REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.1296 OF 1999

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO.1575 OF 1999 OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KERUGOYA)

JOSEPH GITARI NJOKA …….. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

JUDGEMENT

CYRUS KABIRA NJINE (referred to as "the complainant") is a Director of Kimunye Tea Factory and the Chairman of Kirinyaga Tea SACCO. On the 9th April 1998 be received a letter through the Post addressed to him. The envelope bearing his name and address was tendered into evidence as Exhibit No.1 while the letter in question is Exhibit 2. The following are the contents of this letter:

> ***"Mr. C.K. NJINE***
>
> ***KIMUNY E TEA FACTORY***
>
> ***Box 110***
>
> ***KERUGOYA.***
>
> ***Mr. Kabira, Do you know what cato felt? You are really judged. Pay your debt before any initial active action is taken. Remember we are already paid!! Dead line June 1998"***

The complainant suspected JOSEPH GITARI NJOKA the appellant, to have written that letter and when he made a report of this incident to the police, he named the appellant because as the suspect because he is a leader of K.U.S.T.O., an unregistered party that fights Kenya Tea Development Authority. P.C. Patrick Masuki (PW 3) was assigned to investigate this matter. He summoned the appellant to his office at CID Divisional Headquarters Kerugoya and took the appellant's specimen handwriting (Exhibit 3) and appellant's note Book (Exhibit 4) containing known handwriting. He then forwarded them to the Document Examiner for examination which was done by Mr. E. K. Kenga, at CID Headquarters Nairobi. His report was tendered into evidence as exhibit No.5 PW3. The findings of the Document Examiner were that, the questioned handwriting (in the letter Exhibit 2) the standard handwriting i.e. the specimen handwriting taken from the appellant (Exhibit 3) and the known handwriting of the appellant in the Note Book (Exhibit 4) were all by the same hand.

Thereupon the appellant was arrested and charged with the Criminal offence termed Intimidation contrary to section 238 (1) of the Penal Code in the Senior Resident Magistrate's court at Kerugoya in Criminal case No.1575 of 1999. The particulars of this offence were that: On 9th day of April, 1999 at

Kimunye Tea Factory in Kirinyaga District of the Central Province, with intent to cause alarm to Cyrus Kabira Njine, caused the said Cyrus Kabira Njine to receive a letter containing threats to cause unlawful injury to him. The appellant was convicted and sentenced to eighteen months imprisonment on 26th November, 1999. He has now appealed against both conviction and sentence through Mr. Nyakundi Advocate.

A person intimidates another person who, with intent to cause alarm to that person or to cause him to do any act which he is not legally bound to do or to omit to do any act which he is legally entitled to do, causes or threatens to cause unlawful injury to that person, his reputation or property or anyone in whom that person is interested (see Section 238 (2) Penal Code.

With reference to this case it was the prosecution's legal duty to prove beyond reasonable doubt that the appellant, with intent to cause alarm to the complainant, caused or threatened to cause the complainant unlawful injury. The issue is whether the prosecution discharged this burden.

The appellant denied writing the letter Exhibit 2. By so denying its authorship, the appellant challenged the document examiner's Report. It became the first legal duty of the prosecution to prove that the appellant was the author of this letter. This burden never shifted to the appellant.

It is a well established principle of our Criminal Jurisprudence that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist (see Section 107 (1) Evidence Act. The burden lies throughout criminal proceedings on the prosecution to prove the guilt of an accused, and the standard of proof is proof beyond reasonable doubt. An accused person assumes no burden to prove his innocence. Where an accused person elects to give an explanation or raises a defence to a criminal charge he is facing, that explanation or defence is to be considered on a balance of probabilities. If it is probably or possibly true, then an accused is to be given the benefit of doubt and he must be acquitted.

The record of the trial magistrate shows that Police Constable Patrick Masuki, who carried out the investigation of this case, gave evidence on 17th November, 1999. It was on the same day when the complainant gave evidence. It is recorded that the appellant's advocate Mr. Mogusu was absent on that date. Therefore the appellant was unrepresented on 17th November, 1999 when P.C. Masuki (PW 3) produced the Document Examiner's Report as Exhibit 5, it is instructive that the Document Examiner himself Mr. Kenga was not called upon to give evidence.

I accept the general principle of law, embodied in Section 77 (1) of the Evidence Act that in criminal proceedings any document purporting to be a report under the hand, inter alia, of a document examiner submitted to him for examination or analysis may be used in evidence. However, when any each report is so used the court may, if it thinks fit, summon that document examiner so as to examine as to the actual investigative examination which he carried out.

In this particular case, where the appellant had denied the charge and had thus denial authorship of the letter Exhibit 2, more so since the applicant was unrepresented, the learned magistrate ought to have asked the appellant if he wanted to have the document examiner called for cross-examination, or on its own motion, summoned him for such examination.

In this particular case again where the authorship of Exhibit 2 was denied by the appellant, it was necessary to summon the document examiner to explain to the court the particular features of similarity or dissimilarity in the writings of which had been presented to him to examine so as to enable the court to weigh their relative significance. The blanket phrase often recorded I such reports by document examiners, to wit:

"In my opinion the handwriting is by the same hand " lacks detailed features of such similarities and therefore is unsatisfactory and unhelpful to the court.

In HASSAN SALUM V. REPUBLIC 1964 E.A. 126 at page 127 where the summing up of LORD

HEWART in the trial of WILLIAM HENRY PODMORE is quoted at letter H, the said LORD HEWART stated as follows:-

> ***"Let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes rather misunderstood. A handwriting expert is not a person who tells you, this is the handwri ting of such and such a man. He is a person who, habituated to the examination of handwriting practiced in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That, and no m ore than that, is his legitimate province"***

A document examiner cannot say with definite certainty that anybody wrote a particular thing. All he can do is to point out the similarities in the specimen handwriting, standard handwriting and known handwritings and draw conclusions from them. This is the manner in which expert evidence on matters of this kind ought to be presented to court, whose duty is then to make a decision.

SPRY J (as he then was) said in HASSAN SALUM V, REPUBLIC (Supra) at page 128 letter c:, which passage is relevant to this appeal:-

> ***"I think the expert witness, and possibly also the learned magistrate, may have fallen into error of treating handwriting evidence on the same booking as fingerprint evidence. There is a presumption that no two persons have identical fingerprints, but there is no presumption that no two persons have similar handwriting"***

For the foregoing reasons there was, in my view, inconclusive evidence before the learned Magistrate to show that the appellant authored this letter (Exhibit 2).

Assuming that the prosecution had proved that this appellant had in fact authored exhibit 2, which it had failed to do, it had the second duty to prove that the contents thereof left no doubt that the appellant had threatened, in that letter, to cause unlawfully injury to the complainant, so as to amount to intimidation.

I have had the liberty to reproduce the contents of exhibit 2 hereinabove. I have studied the said contents over and over again. I am unable to deduce any threats in this letter to cause unlawful injury to the complainants. If the appellant had such intentions, he did not record them in this letter. It cannot be said by any stretch of imagination that the words: " pay your debt before any initial active action is taken. Remember we are already paid. Deadline June, 1998" means and could only mean that the appellant threatened to cause unlawful injury to the complainant.

For the above reasons I hold that the essential ingredients of the offence of intimidation contrary to section 238(1) Penal Code were not proved beyond reasonable doubt and the appellant's conviction was unsafe.

I accordingly quash his conviction and set aside the sentence of eighteen months imprisonment.

It is so ordered.

Dated at Nairobi this 31st August, 2001.

A.G.A. ETYANG

JUDGE