REPUBLIC OF KENYA

IN THE HIGH COURT

AT CHUKA

CRIMINAL APPEAL NO. E012 OF 2020

PETER MURAUKO MATUMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against judgment by Hon. S. M. Nyaga (SRM) sitting

at Marimanti Law Courts in Criminal Case No. 850 of 2019

and delivered on the 20th .10.2020)

JUDGMENT

INTRODUCTION

1. The appellant was charged before the Senior Resident Magistrate's Court at Marimanti with the offence of threatening to kill contrary to **section 223(1) of the Penal Code**. The particulars being that on the 31st day of July,2019 at Kamuyua Village of Tunyai location in Tharaka South Sub County within Tharaka Nithi county, without lawful excuse, threatened to kill Veronicah Ciang'ombe by chasing her threatening to kill her.

2. The appellant was also charged with the offence of stealing contrary to **section 275 of the Penal Code**. And the particulars were as follows: that on the 31st day of July,2019 at Kamuyua Village of Tunyai Location in Tharaka South Sub – County, stole one mobile phone make of Itel valued at Kshs.2000.00, the property of Veronicah Ciang'ombe.-

3. The appellant faced an alternative charge of handling stolen property contrary to **section 322(1) (2) of the Penal Code.** The particulars of the offence being that, on the 31st day of July,2019 at Kamuyua Village in Tunyai Location in Tharaka South Sub- County within Tharaka Nithi County, otherwise than in the course of stealing, dishonestly retained one mobile phone make Itel, knowing or having reason to believe it to be a stolen property.

4. A plea of not guilty was entered for both counts and the matter proceeded to full hearing whereupon the appellant was convicted on both counts and for count 1 and 2 was sentenced to 10 and 3 years' imprisonment respectively to run concurrently.

PETITION OF APPEAL

5. The Appellant was dissatisfied with the conviction of the lower court, the appellant did file a petition of appeal dated 2nd.11.2020 citing the following grounds:

i. That the learned trial magistrate erred in law in failing to appreciate and find that both counts were fatally defective.

ii. That the learned magistrate erred in law and fact in convicting the appellant on the basis of uncorroborated evidence by the complainant.

iii. That the learned trial magistrate erred in law and fact in convicting the appellant on the basis of inconsistent evidence by the complainant.

iv. That the learned trial magistrate erred in law in finding the appellant guilty when the vital ingredients of stealing and the alternative charge of handling stolen property had not been established beyond the reasonable doubt.

v. That the conviction was against the weight of the evidence presented in court.

vi. That the learned trial magistrate erred in law and fact in finding the offence of threatening to kill to have been established when there was no corroboration on that count.

vii. That the learned trial magistrate erred in law and fact in finding the appellant guilty of threatening to kill when vital ingredients of the offence had not been proved beyond any reasonable doubt.

6. He therefore sought before this court that the appeal be allowed, the convictions be quashed and the sentences set aside.

7. On the 2nd.03.2021, the appellant filed a supplementary petition of appeal citing the following grounds of appeal.

i. The learned trial magistrate erred in law and in fact in convicting the appellant on the strength of none existent evidence from the complainant in that the said complainant did not allude to any threats to kill in her evidence in chief or at all.

ii. The learned trial magistrate erred in fact in failing to find and hold that there was glaring contradictions in the evidence of PW1 and PW3 especially in the manner in which the offence is alleged to have been committed.

iii. The learned trial magistrate erred in law and fact in failing to warn himself on the dangers of convicting the appellant on the strength of the evidence of PW1 and PW3 who were/are mother and son respectively notwithstanding that their version of the events of the day the alleged offence occurred was markedly different.

iv. The learned trial magistrate erred in law and in fact in failing to independently apply his mind while considering the evidence on record especially putting into effect that the alleged offence was committed during broad daylight yet no independent evidence was called.

v. The learned trial magistrate erred in law and in fact in allowing himself to be influenced by alleged past criminal acts of the appellants without any proof of such criminal acts being presented to him.

vi. The learned trial magistrate erred in law and fact in failing to hold that the alleged stolen mobile phone was neither described nor connected with the complainant.

vii. The learned trial magistrate erred in law and in fact in rejecting the positive report of the probation officer and allowed his personal emotions to influence his decision while convicting and sentencing the appellant.

viii. The learned trial magistrate erred in law and fact in holding and in deed stating that the appellant was not remorseful while records indeed indicate the very contrary.

ix. In view of the fact that the appellant had no previous records of conviction, the learned trial magistrate erred in law and in fact in returning the maximum sentence provided by the law in both counts.

x. The learned trial magistrate erred in law and in fact to find that the prosecution case was not supported by any evidence and therefore not proved on the required standards or at all.

xi. The conviction and sentence is excessive and unsafe in the circumstances.

