



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**HIGH COURT CRIMINAL APPEAL NO. 36 OF 2019**

**KEYTH MUTUA MWANZA alias MULI MAKONGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*Being an Appeal vide Mutomo Senior PrincipaL*

*Magistrate's Court Criminal Case Number 398 of 2018.*

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**J U D G E M E N T**

1. **“Witches are real”** is a street mantra that aptly describes the background of this case where the Appellant herein, **Keyth Mutua Mwanza Alias Muli Makonge** was charged with two counts namely:-

(i) Demanding property with menaces contrary to **Section 302 of the Penal Code** with particulars that, between 20<sup>th</sup> July, 2018 and 21<sup>st</sup> July 2018 at unknown place within the Republic of Kenya demanded Kshs. 45,606 from Frocinder Bahati Musingi by falsely pretending that he was in a position to prevent her from bewitchment.

(ii) He was also charged with money laundering contrary to **Section 3(b) (1)** as read with **Section 16(1)** of the proceeds **of the Crime and Anti Laundering Act No. 9 of 2009**. The particulars were that on diverse dates between 20<sup>th</sup> July 2018 and 21<sup>st</sup> July 2018 at unknown place performed an act to conceal the real recipient and movement of Kshs. 45,606 by using a fraudulently registered M-pesa account Number 0718xxxx in the name of Muli Makonge to receive the said money.

2. The charges were preferred against the Appellant vide Mutomo Senior Principal Magistrate’s Court Criminal Case Number 398 of 2018 where upon trial, the Appellant was found guilty and convicted on both count and sentenced to serve 10 years in each count with the sentences running concurrently.

3. The Appellant felt aggrieved and preferred this appeal raising five grounds. I will look at evidence presented during trial at the Lower Court before I consider the grounds raised in the petition of appeal.

4. Frocinder Bahati (PW1), the Complainant in the case testified at the trial court that on 20/07/2018 at around 2 PM she was informed by a person who called her using mobile No. 0718xxxx and told that her child and herself would die out of witchcraft unless he send money via M-pesa to that line for a witchdoctor to undo what some sorcerers had alledgedly done. According to her, she first send Kshs. 4,300 but the caller kept on demanding more and more which totalled to Kshs. 45,606 all sent through 0718xxxx. When the Complainant realised she was being played, she reported to the Chief who informed her that he knew the culprit because apparently the Appellant was a known fraudster in the area.

5. The Area Chief Patrick Kenyatta Mulu (PW2) testified and corroborated the evidence of PW1. He testified that the Appellant was using a mobile number registered in the name of Muli Makonge to perpetrate some fraud. He told the trial court that he had received a report on 25/5/2016 from a lady known as Regina who had been conned of Kshs. 20,000 by the same person using the same line. The Chief testified that due to the number of Complaints made against the Appellant, from 2012 (when he used his wife’s number), he had come to know him well. He testified that he assisted the Director of Criminal Investigations Officer-Kitui to trace the home of the Appellant after being notified that they were tracking him. He testified that the Appellant was eventually arrested on 4/10/2018.

6. Muli Makonge (PW3) testified that he lost his identity card in 2015 and that attempts to trace it was in vain forcing him to get a replacement in 2019. He did not know that another person had found his lost identity card and began using it until he was alerted by the Police due to the case involving the complainant.

7. PC John Ndubia (PW4) on his part testified that he investigated complainant who had been conned a total of Kshs. 46,100 which she paid instalments because she had a sick child and was conned that the money was needed to get a remedy. According to him the line used by the fraudster in demanding money had been registered in the name of Muli Makonge identity card No. xxxx. He testified that their investigation led them to a town known as Mosa and that when they inquired from the Area Chief if he knew the person using the name Muli Makonge, the Chief informed them that he knew the culprit and that he was using the name Muli Makonge to steal from people. He testified that their first attempt to arrest him backfired after the suspect got wind of the imminent arrest and escaped. The 2<sup>nd</sup> attempt yielded fruit and that they arrested him and got an identity card with the actual true name of the Appellant.

8. The Investigating Officer further testified that when he carried out further investigation, he noted that M-pesa line 0718xxxx that was registered fraudulently by Appellant using Muli's lost Identity card and had received money from the complainant before the same was forwarded to the Appellant. He tendered a print out from Safaricom showing the movement of money from the complainant to the line registered fraudulently and eventually to the Appellant's legitimate line. He further testified that they conducted a search in the Appellant's house and recovered an Identity card belonging to the Appellant and a broken mobile phone.

