



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 51 OF 2013

(An appeal from the Judgment and sentence of the Senior Principal Magistrate, Embu in CMCR. Case No. 154 of 2011)

PHENIAS NJERU KORU..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is an appeal against the judgment of Senior Principal Magistrate Embu in Criminal Case No. 154 of 2011. The appellant was charged with the offence of threat to kill contrary to Section 223(1) of the Penal Code and fined Kshs.10,000/= in default six months imprisonment. He was dissatisfied with the judgment and lodged this appeal.

2. In his petition of appeal the appellant relied on the following grounds:-

1. *The magistrate erred in fact in failing to appreciate that PW1 and the accused had a hotly contested case which caused PW1 to maliciously and falsely report the appellant to police.*
2. *The magistrate erred in failing to appreciate that the alleged weapon i.e the panga was not produced as an exhibit to court.*
3. *The magistrate erred in failing to appreciate that even if the accused threatened PW1 which is denied there was no intention to harm the complainant.*
4. *The learned magistrate erred in failing to appreciate that the prosecution had failed to prove accused guilty beyond reasonable doubt.*
5. *The magistrate erred in failing to appreciate that the accused could not have been shouting threatening to PW1 who was not anywhere at the moment of shouting.*
6. *The magistrate erred in failing to appreciate that the accused and PW1 had lived for many years without any problem or quarrel till PW1 filed the said civil suit and PW1 wanted to get rid of the accused so that he can win the land case while the accused was in prison.*
7. *The magistrate failed to appreciate that there was no independent witness.*
8. *The magistrate failed to appreciate that the appellant is an old man (over 70 years) and needed special treatment as a first offender instead of harsh sentence.*

3. The counsel for the appellant Mr. P.N. Mugo submitted that the charges were as a result of a long standing land dispute. The appellant and the complainant had an interest in the land and there was a pending civil case on ownership. The complainant stated that he heard the appellant shouting at the gate

that he would kill the complainant. The appellant was ordered to leave and he complied. There was no physical confrontation between the appellant and the complainant. If there was a threat to kill, the complainant would have confronted the appellant. The panga that was allegedly used was not recovered. The parties had lived together for a long time. The offence was not proved to the standards required. PW1 and PW2 are husband and wife and are therefore not independent witnesses.

4. The counsel for the respondent Ms. Matere stated that the case was proved beyond any reasonable doubt. A threat to kill is life threatening and serious. The appellant said "*wewe nitakuua*". The appellant was armed with a panga at the material time. PW1 and PW2 had to retreat after the threat to kill PW1 was made. It was submitted that the land dispute has no effect on the criminal charges. There was evidence that the threat to kill was made to the complainant.

5. The State argued that the trial court considered the defence in light of the prosecution's case and found it not sufficient to rebut the allegations. It is immaterial whether the threat was premeditated or not. There is evidence to show that the appellant had the intention to kill the complainant.

6. The State argued that this appeal had no merit and ought to be dismissed. The sentence was lawful and reasonable.

7. The duty of the 1st appellate court was explained in the case of **OKENO VS REPUBLIC 1972 EA 32** where it was stated in that case as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

8. The evidence of the prosecution was that the complainant had bought land from the mother of the appellant. On 9/11/2011 at around 9.00 p.m. PW1 was in his house resting when he heard the appellant shouting at the gate of the homestead saying "*wewe nitakuua mwizi, mchawi, utakufa kabla ya kupata title deed*". He went out of the house to the gate accompanied by his wife PW2. When the appellant saw him he repeated the threat that he would kill him before he obtained the title deed.

9. The security lights at the gate were on and PW1 was able to see the appellant clearly for he stood just a few metres away. PW1 and his wife retreated to the house and reported the matter to the police the following day. PW1 testified that the appellant was harassing him because of the piece of land he had bought from his mother.

10. The evidence of PW1 was corroborated by that of PW2 on how the appellant went to their home and made threats to kill to her husband in her presence. With the aid of security lights she PW2 was able to see the appellant who was armed with a panga standing outside the gate. PW2 told the court that she is the one who pleaded with the husband to ignore the appellant. Thereafter PW1 and PW2 retreated to their house. PW2 confirmed that her husband had bought a piece of land from the mother of the appellant.

11. The appellant was arrested from his home on 23/11/2011 at around 6.00 a.m. by PW3 PC Misheck Meme of Kibugu police post. PW3 testified that he had received previous reports from the complainant that the appellant had gone to his gate and threatened to kill him. He also established that there was a long standing land dispute between PW1 and the appellant. PW3 investigated the matter and arrested the appellant.

