IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 63 OF 2021

(Originating from Kalambo District Court at Matai in Criminal Case No. 134 of 2020)

RESPIS S/O REMY..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

15th Nov, 2022 &27th Jan 2023.

NDUNGURU, J.

The appellant, Respis s/o Remy was arraigned before District Court of Kalambo at Matai with the offence of threatening violence contrary to Section 89 (2) (a) and (b) of the Penal Code, Cap 16 (R.E 2019). It was alleged by prosecution that on 4th November, 2020 at Matai B village within Kalambo

District and Region of Rukwa in the District Commissioner's office the appellant did threaten to kill one Norbert s/o Mwanisawa by using words. Upon trial the court being satisfied that the prosecution has discharged the duty of proving the case beyond reasonable doubt that the appellant threated to injure the person employed in public service (District Commissioner) contrary to section 101 and 35 of the Penal Code further to the offence charged that is threatening to kill Norbert s/o Mwaniwasa was convicted and sentenced for both offences. For the offence which is contained in the charge he was sentenced to serve 12 months' imprisonment and for the offence of threatening to injure the person employed in public service to serve two (2) years imprisonment. The trial court ordered sentences to run concurrently.

Briefly, the prosecution case in which the appellant's conviction was grounded is as follows: PW1 was a District Commissioner of Kalambo District. That on 4/11/2020 at about 14.00 hours he was in the office settling the land dispute between the appellant and one Norbert Mwanisawa (PW2) who was alleged to have trespassed the land owned by the appellant. That in the course of proceedings the appellant stood up while saying he would kill PW2 if he would try to enter into his land. That when PW1 told him to sit down,

the appellant said he would injure him if he is trying to defend PW2. That the matter was reported to the police station, the appellant was then arrested then arraigned at the District court for offence of threatening to injure whereby he was convicted and sentenced for two counts. Dissatisfied with the conviction and sentence, the appellant preferred this appeal. In the Petition of appeal, the appellant is armed with four grounds of his dissatisfaction as reproduced herein below;

1. That, I did not commit the offence alleged and proved by the prosecution side.
2. That, the prosecution failed to prove the allegation beyond reasonable doubt as required by law.
3. That, the trial court erred in law and fact by convicting and sentencing the appellant for the second offence which the appellant was not charged with.
4. That, the trial court erred in law and fact to convict the appellant based on the lesser offence which was not established by the prosecution side as required by law.

When the case was called upon for hearing, the appellant appeared in person(unrepresented), while Ms. Magutta learned State Attorney appeared

for respondent/Republic. When given opportunity to submit for his appeal, the appellant had no much to submit. He requested the court to adopt his grounds of appeal as they appear in his petition of appeal. Further he prayed his appeal be allowed.

Ms. Magutta, the learned State Attorney partly supported the appeal. Her submission was to the effect that, the testimony of PW1 that the appellant had threatened him was corroborated with the testimony of PW3 and PW3. Further, that the court found those witnesses credible meaning that the offence of threatening violence was proved.

The Attorney went on submitting that the second count which the appellant was convicted with is not a cognate offence to the 1st count. She thus concluded saying conviction and sentence meted on the second count be quashed.

Having pondered ample time going through records and the evidence available in the light of grounds of appeal at hand, the question is whether the appeal before me is meritorious. The record available is that the appellant was charged with only one count that is threatening violence contrary to section 89(2)(a) and (b) of the Penal Code. The testimony of the three prosecution witnesses (PW1, PW2 and PW3) is trying to show that, the

appellant threatened violence to one Norbert Mwanisawa while in the office of the District Commissioner. Looking at the testimony of the three witnesses who were the District Commissioner(PW1), the District Administrative Secretary (PW3) and (PW2), the adversary of the appellant in the land dispute which was referred by him to the District Commissioner to settlement, I find that the witnesses had interest to save. Taking the circumstances of the case it does not click into my mind that the appellant threatened to injure(PW1) the District Commissioner while was in his office. In his testimony PW1 told the court that while in the process of determining the dispute, the appellant stood up at the sometime uttered the words that" he will kill (PW2) if he will try to enter into the disputed land. Further that PW1 will regret as he is going to be injured if he defends PW2 the same was the testimony of PW2 and PW3 with similar words which make this hesitate to believe such kind of testimony. Leave it alone all three witnesses did not give detailed exposition to the circumstances leading to appellant's reaction. Such testimony must be looked at with circumspection.

The record further reveals that the PW1 was not a victim of the act of the appellant when the charge was referred. The appellant was charged with only one count that was threatening violence. The violence which was

exerted to PW2. The offence alleged to have committed against PW1 was not preferred in the charge as one the counts. It was cropped in the testimony of PW1.Though that was the scenario the trial court found him of guilty for that offence and accordingly in terms of **section 300 of Criminal Procedure Act Cap 20 R.E 2019.** For easy of reference the section reads;

300."-(1) Where a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it."

The wording of the above reproduced provision is rather clear that the person must be charged with an offence consisting of several particulars which constitute an offence. That once some of the particulars are not proved the proved once constitute a complete minor offence then that person may be convicted of that minor offence although he was not charged with. That means the offence must be of the same genus. **See Nanak Chand vs. State of Punjab,** AIR 1955 SC 274

In the case at hand the offences with which the appellant was convicted with are not of the same genre thus have deferent elements thus they had

to either be in different counts in the same charge because were committed in the same transaction or separately.

In the circumstances and having so said and done, I find the appeal has merit. I allow the appeal by quashing conviction and set aside sentences meted to the appellant. The appellant be released from the prison if still serving imprisonment term immediately unless lawfully held for any other cause.

It is so ordered.

D.B NDUNGURU
JUDGE
27/01/2023