REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 36 OF 2019

THE REPUBLIC.....APPELLANT

=VRS=

KEVIN ATUYA NYABERA.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. C. W. Waswa – RM Nyamira dated and delivered on the 9th day of October 2019 in the original Nyamira Chief Magistrate's Court Criminal Case No. 181 of 2019}

JUDGEMENT

This is an appeal by the prosecution challenging the judgement of the trial Magistrate that acquitted the respondent who was charged with the offence of **Threatening to kill contrary to Section 223 (1) of the Penal Code.**

The particulars of the charge were that: -

> **"On 18th December 2018 at Pemo Chemist in Nyamira Sub-County within Nyamira County, without lawful excuse caused PETER MOMANYI NYAKUNDI to receive threats to kill the said PETER MOMANYI NYAKUNDI by sending him a parcel containing threatening messages that he choose between life and land, and if he doesn't vacate his business premises within a period of three days, the thunder which he was going to receive, was going to be more and very painful."**

The respondent pleaded not guilty whereupon the prosecution called seven witnesses to prove the charge. The respondent on his part made an unsworn statement. After considering and evaluating the evidence the trial Magistrate found the prosecution had not proved its case beyond reasonable doubt and acquitted the respondent.

This appeal is premised on four grounds: -

> **"1. That the learned magistrate misdirected himself to irrelevant facts while making his finding.**
>
> **2. That the learned magistrate erred in law and in fact by making a finding that the accused person did not issue threatening message to the complainant.**
>
> **3. The learned magistrate did not consider one evidence tabled by the prosecution while making his finding.**
>
> **4. That the trial magistrate misdirected himself in law and fact by not reaching a conclusion that evidence as a whole and given the seriousness of the offence and the acquittal of the accused provided by the law contradicted the prosecution evidence whose threshold was beyond reasonable doubt."**

The appeal which was vehemently opposed was canvassed by way of written submissions which I have considered fully. However, this being the first appellate court I am enjoined to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses myself **(see Okeno v Republic [1972] EA 32.**

The prosecution witnesses all testified that what was contained in the parcel delivered to the complainant's premises had two tissue papers and five leaflets. However, only one was tendered in evidence (Exhibit P1) and it stated:-

> **"NOTICE TO TENANT**

I am appealing to you tenants and in particular **PETER NY AK UNDI MOMANYI 1.1) NO. 25279651** to vacate from this house.

Why are you giving notices to other tenants and threatening them?

You were given a house for business but you have liked the land. You have bribed the **LAND REGISTRAR, THE POLICE** and **THE COURT** to protect you.

It is either peacefully you choose between life and land. An advice to you is that you move out within 3 days. The **THUNDER** that is coming to you is more and very painful.

Dated: 12th December, 2018

TAKE CARE!!!

Sungu Sungu" (the only 2 words that are handwritten).

It is my finding that the words **"Choose between life and land" "The thunder that is coming to you is more and painful**" and "**Take Care"** taken together constitute a threat and the complainant was therefore entitled to interpret the same as being a threat to kill him. Be that as it may, to succeed, the prosecution was required to prove beyond reasonable doubt that those threats were uttered by the respondent.

The prosecution witnesses gave conflicting evidence on what transpired on the day it is alleged the parcel was delivered to the complainant's premises. The complainant himself was not present as he had travelled to Kisii. It is noteworthy however that he claimed to have seen the parcel with the respondent at a place called Konate. In examination in chief the complainant (Pw1) testified that he saw the accused, Junior Nyanchiri, Kennedy Migori and Stanley Migosi at Konate junction. Initially his evidence was that they were in the respondent's car. However, during cross examination, he changed his testimony and stated that the respondent was standing near the bus park. His evidence regarding the times the incidences he narrated occurred varied in his examination in chief and in cross examination hence creating doubt as to whether he was speaking the truth. Moreover, this court wonders how he could have seen the parcel which was in a car as he drove past noting that it was his testimony that he drove while facing ahead. My finding is that his evidence that ***"I told my wife that I had seen someone with such a box at Konate"*** could not have been true.

The complainant's wife Judith Nyamato (Pw2) and their workers Philomena Bitengo (Pw3) and Joash Mokaya (Pw4) also gave very inconsistent and contradictory accounts as to how the parcel was delivered to the premises so much so that this court doubted their credibility. As a matter of fact, Pw3 and Pw4 even stated that the parcel was delivered on 17th December 2018 a day earlier than the complainant and his wife alleged it was taken there. Pw2, Pw3 and Pw4 could not also agree on which of them received the parcel. According to Pw2 the parcel was handed to her by a person who claimed to have been sent by Junior Nyanchiri. On her part, Pw3 initially stated that the parcel was given to Pw2. Not long after that she is on record as saying ***"the day I received the box and recorded my statement are two (2) different days……."*** Then in cross examination she stated ***"I received the box at 3pm."*** Pw4 on the other hand stated ***"I am Joash Mokaya. I am a pharmtech. I am employed at Pemo Chemist. On 18/12/2018, I was at work and in the afternoon someone brought a carton. He handed it over to me. he said he was given the box by Junior to drop at the premises. I gave the box to Judith. Judith opened and I saw……."***

