KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Masibo v Prosecutions (Criminal Appeal E004 of 2022) [2022] KEHC 16944 (KLR) (23 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16944 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E004 OF 2022

WM MUSYOKA, J

DECEMBER 23, 2022

BETWEEN

FREDRICK WATEBA MASIBO .... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

(Being an appeal from the judgment of Hon. JR Ndururi, Principal Magistrate, in Kakamega CMCCRC No. 1195 of 2019, delivered on 10th January 2022)

JUDGMENT

1. The appellant had been charged before the trial court of the offence of threatening to kill, contrary to section 223(1) of the Penal Code, Cap 63, Laws of Kenya. The particulars were that on 23rd May 2019, at Malaika Police Station, Kakamega South Sub-County of Kakamega County, while armed with Jericho pistol S/No. 44331450, loaded with 15 rounds of 9mm ammunition, without lawful excuse, threatened to kill Chief Inspector of Police Sylvester Olalo. He pleaded not guilty, and a trial was conducted.

2. Five witnesses testified. PW1, CIP Sylvester Olalo, the complainant, testified that he was the OCS, Malaika Police Station at the material time. The appellant was a police driver at that station. There was a request to him from the Sub-County DCIO, one Maria Mweni, for a vehicle to move a suspect from Malinya to Kakamega Hospital for mental assessment. He sent a Police Corporal John Wanyonyi to call the appellant, who was at his house then, after he had telephoned him on his mobile phone and her refused to pick his call. The appellant refused to come to his office for duty. The witness then called another driver to his office for deployment he asked the appellant to handover the keys to the station vehicle but he refused. He then took a back-up key which he gave to PC Ogembo, who was also a driver, and asked him to go to Malinya. After the appellant learnt that another driver had been sent on that assignment, he came out of his house, cocked his Jericho pistol, which had 15 rounds of ammunition, and came to his office shouting, asking why I had allowed another driver to use the vehicle. He was

subsequently disarmed by the witness and a Corporal Musyoka. He made a report of the incident to his seniors, who instructed that the appellant be arrested and charged.

3. PW2, PC Boniface Musyoka, was at the report desk in at the material time. He stated that the appellant came to the report office, he cocked his gun and advanced to the office of PW1, who had earlier summoned him, but he had delayed in reporting. Before he could get to where PW1 was, he was held by Corporal Wanyonyi and PC Kipruto Sila. He assisted them to pin him down, and he got hold of the gun, and made it safe, by removing the live ammunition.. thereafter, the appellant was apprehended and locked up in the cells. He said that the appellant came silently, and was taken down.

4. PW3, CIP Kenneth Chumba, testified next. He was a ballistics expert. He had examined a Jericho pistol, presented to him by PC Charles Kadenyi, to ascertain whether it was a firearm and whether it could fire, and whether ammunition forwarded to them with it were capable of being fired. He examined the two sets of items, and his conclusion was that the said pistol was a firearm, and it was capable of firing , and the ammunition forwarded with it was capable of being fired. .

5. PW4, Mark Angatia, was a clinical officer, who had attended to Wanyonyi John, upon the latter complaining that he had injuries sustained in an altercation at the police station. He noted injuries on his right hand and on his right thumb. He treated him, bandaged the injured party and dispensed medicine to him. He also filed a P3 Form which was produced. . PW5, Jackton Ogabo, was a police driver. He stated that PW1 summoned him, through Corporal Wanyonyi, and was instructed to use a police vehicle to proceed to the office of the DCIO Malinya. He said that PW1 told him that the person that he had called for that assignment had failed to come, and that was why he was being sent on that duty instead.

6. PW6, CIP Maria Mweni, was one of the investigating officers. She stated that on the material date she had called PW1, to ask him to assist her with a station vehicle to take suspects for mental assessment at Kakamega Hospital. PW1 later called him to her that the driver had refused to drive the vehicle, and requested her to get a driver. After some time, he called again, saying that he had gotten another driver. Later in the day, PW1 told her that he was nearly killed by the appellant and he had refused to surrender the keys to the station vehicle. He informed her that he had reported the matter to the OCPD, who informed him that disciplinary action would be taken. She was later instructed by the OCPD to go the police station, where she found that the appellant had been disarmed, the Jericho pistol secured, and he placed in custody. The OCPD then instructed her to take over the matter, which she did, and charged the appellant. She instructed the appellant to wear civilian clothes, and escorted her to Kakamega Police Station. She then narrated all the steps that she took in the course of investigating the matter. She stated that administrative action was also taken against him, by having him interdicted.

