



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL CASE NO. 49 OF 2019

KENNEDY KIGEN LETING.....APPELLANT

-VERSUS-

REPUBLICRESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court

at Kabarnet Criminal Case No. 358 of 2019 delivered on the 5th day of August 2019

by Hon. P.C. Biwott, SPM]

JUDGMENT

Introduction

[1] The appellant was on 5th August 2019 convicted and sentenced to imprisonment for 3 years for the offence of threatening to kill contrary to section 223(1) of the Penal Code, with particulars as follows:

“Kennedy Kigen Letting: On the 3rd day of April 2019 at Mlima village, Yatoi Sub-location Baringo South Sub-county without unlawful cause uttered words threatening to kill Mary Kandie, by saying “between me and you one must die.”

[2] The offence of threatening to kill is set out in section 223 (1) of Penal Code as follows:

“223. Threats to kill

(1) 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.”

[3] The Prosecution called three witnesses and the appellant when placed on his defence gave sworn testimony.

Judgment of the trial court

[4] The trial court after analysing the evidence before it found the appellant guilty as follows:

“Judgment

From the evidence given, PW2 saw accused telling PW1 that he either dies or she dies. Accused picked panga from the kitchen. PW1 took refuge in her bedroom locking herself. PW2 saw accused hitting the bedroom door with the panga (Exhibit 1). The evidence of PW2 is consistent with PW1's.

The complainant is parent to accused, she told court had educated him upto college. That accused was without manners and troublesome. This explains why she hid in her bedroom on getting threat to kill her. Accused went beyond the threats. He picked a panga and followed complainant to her locked door. He wanted to actuate his threat. I find his defence wanting in honesty. I dismiss it. I am satisfied that he threatened to kill the complainant of charged. I find him guilty under Section 215 of the CPC. I convict him

accordingly.

P.C. BIWOTT, SPM”

The appeal

[5] Being dissatisfied with the Judgment of the court, the appellant filed an appeal principally on the severity of sentence pleading leniency as follows:

“PETITION OF APPEAL

I KBT/139/019/LS KENNEDY KIGEN LETIING thus hereby lodge my appeal for leniency under the following mitigation condition.

1. That I'm first offender.

2. That, my Lordship I am the bread winner in my family and do beg the honorable court to give me a lesser sentence to look after them.

3. That this matter emanated from alcohol drinks of which after conviction prison, I promise to abandon and become a good citizen as required by the laws of the land.

4. That, the honorable court may re-consider my Appeal and quash this conviction and sentence so that I may be set at liberty. or given anon-custodial sentence

5. That my lord's, do also pray that the court may consider the duration (4 months) I spent while in remand 6. That more grounds shall be adduced during the hearing of this application.”

Appellant's submissions

[6] The appellant further filed written submissions dated 2nd May 2020 urging the court to reduce the sentence and take into account the period that he remained in custody awaiting the conclusion of his trial, as follows:

“WRITTEN SUBMISSIONS

I KBT/139 /019/LS Kennedy Letting a convict in kabarnet prison serving 3 years in original Cr. Case No. 358/019 threatening to kill C/sec 223(1) of Penal Code delivered on 5th August, 2019 by Hon. PC Biwott (SPM) at Kabarnet law courts. I thus hereby humbly lodge appeal on leniency based on the following submissions:

GROUND ONE (1)

That your lordship I am very remorseful of the offence committed after being placed in custody I have undergone the process on transformation whereby I have undergone through a course of biblical studies of which I studied one year period with a certificate attached behind.

GROUND TWO (2)

That your lordship the complainant here is my mother and I called her through the prisons welfare phone we talked and now we have reconciled and now we are in good terms. I therefore beg this court to give me second chance so that I can be able to make peace with my family and live in harmony.

GROUND THREE (3)

That as I stated in the ground of appeal that all those emerged through drunkenness and through the courses, undertake here at prison, made my mind brand new and ready to pick up the pieces and start a sober life, I have learned my mistakes additional through tough conditions in prison and I promise to be upright citizen and show lawful act that may not cross purpose with laws of the land.

GROUND FOUR (4)

That the honorable court may reconsider my appeal and quash this sentence so that I may be set at liberty or given a non- custodial sentence.

GROUND FIVE (5)

That my lordship consider the period (4 months) placed at remand to be part of my sentence or quash the remaining sentence so that

I may be set at liberty.

*REASONS WHEREFORE I humbly pray that may **my mitigation for leniency be considered and the court may reduce the sentence to amount to acquittal.***

DPP's submissions

[7] The DPP opposed the appeal in submissions dated 18th June 2020 as follows:

“The appeal is opposed.

