



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 109 of 2011

RISHAD HAMID APPELLANT

VERSUS

REPUBLIC RESPONDENT

*(From the original Conviction and Sentence in the Criminal Case No. 2471 of 2008 of the Chief Magistrate's Court at Mombasa: **Rosemelle Mutoka – C.M.**)*

JUDGEMENT

The Appellant **RISHAD HAMID** has filed this appeal challenging his conviction and sentence by the learned Chief Magistrate sitting at Mombasa Law Courts. The Appellant faced two counts of **THREATENING TO KILL CONTRARY TO SECTION 223(1) OF THE PENAL CODE**. As an alternative to each of these two main counts the Appellant was charged with **IMPROPER USE OF LICENSED TELECOMMUNICATION SYSTEM CONTRARY TO SECTION 29(A) OF THE KENYA COMMUNICATION ACT 1998**. A second accused person **ATHUMAN MOHAMED KIBARA** was in the same trial also charged on count No. 3 with the offence of **THREATENING TO KILL**. This 2nd accused was however acquitted by the trial court and thus had no need to file any appeal.

The Appellant entered a plea of '**Not Guilty**' to all the charges which he faced and his trial commenced on 12th August 2008. The prosecution led by **SUPT. MATE** called a total of ten (10) witnesses in support of their case. The prosecution case revolves around a series of threatening messages that were received by two Coast politicians **HON. FAHIM TWAHA** who testified as **PW1** and **HON. ABU CHIABA** who testified as **PW2**. The two politicians represent the neighbouring Lamu East and Lamu West constituencies. Both men knew the Appellant who was also a politician of note in the Coast Province and had severally contested against **PW1** for the Lamu West parliamentary seat albeit without any success.

In his evidence **PW1** told the court that during the period in question an NGO called Malt International had sought to be allocated land in Lamu specifically 150 acres in order to launch a sugarcane growing project. Both **PW1** and **PW2** were against the allocation of the land to the NGO whilst the Appellant apparently supported the move as he claimed it was what the Lamu residents wanted.

PW1 told the court that he received several threatening text messages through his mobile phone No. 0720753444 a Safaricom line. The witness tried to ascertain the identity of the sender but was unable to do so on his own. After the third threatening text message **PW1** felt sufficiently concerned to report the matter at Parliament Police Station in Nairobi. **PW8 ERNEST AGINA** who was attached to the CID Headquarters Cyber Crime Unit as the Head of the Cellular and Computer Forensic Laboratory told the court that acting upon a request from **INSPECTOR ROSE NDUKO PW9**, he downloaded and printed

out the text messages which had been received on the phone of **PW1**. He produced the said printout as an exhibit **Pexb8** as well as the mobile numbers from which the offensive messages had originated. Below is a full transcript of the downloaded messages:

“Fahim wewe ni mshenzi twajua wajifichia nyuma ya husni jua mradi wa malt ni wa manufaa lakini endelea wewe na pururua haujui mume ni nani na mke ni nani. n.

Sender

(no name)

+254721914012

Received

19:19:48

22nd June 2008

ww ni shoga. Sikumoja itafika

Sender

(no name)

+254721914012

Received

19:29:09

22-June-2008

Wajifanya wajua sana aya za Quran lakini matendo yako ni ya kikafiri ulikuja Lamu ukiwa nitajiri sana u want to help people but ur mwizi arthi unazo chukua si za babako mamako wala babu yako. Fadhili watutesa kila upande na kiburi unacho fanya, but let me tell you watu wote Lamu sima shoga wako walofirwa na babu yako Fadhil na yeye hufirwa kama hujui, the only solution now is 2 kill u, na hilo towa shaka tutafanya, na kila yule na wewe

Sender

(no name)

+254721914012

Received

12:56:18

22 July 2008”

It was this third text message that so alarmed **PW1** that he decided to report the matter to Police.

