Hassan v Republic (Criminal Appeal E060 of 2022)
[2023] KEHC 27360 (KLR) (28 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27360 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E060 OF 2022

JN ONYIEGO, J

DECEMBER 28, 2023

BETWEEN

YUSSUF ABDI HASSAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence by Hon. Mukabi Kimani S.R.M. delivered on 26 .08.2022 in the SRM's Court at Mandera)

JUDGMENT

1. The appellant herein was charged before Mandera SRM's court with two counts. Count i: Threatening to kill contrary to section 223(1) of the *Penal Code* with particulars being that on 13.03.2022 at around 1500hrs at Central Area within Mandera East Sub-County in Mandera County, without lawful excuse uttered threatening words 'Waa Ithin Diili Gurgana Wango BI' meaning 'I Will Kill You and Burn The House' to Isaack Abdi Hassan while armed with kitchen knife.

2. Count ii: Creating disturbance in a manner likely to cause a breach of peace contrary to section 95(1) (b) of the *Penal Code* with particulars being that on 13.03.2022 at around 1500hrs at Central Area within Mandera East Sub-County in Mandera County, he created disturbance in a manner likely to cause abreach of peace by throwing stones on the house roof and compound belonging to Isaack Abdi Hassan.

3. Having returned a plea of not guilty, prosecution lined up a total of three witness to prove its case. Upon conclusion of the trial, the trial court delivered its judgment on 26.08.2022, thus convicting the appellant and sentenced him to serve a period of 10 years and 6 years imprisonment respectively. That the sentence was to run concurrently.

4. Dissatisfied with the determination of the court, the appellant preferred the instant appeal via an undated petition of appeal citing grounds that:

i. The trial learned magistrate erred in law and facts in convicting the appellant based on contradictory and inconsistent evidence.

ii. The trial learned magistrate erred in law and facts in meting out a manifestly harsh sentence upon the appellant.

iii. The trial learned magistrate erred in law and facts by convicting and sentencing the appellant without appreciating the fact that the case emanated from a grudge in relation to family feud/s and that the same could easily be solved by the parties.

iv. The learned trial magistrate failed to consider the appellant's defence in coming up with the judgment.

5. The court gave directions that the appeal be canvassed by way of written submissions. On his part, the appellant submitted that the complainant who is also his brother was ready to withdraw the complaint filed against him. He pleaded for mercy thus urging this court to allow the appeal as prayed.

6. Mr. Kihara for the respondent relied on his submissions filed on 24.08.2023. He contended that the evidence adduced by the prosecution was sufficient enough to warrant proof of the case beyond reasonable doubt. That the sentence by the trial court was not only legal but also appropriate in the given circumstances. Learned counsel therefore urged the court to uphold the finding of the trial court.

7. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come up with my own independent conclusion and determination – See *Okeno v Republic* (1972) E.A 32.

8. Brief facts of the case are that, on 13.03.2022 at 3 p.m., PW1, Isaack Abdi Hassan was at his home with his wife when he heard stones being pelted on his house roof. That upon getting out of the house, he saw the appellant throwing stones on his roof. It was his evidence that he enquired from him why he was acting so but the appellant told him that he would stab him with a knife. That the appellant stabbed the mabati fence using the said knife while stating in kisomali that he would stab him in the manner in which he was stabbing the mabati.

9. On cross examination, PW1 stated that the appellant was known to cause disturbances as he was in the habit of abusing drugs. That there was a certain time that he complained about the appellant thus leading to the appellant's imprisonment for a period of three years.

10. PW2, Zeitun Yussuf Abdullahi testified that on the material day, she was at her home when she realized that the appellant, was pelting stones on their roof. That the plot where she lives is adjacent to that of PW1. She stated that the appellant went to their plot, picked a knife from the kitchen and then fled. That he started stabbing the mabati fence prompting her to go and enquire on what was happening. She stated that while there, the appellant in his usual fashion started shouting at PW1 swearing that he would stab him in the manner that he was stabbing the mabati. On cross examination, she reiterated that she saw the appellant with a knife stabbing mabati and pelting stones at PW1's roof.

