REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 52 OF 2008

HARRISON OPURU …..APPELLANT

VERSUS

REPULIC..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 53 OF 2008

JULIA NGETICH MENJO...APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

AND

CRIMINAL APPEAL NO. 51 OF 2008

GRACE KASOHA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Apppeal from the conviction and sentence of J.Owiti Resident Magistrate Eldoret in Criminal Case No. 246 of 2006 dated 18th July 2008.)

JUDGMENT

The three Appellants Harrison Opuru, Julia Ngetich Menjo and Grace Kasoha were jointly charged with the offence of threatening to kill contrary to Section 223 (1) of the Penal Code.

Particulars of the offence were that on the 24th day of December, 2005 at Eldoret Special School in Uasin Gishu District jointly without lawful excuse caused Miliana Ipara to receive a threat to kill the said Muliana Ipara.

In a judgment delivered on 22nd May 2005, the trial court found the three accused persons guilty

and convicted them. They were sentenced to serve a probation period of two years each.

They were dissatisfied with the verdict of the trial court. They each filed the separate appeals; thereafter, the three appeals were consolidated. Directions were given that Appeal No. 52 of 2008 would be the lead appeal file. Harrison Opuru would then be the 1st Appellant, Julia Ngetich Menjo the 2nd Appellant and Grace Kasoya the 3rd Appellant.

The respective appeals were filed by counsel, M/s Buluma and Company Advocates. The counsel raised similar grounds of appeal in all three appeals. The appeals having been consolidated, learned counsel for the Appellant argued the appeals simultaneously. Although the Memorandum of Appeal raised 14 grounds, the then counsel on record, Mr. Mathai submitted that he would only argue on grounds 1, 4,6 and 9. I duplicate them as under;

1. The learned trial magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubts.

4. The learned trial magistrate erred in law and fact in admitting confessionary evidence into the proceedings.

6. The learned trial magistrate erred in law and fact in allowing dock identification.

9. The learned trial magistrate erred in law and fact in failing to give a proper interpretation of the words in the alleged Leaflets.

Under ground 1, Mr. Mathai submitted that the trial court failed to take into account that the complainant (PW1) had personal administrative differences with the Appellants. In that regard, Mr. Mathai stated that PW1 testified that the 3rd Appellant had told a certain lady to listen to Radio Citizen that shames people who do not conform to societal norms. PW1 did not however disclose if she listed to the said radio channel.

Further, it was submitted that the threatening leaflets had no author, signature or addressee- hence PW1 could not claim they were targeted at her. They were also not specifically placed for the view of PW1 but any passerby.

Besides, PW1 suspected the Appellants as the authors of the leaflets merely because they had posted an issue about a cow in the radio station. But there was no relationship between the leaflets and the cow.

Mr. Mathai further submitted that the prosecution did not call any evidence on the differences the Appellants had with PW1

He also submitted that, although PW3 saw the son of the 1st Appellant making copies of the leaflets he did not retain or exhibit a copy thereof.

With respect to ground 4, the same was premised on PW4's evidence. PW4 visited the scene and got the leaflets in the presence of the 2nd Appellant who in turn confessed to having authored them. According to Mr. Mathai, the alleged no confession was not taken in accordance with Section 25A of the Evidence Act, Cap 80, Laws of Kenya. Hence, the evidence of PW4 could not be used as proof of the guilt of the 2nd Appellant.

On ground 6, Mr. Mathai submitted that PW3 did not properly identify the author of the leaflets. At one point, he testified that it is the 1st Appellant who went to the shop to have the notes typed. Later, he testified that it was the 1st Appellant who pointed at the 3rd Appellant as the culprit. In that instance an identification parade ought to have been conducted so that PW3 would clearly identify the author of the leaflets. Mr. Mathai also submitted that PW3 had testified that he had followed the 2nd Appellant to a shop but in cross-examination indicated that it was not possible to

see a person form a distance of 10 metres from his shop hence the need for an identification parade.

On ground 9 Mr. Mathai submitted that the leaflet read “ We are coming for your head”. Those words did not imply that somebody would be killed or that somebody's head would be chopped off.

He urged the court to allow the appeals.

Learned state counsel Mr. Mulati opposed the appeal in respect of the 1st and 2nd Appellant but conceded to that of the 3rd Appellant.

In conceding, Mr. Mulati submitted that PW3 was working in the studio when the 1st Appellant entered to type some leaflets which read “Bring back the cow before 24.12.2005 at noon otherwise we will come for your head.” PW3 made 5 copies of the leaflet. He then followed the 1st Appellant to a shop where he gave the 2nd Appellant the leaflets. The 3rd Appellant was not there. Thus, there was no link between the 3rd Appellant and the leaflets.

As regards the appeals of the 1st and 2nd Appellants, Mr. Mulati submitted that PW3 saw the author of the leaflets. He submitted that the evidence on the radio program was not adduced in court because it was mentioned so as to demonstrate the bad relationship between the Appellants and the complainant.

On confession, he submitted that PW4 did not testify about a recorded confession but the information he gathered from the 1st Appellant on interrogating him.

On identification, he urged the court to take into account that PW3 adversely mentioned both 1st and 2nd Appellants and the fact that the 1st Appellant had admitted to having committed the offence.

On ground 9, Mr. Mulati submitted that the simple interpretation of the words “come for your head” is sufficient evidence of a threat to kill.

He urged the court to dismiss the appeal in respect of the 1st and 2nd Appellants.

From the grounds of appeal raised and the respective submissions I summarize the issues for determination as follows:

1. Were the 1st and 2nd Appellants properly identified by PW3 as the authors of the threatening leaflets?
2. Was a confession recorded by PW4 in respect of the 1st Appellant? In other words, did the 1st Appellant admit the offence?
3. Were the leaflets targeted at PW1?
4. Were the elements of the offence proved?

