



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE**

CRIMINAL APPEAL NO. 109 OF 2018

(Appeal arising out of conviction and sentence of Hon. M.I.G Moranga (Senior Principal Magistrate) in

Kitale Chief Magistrate's Court Criminal Case No. 505 of 2018

delivered on 21st November 2018)

DAN SIMIYU MASINDE APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, DAN SIMIYU MASINDE faced a raft of charges as follows:

1. Count I: **threatening to kill** contrary to **Section 223 (1)** of the **Penal Code**. The particulars of the offence were that on the 22nd day of January 2018 at Shangalamwe village within Trans Nzoia County, the Appellant without lawful excuse uttered words threatening to kill GODFREY WAFULA BARASA.
2. Count II: **entering a dwelling house with intent to commit a felony** contrary to **Section 305 (1)** of the **Penal Code**. The particulars of the offence were that on the 22nd day of January 2018 at Shangalamwe Village within Trans Nzoia County, the Appellant entered the dwelling house of ESTHER BARASA with intent to commit a felony namely murder.
3. Count III: **preparation to commit a felony** contrary to **Section 308 (1)** of the **Penal Code**. The particulars of the offence were that on the 22nd day of January 2018 at Shangalamwe Village within Trans Nzoia County, the Appellant jointly with others not before court was found armed with a dangerous weapon namely a knife in circumstances that indicated that he was so armed with intent to commit a felony namely murder.

When the Appellant was arraigned in court, he pleaded not guilty to the three (3) counts. After full trial, the Appellant was acquitted on count I. He was however convicted on count II and III. He was sentenced to serve **four (4) years imprisonment** and **seven (7) years imprisonment** on count II count III respectively. Both sentences were ordered to run concurrently.

The Appellant is dissatisfied with the conviction and sentence of the trial magistrate hence this Appeal. The grounds in support of the Appeal are that the trial court erred in convicting the Appellant as the charges preferred were premeditated upon a land dispute. He maintained that the evidence adduced was marred with contradictions, inconsistencies and discrepancies. He faulted the trial court for convicting him bereft of any exhibits tying him to the offence. He stated that the Prosecution did not meet the standard required to prove the offence.

During the hearing, parties by consent canvassed the Appeal by way of written submissions. On his part, the Appellant submitted that a miscarriage of justice was occasioned as the Prosecution failed to conclude their evidence without unreasonable delay. He cited that the evidence of the Prosecution was marred with irregularities and contradictions. He further lamented that the charges preferred against him on count III did not meet the required threshold to sustain a conviction. While he concurred with PW1 that he was to sell some property, he disclaimed that it was on the instructions of his father-in-law; PW1's father. He maintained that the charges levelled against him are hinged on manipulation, bullying, strife and resentment to rid him off his wife's family and property. He opined that the evidence presented before the court was from one family hence biased. Finally, he urged this court to reconsider the sentence imposed on him.

On the part of the State, Learned Prosecutor Mr. Omooria maintained that the charges preferred against the Appellant were established to the required standard of proof. He maintained that any inconsistencies, contradictions and/or discrepancies (if at all) did not affect the outcome of the trial as they were minor. He added that there no evidence that any of the prosecution witnesses had engaged in deliberate untruthfulness. He conceded that the knife was never recovered by the investigation officer. He however proposed that the failure to produce the same as an exhibit was not prejudicial to the watertight evidence submitted. He relied on witness accounts for this submission.

This court has considered the rival submissions presented by the parties herein. The court has also taken the liberty to look at the trial court's proceedings. This court shall now pronounce itself as follows.

This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses **(See Njoroge -vs Republic [1986] KLR 19)**.

The facts as established by the Prosecution and giving rise to the charges are recorded as follows:

On 22nd January 2018, PW2, PAMELA WAFULA was at home in Shangalamwe area in the company of her minor daughter and her mother PW3 ESTHER BARASA. They were asleep when at around 10:30 p.m., PW2 heard a knock on the door. No sooner had she opened the door than the Appellant grabbed her neck. He demanded to know the whereabouts of her brother PW1, GODFREY BARASA WAFULA. He threatened to kill her by stabbing her with a knife that he held on his hand if she didn't comply. She identified and recognized the Appellant as her step-sister's estranged husband. She recognized his voice. During the entire ordeal, the Appellant beamed a torch on them. She identified his face. She informed him that PW1 was away at work in Uganda. He was a soldier in the Ugandan army.

While this was unfolding, PW3 (PW1 and PW2's mother) was awakened by the commotion and conversation unfolding between the Appellant and PW2. She also heard PW2 asking the Appellant "*shemeji*, what do you want?" Having heard the threats the Appellant imposed on PW2, PW3 screamed. She recognized him by voice. The Appellant escaped following the alarm.

PW2 and PW3 saw the Appellant's escape through their glass window. With the aid of the moonlight, they noted that the Appellant ran away in the company of three (3) other persons.

Meanwhile, PW4, BENSON SITUMA their neighbour and village elder, on hearing the alarm raised, left his homestead with a *panga*. He stood outside his house. He overheard the conversation the Appellant had with PW1. He saw four (4) people running in the distance but could not recognize their faces. He saw the four people with the help of the moonlight. He called the chief and informed her what happened after interviewing PW2. Although he wasn't able to identify the Appellant at the scene, he knew him as the estranged husband to PW3's step-daughter. The Appellant had lived at the homestead where the incident occurred with his wife for nine (9) years prior to their separation. This was also confirmed by PW1.

When the dust settled, PW2 informed PW1 by way of a phone call on what had transpired on the same night at 11:00 p.m. She warned PW1 to be careful. PW1 further testified that the Appellant had previously assaulted him on two (2) occasions. He was charged in Kitale Law Courts. The case was still pending at the time of his testimony. This was also confirmed by PW3. Following this incident, he advised PW2 to report the matter to the police station. He then sought leave from his superiors in Uganda to file his statement.

The following morning, PW2 and PW3 observed that the smaller house (occupied by PW1 when around) within the compound had been broken into. The glass pane was broken. They suspected that the Appellant was responsible for the break in as he was well familiar with the house and its surroundings. They believed that the Appellant together with his accomplices broke into that house first before heading to the main house where PW2 and PW3 were.

PW2 painted the Appellant's temperament as distant during the time he lived with them. He had since moved to some rentals owned by her father in Kamukuywa. Further testimony by PW3 revealed that the Appellant was instructed by her husband to scare away PW1, PW2 and PW3 in order that they are disinherited. According to PW3, the Appellant had once destroyed PW1's house. PW2 further recalled that the Appellant told her that PW1 would predecease him. It was further testified that the Appellant had once assaulted another person as well as her son PW1 to which PW4 confirmed.

The investigating officer PW5, PC CHRISPINUS ALWANYI NO. 60639 testified in court that his predecessor PC Bashir had commenced investigations into this case. He received the complaint from PW3 in the company of PW2 on 23rd January 2018. He visited the scene and recorded the statements of the witnesses herein. PW5 concluded that there were ongoing land disputes that resulted into the assault of PW1. After reviewing the evidence, PC Bashir arrested the Appellant and charged him with the present offences. He further confirmed that the Appellant was concurrently facing charges of assault in another court at the time of the present offence. He committed the present offences while he was out on bond.

The court placed the Appellant on his defence. He gave sworn evidence. He testified that his father-in-law had gifted his wife land on diverse dates between 2013 and 2014. This decision caused a rift in the family. Consequently, on 17th October 2017, while at work, PW1 and his accomplices descended on him and attacked him. His father-in-law was injured. The following day he was rushed to hospital and treated. He was subsequently arrested on 19th January 2018 and took plea before court on a charge of assault on PW1. He was released on bail. He testified that he traveled to Uganda on 20th January 2018. He was not in the country when the alleged offence occurred. He was then arrested on Saturday 26th January 2018 while at work. He accused PW1 of instigating his arrest to defeat his earlier release on bail. He stated that PW1 was envious of the fact that his father stood as surety for him. He denied committing the offence.

In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellant committed the offences that he was charged with. Put differently, did the Prosecution prove its case beyond reasonable doubt to sustain the conviction and sentence meted out against the Appellant?

The Appellant's defence of alibi was incredible. He was positively identified to the satisfaction of the trial court that he was at the scene when the offence occurred. Those facts are not in dispute. The Appellant faced three counts. In determining this appeal, this court shall address each count separately as hereunder:

COUNT II: ENTERING A DWELLING HOUSE WITH INTENT TO COMMIT A FELONY

The particulars of the offence were that on the 22nd day of January 2018 at Shangalamwe Village within Trans Nzoia County, the Appellant entered the dwelling house of ESTHER BARASA with intent to commit a felony namely murder. **Section 305 (1)** of the **Penal Code** provides:

“Any person who enters or is in any building, tent or vessel used as a human dwelling with intent to commit a felony therein is guilty of a felony and is liable to imprisonment for five years.”

