Kimuri v Republic

Court of Appeal, at Nyeri

October 24, 1990

Hancox CJ, Nyarangi JA, Cockar Ag JA

Criminal Appeal No. 133 of 1989

On October 24, 1990, Hancox CJ, Nyarangi JA, Cockar Ag JA delivered the following

Judgment.

Following the dismissal of his appeal by the High Court at Nyeri from his conviction of demanding property with menances contrary to section 302 of the Penal Code by the resident magistrate, Nyahururu, the appellant through his advocate Mr Ngunjiri filed a Memorandum of Appeal containing the following grounds of appeal:-

1. Having established that corruption was the proper charge the judge should have allowed the appeal.

2. The learned resident magistrate failed to appreciate that if she was satisfied that the sum of Kshs.60 was passed to the appellant by PW 3 an offence of corruption was committed and no longer that of demanding.

3. The learned resident magistrate failed to appreciate that if she was satisfied that the sum of Kshs.60 was passed to the appellant by PW 3 an offence of corruption was committed and no longer that of demanding.

4. The learned magistrate should have sought the consent of Attorney General when corruption was established.

5. The evidence of PW 3 should have been treated as that of an accomplice which was in considering it weight.

Mr Ngunjiri did not make any submission in respect of ground four above. Before we deal with the remaining four grounds of appeal and the submissions made by Mr Ngunjiri

in court we will give a brief resume of evidence which was accepted by the trial magistrate and also by the Superior Court. On 10th January, 1988, the appellant, an Administrative Policeman, and another

Administrative Policeman (hereafter referred to as the other A.P) arrested the complainant for the offence of hawking without a licence and took him to the Administration Police Post. There he was asked by the other A.P. to make a list of his property which he did. The same A.P. then released him with instructions to report back the following morning. Unfortunately soon after that the complainant happened to come across the appellant inside a bar. He was re-arrested together with one Jesse Wamiti (PW 2) and taken by the appellant back to the A.P. Post and handcuffed to a Post. Wamiti (PW 2) was later released after he paid the appellant Kshs.20. Before that the appellant had asked the complainant to produce something and if he did not have the money he would be slapped. About three hours later at about 7.30 pm the appellant took the complainant to Mukeu Farmers Union Building, handcuffed him to a post and left after instructing a watchman to keep an eye on the complainant.

Earlier on William Wanjuki (PW 3), a bursar at a Girl's School, had happened to see the complainant and the latter had explained to him his predicament and requested him to persuade the appellant to release this property.

The appellant was drinking in the bar when Wanjuki came and talked to him. The appellant told him that he would release the property only if the complainant talked to him nicely. The other A.P. also had now joined them. After the appellant had been taken to the Union building Wanjuki again raised the matter with the appellant and the other A.P. They, however, insisted that the complainant would be released only if he talked to them nicely. Eventually the appellant said that the complainant would be released if he would buy him, the appellant, a crate of beer.

Other evidence followed as to how a sum of Kshs. 60 made up of Kshs.50 which the complainant had with him, and Kshs.10 which were added by Wanjuki form his own pocket, were paid by Wanjuki to the appellant who then told Wanjuki that the complainant would have to bring them Kshs.100 if he did not want to be taken to court.

Soon after, the complainant was brought to them. He also was told by the appellant that if he wanted his items to be released he should bring the money Kshs.100 the following day.

That is the evidence relating to the offence of demanding with menances. There is other evidence which might or might not amount to corruption involving Wanjuki, PW 3, which was also noted by the learned judge, on which we will comment later. The learned trial magistrate found the offence of demanding with menaces proved. That was confirmed by the High Court in the first appeal.

In his submissions to this court Mr Ngunjiri contended that Demand had not been proved. He conceded that the complainant had been handcuffed to a post but there was no evidence that before the arrival of Wanjiku PW 3, any demand had been made by the appellant. If the prosecution evidence is accepted then after the arrival of Wanjuki the events that happened constituted corruption. Due consideration had not been given to the material contradictions between the evidence of the complainant and Wanjuki, PW 3. The evidence of Wanjiki should have been treated as that of an accomplice because he was involved in the negotiations as to the amount to be paid for release and also in the actual payment of Kshs.60. Corroboration of his evidence had not been sought and that constituted a grave misdirection. It would be appropriate at this stage to consider what constitute the offence of demanding with menances.

The offences is defined in section 302, of the Penal Code as follows:-

> Any person who, with intent to steal any valuable thing, demands it from any person with menaces or force is guilty of felony and is liable to imprisonment for ten years.

It is clear from the definition that the offence is complete when a demand is made. Whether payment is made or not is immaterial. Further there must be a use of menace, threat or force capable of arousing fear. Finally only the person who demands with

menaces commits the offence. The victim is not an accomplice to the offence even if he parts with the property.