8. The State opposed the appeal. The appeal proceeded by way of written submissions. For the appellant, submissions were filed by Basilio Gitonga Murithi & Associates Advocates while those of respondent were filed by D.M Mbithe for the office of Director of Public Prosecutions.

APPELLANT'S SUBMISSIONS

9. The appellant submitted that the evidence of PW1 does not allude to any threats to kill by the appellant or any other person at all; this is so since her evidence only refers to the fact that she heard the appellant call her from the outside. The particulars in the charge sheet in regard to count 1 that allege that the appellant threatened PW1 and chased her. Her evidence is that he wanted to kill both PW1 and PW3 and it is therefore not clear why there was no separate count of wanting to kill PW3. That their fear seem to stem from an alleged past threat by the appellant which was not proved in evidence. Further that, PW3 contrasts the evidence of PW1 with regard to where the phone was before it was stolen. PW1 gave a contradictory evidence in regard to the exact position of where the phone was. That the trial magistrate heavily leaned on the evidence of PW1 and PW2 who were son and mother respectively. That there was a previous altercation between the parties as alleged by PW1 and yet the same were not proven nor any document presented before the court to support the same. In the same breadth, that there was no evidence tendered to prove a connection of the alleged panga recovered from the appellant to the alleged offence. The three witnesses neither tendered any proof that the mobile phone (MFI2) actually belonged to the complainant or that it was recovered from the appellant.

10. That the trial magistrate appeared to have been carried away by the emotions and unjustifiably leaned in favour of the evidence tendered

by the prosecution. That he appeared to have made his mind about the credibility of the complainant's evidence even before the prosecution had closed their case. That the trial magistrate relied on a past criminal case involving the appellant to convict him; and in sentencing, the magistrate further delved into the history of a case whose particulars he did not give indicating that the appellant had previously been charged over land matters. That the alleged offence was committed in broad daylight yet, there were no independent witnesses called to adduce evidence save for PW1 and PW2.Finally, that the sentence awarded was excessive and unsafe in the given circumstances.

RESPONDENT'S SUBMISSIONS

11 The respondent fully supported the conviction and the sentence meted out and urged this court to dismiss the appeal. That in regard to the ground that the charge sheet was defective, it was submitted that the particulars of the charge were read to the appellant and he further participated robustly in the trial process thus he was never prejudiced in any way. That a defective charge sheet claim was addressed by Sections 134 and 382 of the Criminal Procedure Code. Further to that, that sentencing is at the discretion of the court and such interference would only be called upon if the there was a material misdirection by the trial court and in this case, nothing of that nature has been demonstrated. In the same breadth, an argument was made to the effect that non assigning of an advocate to represent the appellant was not prejudicial in any way since the appellant robustly participated in the trial process and further to that, he never informed the court to make appropriate orders in regard to representation by a counsel.

Brief facts of the case:

12. The complainant Veronica Ciang'ombe (PW1) and the appellant are blood sister and brother. It is apparent from the proceedings that they have a protracted land dispute which according to PW1 due to the fact that she is not married and was allocated a big parcel of land by her father. On the material day which is 31/7/2019 PW1 was in her house early in the morning when she heard the appellant calling her from outside. Her son Geoffrey Mukatha responded and the appellant told him to tell PW1 to go and remove her chicken which were feeding on his green grams.

13. PW1 told her son Geoffrey Mukatha (PW3) not to go out. She then went outside and saw the accused armed with a panga. She immediately ran away for fear of an attack by the appellant who looked very furious. The appellant entered her house and took her mobile phone claiming that she uses the phone to raise alarm whenever he attacks her and told her to call whoever he wished.

14. PW1 (in her evidence she says "we") returned to the house between 2.30 p.m and decided to report at Tunyai Police Station. She reported a case of threatening to kill by her neighbor for refusing to get married.

