Bunda) to accord the parties a right of hearing on the issue raised by the learned magistrate *suo mottu* when composing the judgment (on the non-existent provision). Thereafter the court should proceed to compose judgment according to the law.

In fine, the appeal is allowed only to the above extent.

It is so ordered

The right of appeal is fully explained.

THE HIGH COURT OF TANZANIA
MUSOMA

A. A. MBAGWA

JUDGE

09/06/2023