



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL REVISION NO. 31 OF 2017

MASSIMILANO FORCATI.....APPLICANT

VERSUS

FRANCESCO ONISTO.....RESPONDENT

(An application for review from the conviction and sentence of Hon. Dr. Julie Oseko dated 19th April, 2017 in Malindi CM Criminal Case No. 31 of 2017)

JUDGMENT

1. The Respondent, Francescar Onisto was charged before the Chief Magistrate's Court at Malindi for threatening to kill contrary to Section 223(1) of the Penal Code. It was alleged that on 11th January, 2017 at Mambui Sub-Location, Magarini Sub-County within Kilifi County the Respondent without lawful excuse directly caused Massimilano Forcati to receive a letter threatening to kill him with contents in Italian language "PER MAX MILANO ADESO TUO CORPO TROVANO IN OCEANO TV DROGAE BEVE TROPO NON PAGA E NOV LA VORA NOSTRA GENTE TU MORIO WJA" when translated to English language to mean "TO MAX MILANO YOUR BODY WILL BE FOUND IN THE OCEAN YOU ARE A DRUG AND ALCOHOL ABUSER YOU DON'T PAY AND YOU DON'T ALLOW OUR PEOPLE WORKING HERE AND YOU WILL DIE".
2. When the matter came up for plea on 22nd March, 2017, the Respondent who was unrepresented entered a plea of not guilty. Mr Ole Kina was on record for the complainant.
3. On 13th April, 2017, the firm of Gicharu Kimani wrote a letter to the Chief Magistrate asking that the matter be placed before her on 19th April, 2017 so that the Respondent could change plea.
4. The matter was indeed mentioned before the Chief Magistrate, Dr. Julie Oseko on 19th April, 2017. The charge was read to the Respondent and she pleaded guilty to the charge. She was fined Kshs. 50,000 in default to serve 6 months imprisonment. Her surety was then discharged.
5. On 25th April, 2017 counsel for the complainant wrote to this court asking it to exercise its powers under Section 364 of the Criminal Procedure Code and enhance the sentence imposed on the Respondent by the trial court.
6. Counsel for the complainant was directed to serve the Respondent but service was not successful as it was indicated that the Respondent being a foreigner had left the country.
7. Even with this state of affairs counsel for the complainant persisted in seeking a review of the sentence imposed on the Respondent. I therefore directed the advocate for the complainant to file submissions and this was done on 12th September, 2018.
8. On the day the matter first came before me I directed counsel for the complainant to serve the Director of Public Prosecutions with the request for review. The Director of Public Prosecutions, though represented in court, did not take any position in the matter.
9. Upon reflecting on this matter, I find that I first need to enquire whether I have jurisdiction to proceed with the request for review.
10. Section 364 of the Criminal Procedure Code, Cap. 75 (CPC) grants this court powers of revision in criminal cases. Sub- Section (2) provides that:

"No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.”

11. An enhancement of a sentence imposed by a trial court is without doubt prejudicial to an accused person and Section 364(2) of the CPC requires that a revision order that is prejudicial to an accused person can only be made if the accused person has been given an opportunity to be heard. In this case the Respondent has not been given an opportunity to be heard as she was never served. As such I find that I do not have jurisdiction to consider the complainant's request for enhancement of sentence.

12. I am alive to the proviso to the said sub-section (2). The proviso allows revision that is prejudicial to an accused to proceed, without involvement of the accused, where the trial court fails to pass the sentence provided for the offence with which the accused person is charged. In my view, where for example a subordinate court fails to impose the minimum sentence, this court once alerted of such an illegality is at liberty to impose the correct sentence without hearing the accused person. This is not the case in the instant matter.

13. Section 223(1) of the Penal Code, Cap. 63 under which the Respondent was charged and convicted provides that:-

“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.”

14. Section 26(3) of the Penal Code allows for imposition of a fine in place of imprisonment in respect of the offence with which the Respondent was charged. The said Sub-section (3) states:-

“ A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment;

(i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;

(ii) deleted by Act No 5 of 2003, s. 4. [Act No 3 of 1969, s. 2 Act No. 5 of 2003, s. 4]”

15. The proviso to Section 364(2) of the CPC is thus not applicable in the circumstances of this case since the sentence imposed by the subordinate court, though deemed lenient by the complainant, is a legal sentence.

16. In the circumstances I find that Section 364(2) of the CPC bars this court from enhancing the sentence of the Respondent without hearing her. I therefore do not have jurisdiction to look at the complainant's application for enhancement of the Respondent's sentence.

17. I find the complainant's application for revision dated 25th April, 2017 without merit. The same is dismissed.

Dated and Signed at Nairobi this 5th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Delivered and Signed at Malindi this 28th day of May 2019

R. Nyakundi,

Judge of the High Court