



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.293 OF 2010

BETWEEN

GERALD MAINA NDIRITU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in the CM's Court at Nyeri in Criminal

Case No 998 of 2009 dated and delivered on 18th November, 2010– Hon. J. Kiarie, SPM)

JUDGMENT

The appellant GERALD MAINA NDIRITU was charged with the offence of threatening to murder contrary to **Section 223 (1)** of the **Penal Code**. The particulars of which were that on diverse dates between 7th September 2009 to 28th September 2009 at Kamoko village, Othaya Division Nyeri District within Central Province without lawful excuse caused **Peninah Muthoni Wachira** to receive threats to kill the said **Peninah Muthoni Wachira**.

On count two (ii) he was charged with demanding property with menaces contrary to **Section 302** of the **Penal Code** the particulars of which were that on 7th day of September 2009 at Kamoko village Othaya in Nyeri District within Central Province with menaces or (force) demanded Kshs.3000/= from **Peninah Muthoni Wachira** with intent to steal.

On count three (iii) he was charged with demanding property with menaces the particulars of which were that on 22nd day of September 2009 at Kamoko village Othaya in Nyeri District within the Central Province with menaces (or force) demanded Kshs.20,000/= from **Peninah Muthoni Wachira** with intent to steal.

On count four (iv) offence of improper use of Licensed Telecommunications System contrary to **Section 29 (A)** of the **Communications Act No.3 of 1998** the particulars of which were that on diverse dates between 7th day of September 2009 and 28th September 2009 at unknown place within the Republic of Kenya by use of Telecommunication System namely **SAFARICOM** through telephone No. 0718828145 sent messages to Telephone No.0722637768 belonging to **Peninah Muthoni Wachira** using threatening and abusive language to the said **Peninah Muthoni Wachira**.

He pleaded not guilty to the said charges, was tried, convicted and sentenced to serve 7 (seven) years imprisonment in count one (i), on count two and three seven years each and on count four three (3) years each with the sentences to run concurrently.

Being aggrieved by the said sentence he filed this appeal through the law firm of WAHOME & CO. ADVOCATES and raised the following grounds of appeal:-

1. *That the Learned Senior Principal Magistrate erred in law and facts in holding that the prosecution had not discharged the very heavy burden of proof beyond all reasonable doubt that the Appellant had threatened to murder, demanded property with menaces and improperly used licensed telecommunications system and a miscarriage of justice was thereby occasioned.*
2. *All the ingredients of the offence charged, to wit, threatening to murder, demanding property with menaces and improper use of licensed telecommunications system as listed in the charge sheet were not proved or established. A miscarriage of justice was thereby occasioned.*
3. *In so far as there were grave contradictions in the evidence of the prosecution, the Learned Senior Principal Magistrate erred in not considering the same and attaching to the same due weight in such a serious charge and a miscarriage of justice was thereby occasioned.*
4. *The Learned Principal Magistrate erred in law and fact in not holding and finding that there were doubt in the prosecution case which doubt ought to have been resolved in favour of the Appellant. A miscarriage of justice was thereby occasioned.*
5. *Considering all the circumstances of the case, the sentence meted out is manifestly harsh, excessive and against the weight of the evidence on record.*

When the appeal came up for hearing before me Mr. Wahome Advocate appeared for the appellant while Mr. Njue appeared for the State and opposed the appeal.

Submissions

On behalf of the appellant it was submitted that the charge sheet was defective. It was submitted that under the then **Section 77 (2) (b)** of the **Constitution** and now **Article 50** a criminal charge must state explicitly the nature of the offence. It was submitted that the charge sheet was defective since it did not state the nature of the offence. It was further submitted that there was no offence of threatening to murder contrary to **Section 223** of the **Penal Code**.

It was further submitted that the appellant could not understand what he was charged with. It was submitted that the charge should have read threatening to kill and not to murder. It was therefore submitted that the defect went to the root of the charge.

It was submitted further that the particulars were also defective as they did not contain the words whether the threat was received by writing or how the said threat was received. Reliance was placed upon the following authorities:-

a) Kimunya -vs- R [2009] E.A. 181

Where it was held that any criminal charge must state the nature of the offence charged and the law creating the offence.

b) Achoki -vs- R. E.A.[2000] page 283

Where the Court of Appeal held that a charge of rape without the word carnal knowledge was defective.

c) Charles Karanja Kinyua -vs- R.

Where the principal in Achoki was followed.

d) Erasmus Wachuri Wachira -vs- R.

e) Joseph Toro Mwangi -vs- Republic

It was submitted that on the count of demanding property with menaces the particulars should have contained the word with intent to steal valuable thing not money. It was submitted that from the evidence and the particulars the appellant should have been charged under **Section 300** of the **Penal Code**.

It was submitted that count four disclosed no offence since it did not have the word grossly offensive. It was further submitted that the charges are duplex and that the prosecution should have selected which of the four charges to prefer against the appellant since all the charges are for the same cause of action and in support thereof the case of **David Mwaniki -vs- R. Nairobi Court of Appeal Cr. Appeal No.68 of 2001** was submitted.

It was submitted that the prosecution did not prove its case against the appellant and that vital witnesses such as officers from Safaricom in respect of the M-pesa transaction, police liaison officer, the officer who signed the inventory were never called and the authority of **Juma Ngodia -vs- R.** was submitted in support thereof. It was submitted further that the prosecution case was full of doubt the benefit of which should have been given to the appellant noting that the same gave an alibi defence which was for the prosecution to discount.

