



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL 5 OF 2008

GEORE K. BOKOLE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

George Karisa Bokole, the appellant, was convicted by the Senior Resident Magistrate (F. W. Andayi) at Kaloleni of threatening to kill contrary to section 223 (1) of the Penal Code and sentenced to seven years imprisonment. He has appealed to this court against his conviction and sentence. In a nutshell, the appellant challenges the Learned Senior Resident Magistrate's conviction on the main ground that the same was based on inconsistent, contradictory and unreliable evidence. The appellant therefore contends that the evidence on record did not prove the charge. The appellant has also alleged breach of his trial rights under the Constitution.

When the appeal came up for hearing before me, Mr. Nyamboye, Learned counsel appeared for the appellant while Mr. Onserio, Learned State Counsel, represented the Republic. Mr. Nyamboye submitted that the appellant was convicted on the sole evidence of the complainant who is the appellant's wife as the alleged threat was made at night. In his view, the rest of the evidence relied upon by the Learned Senior Resident Magistrate was hearsay. Counsel further submitted that one of the prosecution witnesses was not recalled for cross examination after he had been stood down by the Learned Senior Resident Magistrate. Counsel further submitted that the Learned Senior Resident Magistrate misdirected himself in accepting past threats which were not the basis of the charge against the appellant.

On sentence, counsel submitted that the same was harsh in the circumstances of the appellant.

Mr. Onserio conceded the appeal on the grounds that one of the witnesses, (PW 2), had not been fully cross examined and yet his evidence was relied upon by the Learned Senior Resident Magistrate in convicting the appellant. It was also Mr. Onserio's view that the Learned Senior Resident Magistrate placed reliance on the evidence of a hostile witness. In his view therefore, the conviction was unsafe.

The particulars of the offence which faced the appellant were that the appellant on the 8th day of February 2007 at about 10.00 p.m., at Kibojoni village, Kaloleni location in Kaloleni District, within Coast Province, without lawful excuse uttered a threat to kill Kadzo Karisa. The brief facts of the case may be stated. The complainant, Kadzo Karisa is the appellant's wife. She testified as PW 1 and told the court that the appellant was given to drunken habits and used to beat and threaten to kill her whenever he was drunk and whenever he did so, he would remind her of her deceased co-wife. She made several reports to the local administration to no avail always blaming his actions on his drinking. On one of those

occasions, the appellant had held a knife over her saying that he would disfigure her and she had ran off to the village elder who had in turn warned the appellant of his actions.

PW 1 testified that on the material date, i.e. 8th February 2007, the appellant threatened her and she reported to the village elder who informed her that he had already warned the appellant about his actions and when she returned home, the appellant again threatened her. She reported to the same village elder the next morning who gave her the same answer. She then reported to the Assistant Chief who summoned the appellant who blamed his behaviour on alcohol and asked for forgiveness. The appellant was however arrested and taken to police station where he was charged as already stated.

PW 2, Simeon Shikari Mbogo, a village elder, also testified for the prosecution. He testified that the previous year he had received report from PW 1 and another that the complainant and the appellant were not peacefully living together whenever he was drunk. The complainant had infact spent the night at PW 2's home. He took the complainant to the appellant the next morning and warned the appellant against his behaviour. That was not to be, because the complainant made another report to PW 2 who proposed to convene an elders council. But even before the counsel could be convened, the complainant made another complaint to him. PW 2 determined that the matter was beyond him.

At the commencement of cross examination, PW 2 was stood down by the court. The record does not show that he was called later for the cross examination to be completed.

Harrison Kazungu, PW 3, was the Assistant Chief, to whom the complainant made her report. He testified that the appellant used to threaten the complainant whenever he was drunk. The threats persisted even after PW 3 retired. He then referred her to his successor.

PW 4, Kahindi Kobole, is the appellant's brother. He testified that he did not know about the case save that the appellant had differed with the complainant. In cross examination, PW 4 denied that the appellant threatened the complainant.

In his sworn testimony, the appellant denied threatening to kill the complainant and stated that the charge was a frame up organized by the complainant, Harrison Kombo and the village elder.

The Learned Senior Resident Magistrate after considering the evidence adduced before him by the prosecution, accepted the complainant's testimony as credible and reliable and sustained the charge. The Learned Senior Resident Magistrate took into consideration the antecedent conduct of the appellant in convicting the appellant and found the conduct admissible under the doctrine of *res gestae*.

I have reconsidered and re-evaluated the evidence upon which the Learned Senior Resident Magistrate relied to convict the appellant as I am duty bound to do. (See **Okeno – v – Republic [1972] EA 32**). Having done so, I must with respect agree with the Learned State counsel that the conviction of the appellant was not based on sound evidence. The appellant was charged with a single threat to kill which was alleged to have been made on 8th February 2007 at about 10.00 p.m. With regard to that single threat the only direct evidence which was adduced was that of the complainant. With respect to that threat the complainant stated as follows:-

“On 8th February 2007, he threatened me again and I went to the elder and reported. He told me that he had warned the accused. He also said that he is a herder and could only find time on a Saturday. When I went home accused threatened me again. I spent the whole night crying. I reported to the elder in the morning. He gave me the same answer. This went on for 3rd day.....”

In cross examination the complainant stated, *inter alia*, as follows:-

“On this incident we did not discuss with elders.....Your brother is aware of the threats. He had (sic) them. He saw you chase me away with my child. The child was also present. He is a witness.”

It is significant that the complainant in her testimony in chief of the incident of 8th February 2007, did not state that the appellant had threatened to kill her. It is also significant in cross examination she stated that the threat had been heard by the appellant's brother and their child who was to be called as a witness. As it came to be, the appellant's brother did not support that testimony when he testified. The child was also not called to testify in support of that testimony.

There are other discrepancies, which render the appellant's conviction unsafe. Starting with the evidence of the appellant's brother, Kahindi Bokole (PW 4); he disowned his statement made to the police. He was not however declared a hostile witness. His entire evidence should have therefore been taken into consideration. Yet, the Learned Senior Resident Magistrate accepted pieces of that evidence which supported the prosecution case and disregarded the testimony which was favourable to the appellant. The treatment by the Learned Senior Resident Magistrate of the entire evidence of PW 4 was improper and had that testimony been fully appreciated, the Learned Senior Resident Magistrate would probably have arrived at a different conclusion.

There is then the testimony of PW 2, Simeon Shikari Mbogo. When the appellant commenced his cross examination of the witness the record is as follows:-

“Court - It is 4.00 p.m. witness stepped down. Cross examination reserved.

Further hearing on 5th September 2007.....”

PW 2 was not called for further cross examination. The record does not show the reason why he was not so called. Yet in his judgment, the Learned Senior Resident Magistrate took his evidence into consideration in convicting the appellant. That was a grave discrepancy as reliance was placed on evidence which had not been taken as by Law prescribed.

In the premises, I have come to the conclusion that the appellant was not properly convicted. Accordingly, I allow his appeal, quash his conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF JUNE 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Matheka holding brief for Nyamboye for the Appellant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

15TH JUNE 2009