REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 124 of 2009

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CRIMINAL APPEAL NO. 124 OF 2009

ELIAS NDUNGU ……..……... APPELLANT
VERSUS
REPUBLIC ……..……...……. RESPONDENT

JUDGMENT

ELIAS NDUNGU was the third accused person in Eldoret Chief Magistrate's Criminal Case No. 750/2009 wherein he and two others were charged with three counts of demanding money by menaces contrary to Section 302 of the Penal Code. The first accused was found not guilty and was acquitted while the second and third accused were found guilty, convicted and sentenced to serve two (2) years imprisonment in respect of each count with the sentences running concurrently.

This appeal is headed as though it was an appeal brought on behalf of the said third accused Elias Ndungu although clearly the grounds of appeal are couched so as to include accused number two at trial. We are not aware that the 2nd accused ever filed a separate appeal and similarly we are not aware that if that was ever done, whether those appeals were ever consolidated and what appeal number the appeal of the 2nd accused was given. Submissions by counsel, however left no doubt that he was instructed to appeal on behalf of the 3rd accused, this appellant. The heading of the Petition of appeal and the grounds are contradictory and the law clearly does not allow for the filing of a joint appeal. But is this a joint appeal? The heading would suggest not. In the interest of the greater justice and as no prejudice or injustice has been occasioned to the prosecution I will strike out the 2nd accused wherever that appears and consider the appeal in respect of the third accused.

The grounds of appeal are that the appellant was convicted on uncorroborated evidence, that the offence was not proved, the appellant's constitutional rights were breached and that the sentence imposed was harsh and unconscionable since the appellant was a first offender.

In his submissions Counsel for the appellant stated that the appellant's trial was wrongful as he had been held in

police custody for eleven days for an offence where the time allowed is twenty four (24) hours. He further added that the ingredients of menaces were not proved. He relied on various authorities in an attempt to support the point. He finalized his submissions thus, since the offence under S. 302 of the Penal Code was not proved what remained was theft and the trial court did not consider it. That the complainants' evidence was not corroborated and that weakened the case. On sentence he said that the appellant being a first offender a term of imprisonment of two (2) years on each count was excessive as he would serve a total of six (6) years and that would be excessive punishment which would not serve the intended purpose of reforming the appellant.

That appeal was opposed and Mr. Kabaka for the state argued that as the issue of breach of constitutional rights was never raised before the trial court it was now too late in the day to raise the same. The appellant had waived his right by his silence. He said that invoking the name of the D.O while demanding that money and threatening the arrest of the complainants if they failed to pay the money was proof of menaces. He did not think that the sentence was harsh as the appellant could very easily have been handed a ten (10) year term which is the maximum provided.

I have carefully perused the proceeding and judgment at trial. I have subjected the same to a fresh and thorough scrutiny and the following is what I make of it. As concerns the breach of constitutional rights I find from the proceedings that Mr. Sirtuy Advocate represented all the accused persons at trial. That is what the record clearly shows. That being the case and the said Mr. Sirtuy Advocate not having raised the issue of breach before the trial court, that delt a fatal blow to raising the issue again. There are numerous Court of Appeal Judgments on the issue and I am accordingly bound.

I am not aware of a provision of any law which states that the offence under S. 302 of the Penal Code must be proved only by corroborated evidence of witnesses other than the evidence of the complainants and no such provision was made known to me at this appeal. The evidence adduced by the complainants was sufficient to prove the offence as charged and the trial court made no error in so finding.

The offence of demanding by menaces will be proved when menace is shown to have been present in the conduct of the accused. Menace has been held to go hand in hand with the demand. In this case that demand was clearly present and as menace does not have to have its exhaustive definition, I find that this demand was accompanied by menace. The menace need not be expressed for it to be proved – **KAGORI V. R. CRIMINAL APPEAL NO. 26/1967** but in this case it was clearly expressed by the invoking of the name of the D.O and the threat of arrest if money be not given. Those two events are very clear ingredients of menaces. The appellant was one of the people elected as officials of the people living in Beta Farm for the Internally Displaced Persons (IDP Camp). Each family was entitled to receive Kshs. 25,000/= from the government but some received Kshs. 35,000/= in error. It is the amount over and above the Kshs. 25,000/= that the appellant with another demanded refunded saying the D.O had asked for it. The D.O had not asked for any refunds. The complainants were told by the appellant and another that if they did not refund the money they would

be arrested. That was demanding money with menaces and the trial court appreciated the evidence and convicted on it.

The trial court meted out a concurrent sentence of two years for each of the three counts. I am at a total loss as to why counsel for the appellant would submit that the appellant would serve six (6) years. This was not a consecutive sentence. I understand concurrent to mean that the appellant would serve only two years and not the cumulative six (6) years of two years on each count. It was not denied that the appellant was a first offender. He was given a sentence of two (2) years imprisonment for an offence whose maximum term is ten (10) years. Two years is therefore by no standards excessive and unconscionable. The appellant abused his offence of being an official in the IDP Camp which clearly gave him some authority over his fellow displaced persons. In those circumstances the term of two (2) years imprisonment meted out to him, was by his very criminal conduct heavily deserved. The appeal against conviction and sentence is without merit. I dismiss it.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER 2010.

P. M. MWILU
JUDGE

In the presence of:-

Advocate for appellant - Absent
Appellant - Absent
Kabaka Counsel for the State
Andrew Omwenga - Court Clerk

P. M. MWILU
JUDGE