11. PW3, Amos Uhuru Mango the investigating officer testified that upon being assigned the file herein, he embarked on carrying out investigations and recording witness statements. He stated that he called PW1 who informed him of how the appellant had pelted stones onto his roof and further, threatened to kill him and thereafter burn his house.

12. He further testified that he visited the scene where he saw and further documented the punched fence but did not find the knife. That he saw visible marks which he photographed hence clearly demonstrating the punched iron sheets. He produced the said photographs as Pex 1.

13. DW1, Yussuf Abdi Hassan testified that on 13.03.2022 at midday, he was at the bus park doing casual work. That his brother went with police officers who proceeded to arrest him. He denied committing the offences herein and further claimed that he was simply framed. He decried having been previously imprisoned for a period of three years. He stated that the charges herein were spearheaded by his brother who had formed a ploy to own their father's property.

14. I have considered the petition of appeal herein and parties' rival submissions. From the said analysis, it is my considered view that the main issue for determination is whether the prosecution tendered sufficient evidence to prove the elements of the offences preferred against him

15. The appellant was convicted of both counts. The first count, the appellant was charged with threatening to kill contrary to section 223(1) of the *Penal Code* which states as follows –

    223

    (1) 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".

16. From the evidence on record, PW1 gave a detailed testimony on how his brother approached his home and threatened to kill him. He explained that the appellant had a habit of attacking him. That to demonstrate how he intended to kill him, he stabbed the Mabati fence as well as throwing stones on his roof. PW1's testimony was corroborated by the evidence pw2 who heard and saw the appellant threaten to kill pw1. Both pw2 and pw1 heard the appellant utter the words that he would kill the complainant, (PW1)

17. PW3 who visited the scene stated that he found and further documented the punched mabati fence. He also stated that he saw visible marks which he photographed hence clearly demonstrating the punched iron sheets. He produced the said photographs as Pex 1. The testimony of pw1 and pw2 was not shaken. The offence took place during the day hence positive recognition and therefore no element of mistaken identity. In fact, the only defence the appellant raised was that his brother wanted to disinherit him which is a general statement which does not challenge the evidence on record.

18. Pw2 had no grudge with the appellant hence an independent witness. It is no wonder that the appellant is challenging sentence alone in his submission claiming that his brother had forgiven him. Taking into account all factors surrounding this case, Iam persuaded to believe pw1 and pw2 as reliable and truthful witnesses just as the learned magistrate did.

19. Taking all circumstances surrounding the commission of the offence, am inclined to agree with the the trial magistrate, that the prosecution had proved its case against the appellant beyond any reasonable doubt for the offence of threatening to kill.

20. On the second count, Section 95(1)(b) of the *Penal Code* provides that; -

    Any person who -

    (b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.

21. Therefore, the ingredients of the said offence are that the offender either brawled or created a disturbance in a manner likely to cause a breach of the peace.

22. As to what constitutes a brawl, Muchemi, J in *Jacob Nthiga Ngari v Republic* [2014] eKLR, held that:

> " For the offence to be proved (sic), the prosecution must prove that there was a brawl caused by the accused on (sic) that the accused creates disturbance in such a manner as is likely to cause a breach of the peace. A brawl is defined as a rough or noisy quarrel or fight....."

23. The evidence by PW1 was that on the material day, he was at home with his wife when he heard stones being pelted on his roof. That upon getting out of the house, he saw the appellant throwing stones on his roof. PW2 also testified that on the material day, she was at her home when she realized that the appellant, a neighbour was pelting stones on their roof. That the plot where she lived is adjacent to that of PW1. It was her evidence that the appellant went to their plot, picked a knife from the kitchen and then fled. That he started stabbing the mabati fence prompting her to go and enquire on what was happening. She stated that while there, the appellant in his usual fashion started shouting at PW1 while responding that he would stab PW1 in the manner that he was stabbing the mabati.

24. From the evidence on record, and going by the definition of the word brawl as being a rough or noisy quarrel or fight, it is clear that the acts of the appellant did not amount to a brawl. PW1 did not testify as having quarrelled with the appellant and neither did PW2 testify as having witnessed such a quarrel. As such, the first part of the element of the offence was not proved.

25. However, the offence can also be committed where an accused, in any other manner, creates a disturbance in such a manner as is likely to cause a breach of the peace. Under this limb, there must be disturbance and also evidence of likelihood to breach the peace. In the case of *Mule v Republic* Criminal Appeal No. 873 of 1982 it was stated thus:

> " 1) The offence of creating a disturbance likely to cause a breach of the peace constitutes incitement to physical violence and the breach of the peace contemplating physical violence...
>
> 2) It is not enough to constitute the offence of creating disturbance likely to cause a breach of the peace to show that the accused merely created a disturbance. That disturbance should have been likely to cause a breach of peace. Peace would, for instance refer to the right of wananchi to go about their daily activities without interference. The actions of the appellant interfered with people's activities and therefore caused a breach of peace."

26. E.M Muriithi J in *Fransisca Kiborus v Republic* [2017] eKLR held that the term "disturbance" must be construed ejusdem generis with the word brawls to mean creation of violence, chaos or fighting. From the evidence on record, PW1 testified on how while at his home, the appellant started pelting stones at his roof.PW2 also stated on how the appellant, a neighbour was pelting stones on their roof.

27. That the plot where she lived is adjacent to that of PW1.It is clear that the appellant herein caused chaos due to his actions which had the complainant not restrained himself, peace would have been at stake. His conduct had the possibility of endangering peace hence the element of creating disturbance. The conduct of shouting and throwing stones was likely to annoy the complainant hence a possibility that peace would have most likely been disturbed.

28. Further, as the court held in *Mule v Republic* (1983) KLR 246, it is not enough to constitute the offence of creating a disturbance if the disturbance is not likely to cause a breach of the peace. The disturbance should have been likely to cause a breach of the peace. The court went on to hold that peace would, for instance refer to the right of wananchi to go about their daily activities without interference.

29. In the instant case, it is clear that PW1 and PW2 indeed left whatever they were doing to go and check out as to see who was making noise. PW2 further stated that the appellant was throwing stones while young children were around at that time. That in as much as the children were not hurt, the appellant almost hit one young girl. It is my view therefore that the appellant did interfere with PW1, PW2 and the young children's activities.

30. Taking into account all the above, it is my view that the prosecution did tender sufficient evidence to prove the elements of the offences the appellant faced. The evidence was not contradictory and the appellant did not submit as to the alleged contradictions. It follows that grounds 2 and 3 are thus baseless.

31. On the ground that his defence was not considered, this court has since perused the impugned judgment and found that the same was considered as the trial court clearly stated that the defence was an afterthought and therefore, could not displace the prosecution's evidence.

32. With regard to sentence, the maximum sentence for the offence of threatening to kill is 10 years imprisonment. The appellant was sentenced to serve 6 years imprisonment. However, the penalty provided for creating disturbance is 6 months. Why the trial court sentenced him to 6 years is not justified.

33. It is trite law that sentencing is at the discretion of the trial court and that the appellate court can only interfere if the same is excessive, arrived at after considering wrong legal principles or irrelevant factors. See *MMI vs Republic* (2022)e KLR.

34. In a nut shell, I do not find anything wrong in the court meting out the sentence in respect of the 1st count. However, the court illegally acted by giving an illegal sentence in respect to the 2nd count which I do hereby substitute with six months to run concurrently with the penalty in respect of the 1st count.

    ROA 14 days,

DATED, SIGNED DELIVERED VIRTUALLY THIS 28TH DAY OF DECEMBER 2023

.....

J.N.ONYIEGO

JUDGE