



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 974 of 2003

WYCLIFF OKELLO LUNGWILIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2190 of 2000 of the Chief Magistrate's at Nairobi – Mrs. R.A. Mutoka P.M.)

JUDGMENT

WYCLIFF OKELLO LUNGWILI, the appellant, was charged before the subordinate court with the offence of demanding money with menaces contrary to section 302 of the Penal Code. The particulars of offence were that on diverse dates between 20th August 2000 and 14th September 2000 at the National Bank Building in Nairobi within Nairobi Area jointly with others not before court with intent to steal, demanded with menaces Kshs.20,000/= from Ezekiel Komen. He was also charged with two counts of Libel contrary to section 194 of the Penal Code. He was, in addition, charged with a fourth count of failing to execute publishers bond contrary to section 11(1) as read with section 14 of the Books and Newspapers Act (Cap.111 – Laws of Kenya).

After a full trial, he was convicted of count 1 for demanding money with menaces. He was acquitted on the other three charges. He was sentenced to serve o2 years imprisonment. Being aggrieved by the decision of the trial court, the appellant appealed to this court. Before the appeal was heard, the appellant was released on bail pending appeal on 5/10/2005.

At the hearing of the appeal, Mr. Anambo, for the appellant submitted that the appellant was convicted on count 1, for demanding with menaces. PW4, who was alleged to be the complainant, stated in evidence that he never saw George (who was the appellant). Legally, the demand with menaces could not be made by or to a proxy. The magistrate erred in making a finding that the demand was made to PW1 and convicting the appellant that finding. None of PW1 and PW2 were named in the charge sheet as complainants. Counsel submitted that there was no evidence to sustain the charge. The appellant should therefore be acquitted.

Learned State Counsel, Mr. Makura, submitted that the counsel for the appellant argued the appeal on the wrong count. Mr. Mukura contended that the appellant was acquitted of count 1 and convicted on count 2, which was for impersonation. However, the learned State Counsel conceded to the appeal, as the charge of impersonating was not proved beyond any reasonable doubt. Though PW1 stated that the appellant presented himself as a police officer, PW2 and PW3 did not support the allegation. Counsel

further submitted that the Magistrate did not warn herself before convicting on the evidence of a single witness. The evidence was threadbare, and the magistrate failed to give any reason for believing the evidence of the single witness. Lastly, Counsel argued, having acquitted on count 1, the magistrate had no basis for convicting on count 2.

I have perused both the original record and the typed record. It is clear to me that the learned magistrate convicted for count 1, not count 2 as contended by the learned State Counsel. In the judgment, the magistrate stated –

“Hence I find that the prosecution has proved the charge in count I against the accused 1 beyond all reasonable doubt and convict him. However, it failed to prove the charges in court II-IV against him and he is given the benefit of doubt and is acquitted under section 215 Criminal Procedure Code of the same”.

It cannot therefore be said that the magistrate convicted of count 2. The magistrate actually convicted on count 1.

Count 1 is for demanding money with menaces contrary to section 302 of the Penal Code. The particulars of offence were that on diverse dates between 20th August 2000 and 14th September 2000 at National Bank of Kenya Building in Nairobi within Nairobi Area jointly with others not before court with intent to steal demanded with menaces Kshs.20,000/= from Ezekiel Komen. The said Ezekiel Komen was PW4 before the subordinate court. He was Managing Director, Kenya Pipeline Ltd.. His evidence about the Kshs.20,000/= related to what he was told by some of his officers thus –

“I learnt that one George (the appellant) called our office stated that he knew the source of the Newsletter, Cheptumo told me. He George said he could influence the publishers who were about to publish another 3000 copies. I left my officers to continue investigating this case. They told me that George was asking for Kshs.20,000/= so as to influence the publishers. The officers later told me that George was arrested when he went to collect the Kshs.20,000/=. I never saw George this time that this incident happened”

From the above evidence, the charge of demanding with menaces was not proved. First of all, there were no indication of any demand with menaces made by the appellant in the above evidence. Secondly, and most importantly, there was no evidence of any demand by the appellant directed at the complainant who was mentioned in the charge sheet, that is Ezekiel Komen. If the demand was made to other people, those other people should have been mentioned in the charge sheet and the allegation proved by evidence. On both those reasons, the conviction cannot stand. The State Counsel has conceded to the appeal. I will allow the appeal, as the prosecution did not prove its case against the appellant beyond any reasonable doubt.

Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed by the learned trial magistrate. If the appellant is in custody, I order that he be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 21st day of April 2008.

George Dulu

Judge

In the presence of –

Mr. Anambo for appellant - Mr. Biombo holding brief.

Appellant

Mr. Makura for state Counsel

Mwangi - court clerk