



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 100 of 2011

JUSTUS MOTE

MUKUTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal against both conviction and sentence in Resident Magistrate Cr. Case No. 73 of 2011 in Judgement*

*delivered on 19<sup>th</sup> day of May 2011 by Hon S.K Mutai, Resident Magistrate at Mutomo Law Courts)*

### JUDGMENT

The appellant, **Justus Mote Mukuti** was charged with the offence of Threatening to kill contrary to section 223 (1) of the Penal Code in Criminal Case No. 73 of 2011. The particulars of the charge were that on the 3<sup>rd</sup> February 2011 at Kitoo sub-location, in Mutomo district, within Kitui County, without lawful excuse, the appellant threatened to kill his mother namely **Kaveti Mukuti**. The appellant denied the charge and the case was heard and determined by the Resident Magistrate's Court at Mutomo, where the appellant was convicted and sentenced to seven (7) years in prison.

In order to prove its case, the prosecution called a total of four (4) witnesses. The first witness to testify as PW1 was **Kaveti Mukuti**, the complainant. She stated that on 3<sup>rd</sup> February 2011 at around 4.00 p.m, the appellant came home while drunk. The appellant, who is her son, called a child and sent him to the complainant to ask her for money, she told him that she did not have any money. The appellant then called his wife and told her to come and witness him kill the complainant. He was armed with a panga and axe and the complainant on seeing him ran away. She hid in the bushes for three days. She further testified that the appellant had threatened to kill her several times on account of money and drunkenness.

PW2, **Mukuti Muthiami** is the father of the appellant. On the 5<sup>th</sup> March 2011 at around 6.00 p.m, he was at home when the appellant, came and told him that he was going to kill his mother. He told him to go ahead and kill her. He however did not see the axe nor the panga. He reported the matter to the police station nonetheless.

On the material day, PW3, **Stella Vilita Mote at around 4.00 p.m**, was at home when the appellant who is her husband told her to come and witness him cut his mother. She added that the appellant was armed with a panga and axe and that she followed him to her mother – in- law's home. She called out the complainant and the appellant said that he was going to cut her and put her in a sack. The complainant then ran away and slept at a neighbour's house. Later the complainant reported the matter to the police.

PW4, **Police Corporal Phillip Lenarpasipia**, stated that on the 6<sup>th</sup> day of March 2011, he was at the police station when the complainant came and reported that the appellant was threatening to kill her. He booked the report and on 11<sup>th</sup> March 2011, he summoned the appellant who came and he arrested him.

The appellant was put on his defence after a prima facie case was established. He elected to give an unsworn statement and did not call any witness. In his defence the appellant claimed that on that material day he woke up and went to look for timber until evening. On the 5<sup>th</sup> March 2011, he received a letter from the police and on 11<sup>th</sup> March 2011 he went to the police station with his mother. He added that, he was framed by his mother because she hates him. She left him in 1969 and returned home in 1984 as a witchdoctor.

The learned magistrate having considered and evaluated the evidence on record was satisfied that the prosecution had proved its case against the appellant to the required standard. He concluded that the evidence of PW1 was fully corroborated by that of PW2 and PW3 who heard and saw the appellant threaten the complainant and that the witnesses positively identified the appellant as the culprit. He accordingly convicted and sentenced him to seven (7) years in prison.

The Appellant was aggrieved by the conviction and sentence aforesaid and hence preferred this appeal on the grounds that the magistrate failed to consider crucial testimony of PW2, disregarded his defence and the fact that the panga and axe were not produced as exhibits, disregarded the testimony of PW2 and that the magistrate shifted the burden of proof to the appellant.

When the appeal came before me for hearing on 27<sup>th</sup> June 2012, the appellant opted to canvass the same by way of written submissions.

On his part, **Mr. Mukofu**, learned State Counsel orally submitted that the appeal lacked merit and should be dismissed. He added that the appellant was charged with the offence of threatening to kill. The complainant is his mother. She testified that the appellant came to her house armed with a panga and axe and threatened to kill her forcing her to flee the house. PW2 as well testified that the appellant had intimated to him of his intention to kill his mother. PW3 testified that the appellant who was armed with an axe and panga had asked her to follow him and see him cut his mother.

In response to the State Counsel's submissions, the appellant stated that, PW2 never saw him with any weapon. He added that he never hid himself, yet it took so long for him to be arrested and charged. As such the case was a frame up since the complainant had married another woman and wanted the appellant to take care of her yet he had his own wife.

