REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 41 OF 2012

PATRICK MACHARIA ALIAS MACHAA…..……..…….. APPELLANT

VERSUS

REPUBLIC…….....…...……..RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 403 of 2011 in the Senior Resident Magistrate's court at Baricho HON. J.N. Mwaniki (SRM)

JUDGMENT

PATRICK MACHARIA MAINA the appellant herein was charged with the offence of threatening to kill contrary to **Section 223 (1)** of the **Penal Code** before the Senior Resident Magistrate's Court at Baricho . The particulars were that the appellant herein on 20th June 2011 at Kagio Township in Kirinyaga South District without lawful excuse caused one Pauline Wanjiru Kirika to receive a threat to kill her. The appellant after trial was found guilty and sentenced to serve 4 years imprisonment by the trial court. The appellant felt aggrieved and filed this appeal listing seven grounds in his petition of appeal. They are as follows:

1. That he pleaded not guilty.
2. That the Learned magistrate erred in law and fact by failing to consider that the defendant notified the court that there was a pending investigation of the same threatening message by someone else who had used mobile phone to send some threatening message.
3. That the Learned Magistrate erred by failing to consider the fact that the complainant and the appellant had a relationship that had turned sour and even ended up in a children's court.
4. That the Learned Magistrate erred in law and in fact by relying a statement written at the police that was later retracted by the maker.
5. That the Learned Magistrate erred in law by relying on evidence of a witness who was not called to testify.
6. That the Learned Magistrate erred in law and in fact by relying on uncorroborated evidence.
7. That the Learned magistrate erred by law and in facts by failing to consider my defence and mitigation.

In his written submissions filed in court the appellant has stated that the complainant was his ex-wife and that they had differences that ended up in children's court . The appellant has submitted that the complainant now has another husband who was PW2 in the trial court and in the appellant's view the current husband should be taking care of her and the children. The appellant contends that the complainant framed him up to settle scores with him and this fact was not taken into account by the trial court.

The appellant has also taken issue with the reliance of evidence which were later refracted . He

contends that the evidence of PW3 were made under duress at police station and that is why he retracted them at the trial court when called to testify. The appellant further states that the prosecution failed to produce a witness who is said to have been with PW3 during the material time the offending posters were being pinned on the gate of the complainant. The appellants finally says that the trial court did not consider the defence put forward particularly the fact that the receipt book which formed part of the sample taken for analysis by PW6 (document examiner), was authored by appellant's employee(DW2).

The state through the office of Director of Public Prosecution represented by Mr Omayo did not oppose the appeal but this being an appellate court it shall nevertheless consider the appeal on the merits. This being the first appeal, this court is obligated to re-evaluate the evidence adduced at the trial court and determine whether or not the evidence adduced sufficient to support the conviction.

I have looked at the proceedings before the trial court and its clear that the main issued at the trial was the determination of the author of the offensive and threatening posters that were plastered at the gate leading to the house of complainant. The complainant (PW1) testified at the trial court and told the court that the posters were placed in her gate on two occasions (4th March 2011 and 20th June 2011) and it was in the second occasion that she was able to apprehend a person(PW3) with the help of her husband(PW2). The complainant told the trial court that PW3 led them to the appellant who had reportedly tasked him and another person (PW4) to put the offending posters on the gate of the complainant.

I have looked at the posters that were recovered at the scene (five in number) produced as P exhibit (A1-5) and indeed they are offensive and threatening . The contents are as follows:

1. ***"PAULINE WANJIRU KIRIKA MALAYA HII. UNAHARIBU NYUMBA YANGU. WACHANA NA BWANA YANGU. SAMUEL MWAI NDAMA, NITAKUUA KABLA YA MWAKA HUU. NI MIMI BIBI WAKE. NATAABIKA NA WATOTO WAKE ARUNDI NYUMBANI".***
2. ***"PAULINE WANJIRU KIRIKA WACHAANA NA SAMUEL NDAMA NUTAKUUA…….MALAYA HII. NI BIBI YAKE NAKULA TABU NA WATOTO WAKE SAMUEL NDAMA NI MGONJWA NA UKIMWI".***
3. ***"PAULINE WANJIRU KIRIKA WEWE NITAKUUA……WACHANA NA BWANA YANGU SAMUEL MWAI NDAMA NITAKUUA KWA VILE NAKULA TABU NA WATOTO WAKE. NI MIMI BIBI YAKE".***

The other posters produced as exhibits contained similar messages as shown above. The trial court correctly evaluated and concluded that the posters were recovered on the material day at the scene of crime (gate of the complainant) and that there was no doubt that the messages were directed at the complainant in the trial court. That is why she took action of reporting the incident to the police.