Meanwhile **PW2** also told the court that on 22nd July 2008 while in his house he received a text message through his mobile phone No. 0722410177. The message emanated from a mobile phone number +254713742930 and stated:

“We na Fahim (MP West) muhimu wenu ni kula risasi”

PW2 called his colleague **PW1** who confirmed having also received threatening and abusive text messages. **PW2** also reported the threats to Parliament Police Station. In the case of **PW2** he did not avail his mobile phone to have the text message retrieved and downloaded. He told the court that this was because his mobile hand set fell down and was damaged. After the matter had been reported police commenced investigations to establish the source of these text messages. These investigations led police to the Appellant who was arrested and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed onto his defence. He opted to make a sworn statement in which he totally denied being the source of the offensive text messages. On 27th April 2011 the learned trial magistrate delivered her judgement in which she convicted the Appellant on the main charges on both count Nos. 1 and 2. Following mitigation by defence counsel the court sentenced the Appellant to serve three (3) years imprisonment on each

count. The sentences were to be served concurrently. Being dissatisfied with both conviction and sentence the Appellant filed this present appeal.

In the Petition of Appeal filed on 5th May 2011 the Appellant raised 18 grounds for his appeal. **MESSRS MAGOLO & ODERA** Advocates represented the Appellant during the appeal. **MR. TANUI** learned State Counsel who appeared for the Respondent State opposed the appeal.

The first ground raised by both counsel was failure to comply with Section 223(2) of the Penal Code. That provision of the law required that written consent be obtained from the Hon. Attorney-General before a certain category of offences could be prosecuted. However as Mr. Tanui for the State pointed out, that provision of the law is now obsolete having been repealed by the State Law (Miscellaneous Provisions) Act No. 5 of 2003. As such no legal requirement for written consent existed. This ground of the appeal has no merit and is hereby dismissed.

The trial magistrate convicted the Appellant on Count No. 2 of the charge in which the complainant was the '**Hon. Abu Mohamed Chiaba**'. The particulars of this charge were that:

“On diverse dates between the 22nd day of June 2008 and the 27th day of July, 2008 at Mombasa City in Coast Province, without lawful excuse caused Hon ABU CHIABA to receive written threats to kill the said Hon. ABU CHIABA” [my own emphasis]

In order therefore to prove this charge the prosecution must tender tangible proof of these “**written threats**”. **PW2** told the court in his evidence-in-chief that he received a text message on his mobile phone reading “**wewe na Fahim mnajifanya ni werevu. Hakuna aneyewawa bila kuwa na sababu**”. Without a doubt this was an ominous message. However there was no **written** evidence of this threat. The text message was neither retrieved, downloaded nor transcribed by the police (as was done in the case of messages sent to **PW1**). **PW2** himself explained that the mobile phone on which he received this message fell down and was damaged, thus no text message could be retrieved from it. Thus no tangible evidence exists of this threat to kill issued to **PW2**. For this reason I do find that the evidence on this second count cannot be said to pass muster. No witness who saw and read this message was called to testify. It simply boils down to the word of **PW2** against the denial of the Appellant. The evidence on Count No. 2 did not meet the required standard of proof and a conviction ought not to have been rendered. As such I do quash the Appellant’s conviction on this 2nd count and set aside the subsequent three (3) year term of imprisonment.

