



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 2 OF 2017

BAYA LWAMBI HAREAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 87 of 2016 of the Senior Principal Magistrate's Court at Kaloleni – L.K. Sindani, RM)

JUDGEMENT

1. The Appellant, Baya Lwambi Hare, was tried, convicted and sentenced to serve three years imprisonment by the Principal Magistrate's Court at Kaloleni for the offence of threatening to kill contrary to section 223 (1) of the Penal Code. The particulars of the offence disclosed that on 27th February, 2016 at Uwanja wa Ndege Village, Rabai Location in Kilifi County the Appellant, without lawful excuse, directly caused Nzaka Chigulu Nzaka to receive verbal information threatening to kill Julius Mdigo Hare.

2. The Appellant being wholly dissatisfied with the finding of the trial Court and the sentence has appealed to this court on the grounds that: -

“1. The Learned Magistrate erred in law and fact by convicting and sentencing the Appellant to a term of 3 years in prison when the evidence of the prosecution in this matter totally failed to link the Appellant to the offence preferred.

2. The Learned Magistrate erred in law and fact in failing to find that there was absolutely no evidence to support the charge of threatening to kill, contrary to section 223 (1) of the Penal Code thus wrongly based in her findings on conjecture.

3. The Learned Magistrate erred in law and fact in finding that the appellant had an opportunity to commit the offence yet there was no evidence to support that finding.

4. The Learned Magistrate erred in law and fact by introducing extraneous factors to the case and in particular by ignoring the circumstances in which the offence is alleged to have been committed.

5. The Learned Magistrate erred in law and fact by convicting the appellant on uncorroborated evidence and totally disregarding the defence case.

6. The Learned Magistrate erred in law and fact by failing to consider the circumstances of the offence and the conduct of the complainant.

7. The Learned Magistrate erred in law and fact in passing a harsh and excessive sentence against the appellant.”

3. The appeal was disposed off by way of written submissions. The Appellant submitted that the evidence adduced never supported the ingredients of the charge. It is the Appellant’s case that the prosecution failed to establish beyond reasonable doubt that the Appellant made several threats to the life of the complainant as the evidence only pointed to a single threat. Further, that the prosecution did not prove that the alleged threat was by use of a weapon and neither was the mode of executing the alleged threat established. The Appellant asserts that the prosecution did not prove that there was motive for issuing the threat. According to the Appellant, the complainant never reported the alleged threat to the elders though he was related to him by marriage but instead maliciously filed a police report. It is the Appellant’s submission that the prosecution evidence was inconsistent and uncorroborated and there was no independent and credible prosecution witness called. The Appellant distinguished the authorities relied on by the prosecution asserting that in those cases there was active actualisation of the threats as there were weapons and a plan or mode of execution of the threat.

4. The State opposed the appeal contending that it had proved that the Appellant issued the death threats and had a clear motive. According to the Respondent, PW3 Muluki Mgogo Muta was an independent witness and corroborated the evidence of PW1 Julius Mdigo Hare and PW2 Nzaka Chigulu Nzaka. That the prosecution evidence was consistent and credible. Further, that the witnesses identified the Appellant as the person who uttered the death threat. Reliance was placed on the High Court decision in **Francis Muteti Nzinzi v Republic [2016] eKLR** where, the court found the witnesses credible and consistent in a situation where the appellant had been convicted for a similar charge. It is the prosecution’s case that it had proved its case beyond reasonable doubt as per the requirement in **Ndungu Kanyi v Republic. (1976 – 80) 1 KLR** cited in **Phenias Njeru Koru v Republic [2015] eKLR**.

5. In a first appeal the duty of the court is to re-evaluate the evidence and reach its own conclusion bearing in mind that unlike the trial court it did not have the opportunity to hear and see the witnesses as they testified – see **Okeno v Republic [1972] EA 32**.

6. In brief, the prosecution’s case was that on 27th February, 2016 the Appellant informed PW2 that he wanted the complainant (PW1) killed. PW1 was informed by PW2 at a funeral wake about the threat and PW3 overheard the conversation. A police report was filed and the Appellant was arrested and charged.

7. PW1’s testimony was that on the material night at 11.00 p.m. he was at a funeral wake at his grandfather’s place when the Appellant arrived with PW2 on a motorcycle. There were many people around. PW2 came to where he was sitting with others and enquired if he knew the person he had arrived with. PW1 confirmed that he knew the Appellant who was his uncle. PW2 then informed him that the Appellant wanted him (PW2) to look for a hit man to kill a person who had been disturbing their family. Moving away from the noise, PW2 further explained to the complainant that they had first searched for the target at the drinking joints he patronized at Mazeras before coming to the wake. PW2 told the complainant that the Appellant had identified him (the complainant) as the person to be killed. They drunk for a while and PW2 left saying that he could not eliminate him (the complainant). PW2 went and met the Appellant and they left together. Two weeks later PW1 summoned PW2 who confirmed the information of the Appellant’s intention to kill him. On 13th April, 2016 PW2 gave the same account to PW1’s family members upon which PW1 was advised to take up the matter with the authorities as it was a serious issue. PW1 proceeded to Rabai Police Station where he made a report.