The appellant herein was charged and convicted of the offence of Threatening to Kill contrary to section 223(1) of the Penal Code. The prosecution called a total of 3 witnesses. PW1 testified that the appellant went to her house while appearing drunk. She inquired why he was there to which he responded that she would know good/bad on that day. He then entered the complainant's kitchen and picked a panga. The complainant locked herself in as she knew he was violent. She called the OCS on phone and the police responded and came to her rescue. On seeing the police, the appellant ran away. He had been disarmed and left the panga at the scene. The panga was produced as prosecution exhibit 1. After the incident, the appellant went at large and police arrested him in connection to another offence. The complainant was called by the police and asked to record her statements together with her witnesses.

PW2 corroborated the evidence of the complainant and confirmed that the appellant had threatened the complainant severally. PW3 the investigating officer testified on the events of the material day. He confirmed that he and PC Ewoi had been called by the OCS to respond to an issue at Milimani Village where the complainant lived. They found the complainant and the panga at the scene. The appellant had ran away at the time. The officer arrested him at Marigat having committed another offence. There was no grudge between the officer and the appellant.

The appellant gave sworn defence. He explained that he had gone to the complainant's house to pick his daughter when he saw his brother's wife beating his daughter. He inquired why his daughter was being beaten to which his brother's wife replied that the appellant was drunk. She entered the complainant's house to inform her that he was quarrelling him and that is when they called the police. He said he picked his daughter and left for his house. He confirmed he was arrested a week later on an issue of a lost phone that he had allegedly reported to the police. He denied threatening his mother as alleged. The trial court dismissed his defence and found it wanting in honesty.

The evidence tendered shows that the appellant threatened to kill the complainant who was his mother and this threat was both verbal and in actions evidenced by the appellant having a panga. The sentence passed is sufficient under the circumstances. The complainant had ensured that the complainant had a decent life and gone as far as ensuring he was educated. He had no justifiable reason to threaten his mother. The sentence passed is sufficient. The court may however consider the period the appellant spent in remand.”

Determination

Issue for determination

[8] Although the appellant does not challenge his conviction and rather pleads lenient sentence, this court, as a first appellate court (see **Okeno v. R** (1972) EA 32), shall re-evaluate the evidence before the trial court to form its own conclusion as the guilt of the appellant, before considering the request for review of the sentence of the trial court. In this regard, on the evidence the question is whether there is before the court sufficient evidence to prove the offence of threat to kill as charged.

The Evidence

[9] Before the trial court, PW1 the complainant testified as to the threat on her life by her son (appellant herein) as follows:

“[O]n 3/4/19 at 4:00pm I was at home resting.

*This boy (accused) who is my 2nd born arrived. He looked drunk. He lived alone he is 22 years old. I asked him why he was there. He is married and has children lived with me. **He said I would know good/bad that day. He said would kill me. I rose up. He entered my kitchen and picked panga. I closed myself in. I knew he was violent. I called OCS on phone. He knocked my door with the panga.** My house girl called others on phone. The police came to my rescue. The accused ran away on seeing them. My elder son's wife had disarmed accused before police arrive. I saw it outside the house. I took it to the police station to record statement. Accused went at large for a week. After a week police called me that he had been arrested for stealing another person's mobile phone. My witnesses recorded statements. One was Mercy Kikwai. He is charged after that for threatening to kill me. He had been stealing my items. He has 2 children with different women. He has diploma in mechanics. I told him to learn to vend for himself. He is now in the dock (pointing at accused). That is all.*

P.C. BIWOTT, SPM

CROSS EXAMINATION BY ACCUSED:

You picked the panga from kitchen.

You ran away on seeing the police coming to scene. You left down the panga when running away. The door you hit left marks.

RE- EXAMINATION BY PROSECUTION:

The panga was in the Kitchen. Accused picked it and hit door with it where I hit.

P.C.BIWOTT. SPM”

[10] PW2 supported the complainant’s version of events as follows:

“[O]n 3/4/19 at 4.00pm I was at home with mother in law - Mary Kandie. Kennedy Letting (accused pointed to) arrive. **We were watching T.V. He told Mary (PW1) that between him and her one had to die. Mary (PW1) ran to the bedroom and locked herself in. He picked from the Kitchen. He hit the door with the panga. I asked him to stop it. He did not heed. Mary called police on phone. He heard it. He ran away leaving the panga down.** He went away into hiding. The police arrived. We recorded statements. Later he (accused) was arrested. I am now here to state what I saw. The accused is my brother in-law. He threatened PW1 severally. He got driving job through PW1 but he declined to take up.”

