



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU

CRIMINAL APPEAL 45 OF 2010

*(From original conviction and sentence in Criminal Case No. 1873 of  
the Chief Magistrate's court at Nakuru – J. N. ONYIEGO, PM)*

**SIMON SUKORIA CHEMONGES.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This is an appeal against the conviction and the sentence imposed upon the appellant by the Principal Magistrate in Nakuru CM Cr. Case No. 1873 of 2007.

In that case the appellant was with another charged with the offence of demanding property with menaces contrary to **Section 302** of the **Penal Code**.

He was charged that on 27<sup>th</sup> September 2006 in Naivasha/Nakuru District within Rift Valley Province jointly with others not before court he demanded with menaces Kshs.120,000/- from Joseph Gichoya Kimani. They pleaded not guilty but after trial the co-accused was acquitted but the appellant was convicted and sentenced to two years imprisonment.

Before filing this appeal the appellant had applied for revision of his conviction on the ground that the court intended to convict his co-accused and not him. As only a copy of the judgment was availed to me I dismissed the application and it is after that dismissal that this appeal was filed out of time with leave of court.

The thrust of the submissions by Mr. Ogolla for the appellant was that the court intended to convict the co-accused but convicted the appellant by mistake. Admitting that there was some confusion in the lower court proceedings Mr. Nyakundi for the state did not oppose the appeal and instead left the matter to court.

I have carefully perused the lower court record. One Yusuf, an inmate at Kamiti Maximum Prison rung the complainant, Joseph Gichoya Kimani of Naivasha and told him that he had been hired to kill him and that he would spare him if he paid him a ransom of Kshs.400,000/-. After some discussion the amount was reduced to Kshs.100,000/- and the complainant was directed to take it to Kamiti Maximum Prison. He reported the matter to Naivasha Police Station where he was given two police officers to accompany him to Kamiti Maximum Prison and arrest that extortionist. After meeting him at the Kamiti Maximum Prison the said Yusuf directed the complainant to take the money to a tall brown man by the name David who was at the kiosk outside that prison. Together with two police officers the complainant proceeded to that kiosk and a man who met the description given went forward and asked for the money from the complainant. As the complainant handed the envelope which contained some money and some pieces of paper the two police officers arrested him. They took him to the main prison office where he was identified as a prison warder stationed at Kakamega who was at Ruiru GK Prison for sports. He was later separately charged with that offence.

It is not clear how the appellant was arrested and also separately charged with the same offence. Later the two cases were consolidated and the combined charged sheet gave the appellant's name as the second accused. Throughout the proceedings except for PW4 who referred to the co-accused by name, the two accused persons were referred to as accused one and accused two.

Isaac Murubi, PW4, was the Deputy in charge of the Condemned Section at the Kamiti Maximum Prison. He testified that on 3<sup>rd</sup> October 2006 at about 1.00 p.m. on instruction of his boss he took the complainant to block G to see the inmate by the name Yusuf. After finishing with him the complainant walked out and after a few minutes he saw CID officers come to the office with one Busolo who was a prison warder at Kakamega attending sports at Ruiru GK

Prison. He learned that the inmate, Yusuf, had tried to extort money from the complainant and had directed that Busolo receives it for him and that is why he had been arrested. In cross examination he said that he knew the appellant who was a fellow warder at Kamiti Maximum Prison in charge of Muslim convicts. Upon finding that the accused persons had a case to answer and calling upon them to defend themselves the record shows that the appellant was the first to testify. He said he is a warder at Kamiti Maximum Prison in charge of the Muslim convicts thus corroborating the evidence of PW4. On 3<sup>rd</sup> October 2006 the inmate Yusuf had told him that there were some donors who were going to bring in some money and food for the Muslim inmates. He waited for them but they did not turn up and he went out of the prison premises. When he returned he was arrested and charged with this offence which he says he knows nothing about.

From the appellant's unsworn statement which I have summarised hereinabove and the testimony of PW4 I am satisfied that the appellant was confused for his co-accused. It could appear that the confusion arose from the appellant and his co-accused's sitting positions in court. Though the appellant was the second accused in the case it could appear in court he sat on the place reserved for the first accused. And as I have stated throughout the proceedings the witnesses referred to the two of them as accused one and accused two. They all pointed an accusing finger at accused two who was David Busolo the tall brown man, the appellant's co-accused. The appellant in this case is short and dark. Throughout his judgment, the learned trial magistrate did not refer to the person he convicted by name but as accused two. I am therefore satisfied that the learned trial magistrate meant to convict the appellant's co-accused whom the witnesses referred to as accused two. Consequently I allow this appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED on this 27<sup>th</sup> day of April, 2010.**

**D. K. MARAGA**

**JUDGE.**