This court is left wondering why the accounts of these witnesses is so contradictory and the only inference I can draw is that either some of them or all of them were not telling the truth. The witnesses also gave contradictory accounts on how the parcel ended up at the police station with the complainant alleging it was taken there by his wife who on her part stated that the parcel was taken to the complainant by Pw4 and that he, the complainant, took it to the police station. This offence is alleged to have been committed on 18th December 2018 and the minds of the witnesses testifying five months later was still fresh. My suspicion is that they were not telling the truth. However, even were we to ignore the inconsistencies and contradictions and assume the witnesses spoke the truth we still have to grapple with the issue of whether the respondent was responsible for the threatening document.

The witnesses were in agreement that it is not the respondent who delivered this parcel to the complainant's premises but rather a person who claimed he had been sent by one Junior Nyanchiri. This court has also ruled out evidence that the complainant saw the respondent with the parcel at Konate. In an attempt to establish a nexus between the sender of the parcel and the respondent, the prosecution called Polycarp Mogaka (Pw5) who testified that the respondent instructed him to deliver the parcel and paid him 500/= for that purpose. The evidence of this witness is however not convincing. Firstly, the prosecution did not demonstrate that Polycarp Mogaka and Junior Nyanchiri are one and the same person. It was crucial for the prosecution to do so given that it was the evidence of the complainant and his wife (Pw2) that the person who delivered the parcel said he was sent by Junior Nyanchiri. Secondly, this witness could not have been telling the truth because it was his own testimony that after receiving the box and getting out of the respondent's car he spotted the complainant and tried to stop him so he could give the parcel to him but the complainant did not stop and for that reason the respondent told him to return the box in the vehicle which he did. From there they went to Equity Bank and thereafter to a bar at Keroka where they drank alcohol. Clearly Pw5 did not and could not have delivered the parcel. Indeed, his evidence was that the respondent told him that he had dispatched the box and he did not know what was in it until he saw it at the police station. What is difficult for this court to believe is that the respondent could have disposed of the box without the witness (Pw5) seeing him leaving the car with it which he could have done since they were together throughout save for the time he alleged the respondent went into the bank. Even then, he did not state whether the respondent left the car with the box. These gaps in his evidence weaken the case.

The prosecution also produced Safaricom M-pesa data to prove a nexus between the respondent and this witness. It is my finding that this too fell below the standard required as the money sent, was to a number registered in a person other than this witness (Pw5) and that person was not called as a witness to clarify that his name had in fact been used by the witness to register for M-pesa. That evidence would even then have been of no probative value given that the witness confessed as it were that he was not the person who delivered the parcel.

All in all, his claim that he identified the parcel at the police station cannot be believed or relied upon as he turned out to be an untrustworthy witness.

As for the prosecution's allegation that the trial court shut out a piece of evidence material to the case and hence prejudiced it's case, it is well answered by **Section 175 of the Evidence Act** which states: -

> **"The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.**

It is my finding firstly, that the trial court was right in excluding the evidence of the document examiner. The issue was canvassed before the trial court on 3rd June 2019 and the prosecution is on record as applying for the court to allow the respondent's sample handwriting to be taken so it could be taken for analysis. It is not very clear whether what the prosecution meant was the specimen handwriting of the respondent or known handwriting as those are the writings sent for comparison with the questioned handwriting. Whatever it was this reveals that the report was not complete. Moreover, even had the report been admitted it would not have affected the outcome of the case given that the same was full of inconsistencies, contradictions and so many gaps that had I been the court in conduct of the trial, I would not even have put the respondent on his defence.

In the submissions, Counsel for the appellant asserts that it was unprocedural for the trial Magistrate to continue with the trial while a revision was pending in this court and seems to suggest that the appeal is merited on that ground if not for anything else. Counsel does not disclose what the outcome of the revision was. Be that as it may, in the absence of a stay by this court, the trial Magistrate was perfectly within his right to continue with the trial. In the end therefore, I find that the prosecution did not prove beyond reasonable doubt that the respondent was the author of the threatening leaflet which was in any event typed save for the two words "Sungu Sungu", or that he was the person who caused the same to be delivered to the complainant.

The upshot is that this appeal has no merit and it is dismissed and the judgement acquitting the respondent is upheld. It is so ordered.

Signed, dated and delivered in open court this 12th day of March 2020.

E. N. MAINA

JUDGE