**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL CASE NO. 26 OF 2019**

**ABDIAZIZ YUSSUF ABI...................................................................APPELLANT**

**-VERSUS-**

**REPUBLIC.........................................................................................RESPONDENT**

*(An appeal from the original conviction and sentence of the Senior Resident Magistrate's Court*

*at Garissa Criminal Case No. 588 of 2016 delivered on the 8th day of August 2019*

*by Hon.J.J. Masiga SRM)*

**JUDGEMENT**

**Introduction:**

**1.** The Appellant, Abdiaziz Yussuf Abdi was charged with the offence of threatening to kill contrary to Section 223(1) of the Penal Code. The particulars of the offence were that on 13th day of July, 2016 at Soko Ngombe within Garissa County, the appellant without any lawful excuse while armed with a knife and a metal bar uttered threatening words to one Abdulahi Falir Kaliba that he would kill him. The appellant pleaded not guilty. After full trial, he was convicted as charged. He was sentenced to serve two (2) years imprisonment. He was aggrieved by his conviction and sentence. He filed an appeal to this court.

**2.** The appellant has appealed against his conviction and sentence. The original petition of Appeal was filed on 9th August, 2019. His Counsel on record filed a Supplementary Petition of Appeal on 22nd January, 2020. The summary of their grounds of appeal as captured by the appellant in their submissions are: -

**1) That the charges preferred against the appellant were defective from the initial stage which was contrary to convict him without considering the rule of law as stipulated in section (1) of the CPC.**

**2) That the learned trial magistrate erred in law and fact to convict the appellant without considering that the prosecution's evidence adduced was not proved beyond reasonable doubt hence unsafe to warrant a conviction, contrary to section 109 and 110 of the Evidence Act.**

**3) That the learned trial magistrate erred in law and fact to convict him without considering that there was no independent eye witness to support the complainant's allegation.**

**4) That the learned trial magistrate erred in law and facts when he failed to appreciate that the evidence adduced in court was manifestly contradictory, fabricated, inconsistent and glaring gaps revealed uncertainty and failing to give due consideration in contravention of section 163 of the evidence Act.**

**5) That the trial magistrate failed in considering that there was business rivalry between the accused and the complainant.**

**6) That the trial magistrate failed to consider that there was no medical assessment to confirm the sanity of the accused person.**

**7) The learned trial magistrate erred in law and in fact by failing to observe that the provisions of section 200(3) of the Criminal Procedure Code was not complied with as per Article 25 (c) of the Constitution hence the conviction was unsafe**

**and bad in law.**

**8) The learned trial magistrate did not comply with section 169 of the Criminal Procedure Code in writing the judgment herein.**

**Submissions:**

**3.** The appellant filed written submissions dated 28th February, 2020 and filed on 3rd March, 2020, which Counsel for the appellant fully relied on the same when the matter came up for hearing on 27th July, 2020. The first ground advanced by the appellant is the allegation that the trial court failed to appreciate the evidence adduced in court which they allege was manifestly contradictory, fabricated, and inconsistent and had glaring gaps.

**4.** For instance, the testimony of PW1 and PW2, which were never taken into consideration, submitting that the evidence of PW1 the complainant should not have been relied on as contradictory. In this they rely in the case of **Ndungu Kamanyi vs Republic (1976-80] 1 KLR.**

**5.** The second issue raised by the appellant was to urge the court to analyze the evidence tendered as an appellate court afresh and give due allowance to issues raised as was held in **Isaac Nganga alia Peter Nganga Kahiga vs Republic Criminal Appeal No. 272 of 2005.**

**6.** Thirdly, the appellant submitted that the prosecution failed to call crucial and independent witnesses, who they argue were available and no justifiable cause was given implying that their evidence would have exonerated the appellant. These are Ali Siyat Farah and Hassan Siyat Aden. In this they rely in the case **of Bukenya & Others vs Uganda [1972] EA 549.**

**7.** The fourth issue addressed by the appellant is that the trial court failed to comply with section 200(3) of the Criminal Procedure Code, which is in contravention of Article 25(c) of the Constitution. They submitted that the Court failed to explain to the appellant the implication of section 200 in view of the fact that he was unrepresented by a Lawyer.

