REPUBLIC OF KENYA

High Court at Busia

Criminal Appeal 64 of 2012

(An appeal arising from the conviction and sentence of E.H. Keago – SRM delivered on 16th April 2012 in Busia.cr.case No.1426 of 2011)

DANIEL ONYANGO OHANGA ……..…APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

J U D G M E N T

1) Daniel Onyango Ohanga(the Appellant) is serving a jail term of 18 months after being convicted of two counts of the offence of Threatening to Kill contrary to section 233(1) of the Penal Code. The appellant has preferred this appeal against both conviction and sentence.

2) It was alleged that on or about the 25th of October 2011 in Busia County, without lawful excuse the appellant uttered a threatening letter to Charles Wesonga Mbinga(the Complainant) demanding a ransom of ksh.400,000/= from him. Again, it was alleged that on diverse dates between 26th of October 2011 and 1st of November 2011 he sent threatening messages by means of a mobile phone to the complainant to compel him to pay the demanded ransom of ksh. 400,000/=.

3) The facts to the matter are not sophisticated. Robert Wanyonyi Dimo (PW3) was employed by the Complainant as a guard at his home. On 25th October 2011, about 7.30p.m, he answered to a knock at the gate. Standing at the gate was a man who requested to see the owner.PW3 declined to allow him in. The man then threw a Khaki envelope into the compound and left. The envelope was addressed to the Complainant.

4) In the envelope were letters in which the author was demanding a sum of ksh.400000/= so as to spare the life of the complainant. On one of them was a telephone to be used for purposes of agreeing on the delivery of the ransom. The complainant at first ignored the contents but took it seriously when he received a telephone call from cell number 0737543984. This was the same number on the letter. The caller was enquiring whether the Complainant had received the letter. He received other threatening calls from different numbers in respect to the ransom. These were 0726-498838 and 0787-518042.

5) Johnson Munene Ndungu (PW4) was asked to investigate the complaint. He received some invaluable information from an informer. He arrested the appellant at Sidindi and on conducting a search at his home recovered some documents with the handwriting of the Appellant. Those documents, and the envelope and letter addressed to the complainant were examined by a Document Examiner, Chief Inspector Jacob Odour (PW1). In addition a specimen handwriting had been taken from the appellant. The finding of the examination was that one hand had authored all the documents.

6) Inspector Kalvin Abaga (PW5) assisted in investigating the telephone communications. It proved fairly easy to trace the handset that was used to communicate the menacing messages. The help of a mobile service provider is all that was needed. The print out of the calls made from numbers 0737-543984 and 0787-518042 revealed that the threatening calls and messages were made from one handset. That handset had a serial number being 359033031661390.That handset was found on the person of the appellant.

7) In his Defence, the Appellant denied committing the offence but incriminated himself on cross-examination. In a sum. On 10th November 2011 the Appellant was asked for a meeting by his friend Julius Kolengolo. They agreed to meet at Sidindi. That happened at about 12.40p.m. As they spoke, police appeared and arrested him. The police searched him and found a mobile phone LG. He was later taken to his house wherefrom the police took away some items. He spent that night in the police cells. The following morning he was asked to copy a letter shown to him. He did so reluctantly and against his wish. The Appellant knew the complainant. He had worked for him as a casual labourer.

8) It was on cross-examination that the Appellant made some concessions that would work against him. He confirmed that his mobile number was 0726-498838. He further confirmed that the handwriting in the documents produced in Court by the Document Examiner was his.

9) The court will subject the above evidence to a close scrutiny with a view to reaching its own conclusion. The handicap the court faces as an appellant court is that it does not have a firsthand contact with the witnesses as they testify and due allowance will be given for that.

10) At the hearing the appellant abandoned his request to be subjected to a retrial. Instead, he argued that the evidence that was used to convict him was weak, contradictory and uncorroborated. He also sought a reduction of sentence, he thought the same to be manifestly excessive.

11) The prosecution case rested on the document examination of the threatening letters and the Data print-out of a telephone handset. And although opinion is divided as to whether technology and science can lie, technology and science is often brutally accurate. Is this one such occasion?

12) The letters that contained the threats were thrown into the complainant's compound by a person seen by PW3, but not known to him. Those letters were inside a khaki envelope which was addressed by hand to the complainant. The letters themselves were handwritten. Following a lead by a helpful informer, PW4 arrested the Appellant. At the Appellants house were recovered some documents which were allegedly handwritten by him. PW4 then took some specimen handwriting from the Appellant. All these documents were sent to the document examiner, PW1. They were delivered as a parcel via the services of a courier provider, Easy Coach.

13) Before making any observations on the outcome of the experts' analysis, I should make some short comments on the process of the taking of the specimen handwriting, the handling and delivery of the documents to the Document examiner. The process would have an impact on the integrity of the documents examined and therefore the outcome of the examinations.

14) In addition to the recovered documents which had known handwriting, PW4 took some specimen handwriting from the Appellant. What PW4 asked the Appellant do was to reproduce the writings on the envelope and the letters sent to the complainant. Answering cross-examination questions when giving his sworn defence, the Appellant said,

"**Exhibit 5 is mine. It is the known handwriting."**

That was in respect to the documents recovered from his home. While on the specimen taken by PW4 he stated,

"It was taken by the police Exhibit 6 in my handwriting……..Exhibit 3 is my handwriting."

