REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 55 OF 2012

NANCY WANJA GITHAKA..…….....……..…….APPELLANT

-VERSUS-

REPUBLIC…….....…….....….....RESPONDENT

(An appeal from the conviction and sentence of the Senior Resident Magistrate's Court (P. T. Nditika) at Kerugoya, Criminal Case No. 1018 of 2008 dated 30th July, 2009)

JUDGMENT

1. **NANCY WANJA GITHAKA** is the appellant herein and was charged with the offence of threatening to kill contrary to ***Section 223 (1)*** of the Penal Code before **Kerugoya Senior Resident Magistrate's Court Criminal Case No. 1018 of 2008.** The particulars of the charge were that on 28th August, 2008 along Kutus-Kerugoya Road within Kirinyaga District without lawful excuse caused Hellen Wamai, the complainant, to receive a threat to kill through mobile phone number 254 710 522 367 severally. The Appellant was found guilty of the offence by the trial court, convicted and sentenced to serve 3 years imprisonment. She felt aggrieved and preferred this appeal raising the following grounds:
2. ***(i) That she pleaded not guilty.***

   (ii) That the learned trial magistrate failed in law and fact by convicting her without evidence to support the allegations.

   (iii) That the complainant, her former employer did not tell the trial court the truth as she had received threats from another person and not the appellant.

   (iv) That the appellant is a mother of 2 children one of whom suffered from meningitis and unable to walk and that putting her in prison would affect the life of her children.

   (v) That the sentence was harsh and excessive.

3. Mr. Momanyi counsel for the appellant summarized and condensed the five grounds and argued them as one and this Court shall consider them as such. Mr. Momanyi submitted that there was no evidence tendered at the trial court to support conviction and that the trial magistrate erred to find a conviction against the Appellant.

4. The Appellant faulted the particulars contained in the charge saying that the threatening words were omitted. This Court though concurred noted that the ground was not contained in the petition of appeal and no leave was sought to include a new ground or amend the petition pursuant to ***Section 350 (2) (iv)*** of the **Criminal Procedure Code.**
5. The Appellant submitted through her counsel that the prosecution did not adduce sufficient evidence before the trial court noting that the words complained of should have been extracted from the mobile phone and used to prove that the Appellant had caused the threatening words to be sent to the complainant.
6. The Appellant further pointed out that the evidence of P.W.1 which indicated that she had received SMS with the following words:

"I prepare how to stay where I do live" and "leo nitatafuta Mrs Chomba," were not threatening at all and did not amount to threat to life or kill. She submitted that the same could not be attributed to the Appellant as the message was alleged to have been received from mobile number [Particulars Withheld]. The Appellant argued that the number was not connected to her by any evidence save for evidence of P.W.2 which was not supported.

7. The Appellant also submitted that P.W.3 told the trial court that the offending messages originated from mobile No. [Particulars Withheld]. which number belonged to the complainant.
8. On defence, the Appellant submitted that the trial court never considered it despite the fact that she told the court that the phone number used to send the SMS did not belong to her.
9. Mr. Sitati for the Respondent conceded to the appeal telling this Court that the state did not oppose the appeal. This Court shall however, determine the appeal on its merit.
10. The main issue for determination by this Court is whether there was sufficient evidence adduced before the trial court to warrant conviction of the Appellant with the offence that faced her.

11. I have considered the evidence tendered and the finding of the learned trial magistrate over the same. The Appellant faced a charge of causing the complainant to receive a threat to kill her which is a felony under ***Section 223 (1)*** of the **Penal Code**. The prosecution was required to establish and prove that the Appellant did directly or indirectly whether in writing or not caused the complainant to receive a threat to kill her.

12. According to the particulars of the charge sheet the threat is not clearly disclosed but the evidence of P.W.1 indicated that the threats were comprised in the following words;

i. "That I stay where I lived".
ii. "That I would be bewitched and my pants would be taken to Meru."
iii. "leo hii natamfafuta Mrs Chomba."

The trial court concluded that the words amounted to threats to kill. That finding in my view with respect to the learned trial magistrate was in error. Save for the 2nd message of bewitching and taking her pant to Meru which I find abusive and provoking the SMS does not amount to threats to kill though if proved could have amounted to a lesser offence created under ***Section 29*** of the Kenya Information and Communication Act No. 2 of 1998. The necessary ingredients to the offence under ***Section 223 (1)*** of the Penal Code were clearly missing from the prosecution at the trial court. The ingredients are:

i. Existence of a threat to life.
ii. Cause a person directly or indirectly to receive the threat.

13. Perhaps more importantly is the point raised by the Appellant that there was no connection proved to connect her with the offending SMS. I do agree with the Appellant that it was crucial for the prosecution to extract the messages from the mobile provider and prove that the messages emanated from the mobile phone belonging to the Appellant or used by her. The judgment or the finding of the learned trial magistrate in that regard appears to be hinged on the evidence of P.W. 2. But as pointed out by the Appellant's counsel the evidence was not corroborated by any

evidence to sufficiently prove beyond reasonable doubt that the Appellant had authored directly or indirectly the messages that the complainant received. I also find that the prosecution did not adduce evidence to connect one Mrs. Chomba with the complaint made or the charge that faced the Appellant. The evidence of P.W.1 on record showed that on 28th August, 2008 she received the message from mobile phone number [Particulars Withheld]. stating "leo hii nitamutafuta Mrs. Chomba." She also told the trial court that she had received the other message of "staying where she lived" on 28th July, 2008. The message of bewitching and taking her pant to Meru did not indicate when it was received. The charge sheet indicated that the offence that the Appellant was being accused of was committed on 28th August, 2008.

14. It is therefore clear that the message that is properly complained of is the one asking the complainant to stay where she lived. Apart from the fact that there was nothing to show that the Appellant was the registered owner or the user of mobile phone No. [Particulars Withheld]., surely the message does not amount to threats to kill whichever way or context one is to look at it. The trial magistrate clearly misdirected herself on the evidence tendered and came to the wrong conclusion.

15. I also find that the Appellant tendered a good defence which though unsworn should have been considered. Had the learned trial magistrate considered the defence which was well framed in her judgment, she could have entertained doubts in her mind about the actual weight of the prosecution case. It was not safe for the trial magistrate to use only the evidence of P.W.2 alone to connect the offending mobile phone number [Particulars Withheld]. to the appellant. The evidence produced by the prosecution as P. Ex 5 was not useful to the prosecution as it did not provide the nexus between the Appellant's phone and the sim card used to send the messages that the trial court found to be threatening. In the absence of extracted messages from mobile phone provider, the prosecution case failed to meet the required threshold. The trial magistrate erred and indeed misdirected herself on the evidence tendered that the prosecution had proved their case beyond doubt. This Court finds that there was no case against the Appellant in the first place because the evidence tendered did not establish any.

16. The upshot of the above is that I find merit in this appeal. The conviction against the Appellant is quashed and the sentence is reversed. She shall be set free forthwith unless lawfully held. The surety is discharged and the security may be returned to him. It is so ordered.

Dated and delivered at Kerugoya this 30th day of June, 2015.

R. K. LIMO

JUDGE

30.6.2015

Before Hon. Justice R. Limo

Court Assistant Wily

Appellant present

Nancy Wanja present

Omayo for State

NANCY WANJA: My advocate is on the way but I am ready to take the judgment.

COURT: Judgment delivered in the present of Omayo for State and the appellant present in

person.

R. K. LIMO

JUDGE

30.6.15