With respect to Count No. 1 the situation is somewhat different. **PW1** told the court that he received a series of threats to kill by way of text messages on his mobile phones Nos. 0734654007 and 0720753444. **PW1** further told the court that the number from which these threats emanated was 0721914012. The text messages were retrieved, downloaded and printed by **PW8** an ICT technician then attached to the CID Cyber Crime Unit. He produced the transcript of the offensive messages as **Pexb8**. This transcript clearly shows that the messages were sent by telephone number **0721914012**. The prosecution had sought to link the Appellant to this phone number by way of records obtained from the mobile provider Safaricom. **PW10** a telecom GSM specialist working with Safaricom told the court that the mobile provider is able to capture the IMEI (International Mobile Equipment Identity) number of the mobile phone from which any call or text message has been sent. The IMEI number is an exclusive identifying number (much like a serial number) which identifies each individual handset. The Appellant by his own admission was the registered subscriber of a mobile phone Tel. No. 0722879998. The IMEI number for the Appellant’s handset was found to be 350984203982740. The handset from which 0721914012 was used to send the messages to the number 0720753444 belonging to the complainant was 3500000000000000. Thus it bore a different IMEI number than that of the Appellant phone. No evidence is given to prove that the accused was the registered subscriber of this number 0721914012. The prosecution attempted to link the Appellant to this phone by use of the flow chart **Pexb.12** prepared by **PW10**. This flow chart shows that the same handset IMEI No. 3500000000000000 was used with a sim-card No. 0721206311. Once again no evidence has been tendered to show that the Appellant was the registered subscriber of this phone. All that is revealed is that this number 0721206311 which shared a handset with No. 0721914012 (from which the offensive messages emanated), was in frequent

communication with the subscriber of No. 0722966301. This last number was found to have on occasion been used to communicate with 0722879998 which has been proved to be the Appellant's number.

All this proves that the Appellant frequently communicated with a person who communicated with the subscriber of No. 0721914012 from which the offensive text messages were sent. The identity of these mysterious subscribers was never established by the investigators. The mobile numbers were not registered to any person but more importantly were not registered to the Appellant. This court cannot rule out the very real possibility that the subscriber of 0721914012 independently sent the threatening message to **PW1** without the knowledge or even the input of the Appellant. This link which is merely based on supposition and innuendo is far too tenuous to prove any direct involvement by the Appellant in sending the threatening messages from No. 0721914012.

The other number from which **PW1** said he received a threatening text message was 0713742930. This number (or sim-card) was per the evidence of **PW10** used in a mobile handset bearing IMEI number 350984203982 which was the same IMEI number as the phone registered to the Appellant. As such it would be safe to presume that this particular threatening message was indeed sent from the Appellant's phone. In his defence the Appellant attempts to distance himself from his own handset by claiming firstly that it was often inside his office which is accessible to any member of public and secondly he claims that on a bus trip from Nairobi to Mombasa, he was robbed and his phone was stolen. A mobile phone is a personal item. It is not often left lying around for any person to pick up and use as they please. I do not buy the theory that some stranger wandered into the Appellant's office picked up his phone and sent a threatening message to **PW1**. Secondly although the Appellant claims that the report concerning the bus hijack and theft of his mobile phone was made at Kiboko Police Station, he has not produced either the OB from that police station or even a police abstract as proof that indeed such an incident ever did occur. I do concur with the trial magistrate's dismissal of this defence. The fact that one of the offensive messages was sent from the Appellant's handset, coupled with the fact that by his own admission the Appellant and **PW1** had differences over the malt project in Lamu is proof enough that this message was in actual fact sent by the Appellant. On this I find that the prosecution have indeed discharged their burden of proof. For this reason I do confirm and uphold the conviction of the Appellant on Count No. 1 of the charge.

With regard to sentence the Appellant was a first offender. The trial magistrate did seek and obtain a Probation Report in respect of the Appellant. I have perused the said Probation Report and note that it was favourable in all respects. The complainant did not suffer any physical harm or injury or loss. In my view a custodial sentence was un-called for. An alternative sentence would have sufficed. As such I do set aside the three year term of imprisonment imposed by the trial court. I substitute instead a fine of Kshs.30,000/- in default to serve three (3) years imprisonment.

It is so ordered.

Dated and Delivered in Mombasa this 27th day of November 2012.

M. ODERO

JUDGE

In the presence of:

Mr. Onserio holding brief for Mr. Ondari for State

Mr. Magolo and Mr. Odera for Appellant