There is unequivocal confirmation that the known handwriting and the specimen handwriting collected by PW4 were the handwritings of the Appellant. Then on the questioned document he said:-

"I am the one who wrote Exhibit 2"

15) Are these documents the ones that were delivered to the Document examiner for examination? The delivery was by way of courier. There was no evidence as to how the documents moved from the custody of PW4 to the courier company and then from the courier company to the Document examiner. This, in my view, was necessary evidence. Fortunately for the prosecution, the Appellants sworn statement in Defence (Quoted in paragraph 14 above) took away any doubt that may have arisen about the delivery of the documents. The Defence filled a gap in the prosecution case. It removed a weak link in the prosecution case!

16) On analysis of the documents, the Forensic Document examiner returned the following findings,

"I have also examined and compared the questioned handwriting on exhibit marked A and C with the standard handwriting on exhibit marked B and F1 – F4 and known handwriting on Exhibit marked D and E. The handwriting is in my opinion made by the same author."

From the Exhibit Memo form forwarding the documents to the Examiner, Exhibits marked C and A were the envelope and letters addressed to and thrown into the complainants house. Exhibits B and F1 – F4 were the specimen handwriting of the Appellants taken by PW1. Exhibit D and E were documents containing known handwritings of the Appellant. The verdict of the forensic expert that all these documents had been written by the same person was overwhelming evidence that the Appellant had authored the letters that were in the envelope that had been thrown into the compound of complainant. There was then absolute proof when the Appellant, in his defence, expressly admitted being the author of the letters. He said

"I am the one who wrote Exhibit 2."

Exhibit 2 were the offending letters.

17) Plainly read, the letters were a threat to the complainant and calling for ransom. Some short extracts demonstrates this. Part of one letter reads,

"This should be very confidential and private because if the guy who wants your blood gets to know, we are sorry that you will just have to go and that's why we are telling you, don't trust anyone. If you have the money, take it with you and call this number 0737543984, on FRIDAY THE 28/10/2011 at precisely 9.30p.m and you will be told where to take the money."

Part of the other reads,

"It will be very prestigious to start with the licking of your blood in this Western part of Kenya after being underground for sometime.

If you fly out due to your hard hands on money, we will start with your family and properties. Remember; You can Run But You Cannot Escape."

This Court is in agreement with the State that the learned Magistrate was perfectly entitled to return a conviction on the 1st count.

18) There is then the 2nd count. The complainant received threatening messages sent from telephone numbers 0737-543984, 0787-518042 and 0726-498838. PW5's investigations on this led him to discover that the messages from two of these numbers emanated from one handset bearing serial number 359033031661390. Details of how this investigation was undertaken was not shared with the Court. Anyhow, print outs of the data from the two of numbers, namely 0737-543984 and 0787518842, showed

that some voice and short message communications from the two numbers to telephone number 0722-716590 belonging to the complainant originated from that handset. The handset was traced to the Appellant and recovered from him. Its model was LG, black in colour. The handset bore the same serial number appearing in the print out. And at the time of recovery the Appellant was using the number 0726-498838. The Appellant confirmed this in his Defence. This is one of the numbers that had been used to threaten the complainant.

19) From the foregoing, there would be sufficient evidence that a person possessing handset serial number 3590330316611390 was communicating with the complainant. This person was the Appellant. The allegation by the prosecution was that the Appellant was sending threatening messages to the complainant. At the time of trial, the messages were still saved in the complainants handset. That handset was produced as an exhibit. An extract of the saved messages was also produced in evidence. One such message from telephone 07337543984 read,

"Its good that you are not picking my calls but just know that the expiry period of our letter is on the Friday of 28.10.2011 precisely after 9.30p.m. If you haven't read it and don't waste your time looking for us because you wont find us and it will be too late." (4.00p.m.).

Another from telephone 0787-518042.

"You will be like your counterpart in Eldoret who we killed and never took anything from the car. Tomorrow is the D-Day and just know that one of your workers goes down tonight and this is the message we will leave him/her with "my death is as a result of working for Mr. Charles Wesonga Mbingi. He knows of my death and never did anything to stop it. All he did was to put those messages he got under tight privacy and acted like everything was going well. I now ask my country Kenya to do everything possible and bring Mr. Wesonga to book for negligence. "The victim will write and sign the letter before we hang him/her. We have laid down good legal actions and we discovered that if only one of your workers goes down tonight, no one will ever work for you. Enjoy your numbered nights on earth."

20) The only result that the learned Magistrate could reach was that the 2nd Count had also been proved beyond any shadow of doubt.

21) An offender under Section 223(1) is liable to imprisonment for ten years. This Section reads,

"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 <u>any person is guilty of a felony and is unable to imprisonment for ten years.</u>"

The trial Court imposed a fine of ksh.50,000/= and a prison term of 18 months for each count. The prison term was much less than the maximum possible and it cannot be said to be excessive or unreasonable.

22) But I see one omission, perhaps an oversight, on the sentencing. The learned Magistrate did not make an order as to how the sentences would run. Where more than one sentence is imposed against an accused person, it is the Court's discretion to order whether the sentences should run concurrently or consecutively. However, the agreed principle of law is that "**where offences are committed in one transaction, the sentences ought to run concurrently even when laid in separate counts''** (**<u>Njoki –vs-Republic</u>** [2001] KLR 125). This is because the commission of such offences carry one *mens rea*. The threats that were made through the telephone messages were a continuation of the initial threat uttered in the letters. They are one transaction. This Court will use its authority under Section 354 of the Criminal Procedure Code to clarify how the two sentences should run.

23) The result. The conviction on both count 1 and count 2 are hereby upheld. The eighteen (18) months imposed on each count shall run concurrently. Those are the orders of this Court.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 21ST DAY OF MAY 2013.

IN THE PRESENCE OF:

…….COURT CLERK

…….FOR STATE

F. TUIYOTT

J U D G E