8. PW1 was subjected to lengthy cross-examination by the defence counsel. He stated that the Appellant and PW2 had gone looking for him at various drinking joints. It was PW1’s evidence that PW2 informed him that a few days earlier the Appellant had informed him there was a person disturbing the family and they wanted him eliminated. The name of the person to be eliminated was never mentioned. PW1 stated that there was light emanating from electricity bulbs at the wake and that they discussed the matter in

hushed tones save that PW3 overheard them before they moved away to discuss further. PW1 informed the court that his drinking joints were about 50 minutes' walk from the place where they were. Further, that the Appellant never came to where they were but instead went into the disco which had been set up at the homestead. PW2 informed him that it was the Appellant who had identified him although he did not see the Appellant point at him. Later as PW2 made to leave, he saw the Appellant pay for the motorcycle which was about 5 metres away. PW2 was taken away by that motorcycle.

9. PW1 told the court that he did not inform anybody about the incident the following day. He, however, in the same breath stated that he informed his mother and others including his grandmother the next day. Two weeks later he called PW2 to elaborate about the incident. PW1 also stated that he followed the Appellant to his home so that they could come and discuss the matter but getting the Appellant and PW2 at the same time became difficult. He stated that in March he managed to sit down with the Appellant in the presence of two of his uncles. Asked if the two uncles had recorded statements with the police, he replied that they had not. He stated that he had no disagreement with the Appellant prior to the incident. He accepted that he had previously made similar reports against his uncles.

10. PW2 testified that on the material night at about 8.00 p.m. he was drinking with the Appellant. At about 10.00 p.m. the Appellant told him that there was a family member disturbing him and they wanted him killed. He testified that he knew the Appellant who was a relative of his wife and an uncle to the complainant. PW2 enquired from the Appellant whether he had heard that he was a hit man but the Appellant told him that he needed help to get someone to do the job. PW2 then informed him that he first needed to acquaint himself with the target and the Appellant told him the target was at Uwanja wa Ndege. They proceeded to a drinking joint at Uwanja wa Ndege but they did not find the person. At the Appellant's suggestion, they proceeded to a funeral vigil near Benema. It was there that the Appellant pointed to a young man seated with two others. Both he and the Appellant approached the complainant and his companions and greeted them. The Appellant then retreated. PW2 then asked the complainant whether he recognized the Appellant and the complainant answered in the affirmative stating that the Appellant was his uncle. PW2 then explained to the complainant that he had come to identify him so that he could be eliminated.

11. PW2 told the court that the Appellant later asked him whether he had seen the complainant and he told him he had seen him. The Appellant then paid his fare. PW2 told the court that he then went back to where the complainant was and informed him that he had been given fare. They continued drinking with the complainant until 1.00 a.m. when he went home. He stated that the complainant later called him to his home but the Appellant was not present.

12. Upon cross-examination, PW2 testified that on 27th February, 2016 he went to a drinking joint at Mazaras by himself. He found the Appellant there. That was the fourth time he had bumped into him at the same drinking joint. The previous three times they only waved at each other but on this occasion they sat together. He stated that he was a mechanic and owned a yard.

13 According to PW2 by the time the Appellant arrived he had only taken a bottle of Guinness. His evidence was that when they arrived at the funeral wake they saw three people. One stood as the rest sat. They approached the people as the Appellant pointed the complainant to him. Before they reached the people, the one who had been standing left. They greeted the complainant and PW3 and the Appellant went to the disco. He came back after an hour before leaving again.

14. PW2 stated he had known the complainant since 1996. PW2 denied the contents of the statement he had recorded with the police and in particular that there were four persons present. PW2 told the court that he sat and discussed with the complainant and PW3 for two hours. He stated that they did not step aside to discuss the matter. He stated that he left at 1.00 a.m. after the complainant called a motorbike for him. It was his evidence that the Appellant had left at 11.00 p.m.

15. In response to questions put to him by the prosecutor during re-examination, PW2 stated that he was a mechanic but was working as a security guard at that time. He also stated that although he had told the court that the Appellant had said the person who was to be killed was disturbing the family over land, the

truth of the matter was that the Appellant never mentioned a land dispute but he (PW2) only guessed that the complainant was disturbing the family over land. He also stated that he never talked to the Appellant after that day.