7. PW7 was retired Corporal John Wanyonyi Khaemba. He testified that on the material day, PW1 had informed him that the appellant refused to heed to his instructions, and more specifically those relating to an assignment at Malinya Police Post. PW1 then sent him, the witness, as a senior officer, to call the appellant from his house. He did so, he went to the house, knocked at the door and called his name out, but there was no response, although it was clear that there was someone inside,. He reported back to PW1, who instructed him call the other available police driver to carry out the assignment at Malinya. PW5, the other police driver, was authorised by PW1 to take the station vehicle, and to drive it to Malinya. At the point PW5 was leaving, the witness heard the appellant shouting, from his house, asking who was driving his vehicle. He also heard him cock his gun, whereupon the witness and PW1 took cover. The appellant came into the office of PW1 and pointed the gun at his chair. When the appellant turned to leave the room, upon realising that there was no one inside, the witness pounced on him, and, assisted by other officers, wrestled him to the ground, and disarmed him, and locked him in the cells. He described him as being violent at that stage. He stated that he, the witness, was injured

on his right thumb. He stated that he was in charge of the armoury, and was aware that the appellant had been issued with a Jericho firearm, a pistol S/No. 44331450, having issued the firearm to him. He testified that he was the one who unloaded the gun, and not PW2.

8. The trial court put the appellant on his defence. Upon being put on his defence, the appellant gave a sworn statement. He testified that on the material day he was awoken by the sound of the station vehicle being started at 9.30 AM, and was surprised, as no one had the key to it. he got up, took his gun and went out to see who it was. He said that he had not cocked his gun. He passed through the report office, and saw PW1 and PW7, but by-passed them, and went out. He found PW5 in the vehicle, yet he was under interdiction. He was then suddenly grabbed by PW1 and PW7, who overwhelmed him. PC Kipruto Sila took his gun. He was thereafter dragged to the cells, and licked up. While at the cells, he was visited by the OCPD and other senior police officers. Later PW1 and other officers came, handcuffed him and escorted him to his house, ordered him to change into civilian clothes, after which he was handed over to PW6.

9. After analysing the evidence tendered by the prosecution and the defence, the trial court was satisfied that the ingredients of the offence charged had established, and proceeded to convict the appellant, and to sentence him serve 3 years' probation.

10. The appellant was aggrieved of his conviction and sentence, and filed the instant appeal. He raises issues around the holding that the word "utters" not being limited words, failure to consider the authorities cited by the appellant, the holding that the appellant refused to respond to summons by PW1, the holding that the appellant failed to enquire from PW1 and PW7 about who was starting the vehicle instead of going outside, the finding that the focus on PW3 b the defence pointed to a motive to kill PW1, the holding that PW6 confirmed trouble brewing between the appellant and PW1 gave a background to what followed, the finding that the testimony of PW4 was not contested and was limited to merely confirming the fireman and the ammunition, the finding that the appellant cocked his gun and advanced towards PW1, the holding that the appellant pointed a loaded and cocked gun at PW1, the holding that the testimonies of the prosecution witnesses were consistent and any contradiction was not material, and the finding that the defence had submitted that the prosecution needed to prove existence of a threat to kill it had to establish a motive. The appellant sought that the conviction and sentence by the trial court be set aside.

11. The matter was canvassed by way of written submissions. Only the appellant filed submissions. My understanding of the appeal is that there are really only 2 grounds. One, around the construction of the word "utters" as used in section 223(1) of the penal Code; and whether facts as presented by the prosecution were sufficient to establish the offence charged. In determining the appeal before me, I shall address the 2 grounds.

12. The first ground faults the trial court for construing "utters," as used in section 223 , too broadly, to include non-verbal threats, instead of giving a strict interpretation, which would have limited it to a verbal threat, so that where the alleged threat is not verbalised then the offence is not established.