The appellant has contended that the trial court erred by relying on the evidence of a single witness . The appellant did not point out who that single witness was in his opinion but from the proceedings it is obvious that the position is incorrect . The court evaluated the evidence of PW1 and PW2 who apprehended PW3 putting up the posters and frog marched him to police station where they all recorded statements and the police commenced investigations that led to the arrest and prosecution of the appellant. The investigating officer (PW7) gave a detailed account of the actions he took after receiving the report. He interrogated suspects PW3 and PW4 and took their statements . He also involved the handwriting expert (PW6) who also testified and gave evidence in support of prosecution case. The trial court therefore took evidence of seven witnesses called by the prosecution and from the judgment the Learned Magistrate weighed evidence adduced by all the seven witnesses in totality. I do find that conviction was not founded or based on the evidence of a single witness as pointed out by the appellant.

The other ground of appeal that the appellant gave weight was that the trial court relied on

evidence of a refractory witnesses the said witnesses being PW3 and PW4 . The record shows that PW3 was not only declared a hostile witness but had to be locked in for 14 days to agree to testify and even after agreeing to testify he gave evidence that was not tandem with the statement he had earlier recorded at the police station . He told the court after being first locked in for eight days that

" I still maintain I will not give evidence I do not believe in". There is no doubt therefore that PW3 stubbornly maintained his position of being refractory witness and the trial court had no choice but to declare him a hostile witness. The weight of evidence of such witnesses in law are usually of little value and a court should not rely on them either for the prosecution or for an accused person because such witnesses and their evidence are unreliable . In the case of **DANIEL ODHIAMBO KOYO –VS- REPUBLIC (2011) e KLR ,** the court of appeal sitting in Kisumu stated that the probative value of such evidence is neglible and may only be relied upon in clear cases to support the prosecution or the defence case. The court in quoting the case of **MAGHENDA –VS- REPUBLIC (1986) KLR 255** observed

" **the evidence of a hostile witness must be evaluated in particular if he intends to favour the accused though it may not necessarily be acted upon by the court".** The court went on to state that a court would normally take a perverse view of the credibility of the hostile or refractory witness in view of shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify. The trial court in this case however seems to have placed great value on the statement made by PW3 in the trial case. This is deduced from the judgment when he made the following observations;

" first statements made to persons in the authority are of paramount importance as they provide a test by which the truth is subsequently told……"

It is my view that the evidence of a refractory witness must be treated with caution and only be used where there is sufficient corroboration. A court cannot place weight on evidence that is neglible in law. In the case of **ABEL MONARI NYANAMBA & 4 OTHERS –VS- REPUBLIC (1996) e KLR** the court made the following observation in regard to evidence of a hostile witness;

" **the evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt "** (emphasis added)

Furthermore in the case of **BATALA –VS- UGANDA (1974) E.A. 402** the court stated in relation to evidence of a hostile witness;

" The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable it enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight".

The trial court in regard to evidence of PW3 and PW4 appear to have misdirected himself on a point of law when he viewed the statements made by them as " **very comprehensive and very relevant"** in his judgment and appears to have placed undue weight on the same against the position in law as expounded in the above cited authorities.

The issue for determination therefore is if the correct weight was placed on the evidence of PW3 and PW4 both of who were treated as refractory witnesses (though the former was not treated as hostile by the trial court) could the court have still find a conviction? I have evaluated the evidence tendered before the trial court and I find that the evidence of the expert witness (PW6) was key to the prosecution case. PW6 told the court that he was an expert in handwriting having trained in National Rehab University in Sudan. His evidence was that having received two sets of exhibits that is to say;

a. Exhibits marked A1-A5 –exhibits found at the crime scene and the suspect

b. Exhibits B1-B5-samples of appellant's handwriting he subjected the documents to examination to see if they were made by the same person. The tests carried out involved

"Image enhancement and magnification procedures on stereo microscope, video spectro and compass for the projecting using infra red filters for better visibility and inspection of minute individual characteristics for absolute identification". On the basis of this test, he formed an opinion that the two samples were made by the same author. When cross examined by counsel for the appellant, the expert witness added that the examinations carried out included per lifts, pen pressure and that is why he opined that his opinion was conclusive.

