THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 0080 OF 2019

(ARISING FROM CRIMINAL CASE NO. KLA-CR-CO- 1115/2018 AT THE CHIEF MAGISTRATE'S COURT OF KAMPALA AT BUGANDA ROAD)

UGANDA :: APPELLANT

VERSUS

DR. STELLA NYANZI :: RESPONDENT

BEFORE: THE HONOURABLE JUSTICE DR. HENRY PETER ADONYO

JUDGMENT

1. **Background:**

Dr Stella Nyanzi (herein referred to as the appellant), a Medical Anthropologist and a former Research Fellow at Makerere University, Kampala, Uganda was charged with two counts of offences before the Buganda Road Chief Magistrate's Court presided over by Her Worship

Gladys Kamasanyu, a Magistrate Grade 1 (hereinafter referred to as the lower trial court).

In Count 1 the Appellant was charged with the offence of Cyber Harassment contrary to section 24(1), (2) (a) of the Computer Misuse Act, 2011 the particular of which are that:

> **"....Stella Nyanzi on the 16th September 2018 at Kampala District or thereabout used a computer to post on her Facebook page 'Stella Nyanzi' wherein she made suggestions or proposals inter alia that "Yoweri...I wish the smelly and itchy cream-coloured candida festering in Esteri's cunt had suffocated you to death during birth"; "Yoweri...I wish the acidic pus flooding Esteri's cursed vaginal canal had burnt up on your unborn fetus"; "Yoweri...I wish the infectious dirty-brown discharge flooding Esteri's loose pussy had drowned you to death"; which suggestions are obscene, lewd or indecent..."**

In Count 2 the Appellant was charged with the offence of Offensive Communications contrary to section 25 of the Computer Misuse Act, Act 2 of 2011, the particulars of which are that;

> **"... Stella Nyanzi on the 16th September 2018 in Kampala District wilfully and repeatedly used electronic communication to post messages offensive in nature via Facebook inter alia that "Yoweri...I wish the smelly and itchy cream-coloured candida festering in Esteri's cunt had suffocated you to death during**

birth"; "Yoweri...I wish the acidic pus flooding Esteri's cursed vaginal canal had burnt up your unborn fetus"; Yoweri...I wish the infectious dirty-brown discharge flooding Esteri's loose pussy had drowned you to death" which were transmitted over the internet to disturb the peace, quiet or right to privacy of his excellency the President of the Uganda Yoweri Kaguta Museveni with no purpose of legitimate communication..."

The Appellant pleaded not guilty to both charges. The Appellant was tried and at the end of the trial the lower trial court delivered its judgment dated 1st August, 2019 wherein the Appellant was found guilty of the offence of Cyber Harassment contrary to section 24(1), (2) (a) of the Computer Misuse Act, Act 2 of 2011 which was charged against her in Count 1 of the charge sheet but acquitted her of the offence of Offensive Communications contrary to section 25 of the Computer Misuse Act, Act 2 of 2011 charged in Count 2 of the charge sheet.

The cross appellant appealed against the acquittal and raised three grounds to support its cross appeal as below.

2. <u>Grounds of Cross Appeal:</u>

a) The learned trial magistrate erred in law and fact when she held that the Facebook post in issue was not repeated and she therefore arrived at the wrong conclusion in acquitting the Respondent

b) The learned trial magistrate erred in law and fact when she stated that the appellant did not prove that the post in issue disturbed the peace,

quiet or right of privacy of His Excellency Yoweri Kaguta Museveni with no purpose of legitimate communication

c) The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record, by arriving at a wrong conclusion by acquitting the Respondent thus leading to a miscarriage of justice.

3. Representation:

During the hearing of the appeal Ms. Janet Kitimbo and Mr. Timothy Amerit both state attorneys from the Office of the Directorate of Public Prosecutions appeared the Cross Appellant while Mr. Isaac Semakadde and Mr. Brian Bazeketta from Centre for Legal Aid Kampala represented for the Cross Respondent.

The Cross Appellant made a lengthy submission both written and oral while the Cross Respondent adopted its submissions in Criminal Appeal No 79 of 2019.

4 . Legal Principles:

Trials of a criminal nature are governed by established legal principles. It is imperative that their mention be made at the onset here for they guide criminal justice practices of courts of law. These legal principles are;

a. Burden and Standard of Proof:

In all criminal matters consideration must be had on the burden of proof of a criminal and the standard of proof. In regards to the burden of proof this

lies with the prosecution while the standard of proof for one to be found guilty of an offence is that which is beyond reasonable doubt.

The principle of burden of proof is higher than in a civil matter and is grounded under Article 28 (3) of the Constitution of the Republic of Uganda which provides that;

> **"... every person who is charged with a criminal offence shall ...be presumed to be innocent until proved guilty or until that person has pleaded guilty..."**

This principle was first articulated in the landmark case of Woolmington vs DPP [1935] AC 462 in the House of Lords of the United Kingdom where the presumption of innocence was first articulated in the Commonwealth. In law the case is remembered for introducing the metaphorical "golden thread" running through the law relating to the presumption of innocence with emphasis being that an accused person can only be convicted by a court of law on the strength of the case as proved by the prosecution and not on weakness of the defence given by an accused.

In Woolmington's case cited above Violet Woolmington was married to Reginald Woolmington. She left him and went to live with her mother. He sought her out and shot her. Reginald Woolmington was convicted of murder. He appealed the case which reached the House of Lords (now the Supreme Court). The House of Lords quashed the conviction on appeal with Viscount Sankey J stating that;

"... Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained..."

Arising from the above since the case which was before the lower trial court was one which was criminal the burden of proof of the guilt of the accused is placed squarely on the Prosecution with that burden resting upon it in respect of every element or essential fact that makes up the offence with which the accused has been charged. That burden never shifts to the accused. There is no obligation whatsoever on the accused to prove any fact or issue that is in dispute before court and it is of course NOT (Emphasis added) for the accused to prove his/her innocence but for the Prosecution.

On the other hand the standard of proof in a criminal case is one in which the Prosecution must prove an accused's guilt beyond reasonable doubt. That is the high standard of proof that the Prosecution must achieve before

a court can convict an accused with the words meaning exactly what they say – proof beyond reasonable doubt.

Which means that a court at the end of considering the evidence in the trial and the submissions made to it by the parties must ask itself whether the prosecution has established the accused's guilt beyond reasonable doubt for as Lord Denning put it in **Miller vs Minister of Pensions [1947] 2 All ER 372,** the prosecution evidence should be of such standard as to leave no other logical explanation to be derived from the fact that indeed the accused committed the offence. [**See Also Woolmington vs DPP 1935] AC 462]** though the prosecution could negative a defence as not proof to absolute certainty as was held in the case of **Israel Epuku s/o Achietu vs R [1934] I 166 at page 167** nonetheless.

b. <u>Duty of the Appellate Court:</u>

An appellate courts at whatever level perform the primary function to review and correct errors made in the primary or trial courts and may evaluate and scrutinise the evidence given in the lower court and come to its own conclusion as was pointed by Kato J (as he then was) in **Kalange v Uganda Criminal Appeal No. 18/1994) [1996] UGHCCRD 2 of 22 January 1996**, a position which restated by the Supreme Court of Uganda in the celebrated case of **Kifamunte Henry vs Uganda SCCA No. 10 of 1997** which pointed out that though a first appellate court has a duty to rehear the case and to reconsider the materials before the trial judge and make up its own mind it

must not do so by disregarding the judgment appealed from but carefully weighing and considering it.

This position was reiterated also in the holding in the case of **Uganda vs Ngaswireki Paul and Kivumbi Awali (Criminal Appeal No. 3 of 2017 (Arising from Criminal Appeal No. 512 of 2009)** it was pointed that an appellate court has the duty to re-evaluate the evidence before the trial court, look at the manner in which the plea and evidence was taken and the procedure used there, look even at the preferred charges against an appellant and the ingredients of the offences levied against an appellant and finally consider whether the trial court applied the law to the facts properly before arriving at its decision and then appellate court may, depending on its findings, quash or uphold the decision of the lower court, come up with its own decision, address legal issues of unfairness or irregularity that are not contained in the memorandum of appeal but are glaring on the record which resulted into the miscarriage of justice and or order for a retrial in the interests of justice with an appellate court only interfering with the decision of the lower court where there has been gross miscarriage of justice occasioned anyone party during proceedings.