16. PW3 stated that on the material day he was at a funeral wake when the complainant who is his brother-in-law arrived at 10.00 p.m. and joined him. An hour later the Appellant arrived on a motorcycle with PW2. The pillion riders remained by the motorcycle for about five minutes before the Appellant paid the rider. They then came over to where they were sitting and greeted them after which the Appellant left. The complainant and PW2 then engaged in a discussion and he heard PW2 say that the Appellant had brought him to identify the complainant who was to be killed. When PW3 asked the complainant why they were talking about murder, the complainant told him to leave as the person he was talking to was his brother-in-law. He left them alone and after they finished talking he rejoined them. He later recorded a statement with the police.

17. During cross-examination PW3 admitted knowing the Appellant but denied knowing his wife. He also denied knowledge of any disputes between him and the Appellant. PW3 stated that he arrived at the funeral wake at 5.30 p.m. and started taking palm wine up to 10.00 p.m. when he was joined by the complainant. He stated that all along he had been alone. He stated that at 11.00 p.m. the Appellant arrived together with PW2 on a boda boda. The Appellant was not carrying anything. The two proceeded to where they were and greeted them before the Appellant left. PW2 started talking to the complainant. At around 1.00 a.m. the Appellant came back from the disco and gave some money to PW2 before going back to the disco. He stated that he was not aware of any disputes between the complainant and the Appellant.

18. Sergeant Patrick Mutinda, the investigating officer testified as PW4 and informed the court that on 20th April, 2016 he met the complainant at the station. The complainant had on 14th April, 2016 reported that the Appellant had threatened to kill him. He interrogated the complainant and PW2 and concluded that an offence had been omitted. He arrested the Appellant and charged him.

19. In his defence, the Appellant stated that on material day he left his place of work at 5.00 p.m. and proceeded to Mazeras to buy potatoes. He then entered a drinking joint and took one bottle of palm wine before being joined by PW2. At about 7.00 p.m. they boarded a vehicle together and proceeded home. When they alighted, PW2 said there was a funeral wake nearby. They then proceeded there on foot. On arrival he spotted the complainant who was his uncle and a son-in-law to PW2. He told PW2 that he could go and greet the Appellant since he wanted to go home. He left PW2 saying hallo to the complainant and proceeded home. The following day at 5.00 p.m. he received police summons from Rabai Police Station stating he had threatened some unnamed person's life. He reported to the station together with his brother DW2 Muta Lwambi and his uncle DW3 Muga Muta Mwazala where he met the complainant and PW2. They were interrogated and he was told he had threatened the complainant. He denied threatening the complainant stating that he had no differences with him. He denied discussing the killing of the complainant with PW2.

20. DW2 and DW3 told the court that the alleged threat on the complainant's life by the Appellant had never been discussed at the family level. They admitted that they were not present at the time and place of the alleged incident.

21. It is the duty of the prosecution to prove the guilt of an accused person beyond reasonable doubt. The charge of threat to kill under Section 223 (1) of the Penal Code is a serious one. The section 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.”

22. The prosecution needed to prove that a threat had been made and that the threat was made without lawful excuse and had reached the victim.

23. It is the duty of a trial court to see, hear, assess and gauge the demeanor and credibility of the witnesses – see **Ndegwa v Republic [1985] KLR 534**.

24. The trial Magistrate in his judgement concluded that it was the word of the Appellant against that of PW2. In assessing the credibility of a witness, it is not sufficient to just consider the words uttered by the witness. The actions of the witness are also important. The court ought to have noted that upon PW2 being informed that a hit man was required he offered to acquaint himself with the target. He even accepted the fare offered by the Appellant. He appears to have been very willing to aid and abet a crime so long as he was facilitated. He never discouraged the Appellant and neither did he report the matter to the authorities. According to the complainant's account, PW2 only divulged the alleged assignment when he realised that the target was known to him. Can such a person be said to be a truthful witness?

25. PW2 had also made it clear that he had not taken alcohol by the time the Appellant arrived but stated at the same time that he had taken a Guinness brand of beer.

26. The prosecution case was invested with so many contradictions. I only need to give a few examples. There was the question as to what exactly happened when PW2 arrived at the funeral wake in the company of the Appellant. PW3 stated that the Appellant and PW2 went to where he was sitting with the complainant. The complainant testified that the Appellant never went to where he was sitting with PW3. The complainant talked of a third person being present. The time the Appellant left the funeral wake was also in dispute. Some witnesses said he left at 11.00 p.m. and others said he left at 1.00 a.m. The complainant stated that he had to move aside with PW2. PW2 and PW3 stated that the complainant and PW2 never left where they were.

27. It is interesting to note that nobody knows why the Appellant threatened to kill the complainant. PW2 introduced the issue of a land dispute before stating that the Appellant never told him about a land dispute.

28. The evidence of the prosecution witnesses was so contradictory thus lending credence to the defence case that no threat was made by the Appellant.

29. In short, the conviction of the Appellant was based on shaky evidence. The doubt created by that evidence ought to have gone to the credit of the Appellant. The appeal succeeds. The conviction is quashed and the sentence is set aside. The Appellant is set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 28th day of September, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT