

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA f ATMOSHI (DC) CRIMINAL APPEAL NO. 64 OF 2006 /o ,,
(C/F DC HAI CRIMINAL CASE NO. 368/2003) 1}~ JOSEPH SIKUSTAHILI ----- APPELLANT :s. • ~
' t VERSUS THE REPUBLIC-----:.-RESPONDENT

JUDGMENT

HON. JUNDU, J. () The Appellant, in the trial court, was charged with Threatening with Violence c/s 89 (2) (a) of the Penal Code, Cap. 16, Vol. 1 of the laws. The particulars of the offence were that the Appellant on the 2nd day of October, 2003 at about 19:30 hours at Kibaoni Street within Hai District, Kilimanjaro Region, did unlawfully threaten to kill one Maria d/o Mao by telling her that "Kesho nitakuonyesha Dawa yako" with intent to intimidate or annoy. In the said court, the evidence of PW.I Maria d/o Mao was that the Appellant was her husband but had been separated by court in 2001. She testified that on 2/10/2003 at 7.30 p.m was going to a shop, the Appellant went to her and abused her saying "Kumamayo kesho nitakuonyesha dawa yako." She got angry, she reported the matter to the police and the Appellant was arrested and charged accordingly. PW.2 in her evidence she stated that she was buying goods in the said shop, the Appellant went there where she found PW. I buying goods in the said shop and that he abused PW. I by saying "Kesho utaona dawa · yako." On the other hand, the Appellant in his defence evidence had testified that he had complained to the police station for threats made by PW .1 to him. He was not helped hence he complained to the RCO who directed him to contact OCD 1 Hai who wanted the case to be opened but surprisingly he was charged with the off~nce under the present appeal. DW.2 in her evidence testified that she never heard any threats to PW. I by the Appellant. Having heard the evidence of the prosecution witnesses and the defence witnesses, the trial magistrate evaluated the evidence as follows - " The issue to be decided by this court is whether accused person threatened to kill complainant PW. I as alleged in the charge. According to the testimony of complainant PW.I, and NeemaMndeme PW.2 proved accused person threatened to kill complainant () by abusing her "Kumamayo kesho utaona dawa yako". Therefore, I find accused person guilty for the offence charged with I convict him under Section 89

- (2) (a) of the Penal Code as charged." He sentenced the Appellant to a fine of shs.30,000/= or to six (6) months imprisonment in default thereof. The Appellant, having been aggrieved by the conviction and sentence in the trial court has appealed to this court listing seven (7) grounds of appeal in his Petition of Appeal filed in this court. However, the main issue in the

said 'I / grounds of appeal is whether the prosecution side in the trial court had proved the -- ,/ charge against the Appellant beyond reasonable doubt. Mr. Maugo, learned State Attorney who acted for the Respondent/Republic in his submission did not support conviction and sentence. One contention of the Appellant, in grounds 4 and 5 of the appeal, which Mr. Maugo, learned State Attorney concedes is that the evidence of the prosecution witnesses was contradictory. The record shows that PW. I had called PW.2 to corroborate her (PW.I) evidence that the Appellant had insulted her. In her evidence, on record, 2 PW.2 stated that PW. I was her neighbour and that on the material day she was present at the scene of the crime, that is at the shop and that she heard the Appellant insulting PW. I. However, when cross - examined by the Appellant, 01 PW.2 replied that she was alone at the shop and that there was nobody else. In my considered view, this casts doubt on the evidence of PW.2 especially taking into account that she had further testified that the Appellant having insulted PW.I, the shop owner chased him away. PW.I in her evidence did not so state, she stated that having been insulted by the Appellant, she reported the matter to the police and the Appellant was accordingly arrested. Now, the prosecution side in the lower court did not call the shop owner to give evidence as to whether the () Appellant had really insulted PW.I or caused chaos at the said shop on the material day and whether he did chase him away from the scene of crime or that PW. I as stated by PW.2 in her evidence had simply reported the incident to the police leading to the arrest of the Appellant as stated by PW. I in her evidence. Further, there was the evidence that PW. I and the Appellant were a wife and husband but had been separated due to misunderstandings between them. The trial magistrate ought to have taken into mind that a possibility that the case arose due to grudges between PW .1 and the Appellant emanating from their matrimonial dispute. If he had so done, he.,would have seen the said possibility hence casted doubt on the prosecution's case in the trial court. In addition, Mr. Maugo, learned State Attorney in his submission brought to my attention that the trial magistrate did not conduct preliminary hearing at the commencement of trial as mandatorily required under Section 192 of the Criminal Procedure Act, Cap, 20 R.E. 2002 to determine matters not in dispute. I have carefully checked the proceedings of the lower court and confirmed the said shortfall. The effect of the said shortfall is that it rendered all the proceedings conducted by the trial magistrate a nullity. I so hold and declare. 3 I

- In the upshot, I hold that the prosecution did not prove its case against the Appellant in the trial court beyond reasonable doubt. Further, the trial magistrate () did not conduct preliminary hearing as mandatorily required under Section 192 of the Criminal Procedure Act, Cap, 20 R.E. 2002 as I have stated above the effect of which is to render the proceedings of the trial court null and void. With all the aforesaid, I hold that the appeal filed by the Appellant is meritorious. I hereby allow the same. The conviction and sentence are hereby quashed and set aside. If fine of shs.30,000/= has been paid by the Appellant, then the same to be refunded to him or the Appellant is held in prison be released forthwith. It is so ordered. C) ~ F.A.R. JUNDU JUDGE 16/11/2007 Right of Appeal Explained ~ ,LA~/)----. ~ ,-- ,. F.A.R. JUNDU JUDGE 16/11/2007 j 16.11.2007 Coram: F.A.R. Jundu, J. For the Appellant:

present For the Respondent: Mr. Juma, State Attorney CIC: Muyungi 4 "\ Court: Judgment delivered in the presence of the Appellant and in the presence of Mr. Juma, learned State Attorney for the Respondent/Republic. F.A.R. JUNDU JUDGE 16/11/2007 <W . ATMOSHI 5

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