This is the 1st appellate court whose duty is to re-evaluate the evidence on record and draw its own conclusions but bear in mind that it has neither seen nor heard the witnesses and give due allowance for that. See. **Okeno-vs- Republic (1972) E.A, 32, Kariuki Karanja -vs- Republic (1986) KLR, 190 and Pandya -vs- Republic (1957) E.A, 336**

Identification.

PW3, George Kipsang Rono was the key witness in this respect. He testified that on 7.12.2005 a customer went to his shop and requested to type and print a note written “bring back the cow before 24.12.2005 at noon the same time you took otherwise we will come for your head.” He printed and made five (5) copies thereof. He then followed the customers who entered into a watch repair shop

and handed the documents to a brown lady. He returned to his office and after three days he was questioned by CID about the notes. He took the police to where the documents were handed over to a lady.

PW3 testified that, his customer was the 1st Appellant while the person to whom documents were handed over to was the 2nd Appellant.

He added that he did not see the 3rd Appellant.

In cross examination, PW3 stated that he had not known the 1st and 2nd Appellants prior to the date of the incident. He said he stood about 20 metres from the shop the documents were handed over to the 2nd accused.

Questions remained unanswered from his testimony. That is, exactly in what position inside the watch repair shop was the 2nd accused? Also, at what angle was PW3 standing so as to be able to see the 1st accused handing over the notes to the 2nd accused? I ask these questions because, it must be explained beyond all doubts that, from a distance of 20 metres PW3 could clearly see a person inside the shop. This would call on him to state exactly in what position the 2nd accused either stood or sat inside that shop. He also needed to describe the shop itself particularly its position so that the court would be left with no doubts that nothing obstructed PW3 from seeing the 1st accused hand over the notes.

These questions were not addressed by the prosecution, both in examination in chief of PW3 and in re-examination. It then casts doubt whether PW3 clearly saw what he stated in court. I shall accord the benefit of the doubt to the first two Appellants.

In any case, PW3 was categorical that the two accused persons were not known to him before the date of the incident. Therefore, coupled with the doubts of a proper identification it behoved the police to conduct identification parades in respect of the two Appellants so as to erase doubts that the persons he saw on the material date are the persons who were charged.

<u>Confession</u>

It was submitted by the Appellant's counsel that although the 1st accused is alleged to have admitted the offence no confession was recorded from him. Let me pose here and state that learned state counsel Mr. Mulati in submissions also appeared to be referring to a confession by the 1st accused. Mr. Mulati submitted as follows:

" By virtue of PW3 mentioning the 1st and 2nd appellants and <u>the 1st appellant admitting the offence,</u> it was obvious the two appellants were culpable" (emphasis mine)

But was this the position? I have carefully gone through the testimony of PW4 a police constable David Sakwa then of CID, Eldoret and at no point did he refer to a confession taken from the 1st Appellant. The only thing he stated was that upon interrogating the 1st Appellant, he indicated that between 5.7.2007 and 7th December, 2005 while he was on leave he went to Eldoret town and met the 2nd Appellant, who gave him a note to take to a shop for printing. The 2nd Appellant gave him money for printing and photocopying. He made 5 copies of the same. He did as directed and returned to where the 2nd Appellant was, handed her the printed copies together with the original. The 2nd Appellant was to deliver the notes to the school as the notes related to disappearance of a cow from school. On 23.12.2005, he met the 3rd accused whom he gave the notes and agreed to distribute in the school compound.

Indeed this kind of story matched the prosecution's account of what transpired. But then, they did themselves the greatest blunder of not reducing the 1st Appellant's story into a confession. The confession would then have been produced in court as evidence tending to proof the guilt of the 1st Appellant. This blunder meant that the story the 1st Appellant gave to PW4 cannot be taken as an

admission of his guilt.

<u>Were leaflets targeted at PW1?</u>

The said leaflets had no author, no signature and an addressee. They were also placed at different spots within the school compound. Although one or two were outside PW1's house, by the scattered nature of their distribution, it is difficult to conclude that they were targeted at PW1. And since they were not addressed to her, still she could not claim she was the target.

Of course, there is the evidence that there existed administrative differences between the accused persons on the one hand and PW1 on the other. But this, of itself, could not be used as conclusive reasons why the accused persons could have targeted her.

<u>Were the elements of the offence proved?</u>

Section 223(1) of the Penal Code defines the offence of a threat to kill as;

"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."

According to PW3, the threatening leaflets read;

"bring back the cow before 24.12.2005 at noon the same time you took otherwise, we will come for your head."

Although the statement itself did not use the word "kill" the phrase of <u>"come for your head"</u> alone sends chills in anybody's body. By custom and usage the words "come for your head" are construed to mean to kill.

Therefore, had the prosecution proved that the accused persons were linked to the leaflets and that the said leaflets were targeted at PW1, then the court would have concluded that indeed the Appellants had, in writing the leaflets, threatened PW1 with death. Unfortunately, the prosecution did not meet this threshold. And it is trite that the burden of proof always lies with the prosecution to prove their case beyond all reasonable doubts. They did not discharge this burden. Suffice it to say, though, no evidence was adduced that linked` the 3rd accused to the offence and I therefore absorb her from culpability

In the result, I allow the appeal. I quash the conviction against the Appellants. I make no orders as to their being set free since they have all served the respective sentences.

DATED and **DELIVERED** at **ELDORET** this 21st day of November, 2014.

G. W. NGENYE - MACHARIA

<u>JUDGE</u>

<u>In the presence of:-</u>

Mulati holding brief for Buluma for the 1st, 2nd and 3rd Appellant

Mr. Mulati for the State/Respondent