[11] When placed on his defence, the appellant confirmed his presence at the alleged scene of crime but denied committing the offence as follows:

“I am Kennedy Kigen Letting, live in Milimani at Darfur school. I am a mason/mechanic. Mary Kandie is mother. She is my parent. She's the complainant herein. On 3/4/19 at 1:30pm I left Darfur where I left for my parents home. I was married. My daughter had slept at complainant's house. I went for her. On entering complainant's gate I saw my brother's wife beating my daughter. I asked why she alleged had assaulted another child. She replied I was drunk. **She entered house to inform the complainant who came quarrelling me. She called police that I was threatening her. I picked my daughter and left for my house. I was away till my brother informed me she had reported to police.**

On 12/4/19 I had issue of lost phone and reported to police. On reaching there was locked in for her complainant and the phones allegations. I did not threaten to kill my mother as she alleged.

That is all.”

[12] The Investigation Officer PW3 confirmed responding with PC Ewoi on instruction by OCS Marigat Police Station to a call to the station when he found the complainant outside her house who informed them that her son had threatened her with a panga which was produced as an exhibit in court.

Finding by the appellate court

[13] The court finds that the prosecution proved its case against the appellant for threat to kill c/s 223(1) of the Penal Code beyond reasonable doubt. PW1’s complain was corroborated by the testimony of the appellant’s sister in-law (PW2) both in the utterance of the threat and in the ensuing action of panga attack on the complainant. The Investigating officer confirmed the police report and information of the complainant as to the threat incident.

[14] Although the offence of threatening to kill is committed by **uttering**, this was a case went beyond mere verbal threat; the appellant verbally threatened to kill the complainant and had further progressed the threat and prepared to commit the threatened act of killing by overt acts of arming himself with a panga and confronting the complainant and even cutting at the door to the bedroom where the complainant had escaped seeking refuge. The appellant’s act did not, however, attain such proximity to the offence of killing as to amount to an attempt to kill which would constitute attempted murder or attempted manslaughter, as the case may be. See sections 388 of the Penal Code:

“388. Attempt defined

(1) When a person, intending to commit an offence, **begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”

[15] The appellant ran away when he heard the complainant calling the police, but his acts were not sufficiently proximate to constitute **attempt** to kill. See KBT HCCRA NO. 192 OF 2017 **Kakurut Ngoletom Lesikiriatum v. R** of 25th February 2019, where I discussed the law on attempt as follows:

“Principles of the law of attempt

8. In accordance with the definition of attempt in section 388 of the Penal Code, **the test for attempt requires a demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence.** See *Mwandikwa Mutisya v. R* (1959) EA 18 and *Mussa Said v. R* (1962) EA 454.

9. In discussing the principles of law on attempt in the case of attempted larceny, Spry, J. (as he then was) in *Mussa s/o Said v. R* (1962) EA 454, 455 Letters C- D said:

“The principles of law involved are very simple but it is their application that is difficult. If the Appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden on the prosecution is therefore first to prove the **intention** and secondly to prove **an overt act** sufficiently proximate to the intended offence.

The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that **the act must be of such a character as to be incompatible with any other reasonable explanation.** Secondly, even if the intention is established, **the act itself must not be too remote from the alleged intended offence.”**

10. In *Keteta v. R*, (1972) EA 532, 534, Madan Ag. CJ. (as he then was) put the matter succinctly as follows:

“A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do.”

[16] The appellant admitted to having gone to the complainant’s home, but if he had only asked his sister in law PW2 not to assault his daughter, the sister in-law should have been the complainant, and there cannot have been any reason for his mother, and none was shown as to raise a reasonable doubt, to lie against her son saying that he that threatened to kill **her** and not the sister in law with whom he had an altercation.

[17] The court has noted that the Appellant is not remorseful for the unlawful act against his own mother. At the hearing before the court, the appellant indicated that he wished to add to the written submissions filed in court, as follows:

“Appellant

I wish to withdraw the ground of appeal on negotiations as the complainant has refused to negotiate.”

[18] However, the appellant was by virtues of section 333 (2) Proviso of the Criminal Procedure Code entitled to a rebate for the pre-trial detention as follows:

“333. (2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

[Act No. 7 of 2007, Sch.]”

[19] The appellant was in custody from 12/4/19 to 5/8/19, a period of almost 4 months, which shall accordingly be discounted by an order that the sentence of the trial court do commence from the **12th April 2019**, the date of remand awaiting trial.

Orders

[20] Accordingly, for the reasons set out above, the appellant’s appeal is without merit and the same is dismissed.

[21] However, pursuant to section 333 (2) Proviso of the Criminal Procedure Code, the appellant is entitled to an order, which is hereby made, that the sentence imposed by the trial court shall commence from the **12th April 2019**, the date of his remand awaiting trial herein.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF JULY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms. Caroline Muriu, Prosecution Counsel for the DPP.