REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 55 OF 2020

JULIUS MATHEW MAGAMBO..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An appeal from the original conviction and sentence by Hon. E.W Ndegwa R.M in Githongo

CR. 1522 of 2018 dated 20/07/2020)

JUDGMENT

1. **JULIUS MATHEW MAGAMBO ("the appellant"),** was charged with threatening to kill contrary to ***section 223(1) of the Penal Code***. The particulars of the charge was alleged that on 02.03.2018 at Ukuu Location of Nkuene Division within Meru County at unknown time, the appellant pinned a note on a tree near Julius Kinoti M'Rinchuni's home with a message of threats to the life of the said Kinoti M'rinchuni.

2. The appellant denied the charge, the was put to trial at which the prosecution paraded 5 witnesses in support of their case after which the appellant was put on his defence. He, in defence, led evidence by two witnesses, he was subsequently convicted and sentenced to imprisonment for 5 years.

3. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 4 grounds of appeal which I have coalesced under 2 heads: -

a) That the trial court erred in convicting the appellant on illegally obtained evidence while the charge sheet was fatally defective.

b) That the trial court erred by wrongly interpreting the words alleged to have been written on the note as a threat to life and convicted the appellant without any evidence linking him to the offence.

4. This being a first appeal, the court is duty bound to re-appraise, review and re-evaluate the facts afresh with a view of drawing its own independent conclusions and findings. See **Okeno v. Republic [1972] EA 32**. However, in doing so, the court must warn itself that it did not have the advantage of seeing the witnesses testify in order to gauge their demeanor.

5. The prosecution case was that **PW1 Joseph Kinoti,** the complainant herein**,** was in his house in the morning of 02.03.2018 when **PW3 Bonface Muthuri,** came and told him there was a note pinned on a tree bearing his name written "mene mene tekel" meaning that his days were numbered. He and PW3 went to where the note was pinned, took it, proceeded to Kariene Police Station and handed over the same to the DCI. The complainant gave the police PW3's number and they contacted him. He was the chairman of Mutego Farmer's Co-operative Society and a member of Overflow water project. The complainant suspected the note to have been written by a member of the water project, that draws water from the Co-operative Society, who were complaining that the appellant was selling its water and solely utilizing the proceeds. The police carried out their investigations and arrested the appellant who was said to be a distant relative of the complainant with whom he did not have any grudge.

6. During cross examination, he stated that the death threats emanated from the water issue where he had no powers to call a meeting in respect to the water project as he was just a member. He further said that was no relationship between the water project and Mutego Society. He denied knowing if the handwriting on the note was the appellant's or how the police knew the author of the note and the group members had decided that any member who no longer supplied coffee to Mutego should not be supplied with water. Finally, PW1 admitted that the reason why he suspected the appellant to be behind the note was his failure to attend the meeting held on 28.02.2018.

7. **PW2, Purity Kanana**, testified that **DW2** had told her that the appellant would write a note to the complainant telling him to keep off the overflow water. That the appellant had sold water to her in exchange for her 5 months old calf and that members were complaining of the water that had been sold without their knowledge. In cross examination, she stated that she was both a member of overflow water project and

Mutego Society so was the complainant. That she did not hear the appellant say he would write the note but heard people talking about it as they were going to the quarry. That she had bought the water in 2017 and members started to complain in 2018. That she did not attend the meeting but was informed by those who attended that their water would be disconnected.

8. PW3, was Boniface Muthuri, the schoolboy who first saw the note notified the complainant then accompanied PW1 to make a report at the police station. In cross examination he denied knowing the author of the note and said his evidence was limited to having seen the note.

9. PW4, No, 235261, Chief inspector of Police, Susan Wambugu, gave evidence to the effect that she examined document escorted to their offices by one PC Geoffrey Tanui. The document were specimen signatures and handwritings of the accused and three others with the mandate to establish if those specimen handwritings matched that in the questioned note he made a conclusion that the note was in the same hand like that in the specimen handwriting of the appellant. When put to cross examination, the witness said that there was a writing on the letter dated 24.10.1996, by the investigating office, to the effect that it was by the appellant yet the letter was shown to have been written and signed by, one Jacob Kinyua.