On behalf of the State Mr. Njue submitted that though count one was defective the same was cured under the provision of **Section 382** of **Criminal Procedure Code** since there was no difference between kill and murder. It was submitted that the particulars of count two and four had indicated the intention to steal.

It was submitted that the charges were not duplex since they were not put on the same count. It was submitted that though the charges were based on the same text message they were issued on different dates. It was further submitted that the charge sheets were not defective since none of the essential ingredients of the charge were left out.

It was submitted that the prosecution evidence was not contradicting and that failure to call some of the witnesses was not fatal to the prosecution case as per the provisions of **Section 143** of the **Evidence Act**.

This being a first appeal, the court is required to reassess the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that it did not have the advantage of seeing and hearing witnesses.

The prosecution case was that PW1 Penina Muthoni Wachira on 7th September 2009 at 9.25 p.m. received a text message demanding Kshs.3000/= to be sent to telephone NO.0718828145. On 9th September 2009 she received another text message at about 9.58 p.m in which it was said that they will visit her and leave her head at the tarmac. She decided to tell her children who sent the money which was forwarded to telephone No.0718828145. She reported the next day to the police at Othaya police station and recorded statement. On 22nd September 2009 at 10.28 a.m she received another message where she was told that she had acted contrary to what had been agreed and demanded Kshs.20,000/= on 28th September she got another text message.

Through Safaricom they were able to confirm the identity of the person who had withdrawn the money earlier sent who was eventually arrested and testified as PW3 Luke Waweru Kamangara whose evidence was that the appellant went to him and stated that he wanted to withdraw some money but did not have an identity card he therefore requested to use his identity card which he agreed to and assisted him withdraw the same at PW2's M-pesa Agency.

After the withdrawal the appellant thanked him and gave him Kshs.100/=. He gave the description of the appellant to the police who subsequently arrested him. This evidence corroborated that of PW2 Esther Mumbi Githinji who confirmed that the appellant gave her the sim card No.0718828145 which had Kshs.3000/= which she paid to him using PW3's identity card.

PW4 PC Paul Machira confirmed receiving report of threatening messages from the complainant which he transcribed to paper and translated into English language from Kikuyu language. The records of the complainant showed that she sent Kshs.3000/= to unregistered owner of telephone No.0718828145 and

with the assistance of safaricom they traced the withdrawal on 14th September 2009 at Extreme Connections using identity card No.27177472 belonging to PW3 through which the appellant was arrested and sim card for 0718828145 recovered. He was subsequently arrested and charged.

When put on his defence the appellant gave sworn statement and stated that on 27th August 2009 his father called him over a land meeting for 2nd September 2009 which was later rescheduled to 15th September 2009. On 13th September 2009 a police officer one Wachira who was his father's friend went to their home at 1.00 p.m took him in his personal car to Othaya police station requesting him to record a statement in respect of theft at her aunt's place. He stated that he lined at Othaya police station unto 29th September 2009 and on 30th September 2009 he was charged.

It was his evidence that he did not have any difference with PW1 and that his being charged was the work of his father with whom he had differences.

Issues

From the proceedings and submissions herein the following issues are identified for determination.

- a. *Whether the charge sheets was defective and if so what is the effect thereof on the trial.*
- b. *Whether the prosecution case against the appellant was proved beyond reasonable doubt.*
- c. *Whether the sentence meted out was harsh and excessive.*

Section 134 of the **Criminal Procedure Code** provides that every charge or information shall contain and **shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.** (Emphasis added)

This principle has been stated by the court in **Sigilani -vs- R.[2004] 2 KLR 48** as follows:-

“The principle of law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

Section 382 of **Criminal Procedure Code** provides that no final sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint summons, warrant, charge, proclamation order, judgment or other proceedings before or during the trial or in any inquiry or the proceedings under this code, unless the error, omission or irregularity has occasioned failure of justice.

Article 59 (2) (d) of the **Constitution of Kenya 2010** provides that in exercising judicial authority courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

Whereas the charge sheet did not contain all the elements of the offence, it is clear that the particulars thereof contained the same and the appellant was able to plead to the charges and participated freely in the trial without any miscarriage of justice. I therefore find no merit on this ground of appeal.

On the issue of duplicity of the charges I agree with the submissions by Mr. Njue that duplicity only arises where two or more offences are charged in the alternative in one count. It is clear that the appellant herein was charged with distinct offences. On each count and this falls under the exceptions to the rule on duplicity as was stated in **Southern Australian Superior Court case of R. -v- Kerin [2013] SA SCPC 56** as follows:-

“However in relation to some offence due to their nature, the rule against duplicity may not apply I was here referring to the traditional “continuing offences””

The appellant herein knew precisely with what offences he was charged with and was able to put up a defence to the said charges and since no offence was charged in the alternative in one count no duplicity was occasioned. I therefore find no merit on this ground of appeal.

From the evidence tendered before the trial court and as analyzed herein above I agree with the final of fact by the trial court that the appellant owned or operates telephone number 0718828145 and he used the safaricom mobile telephone system to send written electronic messages to PW1 on telephone line No.0722-637768 to threaten to murder her and on two occasions to demand money by threats.

I therefore find that the appellant's conviction was safe and dismiss the appeal herein.

Signed and dated this day of 2014

J. WAKIAGA

JUDGE.

Delivered by Justice J. Ngaah on behalf of Justice J. Wakiaga on the 18th day of December 2014

J. NGAAH

JUDGE.

In the presence of:

----- for Appellant

----- for Respondent