15. PW3 Geoffrey Mukaithe who was with PW1 on his part testified that on the material day at 6 00 pm while inside the house with PW1 he heard the appellant calling his mother. He went out and the appellant told him to tell his mother to go and get the chicken which were feeding on his farm. His mother stopped her for fear that the appellant wanted to attack them. According to PW3 they scampered for safety and stood at a safe distance. The appellant went and pricked her mother's phone and said that now that he had the phone he would kill them. They never went back home. PW2 – police constable David Kamunde testified that he received the report. He went to the house of the appellant. The appellant gave them a mobile phone. They recovered a panga. He arrested the appellant and took him to Tunyai Police Post. PW4 who was with PW2 testified that the PW1 reported that the appellant had attacked her. They went and arrested him and recovered a panga. As for PW1 a police officer attached at Marimanti Police Station, formerly of Tunyai Police Post, he received a report that the appellant had attacked PW1. He sent PW2 & 4 who went and arrested the appellant. The OCS allowed the parties to reconcile. The appellant was then charged. The appellant on his part gave a sworn defence and did not call any witness. He told the court that on the material day he found PW1's chicken feeding on his green grams. He told PW3 to go and drive them out. PW1 complied but PW1 stopped him and said she would do it herself. He had some exchange with PW1 who claimed there was nothing to feed on his farm. Later at 4 00pm the PW1 went to his home with two police officers who alleged that he was a drug trafficker. They also told him that he had threatened to kill her sister. He was arrested and escorted to Tunyai Police Post. He was released and told to say sorry to the PW1. He refused as he had not committed any crime. The OCS told him to go and reconcile as it was a Land dispute. He asked the OCS to refer them to the Chief. In the meantime he reported to the D.C.I.O and OCPD that the arresting officer stole Kshs.10,000/- during arrest. He later met PW5 who had arrested him. He promised to charge him with attempted murder. He was then charged. The appellant told the court that PW1 is his blood sister. She did not scream. He told the court he did not chase her. He told the court that the charges were framed. He told the court that he did not steal the mobile phone. He told the court that he had no panga.

16. In his Judgment, the trial magistrate found the accused person guilty on the two counts. There is no indication in the entire Judgment that the trial magistrate had found that the charges were proved beyond any reasonable doubts.

17. I bmissions. The issue which arises for determination is whether the charges were proved beyond any reasonable doubts.

Analysis and determination:

18. This being a 1st appeal this court has a duty to re-evaluate the evidence, analyse it and come up with its own independent finding while bearing in mind that it did not have an opportunity to see the witnesses and leave room for that. The leading authority on the subject is ***Okeno- v- Republic (1972) E.A 32.*** The Court of Appeal has further stated that the 1st appellate court has a duty and the appellant has a legitimate expectation that the evidence will be subject to a fresh evaluation and an independent finding by the appellate court. Thus, the role of the first appellate is not to determine whether the decision of the lower court can be affirmed, it is required to make its own independent finding. See ***Kiilu & Another –v- Republic (2005) KLR 174.***

19. I will proceed to analyse the evidence before the lower court along side the grounds of appeal. The appellant argued grounds 1, 2, 3, & 10 of the Supplementary Petition together. The appellant was charged with threatening to kill contrary to **Section 223 (1) of the Penal Code.** The Section 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."

20. The prosecution needed to prove that the appellant issued a threat to kill the complainant either directly or indirectly, whether in writing or verbally.

21. On the other hand, the trial magistrate was supposed to consider whether the appellant had lawful excuse. The prosecution had duty to disclose the nature of the threat in the particulars of the charge. **Section 134 of the Criminal procedure Code** Provides:-

" 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. "

22.The prosecution then calls evidence to prove the charge and the particulars beyond any reasonable. The particulars of the charge on the 1st count states as follows:-

"…… Without lawful excuse threatened to kill Veronicah Ciang'ombe by chasing her, threatening to kill her."

23. The evidence tendered did not support the charge. PW1 did not allude to any threats made by the appellant. PW1 testified that the appellant called her while she was inside the house. The appellant according to PW1 told her to remove chicken which were damaging her farm. The PW1 did not testify that the appellant confronted or that he chased her. She claimed that she decided to run away as the appellant had a panga. There was no evidence tendered that the appellant chased her. It is also surprising that though PW1 & PW3 stated that the appellant had a panga, the charge sheet never states that the appellant chased the complainant while armed with a panga.

