



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 23 OF 2020

DEKOW ALI ABDIKARIM.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the decision of Honourable P. W. Wasike, Senior Resident Magistrate at Mandera, in Senior Principal Magistrate's Court Criminal Case No. 516 of 2019)

JUDGEMENT

1. This is an appeal arising from the sentence and conviction of Hon. Wasike S.R.M. Mandera in Criminal Case No. 516 of 2019 where the appellant Dekow Ali Abdikarim was charged with the offence of threatening to kill contrary to Section 223(1) of the Penal Code.
2. The particulars of the offence are that on the 9th of November 2019 at Shafshafey area in Mandera East Sub-County within Mandera County without lawful excuse while armed with a rungu he threatened to kill Bare Kobane Mohamed my uttering the words "wakudila" which in Kisomali means I will kill you.
3. The appellant denied the charge, the matter proceeded for trial, he was convicted and sentenced to six (6) years imprisonment.
4. Dissatisfied with the Judgement the Appellant preferred an appeal to this court on grounds summarized as follows;-
 - **The trial court considered extraneous matters and failed to consider the appellant's mitigation.**
 - **The proceedings leading to the Judgement resulted into a miscarriage of justice.**
 - **The trial court did not critically examine the evidence before it; and**
 - **The trial court failed to consider the appellant's age and the period served in custody pending hearing.**
5. The prosecution case against the appellant is that on the 9th of November 2019 at about 7 am the complainant while coming from work as a watchman, met the appellant who was riding a cart and armed with a rungu while in the company of PW2, when the appellant accused the complainant of having stolen his sim card and threatened to kill the complainant unless he returned the same. PW2 restrained the appellant.

The complainant who had a previous such incident with the appellant reported the matter to the police leading to the arrest of the appellant who was serving Probation on the other a similar offence having previously threatened the complainant.
6. On appeal the appellant made oral submissions. Still pleaded his innocence and denied he is a man of ungoverned temper. He informed the court that he has served 1 year of his jail term and served 10 months in custody awaiting trial.
7. The State opposed the appeal and supported both the sentence and conviction. The State however had no issue with consideration of Section 333(2) of the Criminal Procedure Code. The State also on second thoughts conceded that the 6 years meted out was too severe.
8. From the evidence on record from both the complainant and the appellant the two had a long outstanding issue between them. The appellant was previously convicted of a similar offence and at the commission of the offence subject matter of this appeal he was still serving his probation period.

9. From the evidence of PW2 and PW4 it is evident that the appellant threatened the complainant. PW4 the arresting officer further informed the court that the threats continued even after the arrest.

10. In my view the prosecution was able to prove its case against the appellant and therefore the conviction was safe.

11. The trial court called for a Probation report. The same was not favourable to the appellant and it disclosed that he did not obey the conditions on the first probation hence the non-custodial sentence.

12. This court however finds the sentence of six years too harsh in the circumstances of the case.

Further the court notes that the 10 months the appellant served in custody were not considered while being sentenced.

13. Consequently, this court sets aside the sentence of 6 years imprisonment.

The court considers the age of the appellant, the time served in custody awaiting trial and substitutes the jail term of 6 years with a jail term of 2 years.

The appellant having served the two years, is hereby released with a stern warning that he must at his age govern his temper. As they say in Kiswahili "*Hasira ni hasara*". The period in custody should be a lesson to him.

He may go home unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 1st DAY OF JULY, 2021.

.....

ALI-ARONI

JUDGE