I have considered the evidence on record, the judgement of the learned Resident Magistrate, grounds of appeal, written and oral submissions of the appellant and the learned State Counsel respectively.

This is a first appeal, as such the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it and come to its own independent conclusion. In the case of **Ajode -vs- Republic Criminal Appeal No. 87 of 2004** the Court of Appeal sitting at Kisumu held that:-

***“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that.”***

What has to be determined here is whether or not to confirm what the learned magistrate held that the appellant did indeed threaten to kill his mother. I have noted that the incident took place on the 3<sup>rd</sup> February 2011 in broad day light. Infact, it was at 4 p.m. Following the threat, the complainant fled to the bushes. This encounter was witnessed by PW3 who corroborated the evidence of the complainant. The complainant's evidence is further corroborated by the evidence of PW2 her husband and father to the appellant. On the 6<sup>th</sup> day of March 2011, the complainant reported the matter to the police who summoned the appellant on the same day. The appellant then reported at the police station on the 11<sup>th</sup>

March 2011 when he was arrested and charged with the offence.

It was the evidence of PW1 and PW2 that the appellant intended to kill his mother as he uttered the words – that he would kill his mother. He also told PW3 that he was going to cut his mother and proceeded to arm himself with a panga and an axe on the material day. This clearly shows the intentions of the appellant to harm the complainant. The complainant further testified that the appellant had on various occasions threatened to kill her and this particularly was not the first time. Furthermore, it was the evidence of PW2 that on a different date, the 5<sup>th</sup> day of March 2011, the appellant went to his home and told him that he was going to kill his mother.

I will now address the grounds as raised in the petition of appeal. PW2's evidence speaks for itself. PW2 was at his home when the appellant went to his home and declared his intentions to kill his mother. PW1, PW2 and PW3 all corroborated each other's evidence as far as the threats of killing the complainant are concerned. In regard to production of the panga and the axe as exhibit, I am of the view that the same need not have been produced as the charge preferred against the appellant was one of threatening to kill but not an offence in which the axe had been used which would have then necessitated the production of the weapon that was used to commit the offence. In any event, there is evidence of the complainant which the appellant did not challenge that soon after the commission of the offence, he had hidden the axe.

Having gone through the proceedings and judgement of the trial court, I am inclined not to agree with the appellant that the learned Magistrate shifted the burden of proof to him. Nowhere in the judgment does the learned magistrate shift the burden of proof to the appellant. The appellant in his own submissions has not pointed out such occasion.

The trial court should always bear in mind that the burden of proof is on the prosecution and regardless of what an accused person says in his defence; the prosecution is required to prove its case beyond reasonable doubt. The Magistrate having considered the weak defence and rightly so in my view, failed to act on the said defence. The issue of drunkenness was not alluded to by the appellant in hindrance.

The prosecution case and the evidence was water tight enough to convict the appellant. The prosecution called witnesses that placed the appellant at the scene of crime and those that heard the appellant threaten to kill the complainant. Failure by the prosecution to call the child who was sent to the complainant by the appellant to ask for money, as a witness, does not in any case invalidate or weaken the prosecution case. See **Juma Ngodia v R**, Court of Appeal in Nairobi, Criminal Appeal no. 136 of 1983 held that:

***“The prosecutor has general discretion whether to call or not to call someone as a witness. If he does not call a vital reliable one without a satisfactory explanation he runs the risk of the court presuming that his evidence which could be and is not produced will if produced, have been unfavourable to the prosecution.”***

The mere fact that the appellant committed the offence on a particular date and the offence was reported a month later does not necessarily mean that the offence was not committed at all. In any event, the offence was reported a day after the appellant announced his ill intentions of killing the complainant to PW2. It does also appear that a routine had developed where the appellant constantly threatened to kill his mother. This time around things came to a head and the mother decided to take action.

In regard to production of the OB which the appellant claims that the crime was reported and entered on 11<sup>th</sup> March 2011 and not 6<sup>th</sup> March 2011 as alleged, the appellant should have applied to have the same produced in the lower court as part of his defence. He did not do so and cannot allude to it now.

As a result I find that the appeal has no merit and I dismiss it in its entirety. I uphold the conviction and sentence.

**JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS this 15<sup>TH</sup> day of OCTOBER, 2012.**

**ASIKE- MAKHANDIA**

**JUDGE**