



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO. 12 OF 2017

MOHAMED ABDULLAHI APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case no. 261/292 of 2017 of M.S Kimani Senior Resident Magistrate Moyale)

JUDGMENT

The appellant was charged with the offence of threatening violence contrary to Section 95(2) (a) of the Penal Code. The particulars of the offence are that the appellant on the 17th day of June 2017 at Moyale town in Moyale subcounty within Marsabit county with intent to intimidate Abdi Fatah Abdullahi threatened to set a blaze a dwelling house belonging to the said Abdi Fatah Abdulahi. He was convicted and sentenced to serve two years imprisonment. The grounds of appeal are That:-

- 1. The appellant pleaded not guilty.**
- 2. The trial court erred in law and facts by not considering the appellant's mitigation**
- 3. The trial court erred by relying on the false evidence of the complainant who is the appellant's brother and had bad intention against the appellant.**
- 4. The trial court erred in law and facts by not considering that the complainant had filed another case namely No.292 of 2017 against the appellant for the offence of threatening to kill.**

The appellant submitted that the complainant is his younger brother. He had disagreed with his brother out of a plot belonging to their deceased parents. The other witnesses are his brother's employees. The alleged incident occurred at the their parents home. The arresting officer did not inquire anything from the appellant or make him record his statement. He had another case whereby his brother was the complainant and he had been released on bond. The scene is at a public place and people could have witnessed the incident. His brother has caused him to be charged twice.

The state opposed the appeal. Mr. Mwangangi submitted that the appellant mitigation was considered. The appellant was not remorseful. The appellant's was also convicted in the other case and sentenced to serve three years. The threats in case No. 292 of 2017 are attributed to case No.261 of 2017. The defence is a mere denial. If the dispute involved a plot left by their parents then the appellant could have initiated succession proceedings.

This is a first appeal and the court has to evaluate the evidence afresh and make its own conclusion. Four witnesses testified for the prosecution. **PW1 Abdi Fatah Abdullahi** is the complainant and a brother to the appellant. On 17.6.2017 at about 8.00pm he was at his home when he heard the appellant quarreling. The appellant was shouting saying he would raze down the house and kill someone. He came out and asked him to keep quiet. The appellant was armed with a hammer. He refused to keep quiet and continued shouting. The appellant appeared to have been intoxicated. He did not take the threats lightly since he had made a similar threat before. He reported the matter at the Moyale Police station. The appellant was apprehended and charged with the offence. **PW2 Shukri Ibrahim Issack** is PW1's employee. On 17.6.2017 at about 8.00pm he was with PW1 and other people when the appellant went there while drunk and armed with a hammer. The appellant stated that he would kill someone and raze down the house. They tried to arrest the appellant but he fled. The matter was reported to the Police station. The appellant did not have petrol or match box at that time. **PW3 Mohamed Shame** also an employee of PW1. He was in the house when he heard the appellant saying that he would kill someone. It was at night but the lights were on. The complainant confronted the appellant outside the house. He knew the appellant since he is a brother to PW1. **PW4 PC Kesis Saina** was stationed at the Moyale Police station. The matter was reported at the Police station by PW1. The appellant was arrested and charged with the offence.

The appellant tendered sworn defence. He testified that on the alledged date of the incident he was at his shop . The complainant who is his brother is his rival in the business. In the evening there was a disagreement over the ownership of his shop. PW1 threatened to place padlock on the shop. He went to report to the Police station but nothing happened. He decided to remove the padlock. He closed his shop at 9.00pm. The following day he found that his shop had been broken into. He went to the Police and reported the matter. He denied threatening to set ablaze the house. The house in question belongs to their parents and he could not have threatened to burn it.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The complainant's evidence is that the appellant went to his home at about 8.00pm and threatened to burn the house. PW2 and PW3 were present when the threats were made. The matter was reported to the police and the appellant was arrested. The appellant denied committing the offence. It is his evidence that his shop was broken into and he reported to the police. PW3 did confirm that the appellant's shop was broken into but they assisted by taking some of the goods to a safer place in order to avoid theft by those passing by. It is clear that an incident occurred at the material day at about 8.00pm. The prosecution evidence does confirm that the appellant went to the scene and threatened to burn the house. Since it was in the evening it is logical that the complainant was only with his employees and it would be difficult to have called other witnesses. There is no evidence that PW1 was trying to fix the appellant. The alleged dispute on the property left by their parents cannot be a reason for the threats. I am satisfied that the prosecution proved its case beyond reasonable doubt. The conviction is proper.

The evidence shows that the complainant is a younger brother to the appellant. The appellant was convicted on 3.11.2017 and sentenced to serve two years imprisonment on 6.11.2017. By the time the appeal was heard on 11.12.2018 the appellant had already served one year imprisonment. The offence occurred at night. Under Section 95 of the Penal Code it is provided that if the offence is committed at night then the court can impose four years imprisonment sentence. The appellant was charged under Section 95(2)(a) The maximum sentence is four years imprisonment. The trial court noted that the appellant is a repeat offender having been charged in Criminal Case 209 of 2014 with the offence of malicious damage and sentenced to serve 3 years imprisonment. Taking into account the fact that the complainant is a brother to the appellant, I do find that the period already served is sufficient punishment for the offence.

In the end, the appeal on conviction is hereby disallowed. The two years imprisonment is set aside and replaced with the period of over one year already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Marsabit this 29th day of January, 2019

S. CHITEMBWE

JUDGE