24. The evidence and the charge sheet are at variance. PW1 insisted in her testimony that the appellant wanted to kill her and her son (PW3). The particulars of the charge do not state that the appellant threatened to kill the two. The evidence does not support the particulars of the charge. Furthermore the testimony of PW1 and PW3 was contradictory. The PW1 and 3 fabricated evidence. This is because though they said they were at the scene, they gave conflicting and contradictory evidence. They appear to have been out to settle scores with the appellant based on an earlier alleged attack all which was not substantiated or proved. The PW1 and 3 did not tell the court whether the allegation by the appellant that the chicken were damaging his crops was true. The appellant in his defence stated that indeed the chicken had damaged his crops and there were some exchanges. The matter was discussed in the family but the PW1 went away and came with police.

25. From the evidence by PW1 & 3 and the defence, it seems there was some altercation over the chicken which had strayed in the appellants farm. There are doubts as to whether the appellant had threatened to kill the complainant. There is no doubt that the offence of threatening to kill is a serious one. But see what police did. They released the appellant and told him to go and reconcile with PW1 as it was a land dispute. This in itself and is a fact which is not in dispute raises doubts as to whether the appellant had threatened to kill. There was more than meets the eye as the appellant stated that he was arrested and charged after he complained to the DCIO and OCPD that the arresting officers stole Kshs.10,000/-. This had been put to the arresting officers when they were cross-examined a fact which shows that it was not a far fetched allegation. I find that the defence was plausible and raised doubts in the prosecution's case. The prosecution left many questions unanswered. I agree with the appellant that it was not safe to rely on the evidence to convict.

26. On ground 4 & 5 of the supplementary petition the record shows that the trial magistrate was carried away even to the extent of saying that the evidence of PW3 was consistent and candid with that of PW1 when there were glaring contradictions. Such comments before the trial magistrate heard the defence were quite prejudicial and created an impression that he had made up his mind without giving the appellant an opportunity to be heard. The learned trial magistrate made a grievous error by relying on a past criminal case to convict the appellant. This is what the trial magistrate stated-

" The complainant is now tired over constant threats by his greedy brother. He has forgiven him severally over physical assault for what investigators labelled as ender based violence."

27. At the time of sentencing the trial magistrate stated that:-

……..." the accused is a first offender…… I am privy of a matter transferred to court one where he is charged over land matters. Why I refer to that matter is because it is a land matter and basically the cause of issues in this matter is land. I was told the accused has even a further land at Materi area….."

28. I need not quote all what the trial magistrate stated. It is also clear that the trial magistrate trashed the social inquiry report. The trial learned magistrate relied on matters which were not part of the evidence but from undisclosed sources including cops. Though the court was categorical that the appellant was a first offender, the learned trail magistrate overruled them on the basis of undisclosed land dispute. I opine that the leaned magistrate exhibited open bias against the appellant for unknown reasons which culminated in the appellant being given maximum sentence on each of the charges.

29. It is trite that a court of law must ensure that the rights of an accused person to a fair trial are protected at all times. **Article 50 (1) of the Constitution** provides:-

"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

30.The right to fair trial is one of the fundamental rights and freedoms which cannot be limited See **Article 25** of the Constitution. Bias is defined as-

> **" Inclination prejudice – judicial bias. A Judge bias towards one or more of the parties to a case over which the Judge presides ……" See Black Law Dictionary, 8th Edition at page 171.**

31. Based on the analysis above it is doubtful as to whether the appellant was afforded a fair trial. The **Criminal Procedure Code** has an elaborate procedure of proving previous convictions. The certificate of previous conviction must be produced at time of sentencing and the accused asked to state whether he admits them or not. If he denies them the prosecution embarks on calling evidence to proof them. The court merely stated that the appellant had a pending land dispute in court I. This was irrelevant consideration. This was not followed.

32. The report by the probation officer had recommended a probation sentence but the trial magistrate rejected it. From the foregoing analysis, I find that the prosecution did not discharge the burden of proof. **Section 382 of the Criminal Procedure Code** cannot aid the respondent since the omission on the charge occasioned a failure of justice as the evidence tendered did not support the charge. The charge did not mention a panga. There was nothing tendered in evidence to connect the panga allegedly recovered from the appellant with alleged offence. The trial was unfairly conducted due to the open bias exhibited by the learned trial magistrate. The charge was not proved beyond any reasonable doubts and the appellant was entitled to the benefits of doubts.

33. With respect to the charge of stealing **Section 275 of the Penal Code** provides as follows:-

> **"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."**

34. The ingredients of the offence are the taking of anything capable of being stolen. The criminal liability is proved if the person so taking anything capable of being stolen from the owner does so with the intention to permanently deprive the owner of it.

