



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 7 OF 2013

JUSTUS KABAYA MUKIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case NO. 1697 of 2011 of the Chief Magistrate's Court at Maua by C.M. Maundu – Senior Principal Magistrate)

JUDGMENT

The appellant, **JUSTUS KABAYA MUKIRA**, was convicted for the offence of threatening to kill contrary to section 223 (1) of the Penal Code.

The particulars of the offence were that on the 9th day of April 2011 at Maua township in Igembe South District within Meru County, without lawful excuse the appellant caused **MERCELLA KINAITORE MWIMBI** to receive a verbal threat to kill message, through **JEDIEL KAMENCHU** and **MICHAEL IRUKI**.

The appellant was tried and convicted of the offence. He was sentenced to five years imprisonment. He now appeals against conviction. The appeal on sentence was abandoned.

The appellant was represented by M/s Charles Omari Nyambati, learned counsel. He raised seven grounds of appeal which can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant on a defective charge.
2. That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

The appellant send two emissaries to the complainant to inform her that he was going to kill her.

The appellant denied any involvement in the offence and contended that the allegations were false.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced

before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32**.

Section 223 (1) of the Penal code provides as follows:

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.

Although the appellant in the petition of appeal had contended that the charge was defective, my perusal of the charge did not disclose any defect. The ground on defective charge lacks merit.

The argument by the appellant that failure to call one Gladys Njororo was fatal to the prosecution case cannot hold. From the evidence on record, I did not find anywhere where Jadiel Kamencu (PW2) said that he borrowed a cell phone from Gladys Njororo. The person who borrowed Njororo's cell phone was Michael Eruki (PW5). Even if there could have been such evidence, Gladys would not have been a material witness. She was not privy to what Jadiel told the complainant. There is also no evidence that he disclosed to her the purpose of borrowing her phone.

According to the prosecution witnesses, the threat was communicated to two people whom the appellant asked to convey the message to the complainant. One of the two was Jadiel Kamencu (PW2). Jadiel testified that he was seated at a verandah of a hotel with two other people when the appellant called him aside. The appellant then gave him the message to deliver to the complainant. When he returned where he was seated, he informed his companions what the appellant had told him before he reported to the complainant. His companions were Peter Miriti (PW3) and Riungu Mutea Mungania (PW4). These two testified of what Jadiel informed them. I make a finding that Jadiel communicated what the appellant told him.

The other person who was send by the appellant was Michael Eruki (PW5). he testified that he met the appellant at about 3PM at Central Petrol station in Maua. The appellant send him to the complainant to tell her that he was going to cut her head and take her breasts to the police.

The evidence of Michael Eruki (PW5) is that when he enquired from the appellant why he wanted to kill the complainant, the appellant told him that the complainant was doing a case with another lady over land.

I find that there was ample evidence on record on which the learned trial magistrate founded the conviction on.

The upshot analysis of the evidence on record is that the appellant was convicted on very sound evidence that displaced his defence that only amounted to mere denial. His appeal is therefore dismissed.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE