



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 81 OF 2012
MORRIS WANYAMAAPPELLANT
V E R S U S
REPUBLICRESPONDENT

J U D G M E N T

(Appeal against judgment of [M.I.G. MORANGA, PM] dated 21.3.2012 in the Chief Magistrate's Court at Kakamega, in Criminal Case No. 37 of 2010)

The appellant was charged with the offence of threatening to kill contrary to section 223 (1) of the Penal Code. The particulars of the offence were that the appellant *on the 3.1.2010 at Musiti village, Shimuli sub-location, Birundu location in Kakamega North District without lawful excuse caused ASBON SISA MAYENDE to receive a threatening letter to kill the said ASBON SISA MAYENDE.*

The appellant was convicted and sentenced to serve 2 years imprisonment. There are two petitions of appeal. One filed by M/S Ombaye & Company Advocates dated 20.3.2012 and another one by the firm of Mukavale & Company Advocates dated 8.5.2013. Miss Rauto from the latter firm appeared for the appellant. The grounds of appeal are that the trial court did not evaluate the evidence properly, the prosecution case was not proved up to the required standard, the court shifted the burden of proof and the appellant's evidence was rejected. During the hearing of the appeal counsel submitted that the author of the letter was unknown. The letter was typed and not handwritten. The trial court relied on circumstantial evidence to link the appellant to the letter. PW3 who purportedly received the letter from the appellant did not open yet he told the court that it was the same letter he received from the appellant. There were two copies of the letters but only one was produced. Some witnesses referred to the envelope that contained the letter as a brown one while others referred to it as a khaki envelope. PW4 who delivered the letter testified that it was addressed to the assistant chief. There is a contradiction as to the specific sub-location of the assistant chief. The wife of the assistant chief who received the letter did not testify. The trial court shifted the burden of proof by indicating that the appellant did not provide evidence to disprove the prosecution.

Miss Opiyo, State Counsel, opposed the appeal. Counsel submitted that the evidence adduced pointed to the appellant. The letter was passed through PW3 and PW5 and it was sealed. The appellant's defence was considered and the conviction is proper.

The record of the trial court shows that six witnesses testified for the prosecution. **PW1, ASBON SISA MAYENDE**, was the complainant. He was the Ag. Headmaster at St. Josephs Primary School. His evidence was that on the 3.1.2010 he received a letter from the area assistant chief which had also

been copied to the assistant chief. The letter was threatening him not to step at the school. He felt threatened and on the 4.1.2010 he reported the matter to the Navakholo police station. The matter was referred to the CID office at Kakamega police station. On 5.1.2010 he went to the Kakamega CID office and the appellant called him on his phone. The appellant told him not to attempt and go to the school as he had tried the previous day. PW1 had gone to the school to hand over the keys before he went to Navakholo police station. He was referred to the OCS and the matter was investigated. It is his further evidence that the appellant was elected as an interim chairman of school management committee in 2009. However, on 24.11.2009 another election was conducted and the appellant contested the position of school's chairman but was not appointed. On that date the appellant had a list of complaints which he read out to the parents and the same issues raised in his list of complainants were contained in the threatening letter. While the appellant was a chairman PW1 had disagreed with him on an issue relating to fundraising of money to pay for land for the school. PW1 knows the appellant as he was a head teacher at Shimuli Primary School. The appellant's name did not appear on the letter and it was indicated that it was written "**BY PARENTS ORDER**".

PW2 was **BENSON MUCHESIA WAWIRE**. On the 3.1.2010 at around 5.30 p.m. he got a call from PW1 to go to the school. PW2 is the interim chairman of the school. On the 4.1.2010 PW1 went to the school and showed him the threatening letter in the presence of other people. It is his evidence that the contents of the letter were similar to the issues raised by the appellant during a parents meeting held on 24.11.2009. On the 5.1.2010 he was with PW1 when the appellant called him threatening him not to go to school. The appellant was later arrested. **PW3, MAURICE MAYENDE NYONGESA**, testified that on the 2.1.2010 he was coming from Bushiri market when he met the appellant. The appellant gave him a letter asking him to take it to the area assistant chief **MR. EDWARD NGESO (PW4)**. PW3 handed over the letter to the village elder **ISAAC WANYAMA (PW5)**. PW3 knew the appellant since he was his headmaster. PW3 did not read the letter but he was later informed that it was not a good letter. He was with FRANCIS NGESO when he was given the letter.

PW4, EDWARD NGESO, is the assistant chief Shimuli sub-location. On 3.1.2010 at about 3.00 p.m. he was given a letter by his wife. The letter was addressed to the assistant chief Bukhakunya sub-location **MR. EDWANRD TOBES**. His father is called Tobes and he knew that it was meant for him. He further testified that new sub-locations were created and the person who wrote the letter had used the name of the old sub-location. He opened the letter and saw it was addressed to PW1 and copied to him. The letter was threatening PW1. PW5 looked for PW1 and gave him the letter. His wife told him that the letter had been taken to her by **ISAAC SIMWA (PW5)**, the village elder. The following morning PW5 told him that he had been given the letter by **MAURICE NYONGESA PW3** who is a teacher at Bukhakunga Primary School. PW5 went to PW3 to inquire the source of the letter and PW3 informed him that the letter was given to him by **MAURICE WANYAMA**, the appellant. The appellant was later arrested. **PW5, ISAAC SIMWA MASINDE** is the area village elder. He testified that on the 2.1.2010 at about 4.00 p.m. he was given a letter by PW3 to take to PW4 the area sub-chief. He left the letter with the wife of PW4. The letter was addressed to the sub-chief Edward Tobes. PW5 did not open the letter.

PW6, SGT. AUGUSTINE MWAKO, was based at the Navakholo police station. On the 4.1.2010 PW1 went to report the issue. PW6 investigated the matter and arrested the appellant. The appellant was later charged with the offence.

The appellant was put on his defence. In his sworn testimony he stated that he is a retired school teacher. He knows the complainant PW1. He left the board of the school between September and October 2009. He denied that he authored the alleged threatening letter. On the 3.1.2010 he was at home harvesting his cane. He did not meet Maurice Mayende (PW3). He was in his sugarcane farm up to 6.00 p.m. together with DW2. He denied that he called PW1 on his phone and threatened him. **DW2, JOSPHAT BALEMA WASWA** testified that on the 2nd and 3rd of January 2010 he was harvesting cane to take to a jargery at the appellant's home. On the 3.1.2010 he was with the appellant up to 6.00 p.m.

The main issue for determination is appeal is whether the appellant authored the letter threatening PW1's life. According to the prosecution the appellant authored the letter and gave it to PW3 to pass it over to PW4. Counsel for the appellant submits that the area sub-chief referred to in the letter is different

from the one who testified. The evidence shows that the area sub-chief PW4 was the same person who was the addressee of the letter. His name is **EDWARD NGESO** but also referred to as **EDWARD TOBES** as the name of TOBES is that of his father. Counsel further raised issue that the evidence was not properly analyzed by the trial court. I have gone through the judgment of the trial magistrate and I have noted that the court elaborately analyzed the evidence of each witness to and went at great length to analyze it. The trial court also considered the evidence of the appellant and his witness.

The appellant's evidence was that he did not author the letter. The letter is typed and his signature does not appear on the letter. The appellant himself filed his own written submission where he raised issues to the effect that PW6 did not hear the purported call made through PW1's phone, that there was no proof that the purported two letters were authored by the appellant. A reference was made to one Isaac Wanyama while PW5 who purportedly delivered the letter to wife of the assistant chief is called **ISAAC SIMWA MASINDE**. The appellant contends that the case was not proved beyond reasonable doubt.