The above being so I now turn to the appeal now before this court so as to make an informed decision as to the basis upon which the lower trial court convicted the appellant on the first count and acquitted her on the second count.

5. Submissions of the parties:

The Appellant was acquitted of the offence of Offensive Communication contrary to Section 25 of the Computer Misuse Act, Act No. 2 of 2011. The prosecution / the cross appellant appealed against this acquittal and seeks the reversal of that decision by this Honourable Court.

Section 25 of the Computer Misuse Act, Act No. 2 of 2011: Offensive communication: Provides;

> ***"Any person who wilfully and repeatedly uses electronic communication to disturb or attempts to disturb the peace, quiet or right of privacy of any person with no purpose of legitimate communication whether or not a conversation ensues commits a misdemeanor and is liable on conviction to a fine not exceeding twenty four currency points or imprisonment not exceeding one year or both."***

The close reading of the said section shows that two elements of the offence must be proved On the first ingredient, that *'A person wilfully and repeatedly used electronic communication'*, Counsel for the Cross-Appellant referred to the evidence of PW1 in the lower court proceedings and submitted that in 2017, he investigated a similar matter where the Cross-Respondent was charged with making offensive communication and cyber harassment in Criminal case No. 319/2017; and that on 26th July 2018 at 12:21p.m, she also posted a similar article. Counsel also referred to the evidence of PWI and PW2 they follow the Cross-Respondent on her 'Stella Nyanzi' Facebook account and they are familiar with her writing similar

articles. According to Counsel, there was more than one instance in the course of conduct, and as per decided cases, it was not essential that the accused person be found guilty of the previous conduct.

Counsel submitted that the trial Magistrate's statement that '*the prosecution argument that the accused person has another file of the same nature before this Court is a misconception of the term repeatedly'* was in error and it was not true that repeatedness should be in regard to the same post.

On the second element *'to disturb on attempt to disturb the peace, quiet or right of privacy of any person with no purpose of legitimate communication whether or not a conversation ensues'*, Counsel for the Cross-Appellant submitted that in exposing the genital section of Esiteri to public scrutiny, the Cross-Respondent infringed on the right to privacy, quiet and peaceful enjoyment of Yoweri Kaguta Museveni in violation of Article 27 of the Constitution. Counsel argued further that the said post was offensive and that it was the task of the court to censure such utterance.

On the third element that 'the Cross-Respondent is the person is responsible' counsel's submissions were that from PWI's evidence, it was clear that the Cross- Respondent was the person responsible for making the post since from his analysis, she owns the Facebook account 'Stella Nyanzi' and that it was activated by telephone numbers which were registered in her names .

In the submissions in response, counsel for the Cross-Respondent submitted that they were in agreement with the judgment of the lower court

in regard to acquittal on Count 2, and the conviction and sentence urged by the Cross-Appellant is wrong and unsustainable.

Counsel for the cross-respondent also adopted their submissions in respect to criminal appeal case No. 79/2019 *mutatis mutandis;* and submitted that the decision to prosecute the cross-respondent was unlawful since freedom of expression should not be punished.

Resolution of the Cross Appeal:

Having found in Criminal Appeal No 79 of 2019 that the prosecution had failed to prove that trial lower court had jurisdiction to try the offence of Cyber Harassment contrary to section 24(1), (2) (a) of the Computer Misuse Act, 2011 and that Offensive Communications contrary to section 25 of the Computer Misuse Act, Act 2 of 2011 for reasons given in Criminal Appeal No. 79 of 2019, I am constrained to dismiss this appeal accordingly with orders as follows;

1. This Cross Appeal is dismissed reasons given in Criminal Appeal No. 79 of 2019.
2. The Judgment of the lower trial court acquitting the respondent on Count 2 of Offensive Communications contrary to section 25 of the Computer Misuse Act is set aside.
3. The conviction and sentence of the cross respondent on Count 1 on Cyber Harassment contrary to section 24(1), (2) (a) of the Computer Misuse Act, 2011 is set aside.

4. The cross respondent is ordered released from custody forthwith unless being held in custody for any other legal reasons.
5. The right to appeal as provided for under section 132 of the Trial on Indictment Act read to the parties.

I do so order accordingly.

Hon. Justice Dr. Henry Peter Adonyo

Judge

20th February 2020