**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 45 OF 2017**

**FREDRICK GATITU MACHARIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from original conviction and sentence in Mukurweini Principal Magistrates' Court***

***Criminal Case No. 1 of 2017 (Hon. V.O. Chianda, SRM) on 2nd August, 2018)***

**JUDGMENT**

The appellant was convicted in the lower court of the offence of possession of cannabis contrary to **section 3(1)** as read with **section 3(2)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. The particulars were that on the 1st day of January, 2017 at Kiangoma village in Mukurweini Sub-County within Nyeri County, he was found in possession of cannabis, to wit 50 grams, which was not in its medicinal preparation form.

He was also convicted of two other counts of malicious damage to property contrary to **section 339 (1)** of the **Penal Code, Cap. 63** and threatening to kill contrary to **section 223(1)** of the same code. The particulars in the former count were that on the 1st day of January, 2017 at Kiangoma village in Mukurweini sub County within Nyeri County, the appellant willfully and unlawfully destroyed assorted household goods valued at Kshs. 10,000/=, the property of Joyce Wanjiku Macharia. In the latter count, it was alleged that on the same date, that is the 1st day of January, 2017 at Kiangoma village in Mukurweini Sub-County within Nyeri County, without lawful excuse he uttered words threatening to kill Joyce Wanjiku Macharia.

He was sentenced to 20 years imprisonment for the offence of possession of cannabis and 7 years imprisonment for each of the two other counts, with all the sentences running concurrently.

In his appeal to this Honourable Court, against both conviction and sentence, he has raised four grounds in his petition of appeal. He faulted the learned magistrate for convicting him on the first count yet the government analyst did not testify; as far as the second count is concerned, the learned magistrate was faulted for convicting him without any corroborative evidence. And in the third count, the trial magistrate is alleged to have misdirected himself on facts and the law by relying on the evidence of the prosecution that was not supported by any proof. The trial magistrate is also said to have erred in rejecting the appellant's defence contrary to the provisions of **section 212** of the **Criminal Procedure Code, cap. 75, Laws of Kenya.**

Only two witnesses testified, the complainant, who happens to be the appellant's mother, and the investigation officer.

According to the complainant, on the 1st day of January, 2017 she was at home preparing to go to church when the appellant suddenly emerged insulting her and claiming that she had taken his bhang. He threatened to kill her the same way he had killed a girl in Kiahungu village if she did not give him his bhang. The complainant reported the matter to the officer in charge of Mukurweini police station. Indeed, when the police responded and came to her home, they found some plant outside the compound which they suspected to be cannabis; they also found household items that had been destroyed by the appellant.

Police Constable Sylvester Kimei testified that on the material date, that is, the 1st day of January, 2017, he was instructed by the officer in charge of the station to investigate the case of malicious damage to property reported by the complainant. According to his testimony, the complainant had been on her way to church when she received a call from one Wambui Gatero who informed her that the appellant had broken into her house and was in the process of removing some items. They also recovered a plant which they suspected to be bhang.

While they were still at the home, they heard the appellant threaten to kill the complainant the same way he had killed a certain lady at

Kiahungu market. The officer produced the government analyst's report on the plant recovered from the complainant's home and which was suspected to be cannabis.

Looking at this evidence in the context of the charges against the appellant, I must hasten to say that the appellant is genuinely aggrieved by his conviction on the first count; in other words, there is some merit in his first ground of appeal that the learned magistrate erred, in what I think is an error of law, in convicting the appellant when a government analyst did not testify and produce his report on his expert opinion regarding the chemical content of the plant that was suspected to be cannabis.

I have previously addressed this issue in an appeal from the same court and in a judgment delivered by the same learned magistrate. This is in **High Court Criminal Appeal No. 83 of 2015, Maina Thiongo versus Republic** (reported as **Maina Thiongo v Republic [2017] eKLR**). In that case, the appellant was charged with the offence of trafficking in narcotic drugs contrary to **section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No 4 of 1994**. He is alleged to have been found trafficking by storage 139 g of cannabis sativa which was not in its medicinal preparation form.

The substance alleged to be cannabis was certified by the government chemist to be such a substance. However, the government analyst neither testified nor produced his report; rather it was produced by a police officer. Based on this evidence, the appellant was convicted and sentenced to ten years imprisonment. I allowed the appeal solely on the ground that the learned magistrate misapprehended the law in relying on the evidence of a person who was not qualified to give any opinion in an area he had no expertise.

At the risk of repeating myself, I would rather reproduce here my thoughts on this issue at least to the extent of the similarity of facts in the two cases.