The prosecution evidence does establish that indeed a letter dated 3.1.2010 was addressed to **ASBON MAYENDE (PW1)**. The face of the letter that was produced as exhibit 1 show that it was to be passed through the area assistant chief whose name is not indicated in the letter. The khaki envelope that contained the letter was produced as exhibit 2 and it shows that it was addressed to assistant chief Bukhakunga sub-location with the attention of **MR. EDWARD TOBES**. Exhibit 2 settles the issue as to whether the envelope was brown or it was a khaki envelope as the document was produced in court. I have gone through the letter and do agree that the same is threatening. The effect of the letter is that PW1 was warned not to step at the school and if he defied mob justice would be administered on him. The letter indicates that it was not a threat but a reality and that PW1's eyes will be plucked out and other parts of the body will be tortured.

The sequence of events shows that the letter was handed over to PW3. Although there is a slight anomaly on the date whereby PW3 referred to 2.1.2010 when he was given the letter, the totality of the evidence on record shows that the letter was handed over to PW3. It is his evidence that the letter was given to him by the appellant whom he knew as his former headmaster. Counsel for the appellant contends that PW3 did not open the letter yet he identified it in court. That does not prejudice the appellant and in any case the envelope that contained the letter was produced in court and it would have been easier for PW3 to identify the envelope. Further, PW3 testified that he later learnt that the letter was threatening. The crucial issue relating to the evidence of PW3 is who gave him the letter. From the evidence of PW3 I am satisfied that it is the appellant who gave him the letter. PW3 is a teacher in a primary school and knew the appellant very well. There is no evidence that PW3 had any grudge with the appellant.

It is also established by the prosecution evidence that PW3 handed over the letter to **PW5**. **PW3** referred **PW5** as **ISAAC WANYAMA** while PW5 gave his name as **ISAAC SIMWA MASINDE**. The common reference to PW5 is that he is the area village elder. PW5 himself testified that he was given the letter by Mwalimu **MAURICE NYONGESA**. There should be no issue to that sequence of events as what can be concluded is that PW3 received the letter and handed it over to PW5. PW5 testified that he left the letter with the wife of PW4. PW4 confirmed that he got the letter from his wife. His wife informed him that she had received the letter from the village elder by the name **ISAAC SIMWA** which I conclude to be PW5. There was therefore no need to call the wife of PW4 to testify. The defence evidence was to the effect that the letter bears no signature of the appellant and that since it was a typed letter it cannot be attributed to the appellant's handwriting. It is also the position of the defence that the appellant never left his home on the date he purportedly gave out the letter. The trial court evaluated that evidence and concluded that it was possible for the appellant to have handed over the letter to PW3. The evidence of DW2 was that he was supervising the workers at appellant's farm and it cannot be held that the appellant and DW2 were both at the farm throughout the day. DW2 testified that the appellant went to the farm at 9.00 a.m. and stayed for about one and half hours then went back to his house. The trial court was correct in concluding that there was an opportunity for the appellant to pass over the letter to PW3.

Given the evidence on record, it does not matter whether it was the appellant who authored the

letter. What is established it that the letter was handed over to PW3 by the appellant. Since there was no evidence to disprove that fact, I do find that there was no shifting the burden of proof as the court was convinced that it was the appellant who had handed over the letter to PW3. The acts of the appellant involving the passing over of the letter falls within Section 20 of the Penal Code and the appellant can be taken to be a principal offender. I do agree with the evidence of PW1 and PW2 that the appellant had previously read his list of complaints during a meeting at the school and the same sentiments are reflected in the threatening letter. From the evidence on record I am satisfied that, indeed it is the appellant who authored the threatening letter. The evidence of PW1 and PW2 does not show that when the appellant called PW1, PW6 was present. His evidence shows that the appellant called PW1 on the 5.1.2010 while they were at the Kakamega CID office and PW6 was at Navakholo police station. It is the OCS at Kakamega police station who heard the conversation and immediately asked the officers at Navakholo police station to arrest the appellant. I am satisfied that the appellant pursued the threats through a phone call to PW1.

In the end, I do find that the appeal lacks merit and the same is disallowed. The appellant was sentenced to serve 2 years imprisonment which I find to be reasonable as the offence carries a maximum sentence of 10 years.

Delivered, dated and signed at Kakamega this 18th day of February 2014

SAID J. CHITEMBWE

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