10. **PW5 PC Titus Bett** the investigating office stated that after thorough investigations, they arrested and charged the appellant who had been highly mentioned by the complainant as the author of the note. That they searched the appellant's home where they took his specimen handwriting (C3) and signature (B2). They also took known handwritings of the appellant(C), his wife and child. Those specimens, the known handwritings, signatures and the note addressed to the complainant were examined by a **Forensic Document Examiner, Chief Inspector Susan Wambugu (PW4)**. The finding of the examination was that one hand had authored exhibit X, C, C3 and B2. In cross examination, he admitted a grudge between the two and that the specimen signature ad handwritings were given freely not confiscated.

11. In his defence, **the appellant (DW1)** in denying committing the offence, contended that the complainant was his neighbor and uncle in law. That the complainant was the chairman of Mutego Coffee factory and a member of overflow water project and has never had any issues with him. He was not aware of the overflow water project meeting held on 28/02/2018 as he was not invited and that he was coming from the farm when he found police officers leaving his house. He denied having given his specimen signature and handwriting to the investigating officer.

12. In cross-examination, the appellant maintained that he had been framed by the complainant and that the specimen handwriting C3 was not his.

13. **Pamela Kagwene Njuki (DW2),** the appellant's wife, denied ever telling PW2, her niece, that the appellant would write the note. She further contended that the police took sample writings from their house in the absence of the appellant but sample C was not among them.

14. Pursuant to directions by the court. The parties filed respective submissions on 09.02.2021 and 14.01.2021. For the appellant, submissions were made to the effect that the contradictory evidence of all the prosecution witnesses presented a reasonable doubt which doubt ought to have been resolved in his favour. It was contended that the police swiftly arrested the appellant without any iota of reason as the sample handwritings were obtained illegally and arbitrarily without a search warrant. It was further asserted that the failure by the police to inform the appellant's wife of the purpose of their visit amounted to obtaining evidence illegally which equated to self-incrimination by the appellant. According to the appellant, the charge sheet was defective as it did not disclose the charge and that the words "mene mene tekel" were wrongly interpreted to mean threatening. It was concluded that the conviction and sentence of the appellant ought to be quashed. The appellant relied on **Benson Samwel Eralu v R [2019] eKLR**, **Standard Newspapers Ltd & anor v Attorney General & 4 others [2013] eKLR, Re Hyundai Motors Distributors (Pty) And Others Vs Smith (CCT1/00) [2000] ZACC 12** and **R v Mark Lloyd Steveson [2016] eKLR** in support of his submissions that where any doubt in the prosecution's case emerges, the benefit thereof goes to the accused and that citizens must be protected from unwarranted intrusion into their privacy by the state including searches and seizures. In addition, the provisions of Section 223(1) was cited for the submissions that the charge against the accused did not disclose an offence and was thus defective. In conclusion it was asserted that the words in the note were misconstrued to mean a threat to kill when they conveyed no such effect.

15. The respondent's submission was to the effect that it had indeed proved that there was a threat to kill the complainant made by the appellant without a lawful excuse and that the evidence of PW3 was corroborated by that of PW1. The court was urged to dismiss the appeal and uphold the conviction and sentence. The respondent cited **Phenias Njeru Koru v R [2015] eKLR**, on when the offence under section 223(1) I deemed proved and the ingredients of the offence.

Analysis and determination

16. Being a fast appeal, I am mandated to reevaluate the record of proceedings at trial afresh and exhaustively so as to make a finding whether or not the conviction and sentence be merited. As said before, even though the appellant has set out four grounds of appeal, all the grounds would be answered by posing the question whether the conviction was well grounded on the evidence adduced. Of course there would be the issue of propriety of the charge which should be a threshold matter.

17. Was the charge preferred and presented defective? Section 223(1) of the Penal Code stipulates: -,

> **"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."** (emphasis provided)

18. The underlined words form the ingredients of the charge of **Threatening to Kill**. That provision must be looked at and examined if indeed the charge as presented and the statement offence satisfied the circumscription under Section 134 of The Criminal Procedure Code so as to answer the appellant's contention that the charge was defective. The charge sheet read: -

> **"CHARGE**

THREATENING TO KILL CONTRARY TO SECTION 223(1) OF THE PENAL CODE

PARTICULARS OF THE OFFENCE

JULIUS MATHEW MAGAMBO, on 2nd March 2018, at Ukuu location in Nkuene division within Meru county at unknown time he pinned a note on a tree near the Julius Kinoti M'Rinchuni home with a message of threat to his life.

