REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 20 OF 2019

JOSPHAT MWINJI KAMWARA.....1ST APPELLANT

PETER MUTWIRI MWINJ.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

1. **JOSEPH MWINJI KAMWARA** and **PETER MUTWIRI MWINJI** the 1st and 2nd Appellant respectively were both charged with two counts of offences namely;

(i) **Count I -** Threatening to kill contrary to **Section 223(1)** of the **Penal Code**.

The particulars in that count are on 27th day of February 2018 at Mwerera Sub-Location in Tharaka South, Tharaka Nithi the Appellants jointly with another not before court while armed with bows and arrows without lawful excuse shot an arrow while uttering words **"we will kill you Andrew Gitonga Mwenda"** words which meant or rather implied that they would kill one Andrew Gitonga Mwenda.

(ii) **Count II:** Forcible detainer Contrary to **Section 91** of the **Penal Code.**

The particulars in that count are that on the same date (27th February 2018) at Mwerera Sub-Location in Tharaka South within Tharaka Nithi the Appellants jointly with another not before court being in possession of land parcels; South Tharaka/Tunyai B/1032, South Tharaka/Tunyai'B'/1073 and South Tharaka /Tunyai "B"/1035 of Andrew Gitonga Mwenda without colour of right held possession of the said parcels of land in a manner likely to cause a breach of peace or reasonable apprehension of a breach of peace against Andrew Mwenda who was entitled by law to the possession of the said land.

2. The Appellants denied the both counts but after trial, they were found guilty on both counts and were convicted and each sentenced to serve five years imprisonment on count I and 3 years on Count II with both sentences to run consecutively.

3. The Appellants felt aggrieved by both the conviction and sentence and preferred this appeal. Before I delve on the grounds raised in the petition, this court will consider briefly the evidence tendered at the trial court with a view to re-evaluating and re-assessing the same for purposes of determination of this appeal.

Brief background of the case:

4. The evidence tendered at the trial indicates that the 1st and 2nd Appellants are father and son respectively who apparently had staked claims on parcels Nos. South Tharaka/Tunyai B/1032, South Tharaka/Tunyai B/1035 and South Tharaka/Tunyai B/1037. All the said parcels were registered in the name of complainant. The titles were tendered as P. Exhibit 1, 2 and 3 by Wanami Nyongesa (PW1) the investigating office in the case. The Appellants are neighbours to the complainant. The complainant (PW1) told the trial court that he had been away for a long time serving in Kenya Defence Force and had been deployed to Somalia and that when he returned to Kenya, he visited his farm on 27th February 2018 in the company of his workers but on arrival, the 1st Appellant screamed loudly and together with his two sons the 2nd Appellant included, charged at them while armed with bows and arrows with the 2nd Appellant being armed with a machete. The complainants and his workers retreated and as they did so they were shot at with arrows and they left and reported the matter at Tunyai Police Post.

5. The evidence of PW1 was corroborated by the evidence of his workers Misheck Kirimi (PW2) and Josephat Mutembei (PW3). The investigating officer (PW4) tendered 3 bows and 20 arrows (P. Exhibit 5(a)) which he recovered from the house of the Appellant and his two sons. He further confirmed to the trial court that there had been land dispute on the 3 parcels and that the Area administration had confirmed to him that the complainant's three titles were genuine.

6. When placed on their defence, the 1st Appellant claimed that the 3 parcels were irregularly curved out of his land where he had lived since his birth. He claimed that the complainant was not a resident of Tunyai 'A' in Marinya village. He further claimed that National Land Commission had visited the Area and ordered for cancellation of all titles and tendered a letter dated 23rd November 2016 from National Land Commission as D. Exhibit 1. The letter recommended for cancellation/revocation of all titles in Tunyai B adjudication scheme and fresh allotment to deserving cases. The 1st Appellant accused the complainant of grabbing his land and denied threatening him and raised the defence of *alibi*.

7. The 2nd Appellant on his part supported his father in his claims over the parcels in question and denied committing the offence. He also raised *alibi* as his defence.

8. The trial court upon evaluation of the evidence tendered found that the Appellants were guilty as charged as they had taken the law into their hands over a land dispute. The court further found that the Appellants were guilty of forcible detainer as they did not tender any legal document entitling them to the said parcels and that the petition pending at ELC court at Chuka did not indicate if the Appellants were parties to the petition.