12. The appellant in his unsworn statement of defence testified that the complainant bought land from his mother in 1993 and that the two families have lived together for about 20 years. He said that he was arrested and taken to Kibugu police post and later to Embu Police station. Further that it was alleged that he went to the house of the complainant armed with a panga and hit the window. He contended that the complainant wanted to take his land and that is the problem he has with him.

13. The appellant was charged under section 223(1) of the Penal code which provides that;

“Any person who without lawful excuse utters, or directly or indirectly causes any person to receive, a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years”.

14. It was argued that the magistrate erred in failing to appreciate that the appellant and the complainant had a hotly contested case pending in court which caused the complainant to maliciously and falsely accuse the appellant.

15. In his defence the appellant talked of the long standing land dispute between him and the complainant. He stated that the incident arose from the land dispute. In this case, the land dispute pending in court was independent of the criminal charges. The most important thing is for the prosecution to prove the criminal charges against the appellant as required by the law. There was no justification for the appellant to make death threats to the complainant. Furthermore, the appellant did not show in his defence that he was maliciously and falsely accused by the complainant.

16. The appellant raised the issue that the alleged weapon namely a panga was not produced in court. PW3 could not produce exhibit before the court because he did not recover the panga. It is not a requirement of the law that for a criminal offence to be proved, the weapon used to commit the crime has to be produced. A criminal case may be proved by evidence other than that of production of exhibits.

17. In the case of **JOHN WACHIRA MUTHIKE VS REPUBLIC [2014] eKLR** the appellant complained that exhibits were not produced in court. It was held that failure to produce exhibits in court is not necessarily fatal to a prosecution case and that each case depends on its own circumstances.

18. The appellant argued that the magistrate failed to appreciate that even if he threatened the complainant he had no intention to harm him. The ingredients of the offence consist of the following:-

1. *Without lawful excuse utters;*
2. *Or directly or indirectly causes any person to receive a threat;*
3. *The threat may be in writing or verbal;*
4. *It must be a threat to kill any person.*

19. It was held in the case of **NANCY WANJA GITHAKA VS REPUBLIC [2015] eKLR** that the prosecution was required to establish and prove that the appellant directly or indirectly, whether in writing or verbally caused the complainant to receive a threat to kill her.

20. Similarly, in the case of **REPUBLIC VS DAVID KIPSANG RONO [2010] eKLR** it was held that the trial magistrate required to consider the offence in the aspect of lawful excuse “*utters or indirectly or directly causes any person to receive a threat*”.

21. The prosecution adduced evidence that the appellant had no lawful excuse to make the death threat to the complainant. It was irrelevant that there was a pending land dispute. The evidence of PW1 as to the threat made was sufficiently corroborated by the evidence of PW2. The act appellant to go to the gate of the complainant's home and threaten to kill him was a manifestation of the intention to harm him.

22. It was also contended that the magistrate failed to appreciate that the appellant and the complainant had lived together peacefully for many years until the emergence of the land dispute. It is noted that the appellant did not mention in his defence that the parties co-existed peacefully for the said period. Even assuming that he had said it, this had no bearing to the criminal offence. The existence of the land case was irrelevant to the conviction of the offence. Even if the court was to consider the land dispute, it would only have acted as a mitigating factor during sentencing.

23. The appellant raised the issue of PW1 and PW2 not being independent witnesses because they were husband and wife. It was held in the case of **NDUNGU KAMANYI VS REPUBLIC [1976-80] 1 KLR:-**

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straight forward person, or raise a suspicion about his trust worthiness or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”

24. The trial magistrate observed that the evidence of PW1 and PW2 was credible and reliable and that he had no reason to disbelieve them. The defence of the appellant was also considered and found not plausible. The fact that PW1 and PW2 were husband and wife does not affect the credibility of their evidence. The court treats the evidence of each witness independently.

25. The issue of the trial magistrate failing to consider that the appellant was an old man of over 70 years was raised. This is a factor that would be considered in sentencing. The appellant was fined Kshs.10,000/= in default six (6) months imprisonment. The sentence provided under Section 223(1) is ten years imprisonment. It appears that the leniency exercised by the magistrate in sentencing was influenced by the advanced age of the appellant even though he said nothing in mitigation.

26. The prosecution has a duty to prove the case beyond any reasonable doubt. I have re-evaluated the evidence adduced in this case and I am satisfied that the case was proved against the appellant beyond any reasonable doubt. The conviction was safe and the sentence was within the law.

27. The conviction and the sentence are hereby upheld.

28. I find no merit in this appeal and it is hereby dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF DECEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

- 1. Mr. P.N Mugo for appellant.**
- 2. Ms Nandwa for respondent.**
- 3. Appellant present.**



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