In the absence of the evidence of the government analyst, there was, obviously no proof that the plant material collected or allegedly collected from the appellant's home fell under prohibited drugs as prescribed in the 1st schedule to the **Narcotic Drugs and Psychotropic Substances (Control) Act.** The investigations officer who purported to produce the analyst's report, was not competent to produce it and the trial court improperly admitted it in evidence.

In reality, a government analyst's evidence falls within a category of evidence referred to as expert opinion evidence; this sort of evidence is generally admissible to assist the court in respect of matters which lie outside the experience or understanding of the trial court **(see Folkes v Chadd (1782) 3 Doug KB 157; R v Turner [1975] QB 834, 60 Cr App Rep 80, CA**).

In the appellant's trial, the decision whether the plant allegedly recovered in the appellant's home was a prohibited drug or not was based on the opinion of an expert who is knowledgeable in the area of analysis of such substances. There is no doubt that it is for this reason that the state found it necessary to submit the plant for scientific analysis at the government laboratory. It follows that it was only the expert who analysed the plant that was competent to testify and inform the court how he came to his conclusions; only then could the trial court form its own opinion based on the evidence of such analyst.

Accordingly, I hold that failure to call the expert whose report was not only the foundation of the first count against the appellant but was also the basis of the appellant's conviction was a blatant and serious miscarriage of justice; it was a miscarriage of justice because first, by concluding the trial without the evidence of the expert, the court deprived itself of the opportunity to interrogate and satisfy itself of his opinion and, second, the appellant was also denied the opportunity to test the accuracy of the expert's opinion by way of cross-examination.

**Section 48** of the **Evidence Act**, **Cap 80** under which opinion of experts is catered for contemplates that the expert must testify; that section provides as follows:

> ***48. Opinions of experts***
>
> ***(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.***
>
> ***(2) Such persons are called experts.***

The application of this provision of the law was explained by the Court of Appeal in **Mutonyi versus Republic (1982) KLR 203 at 210 where Potter JA said:**

> ***Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.***
>
> ***Section 48 of the Evidence Act (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters.***
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> ***In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scenting the functions of expert witnesses:***
>
> ***"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as***

***to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence."***

***So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:***

***1. Establish by evidence that he is specially skilled in his science or art.***

***2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.***

***3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."***

Without calling the expert to testify there is no way the trial court could have been satisfied that it had been established by evidence that the person on whose opinion the charges against the appellant were based was specially skilled in the particular area he held himself out as being competent. Again, without his evidence, it is obvious that there is no way the court could tell the criteria upon which the expert's opinion was based so that the court itself could test the accuracy of his opinion and also form its own independent opinion by the application of the criteria to the facts proved. The investigations officer who purported to produce the report was, for obvious reasons, ill-equipped to do any of the foregoing things; at any rate, he could not adduce evidence of facts which he had not ascertained.

Afortiori, according to **section 62** of the Evidence Act, subject to certain exceptions, all facts must be proved by oral evidence and **section 63** of the same Act provides further that such evidence must be direct evidence; direct evidence has in turn been defined to include opinion evidence; for better understanding, it is necessary that I reproduce this section here:

***63. Oral evidence must be direct***

***(1) Oral evidence must in all cases be direct evidence.***

***(2) For the purposes of subsection (1) of this section, "direct evidence" means —***

***(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;***

***(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;***

***(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;***

***(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:***

***Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.***

***(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.***

It is therefore obvious that, by admitting the government analyst's report without the analyst himself being present in court and without any explanation why he was not available to produce the report himself and testify to his findings, the trial court flouted **sections 48, 62** and **63 of** the **Evidence Act** to the prejudice of the appellant. In the face of these contraventions, it cannot be concluded that the appellant was accorded a fair trial and more importantly, it is apparent that the offence for which the appellant was convicted was not proved beyond reasonable doubt. His conviction on the first count was, in the circumstances, unsafe. Accordingly, allow his appeal against conviction and sentence on the first count.

As far as the second count is concerned, I am equally not satisfied that the appellant was properly convicted on this count. I say so because it is necessary in a charge of malicious damage to property for the prosecution to prove that indeed property was damaged and that it was damaged by the accused who must also be proved to have consciously and deliberately set out to destroy the property in question.

In the case against the appellant the appellant is said to have destroyed *"household goods valued at Ksh. 10,000/= the property of Jane Wanjiku Machariah"*

In my humble view, the phrase 'household goods' is too general to describe what would constitute 'property' as understood in **section 339 (1)** of the Act. At the very least, the accused is entitled to know, with some degree of certainty, of the particular property he is accused of having destroyed; for this reason, the particulars of offence must be concise, leaving no room for speculation or ambiguity. The danger of generalising particulars of offence when they can, and ought to be specified, is not difficult to see; the accused is not able to tell what it is that he is accused of destroying and therefore he is put in such an awkward position that he may not be able to defend himself effectively. The ultimate result would be that he is prejudiced in his trial and when this happens, as it has turned out to be the case here, this court will not hesitate to find that there has been a grave miscarriage of justice.