13. Section 223(1) of the *Penal Code*, which defines or creates the offence known as threats to kill, is framed as follows:

> " 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. From the provision, what is clear is that the threat envisaged could take 2 forms. The first would the verbal variety, taking the form of the utterance of the threat. An utterance is spoken, and where the

threat is alleged to be verbal, then the prosecution must prove the words spoken or uttered by the accused. The second takes the form of the victim receiving a threat, whether directly or indirectly, whether written or not. Where the threat is verbalised, then there is an utterance, and the act or actus reus would fall under "without lawful excuse utters." Where the threat takes any other form, the act or actus reus would fall under the second limb, "directly or indirectly causes any person to receive, a threat, whether in writing or not... " The offence defined under section 223(1) is, therefore, not limited to cases where there is a verbal threat or an utterance of the threat, for the threat can also take the form of a writing or any other means. It boils down to communication of a threat, it could be verbal, or in writing, or in any other form. I am persuaded, in the circumstances, that the trial court did not fall into any error, when it found and held that the offence can still be established even in the absence of a verbal communication or utterance.

15. The other grounds all turn on the holdings and findings of the court with respect to the evidence adduced. They are arguments about how the trial court appreciated the evidence that was adduced before it. The starting point should be that the appellate court should be wary of faulting the trial court on the matter of interpretation of the evidence that was placed before it, for it was the trial court that saw and heard the witnesses testify first-hand, and was, therefore, most qualified to assess the reliability and believability of the testimonies. However, according to *Okeno vs. Republic* [1972] EA (Sir William Duffus P, Law & Lutta JJA), I have a duty, as the first appellate court, to reconsider the evidence, evaluate it myself and draw my own conclusions in deciding whether or not to uphold the decision of the trial court. I have carefully gone through the judgment of the trial court, and noted that the court went to great lengths to analyse the material that was placed before it, before it made its final holdings and findings.

16. The most critical issue raised is around contradictions or inconsistencies in the evidence adduced by the prosecution. I will start with the caution in *Philip Nzaka Watu vs. Republic* [2016] eKLR (Makhandia, Ouko & M'Inoti JJA), that when it comes to human recollections, no 2 witnesses can recall exactly the same thing to the minutest detail, and that no 2 people can perceive the same phenomena in exactly the same way, and that some inconsistency in evidence may signify veracity and honesty, and unusual uniformity might suggest fabrication and coaching, and that ultimately, it would be the circumstances of each case that ought to be the determinant.

17. Much of the inconsistencies and contradictions raised in the written submissions are, in my view not substantial, and are unworthy of being given any weight. They turn around when and who was sent to and how many times PW1 called the appellant, and the duration between the period when one thing happened and the other. What is fundamental should be the happenings around when the alleged threat was allegedly communicated. There are clear inconsistencies relating to that, from the 3 witnesses who testified on the happenings around the alleged threat.

18. PW1 said:

> "After the accused learnt that I gave another driver the work. The accused came out of his house, cocked his Jericho pistol and advanced to the office where I was...Cpl Wanyoni, Musyoka and I disarmed the accused. We removed the bullet in the chamber...When he refused to come I gave the extra key to another driver. That is when the accused came at me with the gun. I could see him and he was shouting. I hid (take cover). I heard the gun being cocked. He was then disarmed. The accused was shouting "who has given you the vehicle." The accused came to where I was. He did not shout that he was going to kill me. There were three other people there. He cocked the gun...I thought he wanted to shoot me. Because I authorised the release of the vehicle."

19. On his part, PW2 said:

> " ...before entering the report office he cocked his gun and advance to where the OCS was. Before heading the OCS he was held by Cpl Wanyonyi & PC Kipruto Sila. They pinned him down I also assisted. I got hold of the gun and made it safe. I removed a live round the chamber…after sometime he cocked a gun and advanced to the report office. Before he entered he was held by Cpl Wanyonyi and Sila Kipruto. He was not talking. He came silently and was taken down. The OCS was in the report office. He took cover and went into hiding. I did not know intention of accused. I held the rifle and removed a magazine…"