Section 268(1) of the Penal Code provides:

> **" (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."**

35. The charge of stealing was not proved. There were contradictions surrounding the alleged theft and even from the evidence there was no prove that the appellant intended to steal the mobile phone. I find that the charge of stealing was not proved beyond any reasonable doubts for the reasons that the particulars of the phone were not adequately described. Evidence of PW1 &3 was at variance regarding the location from where the said phone was stolen. PW3- gave self conflicting evidence as to where the phone was stolen from. There was also contradictions as to whether the phone was indeed retained by police as PW1 said the sim card was returned while PW4 said the phone was returned to the complainant.

36. On the sentence, it was based on wrong principles. The appellant was a 1st offender. The law provides that a maxim sentence should not be imposed on a 1st offender unless there are aggravating circumstances.

37. The Sentencing Policy Guide-lines sets out an non-exhaustive circumstances.

38. This include-

- Use of weapon to frighten or injure a victim. The more dangerous the weapon the more the culpability.
- Multiple victims
- Grave impact on National Security.
- Previous conviction, this to mention but a few.

39. The court when passing sentence is supposed to take into account relevant matter to the case. If irrelevant matters are considered the court commits an error of the law. The Court of Appeal in ***Clement Kiptarus Kipkurui –v- Republic Criminal Application 183 of 2008.*** While dealing with issue of sentencing stated that where the court failed to take some relevant considerations into account and observed that the offence was prevalent, and imposed deterrent sentence, it had taken into account an irrelevant consideration.

40. In the case of ***Benard Kimani Gacheru –v- Republic (2002) eKLR*** the Court of Appeal stated the principles upon which an appellate court will act in exercising discretion to review, alter or set aside the sentence imposed by the Lower Court.

41. These are:

> **a. Where the sentence is manifestly excessive in the circumstances of the case.**
>
> **b. Where the trial court overlooked some material factor, or**

c. Where the court took into account some wrong material or acted on a wrong principle.

42. The trial court is supposed to bear in mind that one of the principle objective in Criminal justice is the imposition of an appropriate, just, proportionate, and just sentence which is commensurate with the nature and guilty of the offence and the manner in which the offence or crime was executed. That is why the law gives discretion in sentencing as each case is judged according to its own particular circumstances. The Judiciary Sentencing Policy Guidelines takes into account aggravating and mitigating factors, the former with effect of enhancing the sentence and the later to lessen the sentence.

43. In this case no aggravating factor were presented before the trial magistrate. The trial court took into account some irrelevant material and clearly acted on a wrong principle by relying on fresh evidence which he introduced and the appellant was not given an opportunity to respond.

44. The sentence was manifestly harsh as the learned trial magistrate passed maximum sentence on each of the count. The trial magistrate overlooked material factors when sentencing. Based on the above Court of Appeal decision, all the principles upon which the appellate court will interfere with the discretion of the learned magistrate in sentencing are present.

45. The appellant has submitted that the offences he was charged with were of a serious nature and the trial court ought to have explained the rights under **Article 50 (2) (g) & (h)** of the **Constitution.** The article provides:-

´(2) Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

46. The article is expounded under **Section 43 of the Legal Aid Act** which provides that;

" A court before which an unrepresented accused person is presented shall-

a. Promptly inform the accused of his right to legal representation.

b. If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her, and

c. Inform the service to provide legal aid to the accused

47. The trial magistrate did not inform the appellant of this right. Failure to have legal representation perse does not necessarily mean that an accused person would suffer substantial injustice. The court of appeal while dealing with this question in the case of ***David Macharia Njoroge –v- Republic (2011) eKLR*** stated that substantial injustice is not defined and every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission. In ***Karisa Chengo & 2 Others –v- Republic Appeal No. 44, 45 & 76 of 2014*** stated:-

" It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise…."

48. The failure to have legal representation will not viate a trial. The appellant has not stated that he is a man of straw. He has legal representation in this appeal. He never claimed that he could not afford legal representation. I find that this ground is without merits.

In Conclusion:

49. I find that for the above stated reasons, the appeal has merits.

50. I order as follows:-

1. The appeal is allowed.

2. The conviction and sentence is set aside.

3. The appellant shall be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 18TH DAY OF AUGUST, 2021.

L.W. GITARI

JUDGE

18/8/2021

Judgment is read out in open court virtually.

L. W. GITARI

JUDGE

18/8/2021