**8.** In this regard they argue that the court ought to have explained to the appellant that he had the right to recall witnesses in this regard they submit that it infringed the appellant right to fair trial protected under Article 50(2) of the Constitution. They relied in the case of **R vs Wellington Lusiri (2014) eKLR.**

**9.** The final ground addressed by the appellant is the submission that the trial magistrate failed to comply with the provisions of section 169(1) of the Criminal Procedure Code, in that the judgment herein does not contain points for determination and reasons for the decision, which they submit prejudices the appellant. In view of the above the appellant urged the court to find merit in the appeal and quash the sentence and set the appellant free.

**10.** Mr. Mulati for the state in his submissions only conceded to ground 7 of the appeal, in that the court failed to comply with Section 200(3) of the Criminal Procedure Code.

**Evidence:**

**11.** As required by law, this court as the first appellate court must reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion having regard to the fact that, unlike the trial court, it never heard nor saw the witnesses as they testified hence I may not comment on their demeanor. See **Okeno Vs. Republic [1972] E.A 32** where it was held that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (see Pandya Vs. Republic [1957] E.A. 336) and to the Appellate Court’s own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

**12.** The prosecution called a total of four witnesses to prove its case. **PW1 Abdullah Fait Katiba** testified that he is the complainant and recalled that on 13/7/2016 at 9.00am while at Soko Ngombe cattle market saw the appellant carrying a metal rod and a knife running towards his direction threatening to kill him.

**13.** He told the court that the appellant was restrained by members of public who stabbed him and subdued him. It was his testimony that the appellant called his name demanding money which he alleges he owed him, but denied owing him any money. He took a motor bike and rushed to Garissa police station where he reported the matter.

**14.** Further, he told the court that he had previously engaged in a business of selling cows with the appellant’s mother where she contributed 500,000/= and on his part another Kshs 500,000/= where they bought cows to be sold at Thika, however he stated that the alleged buyer never paid them leading to them pursuing criminal proceedings.

**15.** PW2 Abdi Mohamed Aden told the court that he knows both the complainant and the appellant as they both trade in cows and recalled that on 13/7/2016 at 9.00am he was at the cow market in Garissa when the appellant came with a stick and a knife and threatened to beat PW1, while demanding for his property. PW3 and PW4 are the arresting officer and the Investigating Officer respectively. Their evidence is a corroboration of what they were told by PW1, and they produced the said metal pod and the knife which was in possession of the appellant.

**Determination:**

**16.** As rightly noted by the appellant, this is a first appeal, and it is the duty of this court to reconsider and to re-evaluate the evidence

adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> **"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".**

**17.** I have considered the Appellant's grounds of appeal, reviewed and reassessed the evidence adduced before the trial court and written and oral submissions for and against the appeal. In my humble view, the main issues for determination flow from the appellant's grounds of appeal namely: -

*a)* ***Whether the trial court failed to comply with the provisions of Section 200(3) of the Criminal Procedure Code?***

**18.** The appellant claims herein that the trial court failed to comply with section 200(3) of the Criminal Procedure Code, **Section 200 (3) of the Criminal Procedure Code,** which ground was conceded by the state. The said Section states: -

> **(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.**

**19.** The hearing of this matter from the record commenced on 30/08/2016 before Hon. V.K Asiyo and the same was transferred to Hon JJ Masiga upon the transfer of the former. He began hearing the matter on 15/2/2017, where from the proceeding of that day the trial court noted that section 200 was explained to the accused person and the accused responded that he wished to proceed from where the case had reached.

**20.** The above section requires that where a matter is partly heard by one magistrate and concluded by a different magistrate, the accused person must be given an opportunity to choose to either have the trial commence *de novo* or for the incoming magistrate to conclude the trial from where the previous magistrate had reached.

**21.** In the case of the latter, the accused person would also have the right to have witnesses who had testified before the previous magistrate to be recalled for further cross examination. In this case the trial has clearly indicated that it explained to the appellant of the implication of section 200 of the CPC and thus finds the instant ground of appeal though conceded by the state devoid of merit. The same is hereby dismissed.