The grounds of appeal

9. The Appellants as observed above were aggrieved and have listed the following 7 grounds of appeal namely;

i. That the learned trial magistrate erred in law and in fact by holding that the Appellants uttered the words "we will kill you Andrew Gitonga Mwenda" while failing to find the person who actually uttered those words and also against the evidence.

ii. That the learned trial magistrate erred in law and in fact by failing to hold that the Appellants did not shoot any arrows at the complainant.

iii. That the learned trial magistrate erred in law and in fact by failing to hold and find that the lands complained of belongs to the Appellants from time immemorial and the titles held by the complainants are disputed.

iv. That the learned trial magistrate erred by failing to hold that the Appellants had a bona fide claim of right to the suit properties and are therefore not criminally liable of the alleged offence pursuant to Section 8 of the Penal Code.

v. That the learned trial magistrate erred in law and in fact by not finding that the residents of Gakurungu Sub-Location where the Appellants are residents have filed a petition regarding all the titles including the ones complained about in this suit since according to them they were granted illegally.

vi. That the trial magistrate erred by failing to refer this case for hearing before the Environment and Land Court.

vii. That the trial magistrate erred by dismissing the Appellants' defence of alibi.

10. At the hearing of this appeal, the Appellants through their learned counsel Mr. Mwiti, submitted that the threatening words ***"we will kill you Andrew Gitonga Mwenda"*** were missing from the evidence tendered and that the complainant told the trial court in his evidence that the actual threatening words used were ***"we will kill somebody."***

According to the Appellants the words were not specific to anybody. They contend that there was no evidence of joint intention tendered to show that both the Appellants had a joint intention to threaten to kill. They have cited the decision in the case of ***Gitau and another – vs- Republic [1967] E.A 449*** to buttress their contention that it was not possible for the two Appellants to utter the threatening words in unison.

11. On the 2nd ground of the appeal, the Appellants contend that the person who shot at the complainant was neither of them and that the proceedings show that the one who shot at the complainant was not in court.

12. The Appellants further submit that they were convicted over a land dispute of a land they have been occupying since they were born. They contend that they have a legitimate claim insisting that the ELC had directed the National Land Commission to revisit the demarcation and allotment. They have cited the provisions of Section 8 of the **Penal Code** and relied on the decision of ***Veronica Nyambura Wahome – vs- Republic [2019] eKLR*** to buttress their position.

13. The Appellants faults the trial court for not considering their defence of *alibi* and on this score have relied in the case of ***Kiarie –vs- Republic [1984] KLR 739.***

14. The Respondent through Mr. Momanyi learned counsel from the office of Director of Public Prosecution has opposed this appeal. He supports the conviction of the Appellants but not the sentence meted out. He contends that the sentences in both counts I and II should have run concurrently since the offences were committed in the same transaction.

15. The Respondent asserts that the offence of threatening to kill was properly proved against both the Appellants and has cited the evidence tendered by the complainant (PW1) and corroborated by PW2 and PW3. According to the State, the 1st Appellant uttered the threatening words and that he was in the company of the 2nd Appellant and one Mugendi who is still at large.

16. The Respondent contends that the common intention to commit the offence was demonstrated by the fact that the Appellants confronted the complainants while armed with the 1st Appellant and Mugendi being armed with bows and arrows while the 2nd Appellant was armed with a panga.

17. On claims of ownership of the disputed parcels by the 1st Appellant, the Respondent contends that no evidence was tendered to show that the Appellants had bona fide claim over the same.

18. The State further contends that the Appellants are not parties in the suit pending at ELC and the pendency of the suit did not give them the right to threaten to kill.

19. Momanyi also submits that the Appellants did not tender any evidence to show that their defence of *alibi* was well grounded.

20. This court has considered both this appeal and the submissions made by both counsels. The mandate of an appellate court in criminal matters is to re- evaluate and re-assess the evidence tendered at the trial court and come up with own conclusion.

21. I will go straight to the first ground of appeal where the Appellants have urged me to find that there was insufficient evidence tendered at the trial to show that the specific words **" we will kill you Andrew Gitonga Mwenda"** were not attributed to any of the Appellant and were never uttered.

22. I have gone through the evidence both in chief and under cross-examination tendered by PW1 (the complainant) and it is clear that the complainant and the workers (PW2, and PW3) who had accompanied him to the disputed farm were confronted by the 1st Appellant and his two sons. The 2nd Appellant was armed with a machete and one Mugendi (who is still at large) was armed with a bow and arrow. The 1st Appellant was also armed with bows and arrows and he was the one who screamed and attracted the attention of his sons who promptly responded. The complainant clearly told the trial court under cross-examination that the 1st Appellant uttered the following words;

> **"we will kill you Andrew Gitonga Mwenda"** and repeated that he had recorded in his statement that the 1st Appellant had stated that **"I will kill somebody."**

The evidence of PW1 was corroborated by PW2 who stated that he heard the 1st Appellant utter the following words;

