



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 67 OF 2014

ERICK NYAGA PETER alias (Daddy Wa Power)APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR 798 of 2014 at Embu Chief Magistrate's Court by P. BIWOTT – SPM on 26th June, 2014)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of six (6) years imprisonment in respect of six counts of threatening to kill contrary to Section 223 of the Penal Code (Cap 63) Laws of Kenya imposed upon him by the court of the senior Principal Magistrate on 26th June, 2014 at Embu. The sentences were ordered to run concurrently.
2. The respondent/state through Ms Mbae has supported both the convictions and sentences.
3. This is a first appeal. As a first appeal court according to *Peters v. R Sunday Post Ltd (1958) EA 424* I am required to re-assess the evidence upon which the appellant was convicted and thereafter arrive at my own independent conclusions. At the same time, I am required to generally defer to findings of fact as found by the trial court. The reason being that the trial court had the advantage of seeing and hearing the witnesses, an opportunity that this court does not have.
4. The appellant was convicted on the basis of electronic evidence generated by both Safaricom and Airtel, who are service providers in respect of telephone services. The evidence of the Alphaxard Nteere Mathiu, the complainant (PW 1) is that he received threats to kill from mobile no. 0737-886654 on his mobile line No. 0724-313464. It was his evidence that he received threats to kill which were sent through short text messages popularly known as SMS. The caller threatened him with death unless he gave the caller money. The caller stated that they had been promised a sum of Kshs. 300,000/-. The caller went further to tell him that they already had been given Kshs. 150,000/- to have him killed. The caller told the complainant that he should co-operate and they would refund his enemies. He reported the matter to the police and the police in conjunction with the service providers traced the appellant as the person who was making the threats to kill.
5. He has raised 7 grounds of appeal.
6. Ground 1 he has stated the unchallengeable fact that he did not plead guilty. In ground 2 he has faulted the trial court for failing to find that his voice was not recognized by the appellant. The appellant

was not convicted on the basis of his voice recognizing. He was convicted on the basis that he was the person who threatened the complainant with being killed using the two telephone service providers to track or trace him down. This ground of appeal is without merit and is hereby rejected.

7. In ground 3 the appellant has faulted the trial court for failing to find that the mobile used to call PW 1 was not his cell phone. The trial court believed the evidence of Michael Muriithi Njue (PW 7) that he gave the appellant his cell phone to use and he did use it. I also believe his evidence and this ground of appeal fails and is hereby dismissed. Ground 4 is tied up with ground 3 in terms of credibility and since PW 7 was rightly believed and the appellant was disbelieved, this ground of appeal is without merit and hereby dismissed.

8. In ground 5 the appellant has faulted the trial court for failing to find that there were contradictions in the prosecution case. Upon perusal of that evidence I do not find any material contradictions in that evidence and I therefore dismiss this ground of appeal. In ground 6 the appellant has faulted the trial court for failing to consider the defence evidence, which he says is in violation of section 169 of the Criminal Procedure Code, (Cap 75) Laws of Kenya. In this regard the trial court found that: *“The accused used the No that sent the messages. PW 3 and PW 7 confirmed that accused was using the phone line 0737886654. The Airtel data and safaricom data support it that messages were sent through this line. PW 1 had no differences with accused. He is the complainant threatened. Accused shift of blame to the IO is not warranted. It is an excuse in vain. I dismiss his defence.”* It is clear from this passage that his defence was fully considered and was rightly rejected. This ground is without merit and is hereby dismissed.

9. In sentencing the appellant the trial court found that the appellant did not offer any mitigation. That court found that the threats were for extortions purposes. It also found that a deterrent sentence was called for. It then proceeded to sentence the appellant to 6 years imprisonment in each of the six counts, which were ordered to run concurrently.

10. I find no error of law or fact committed by trial court to warrant interference with the sentence imposed. The sentence was merited and is hereby dismissed.

11. The upshot of the foregoing is that the appellant's appeal is hereby dismissed in its entirety.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **30th** day of **MAY 2016**

In the presence of the appellant and Ms Mbae for the State

Court clerk R Njue

J.M. BWONWONGA

JUDGE

30.05.16