*b)* ***Whether the Prosecution failed to summon very crucial witnesses in the case to testify?***

**22.** In this regard, the appellant attacked the prosecution for failure to call crucial witnesses including Ali Siyat Farah and Hassan Siyat Aden who were members of the public present during the subject incident. In **Bukenya Vs. Uganda [1972] EA 549**, the Court of Appeal held that a failure to call crucial witnesses by the Prosecution entitles the court to make an adverse conclusion (inference) against the Prosecution case, and acquit the accused person. However, in **Keter Vs. R [2007] IEA 135**, the court held that: -

> **"The Prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."**

**23.** Section 143 of the Evidence Act provides: -

> **"No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact.**"

**24.** It is therefore the onus is on the Prosecution to adduce evidence against an accused person beyond reasonable doubt. Nonetheless, once the Prosecution has satisfactorily discharged the burden of proving the main elements of proving the main elements of a charge, then there is no need to unnecessarily burden the court by availing many witnesses whose only effect would be to reiterate, add or exaggerate what has already been stated.

**25.** The court would only be bound to make an adverse inference if the evidence called is barely adequate, whereas the Prosecution had the opportunity to call more witnesses to fill the gap in their case.

**26.** Consequently, in the present appeal, the issue for determination by this court is whether the prosecution proved the charge of **threatening to kill** contrary to **Section 223(1)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

**27. Section 223(1)** of the **Penal Code** provides thus:

> **"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 guilt of a felony and is liable to imprisonment for ten years."**

**28.** In view of the above the prosecution was required to establish the following ingredients of the charge: that the Appellant without lawful excuse uttered words which amounted to a threat to kill the complainant. The uttering of these words must be made in the context that the complainant perceives that he is under threat of losing his life. The context must come out in the evidence that will be adduced by the prosecution witnesses and the explanation given by the accused in his defence.

**29.** In the present appeal, it was the prosecution's case is that the Appellant not only uttered words to the effect that he was going to kill the complainant, but he ran towards him with a metal and a knife and uttered the words "you give me my money or I kill you". The context herein comes out clearly from the complainant who despite denying that there was some debt outstanding goes ahead and explains the genesis of the said debt.

**30.** It is his testimony that he had engaged in some joint venture with the appellant's mother where they each contributed Kshs. 500,000/= and bought cows which were delivered to some lady in Thika, who however failed to pay them and as a result pursued some criminal case. This clearly establishes the context of the said confrontation, which is an outstanding debt.

**31.** The next question is whether the evidence tendered is sufficient to support the charges facing the appellant. The prosecution in support of the case produced a metal rod and a knife in which it was recovered from the appellant. PW1 and PW2 are the only witnesses called who were present when the alleged offence happened.

**32.** PW1 state that he saw the appellant running towards him saying that he wanted his money. PW2 on the other hand states that he was at the market when the appellant with a stick and a knife threatened to beat the complainant if he did not pay him his money. He was clear that the knife was in its pod and belt.

**33.** It is apparent to me from the evidence tendered that the appellant and the complainant were all trading in cows as per the evidence of PW2 who told the court that he knows the two of them. PW1 confirmed that there was some previous transaction involving money between the appellant and his mother and therefore forming the basis of their altercation at the market.

**34.** PW2 in his testimony confirmed that the knife in possession of the appellant was in his belt and therefore it cannot be said conclusively that he was in the mood of using it. The alleged metal rod cannot also be established beyond any doubt that the intent was solely to hit the complainant as they were in a cattle's market. In my assessment of the evidence tendered it cannot prove the charges beyond reasonable doubt. It was not absolutely the actions of a person intending to kill.

**Conclusion:**

**35.** The upshot of the above reasons is that the appeal lodged by the Appellant has merit and I therefore allow the same. The prosecution case has doubts and the benefit ought to go the appellant. The court thus makes the following order;

> ***i) That the appeal succeeds both on conviction and sentence and thus the conviction is quashed, sentence set aside and appellant is set at liberty forthwith unless otherwise lawfully held.***

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 24TH DAY OF SEPTEMBER, 2020.**

**........................**

**C. KARIUKI**

**JUDGE**