The evidence of the Prosecution is that the Appellant on the material day appeared in PW3’s residence. He intimidated PW2 with threats to establish the whereabouts of PW1. He grabbed her by the neck and threatened to stab her with a knife. He only let her go when PW3 screamed raising alarm. It has further been established by the Prosecution that there had been a long standing land dispute between the Appellant and PW1 and his family. The land dispute is what caused the Appellant to intimidate the complainant with a view to securing their vacation of suit parcel of land. The motivation behind the machination was for PW1’s father to disinherit them. It was testified that the Appellant had established a propensity to be a law breaker. This, according to the Prosecution, cannot be ignored.

The Appellant had every intention to establish the whereabouts of PW1. However, the manner in which he sought to establish his whereabouts brings his actions into a focal point of view. It was clear that the Appellant had no good intentions when he attempted to establish the whereabouts of PW1. He had every desire to harm him from the facts of the case. So much so that he was willing to harm PW2 if she failed to disclose his whereabouts. PW2 and PW3 testified that the smaller house that was separate from the main house had been broken into. According to the witnesses, only a person familiar with the house could have had access to it. In this regard, they placed every reasonable suspicion on the Appellant who broke into the homestead at night.

This court does not see any reason to disagree with the finding of the trial magistrate. The Appellant had every intention to commit a felony. The prosecution established to the required standard of proof that the Appellant broke into the dwelling house of the complainant.

COUNT III: PREPARATION TO COMMIT A FELONY

The particulars of the offence were that on the 22nd day of January 2018 at Shangalamwe Village within Trans Nzoia County, the Appellant jointly with others not before court was found armed with a dangerous weapon namely a knife in circumstances that indicated that he was so armed with intent to commit a felony namely murder. **Section 308 (1)** of the **Penal Code** reads:

“Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”

This court finds that this count was proved to the required standard of proof. The Appellant was armed with a knife which in the circumstances of the case was deemed dangerous and/or offensive. It was established that the Appellant threatened PW2’s wife with the same. It is discernible that the Appellant had every desire to commit a felony by harming PW1 or PW2 (had she failed to disclose the whereabouts of PW1).

The Appellant impugned the trial court’s decision for convicting him bereft of exhibits produced in support of the Prosecution’s case. According to him, it was imperative that the Prosecution presented the knife that was allegedly in his possession when the offence occurred. This court disagrees. The absence of its production was not fatal to the Prosecution’s case at all. The Appeal against the conviction on this count fails and is subsequently dismissed. This court finds the evidence of the Prosecution was watertight.

The Appellant in his submissions raised the issue that there were glaring contradictions on the Prosecution’s case that would adversely affect the outcome of the trial. This court finds the contradictions minor. The elements to prove the charges were met; the minor contradictions did not go to the root of the Prosecution’s case. This court finds that indeed the Prosecution established the charges to the required standard of proof beyond reasonable doubt. The Appellant’s appeal against the convictions lacks merit. It is hereby dismissed.

This court now shall consider the sentence imposed. The trial court considered his mitigation and the probation report adduced. In imposing the sentence, the trial magistrate held:

“So notwithstanding the probation officer’s recommendation, the court is not of the view that a probation order sentence will be the most appropriate for the accused person. More so because there is another case pending in which he assaulted PW1 and then the current case a perpetration of his earlier intention to eliminate the complainant PW1.”

On count II, the Appellant was sentenced to four (4) years imprisonment. He was sentenced to seven (7) years imprisonment on count III. This court finds that the sentence meted out against the Appellant were legal. Under **Section 305 (2)** of the **Penal Code** on count II, the offender is liable to imprisonment for seven (7) years. The court will not disturb that finding. On count III, the offence attracts imprisonment of between seven (7) and fifteen (15) years. The trial court sentenced the Appellant to the minimum sentence. The court shall not interfere with the sentence. The sentences were ordered to run concurrently. This court therefore upholds the sentences imposed by the trial court.

It is so ordered.

DATED AT KITALE THIS 23RD DAY OF FEBRUARY 2022.

L. KIMARU

JUDGE