20. PW7 said:

> " ...the other driver started to drive off. I heard the accused person shout from his room, "who is that driving my vehicle." I heard him cock the fireman. And the OCS took cover inside the office. Accused came in the office and pointed the firearm at the chair on which the OCS normally sits. The OCS had taken cover inside the computer room next door…When accused person saw that no one was in the office, he turned to go outside…I got a chance… We struggled him to the ground…Other officers came and helped me to secure the accused. We managed to disarm him. I removed the live bullets from the chamber. I emptied the magazine…accused shouted, "Who is driving the vehicle?" We answered back, "The OCS has authorised." In response accuse cocked his gun. There was I, the OCS, PC Musyoka and other officers. We all took cover. Accused entered the office but saw no one. I was taking cover behind the door. I summarised that the accused person wanted to shoot the OCS as I saw him holding the gun and pointing it at the OCS's chair. Yes I grabbed the accused person from behind…The OCS and PC Musyoka helped me overwhelm the accused and disarm him. When I started struggling with the accused the OCS was not there. I am the one who unloaded the gun. It is not PC Musyoka who unloaded the gun."

21. All 3 were describing the same incident, but their respective narratives bring out glaring inconsistencies that a court ought not overlook. PW1, the alleged target of the threat, did not describe where the alleged confrontation happened, whether it was inside his office or not. PW2 said that the appellant was wrestled to the ground before he got into the office, and was disarmed. PW7 said the confrontation happened inside the office. PW1 said that he had from the appellant, but again said that he was party to subduing the appellant, and disarming him. PW2 said that the persons responsible for subduing the appellant were PW7 and PC Sila Kipruto, assisted by him. He makes no mention of PW1. PW7 stated that PW1 went into hiding, then again he said he was among those who helped subdue the appellant, then again said that PW1 was not there. He also said that he was the one who secured the gun, and not PW2.

22. What exactly happened is critical, for it is in that chaos that the alleged threat was allegedly communicated. It was not verbal nor in writing, it was to be deduced from the conduct of the appellant and the circumstances in general. The threat was not direct, if at all there was one, and, therefore, the facts from which it was to be deduced must be clear and coherent. In the instant case, the facts are neither clear nor coherent, and the appellant should have been given the benefit of the doubt. PW1, PW2 and PW7, that is the victim and the eyewitnesses appeared to perceive different things. The appellant did not utter any threat against PW1. He did not point a gun directly on PW1. The only case against him is that he cocked his gun. What did he intend to do with the cocked gun? It did not come out clearly from the evidence, for he did not point the gun at anyone. Neither did he say that he was looking for anyone. It was alleged by PW7 that he entered into the office of PW1, and pointed the

cocked gun at where PW1 usually sat. However, that narrative is inconsistent with that by PW2, who said that the appellant was disarmed before he entered the building, meaning he could not have pointed his gun to the chair were PW1 usually sat, if he did not enter the room in the first place. I cannot tell, as between PW2 and PW7 who was telling the truth, or which of the two versions was more likely to be truthful or reliable. PW1 did not help, for he did not talk about where the altercation happened, whether inside or outside the room, be it in his office or the report office.

23. For the offence under section 223, the utterances of the accused are critical. What he says after getting armed would be a pointer to his intentions. If no words are uttered then his conduct would be critical. What does he do after getting armed? Does he pursue the complainant once he gets so armed? Does he conduct himself in any manner that is likely to suggest an intention to kill the complainant? See *Lawrence Otieno Ochacho vs. Republic* [2016] eKLR (Mrima, J). I am not persuaded that the appellant, from the material on record, acted in any manner that suggested that he was in pursuit of PW1, or that he was intent on harming him. There was evidence that he was upset about something with relation to the vehicle that he was assigned to drive, and that he was armed with the firearm in question, but the prosecution did not bring out clear facts on what exactly happened after that, upon which it could be deduced that the appellant had threatened to kill PW1.

24. Overall, the evidence available fell short of establishing the offence charged to the required standard. Consequently, I do hereby allow the appeal, quash the conviction of the appellant in Kakamega CMCCRC No. 1195 of 2019, and set aside the sentence imposed on him on 7th January 2022. It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS ....23rd .... DAY OF ....December........ 2022

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Omulama, instructed by Edwin Omulama & Associates, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.