19. **Section 134** of the **Criminal Procedure Code** provides that *every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.* The requirement is in place so that an accused person is not ambushed but rather sufficiently informed of the charge facing him so as to make an informed decision how to plead to the charge and where trial is to ensue how to confront the evidence by his accusers. The law requires the charge to be clear and an ambiguous to enable a clear and easy understanding by the accused person. Kimaru j , in **Sigilani -vs- R.[2004] 2 KLR 48** explained the requirement of the law in that regard in the following word:-

"The principal of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principal of the law has a constitutional under pinning."

20. In this matter, I do not see the charge to be vague unclear or duplex. Even with the obvious inelegance in the construction thereof, the massage was quite simple, clear and straight forward. I find no merit on the ground that the charge was defective. A charge is defective when it either fails to disclose an offence Known to law or when it is difficult to understand or reveals no offence at all. In any event, being an appeal, and even if I was to find an error in the charge, such a ground can only suffice to interfere with the finding of conviction if it is demonstrated to have resulted into an injustice. See **Section 382** of **Criminal Procedure Code.**

21. On the merits, the charge as presented placed upon the prosecution to prove that; it was the appellant who authored the note produced and marked as **Exhibit P1,** that the word therein conveyed to the complainant a threat to kill him and that that the uttering was made without lawful excuse.

22. In evidence, there was never direct evidence linking the appellant to the note. The only evidence that weakly pointed that direction was the document examiner's report and the evidence by PW2 alleging that Dw2, the wife to the appellant, had told her that the appellant would do a letter to the complainant to stop interfering with water flow project. I say the evidence weakly pointed at the appellant because, that was hearsay and not admissible unless the prosecution had intended to call the said Pamela Mathew as their witness. That was not to be, she was never called and could not be compelled to give having been attributed as the wife to the appellant on account of spousal privilege. But when called to give evidence on behalf of her husband, DW2 denied having talked to PW2 on the terms alleged by PW2. That evidence was never tested upon cross examination and I treat it as uncontroverted. If uncontroverted, it negated the evidence by PW2 hence I consider PW2's evidence as very weak and just lacking in credibility.

23. How about, the evidence of the document examiner? The conclusion made by the expert was that the handwriting on the disputed note was compared with the Known handwriting of the appellant and opinion made that both were by the same hand. However, on cross examination PW4 admitted that the alleged Known handwriting of the appellant was attributed, on its face, to one Jacob Kinyua who signed it against his name. in further cross examination the witness seems to say she was led to believe the document Called the known handwriting of the appellant by the writing on it by the investigating officer. The witness is recorded to have told the court as follows: -

"Jacob Kinyua from the letter wrote the letter dated 24.10.1996 as the addressor and signed it. This is the same handwriting and signature as that of Julius Magambo.

The investigating officer wrote that this was handwriting of Julius Magambo…"

24. On his part, the investigating officer, PW5, when cross examined, said:

"I do not know if the accused gave us a letter written by somebody else because we requested for his Known handwriting which he supplied".

25. In effect, there was no known signature of the appellant which was compared with the questioned document to reach the conclusion PW4 reached. Instead, the evidence by PW4 and PW5 prove that the disputed note was in the same hand of on Jacob Kinyua. That being the totality and effect of the evidence by the prosecution on the authorship of the note said to utter threats, there was no basis to place the accused person on his defence leave alone being convicted on the basis of a document he never authored. The law remains that the evidence by an expert in a report remains an opinion and it is credibility that may persuade the court to rely on it. Where like in this case the specimen handwriting of the accused were never examined, the report and oral evidence by its maker were stripped of all the expected credibility [1]. No conviction could be based on such opinion.

26. In the judgment appealed against, the trial court gave very scanty regard to whether or not the specimen handwriting used in examination by PW5 belonged to the accused person. In fact, the word is, he glossed over that consideration. Instead of taking the evidence by PW4 &5 on their true purport, the court appears to have shifted the burden of proof upon the accused to prove that the note was not by him. That was wholly erroneous and contrary to the law that an accused person has no burden in a criminal trial to prove his innocence[2]

27. Having found that there was never nexus established between the accused and the authorship of the letter, I do find that the foundation of

the charge was never erected to premise a conviction. I find that the conviction was erroneous for which reason the appeal is allowed, the conviction is quashed and the sentence based on it set aside.

28. The appellant shall be released forthwith unless otherwise lawfully detained.

DATED, SIGNED AND DELIVERED VIRTUALLY, BY MS TEAMS, THIS 30TH DAY OF APRIL, 2021

Patrick J O Otieno

Judge