REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Criminal Application 90 of 2011

DAVID KIMANI WANJIKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **DAVID KIMANI WANJIKU**, was convicted for the offence of Threatening to Murder contrary to **section 223 (i) of the Penal Code.** He was then jailed for five (5) years.

In his appeal to the High Court the appellant has submitted that the case against him was not proved beyond any reasonable doubt.

He believes that the offence of threatening to murder someone can only be deemed as proved if there was proof of a plan to carry out the said murder. Therefore, as the prosecution had only made available some leaflets which contained threatening words, the appellant submitted that the case against him had not been proved.

Secondly, the failure to call two of the other guards who had been on duty on the material night is said to have deprived the trial court of material witnesses.

As the appellant was only one amongst the guards who were on duty on the material night, when the offending leaflets were dumped at the complainant's compound, the appellant says that he ought to have been accorded an opportunity to cross-examine those other guards. He was deprived that opportunity when the other two guards were not called by the prosecution.

As no eye-witness testified at the trial, the appellant submitted that the evidence adduced was all circumstantial. Therefore, in his considered view, that evidence could only have led to a conviction if it pointed nobody other than himself, as the author of the leaflets.

The appellant's view was that because his two colleagues who had been on duty at the material time did not testify, there arose co-existing circumstances that greatly weakened the case of the prosecution.

In any event, the evidence of the handwriting expert was deemed, by the appellant, as being inconclusive.

Furthermore, as the appellant's two sets of handwritings were given to the document examiner, whilst all other suspects had only one set of their respective handwriting samples given to the document examiner, the appellant perceives that to have been a deliberate targeting of him. He does not comprehend why the police investigating the crime had targeted him.

The appellant also submitted that the trial court erred by rejecting his defence, without giving a reason therefor.

Finally, the learned trial magistrate is faulted for failing to take into account the mitigation, when sentencing the appellant.

Having re-evaluated all the evidence on record, and after taking into account the submissions by the parties, I note that the leaflets in issue were dumped on a path leading to the complainant's house.

Nobody saw the person who had dumped them there.

PW 2 testified that he was on patrol duties at about 11.00p.m, when he found the leaflets. As the leaflets were addressed to the complainant, **PW 2** took them to him.

PW 1 was the complainant. He said that the leaflets were taken to him by the security supervisor, JOSEPH MOMANYI, at about 9.30p.m.

That implies that it was not **PW 2, PETER MWANGI NJAGI,** who took the leaflets to him.

PW 3, JACKSON MOMANYI MIRINGU, is a security officer. He said that a guard named JULIUS contacted him by a radio call at 11.00p.m. The said JULIUS told **PW 3** that he was with **PW 2**.

PW 3 joined **PW 2** and the said Julius, and they then handed over the leaflets to the complainant.

Clearly, the sequence of events, as narrated by the prosecution witnesses was not consistent. **PW 1** cannot have received the leaflets at 9.30p.m. when the said leaflets were only recovered at 11.00p.m.

Secondly, whereas **PW 1** said that he was given 5 leaflets by **JOSEPH MOMANYI, PW** 2 testified that he only found 4 leaflets. One cannot help but ask themselves where the fifth leaflet which the complainant was given, had come from.

Had Joseph Momanyi testified, he could have told the court where he had got the five (5) leaflets which he took to **PW 1** at 9.30p.m.

Secondly, as **PW 2** recovered some 4 leaflets at 11.00p.m, which **PW 3** saw, the question that then arises is whether there were two sets of leaflets which were recovered.

The Investigating Officer **(PW 5)** said that the four (4) leaflets in issue were recovered from the complainant's compound. But during cross-examination he said that the said leaflets were recovered on a path leading to the complainant's compound.

The investigating Officer forwarded to the handwriting expert, the offending leaflets together with 3 documents from each of the suspects. However, the document examiner only got 2 documents of the appellant and one each from the other suspects. It is thus not clear what happened to the other 2 sets which the Investigating Officer allegedly forwarded to the document examiner.

But what is clear is that the document examiner only analysed two sets of documents from the appellant, and one set from each of the other suspects. No explanation was provided to the court as to why that was deemed prudent or necessary.

The document examiner concluded that the leaflets in issue were authored by the appellant. That conclusion was arrived at due to the similarities in the characteristics on seven (7) letters and the number 5.

I find that conclusion to be surprising when it is considered that the complainant had testified that the leaflets;

"appear written by different persons from the look of it."

In the circumstances, as the only piece of evidence linking the appellant to the offence was the report of the handwriting expert, I find that it would be unsafe to uphold the conviction, when the handwriting on the leaflets appear to have been of different persons.

Accordingly, there is merit in the appeal. I therefore quash the conviction and set aside the sentence.

Before concluding this judgment, I note that if I had upheld the conviction, I would have found it hard to sustain the sentence. I say so because the Probation Officer had recommended that the appellant be given a chance on probation.

Whereas the report of a probation officer is not binding on the court, it is necessary for the court that decides to hand down a sentence that was inconsistent with the recommendation of the probation officer, to explain the decision made. In this instance, although the court called for a report from the probation officer, the court did not even mention the said report when sentencing the appellant. That was an error on the part of the learned trial magistrate.

In conclusion, I now direct that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 11th day of June, 2012.

.....

FRED A. OCHIENG

JUDGE

-