Coupled with this defect in the charge, I cannot fail to note that even in her evidence the complainant herself did not specify any particular property that the appellant destroyed. All she referred to were photographs taken by the investigation officer allegedly showing the properties that were destroyed.

The investigation officer himself did not describe in his evidence what it is that he took pictures of. All he said in his evidence with regard to his pictures is, "*we photographed the scene*." There is no evidence that the investigation officer or any of the other officers who accompanied him to the scene was duly appointed and gazetted by the Attorney General as a crime scene support services officer and who in these circumstances would have been the proper officer to take the photographs and present them to court describing, *inter alia*, the place, the specific scene and the particular items that he took pictures of; equally important, he would produce the requisite certificate certifying that the prints were processed and printed under his supervision and that the pictures were always secure before they presented in court as exhibits. In the absence of any evidence that the investigation officer was qualified to undertake this task and produce the requisite certificate, doubt, which in my humble view is reasonable, abounds whether the photographs presented in court are a true representation of the facts alluded to by the complainant and the investigation officer himself.

I suppose it would have been easier for the investigation officer to take the alleged items and produce them in court as exhibits rather than engage in an exercise that he was ill-equipped to undertake and which he may, in any event, not have been duly mandated to undertake.

The net result of what appears to me to be a botched investigation is that the second count was also not proved beyond reasonable doubt and I would acquit the appellant of the same.

Turning to the third count, I understand it to have been based on the appellants utterances to the effect that he was going to kill the complainant. As a matter of fact, **section 223(1)** of the Act under which the appellant was charged criminalises utterances made without any lawful excuse that a person will kill another. That section reads 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.***

My understanding of this section is that threats to kill come in diverse forms including uttering such a threat. Where the threat takes the form of utterance, as is alleged to have been the case in the appellant's trial, I hold the humble view that the utterance must be reproduced verbatim in the particulars of offence. I hold such view because, everything else being equal, the prosecution case will eventually stand or fall on the specific words used and the interpretation attributed to them. Of course, such other factors as the circumstances under which the offending utterance was made should be taken into account but the central issue upon which the prosecution case turns is the exact words used.

It follows, therefore, being that material, it is necessary that the words alleged to constitute utterances that convey the threat or the threats to kill ought to be expressly stated in the particulars of offence. Once they are so expressed, the burden falls on the prosecution to prove, beyond reasonable doubt, that those words are not empty tittle-tattles but are the sort of utterances that the legislature had in mind when it came up with **section 223(1)** of the Act.

The words are also important for the sake of a fair trial; no doubt that the accused will be interested to know, the words he is alleged to have uttered; it is only when he is informed of the particular words that he can either contest that he made them or persuade the court that though he uttered the words, they do not mean what the state thinks they mean, or, at any rate, constitute an offence under **section 223(1)** of the Act.

In the case against the appellant the utterances alleged were neither stated in the particulars of offence or in evidence. The particulars of offence were stated thus:

> ***On the 1st day of January, 2017 at Kiangoma village in Mukurweini subcounty within Nyeri County without lawful excuse uttered words threatened to kill Joyce Wanjiku Machariah.***

The question that appellant must have asked himself and which the lower court ought to have also asked itself is which are these words that the appellant uttered? Secondly, in what circumstances were these words made; and thirdly, are they words that would constitute an offence under **section 223(1)** of the Act?

Looking at the lower court's judgment, I am not satisfied that the learned trial magistrate addressed his mind to these questions; not surprisingly, he reached a wrong conclusion.

In conclusion, I have to mention that there is a glaring material contradiction between the testimony of the complainant and that of the investigation officer on the material aspect of their evidence. According to the complainant, she was preparing to go to church when the appellant emerged from his house and started insulting her. He is said to have alleged that the complainant had taken his bhang and that he was going to kill her. The investigation officer, on the other hand, testified that according to the report in the occurrence book, the complainant was on her way to church when she received a call from one Wamui Gatero to the effect that the appellant had removed some items from the complainant's house.

Wamui Gatero did not testify and therefore it is not clear who between the complainant and the investigation officer was right but more importantly, when the appellant is alleged to have uttered the words for which he was arrested, charged and eventually tried.

My assessment of the evidence, coupled with what I understand the law to be, has inevitably led me to the conclusion that the appellant's

appeal has merits. Accordingly, I hereby allow it. The convictions and sentences on all the three counts are respectively quashed and set side. The appellant is set free unless he is lawfully held.

**Dated, signed and delivered in the open court this 25th day of January, 2019**

**Ngaah Jairus**

**JUDGE**