The evidence show that the first time that a specific demand was made by the appellant from the complainant was between 4.30 pm when he was tied to the post at the camp and 7.30 pm before Jesse Wamiti CPW 2) was released. Before that, according to the complainant, Administrative Policemen were making demands to be treated nicely but he did not state in examination in-chief who those policemen were. It was during crossexamination that he specifically mentioned the appellant making the demand adding that he was told that if he did not have money he should be slapped. The trial court and the Superior Court had accepted the complainant's evidence and this court will not depart from the concurs findings of fact of the two lower court without clear and compelling reasons. Clearly the demand accompanied with menaces was for money.

The offence of demanding by menaces was then complete. This had happened before Wanjuki (PW 3) had an opportunity of meeting and telling the complainant of the result of his discussion with the appellant. No element of corruption had by that time appeared in the incident. The offence of demanding by menaces was completed between 4.30 pm and 7.30 pm on the material day. That is what the learned judge had in mind when he said that corruption was a possible charge and then he referred to his earlier findings that the offence of demanding with menaces became when the initial demand was mde and had added that the pp could also be charged and convicted of demanding with menaces. That disposes of the first ground of appeal.

Further demands with menaces, were made by the appellant in continuation of the same incident from Wanjuki (PW 3) who was acting as an intermediary and again from the appellant himself. After the complainant had explained to Wanjuki (PW 3) about his problem the latter went to the appellant in the bar. When they talked the appellant told him that he would release them (that is the complainant and (PW 2) only if the complainant talked to them nicely. Wanjuki was then called away. So the demand had yet again been made.

A little later when Wanjuki had again met the appellant and the other police man they went together to the bar where Wanjuki bought them beer.

The appellant and the other policeman told him that they would release the complainant if he talked to them nicely. The appellant shortly afterwards told Wanjuki that if the complainant could buy him a crate of beer he would be released. This was another demand with menace. Wanjuki went to the appellant at the other place where he had been taken and handcuffed to post, took Kshs.50 from the complainant's trouser pocket, and went to the appellant who refused because that was not enough. Wanjuki added Kshs.10 of his own. The appellant and the other policeman accepted Kshs.60 . But the appellant had then said that if the complainant did not want to be taken to court he should bring them anther Kshs.100.

That was yet another demand with menaces. The final demand with directed against the complainant through the intermediary Wanjiku was made when the complainant was brought to the policeman when he was about to be released. At that time the appellant told him to leave his merchandise there and that the same would be returned after he had brought Kshs.100 the following day and had paid the balance

of money by instalments until he had paid Kshs.250 in full.

Mr Ngunjiri's submission was that Wanjuki was involved in the payment of Kshs.60 in order to secure release in circumstances which showed that the offence of corruption had been committed. Whether that amounted to corruption or not is in our view immaterial. The appellant was charged with the offence of demanding with menaces. We stated earlier that on this charge only the person who makes the demand commits the offence. Unlike the offence of corruption in which both the giver and the receiver commit the offence, in the offence of demanding with menaces the victim can neither be charged nor convicted of demanding. The victim was not an accomplice in this offence. www.kenyalawreports.or.ke

As far as the offence of which the appellant was charged is concerned Wanjuki was acting merely to help his friend, the complainant. He was not acting in concert with or in the interests of the appellant. The learned judge rightly found that Wanjuki (PW 4) was not an accomplice in the commission of the offence of demanding with menaces and hence his evidence did not need corroboration. It was the option of the prosecution with which offence to charge the appellant.

We have covered the 3rd and 5th grounds of appeal and also Mr Ngunjiri's submission that Wanjuki was an accomplice and that corroboration should have been sought of his evidence. There is no merit in either of these two grounds of appeal nor in the submission made in court.

As regards the 2nd ground of appeal claiming material contradictions surrounding the passing of Kshs.60 to the appellant, we have carefully considered the contradictions which Mr Ngunjiri pointed out. In our view these were of a minor nature and did not affect the credibility of the witness. The trial magistrate and the learned judge had same were not substantial.

A little later when Wanjuki had again met the appellant and the other police man they went together to the bar where Wanjuki bought them beer. The appellant and the other police told him that they would release the complainant and if he talked to them nicely. The appellant shortly afterwards told Wanjuki that if the complainant could buy him a crate of beer he would be released. This was another demand with menace. Wanjuki went to the appellant at the other place where he had been taken and handcuffed to a post, took Kshs.50 from the complainant's trouser pocket, and went to the appellant who refused because that was not enough. Wanjuki added Kshs.10 of his own. The appellant and the other policeman accepted Kshs.60. But the appellant had then said that if the complainant did not want to be taken to court should bring them another Kshs.100.

That was yet another demand with menaces. The final demand with menace directed against the complainant through the intermediary Wanjiku was made when the complainant was brought to the policeman when he was about to be released. At that time the appellant told him to leave his merchandise there and that the same would be returned after he had brought Kshs.100 the following day and had paid the balance of money by instalments until he had paid Kshs.250 in full.

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help his friend, the complainant. He was not acting in concert with or in the interests of the appellant. The learned judge rightly found that Wanjuki (PW 4) was not an accomplice in the commission of the offence of demanding with menaces and hence his evidence did not need corroboration. It was the option of the prosecution with which offence to charge the appellant.

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We are satisfied that this is a safe conviction. The appeal is accordingly dismissed.