The trial court has not been faulted by the appellant in the manner in which he treated the evidence of the expert. The trial court in my view correctly applied the law as indicated in his judgment. The trial court in the judgment referred to **Section 48** of the **Evidence Act** and relied on the authority of **NGUKU –VS- REPUBLIC (2004) 2 KLR 5** in relying on the expertise of the PW6. Apart from the evidence of PW6 the trial court also on its own perused the exhibits produced in court by PW5 as P exhibit 3 a(1)-a5 and compared them with sample taken from appellant by PW5 and produced as P. exhibit 3 b1-b5 and found them in his opinion to be much alike. Again on this score the trial magistrate was right since the evidence of expert is an opinion and not binding to trial court. The court in such instances has to make its own independent evaluation and finding . This view is in line with s similar holding as seen in the case of **SAMSON TELA AKUTE –VS- REPUBLIC (2006).** The court made the following observation which I consider relevant here

" The court has to examine the documents itself and come up to the conclusion to the same conclusion with such assistance as can be furnished by the experts in the field…….".

This court has also had the occasion of observing very closely the said exhibits marked A1-A5and produced at the trial as P exhibit 3a and I have compared them with exhibits marked B1-B5 and produced at the trial as P. exhibit 3b . The two sets of exhibits are so similar that it would have been quite a task to distinguish them had the same pen been used by PW5 when taking the sample handwriting from the appellant. I therefore find that the Learned Magistrate was right in drawing the conclusion which he did in his judgment upon evaluating the evidence adduced by the prosecution. The trial court's inference on the guilt of the appellant in regard to authoring the offensive posters was sound in my view given the above reasons and in particular the case quoted by the trial magistrate in regard to the approach he gave to the evidence of the handwriting expert (**NGUKU –VS- REPUBLIC (2004) 2KLR.**

The appellant has stated that his defence was not taken into account. I have considered the evidence adduced by the appellant. He told the trial court that they had a history of alterations with the complainant and that could have made the complainant to frame up the charges against him to settle scores . I however find the defence to be a double edged sword since it may have provided the complainant an avenue to avenge for the past differences they may have had with the complainant , the same could also explain the motive behind the appellant authoring the offensive posters to revenge as well owing to a love gone sour. I find the defence put forward by the appellant was in a way trying to paint the PW2's other wife as the culprit a bit telling given the message contained in the poster that appear to implicate, at least on the face value the wife if PW2, one **RUTH MUKAMI.** It is obvious that the appellant in an attempt to conceal his identity attempted to deflect the attention to an easy and "obvious" target. This court notes the great lengths that the appellant went in trying to sell this idea which was diversionary in my opinion that ended up betraying him. His case for me is a classic example of the infamous proverbial thief who upon being cornered shouts "thief" thief" pointing to the wrong target to divert attention. The witness DW2 called by the appellant was his employee and the trial court never gave any weight to his evidence in support of appellant's case for obvious reasons. He was an employee of the appellant and contrasting his evidence with that of PW6 the expert witness an independent witness by all means and balancing them on the scales of justice, the trial was correct to agree with the version given by the expert witness. I do find that the evidence of the expert witness easily outweighed the evidence tendered by the defence and the trial court properly directed itself in that regard.

The appellant submitted that the trial court never considered the past relationship and the history they had with the complainant prior to the incident that led to his prosecution. I have considered the same and does appear that there was a love triangle gone bad at some stage leading to threatening messages sent via sms to the phone of the complainant which was reported to at the police. There is also no doubt that there exist a children's cause between the appellant and the complainant in the trial court which perhaps explains the action or the motive behind the appellant's action. Though I find the same ill-advised and unwarranted, I consider it a relevant mitigating factor given the circumstances and this which should have been considered by the trial court upon conviction of the appellant.

In conclusion and for the reasons advanced above I find that the conviction of the appellant was well founded on the basis of the evidence adduced by the prosecution at the trial court. I find no basis to interfered with the finding of conviction by the trial. It is upheld. On the sentence as I have observed, taking into consideration the mitigating circumstances under with the appellant committed the offence I hereby do exercise of powers under **Section 354 3(b) Criminal Procedure Code,** and alter the sentence meted out against the appellant from custodial sentence of 4 years imprisonment to a fine of kshs 20,000/- or 1 year imprisonment in default and in addition order the appellant to keep peace for a period of 2 years. The upshot of this is that the appellant's conviction is upheld but the sentence is set aside in its place a fine of kshs 20,000/- is imposed or 1 year imprisonment in default and in addition the appellant is ordered to keep peace for 2 years.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 9TH DAY OF DECEMBER, 2014
in the presence of

The appellant

Mr Omayo for state

Mbogo Court Clerk