> **" tutakuuwa wewe Andrew Mwenda Gitonga"**

This shows that the claim by the Appellants that the words reportedly uttered were none specific is contradicted by the evidence tendered. The evidence tendered shows that the 1st Appellant screamed or wailed loudly which in my considered view was a war cry because almost immediately he came out armed with bow and arrows accompanied by his sons including the 2nd Appellant who was equally armed with a machete. I agree with the Respondent that the fact that the Appellants confronted the complainant while armed and actually carried out the threat by shooting arrows at the complainant clearly shows that they all had common intention of repulsing the complainant by whatever means possible. The trial court captured this by holding that the motive was all about the land dispute. The fact that only one of them uttered the threatening words does absolve the others from culpability. The evidence tendered showed that the Appellants had a common purpose. The provision of **Section 21** of the **Penal Code** provide as follows:-

> **" when two or more persons form a common intention to prosecute an unlawful purpose in conjunctive with another and in the prosecution of such purpose an offence is committed of such nature that its probable consequences of the prosecution of such purpose, each of them is deemed to have committed the offence,"**

It did not matter therefore that the threatening words were not and probably could not be uttered in unison by both the Appellants to be found culpable.

The authority in the cited case of ***Gitau and Another –vs- Republic (Supra)*** is not applicable because in that case, there was an accidental shooting of a boy in a garden by 3 prisoners who were engaged in practice shooting and the question before court was not the applicability of **Section 21** of **Penal Code** *per se* but rather whether the circumstances could be said to be a probable result of what the two men agreed to do if indeed they agreed at all. The court allowed the appeal and found that the 2 men were not culpable but in this instance, the evidence tendered clearly revealed a common intention to resist the complainants attempts to gain entry and utility over his parcels of land.

23. On *alibi*, I am not persuaded by the Appellants' contention that their defence in that respect was not considered by the trial court in its judgment. The defence of *alibi* was duly considered by the trial court who found the same to be an afterthought. This court concurs with the finding of the trial court because it is quite clear that the Appellants were quite unhappy by the fact that the complainant whom they considered an outsider had been allotted some parcels of land in their neighbourhood. Their evidence is quite revealing about their displeasure and therefore when they claim that they were away at the material time (but fail to call witness to atleast establish their whereabouts at the material time), it is easy to find that their *alibi* was not only a sham but an attempt to get off the hook.

24. The appellants have on the other hand raised a strong argument regarding their claim over the disputed portions and have raised a valid legal point about the provisions of **Section 8** of the **Penal Code** absolving them of any criminal liability. **Section 8** of the **Penal Code** states

as follows:-

" A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud."

It is clear that count II in the charge sheet presented to the trial court as I have observed above related to property. A disputed property. This court notes from the evidence tendered by the Appellants during the defence that there is a dispute filed over Tunyai B Adjudication Section and though the Appellants are not named as parties to the petition, it is apparent that their claim over the disputed land has been channeled to the right forum at ELC and National Land Commission.

25. While I agree with the Respondent that the pendency of a suit or a petition in court over a land dispute is not a licence to threaten to kill or commit any other unlawful/criminal acts, it is quite clear that under **Section 8** of the **Penal Code** *bonafide* claim over land cannot be criminalized and solved through criminal process. I am persuaded by the decision in ***Veronica Nyambura Wahome –vs- Republic [2019] eKLR*** that the evidence tendered by the Appellant shows that they had a claim over that parcels of land held by the complainant and their belief was ***"neither based on a falsehood or intent to create a false impression".*** The prosecution failed to prove those two ingredients in the trial court. This court is therefore satisfied that the Appellant's grounds in that regard is well grounded.

In the end I will for the reasons aforestated partly allow this appeal only in regard to the 2nd count. The conviction and indeed the sentence by the trial court on that count was erroneous. The sentence was erroneous because the trial court was supposed to have the two sentences run concurrently because the evidence tendered shows that both offences in count I and II were committed in the same transaction. The conviction of the Appellants on count II as I have observed above was erroneous courtesy of the provision of **Section 8** of the **Penal Code** which I have found to be applicable to the Appellant's claim over the disputed portions notwithstanding the fact that the complainant is the registered owner. The dispute in my view is better handled in the right forum which is at the ELC. The conviction and sentenceof the Appellant is respect to Count II is therefore set aside. In regard to the first count, this court for the reasons aforesaid disallows the appeal on both conviction and sentence. The penalty prescribed by **Section 223** is **10 years** but the trial court exercised its discretion under **Section 26** of the **Penal Code** and sentenced the Appellants to **5 years** imprisonment each. I have no reason to interfere with that sentence. The conviction and sentence in regard to Count I are upheld.

Dated, signed and delivered at Chuka this 23rd day of April 2020 via skype connected to G.K. Prison Meru, ODPP Chuka and Appellant's counsel

R. K. LIMO

JUDGE