9. When placed on his defence, the Appellant denied the offence. He testified that there was no proof that he was the person who has called the complainant and demanded the money. He faulted the prosecution for not providing sound recordings to show that he was the one who had called.

10. He further faulted the Area Chief for not providing proof of his past misdeeds and that Muli Mukonge did not show a police abstract to show he had lost his original Identity card. He insisted that a search conducted at his house did not yield anything. He denied using mobile number 0718xxxx and that the allegation that he had swallowed the sim card of the said line was not proved.

11. The trial court evaluated the evidence tendered and found that the evidence tendered, sufficiently proved that the Appellant was guilty as charged and proceeded to convict him. The trial court found that from the M-Pesa Print out it was clear that the Appellant used a fraudulently registered line to conceal the crime and used menaces to obtain money from the Complainant.

12. The Appellant felt aggrieved and filed this appeal raising the following grounds namely:-

*(i) That the trial Magistrate erred by convicting him by relying on the evidence of PW3 whose evidence he claims were hearsay.*

*(ii) That the learned trial Magistrate erred by relying on Safaricom data which he claims was insufficient evidence to sustain a conviction.*

*(iii) That the trial Magistrate erred by not considering that the evidence of Investigating Officer was not watertight.*

*(iv) That the M-Pesa statement tendered had no authenticity.*

*(v) That the trial Magistrate failed to note that Muli Makonge had no Police Abstract to prove to lose of his Identity Card.*

13. In his written submissions dated 17<sup>th</sup> May 2021, the Appellant submits that the evidence tendered against him was insufficient to sustain a conviction. He contends there was no evidence that the person who called the Appellant on 20.7.2018 was him. He wondered why the Complainant sent the money to a person named Muli Makonge yet the person who had called her had introduced himself as Quick Kinyamasyo.

14. The Appellant submits that both the Complainant and Muli Makonge did not know him and there was no evidence tendered that showed that the caller had assured the complainant that he would protect her child from witches.

15. He contends that the Area Chief (PW2) is the one who implicated him on account of past misdeeds but faults the Chief for not adducing evidence to prove those past misdeeds.

16. He further submits that, the ingredients forming the offence in respect to 2<sup>nd</sup> count were not established. He submits that the 2<sup>nd</sup> Count was improperly preferred against him because it could have been a case of mistaken identity arguing that his full names are Keyth Mutua Mwanza, while the money transferred of the line registered in the name of Muli Makonge was sent to Keyth Mwanza. He faults the Investigating Officer for not establishing that the line belonging to Keyth Mwanza was registered by him and that, that failure left doubts about the two set of names and as it was doubtful if the 2 sets of names referred to one and the same person. He submits that it was unsafe to convict him in the face of such doubts.

17. He contends that the ten-year sentence was manifestly recessive for a first offender.

18. The State/Respondent through the Office of the Director of Public Prosecution has opposed this appeal vide written submissions dated 3<sup>rd</sup> September 2021. The State contends that in respect of the 1<sup>st</sup> count i.e. the offence of demanding money with menaces contrary to **Section 302 of Penal Code**, the elements of the offence were proved.

19. The State has cited the decision in **Samuel Alwenda Oyani versus Republic [1993]eKLR** to support its contention. In that case the court held that for a charge under **Section 302** of the **Penal Code** to be sustained the following essential elements must be proved:-

*(i) That the accused demanded a valuable items from some person.*

*(ii) That the demands were made with menaces.*

*(iii) That the demand was made with intention to steal.*

20. That state has paraphrased the evidence tendered by the Complainant (PW1) and argued that from the evidence, it is evident that a demand totalling Kshs. 45,606 was made to the Complainant and that the Appellant kept asking for the money to buy “*pig tails*” among other tricks which were meant to alarm the complainant in order to send the money. The Respondent cites the decision in ***Samuel Alwenda Oyani versus Republic [1993] eKLR*** where the court gave the following meaning of the word “*menaces*”.

21. The State submits that the Appellant demanded money with menaces when he tricked the Complainant that her sick child would die unless he complies with his demand to send money and that because the Complainant did not want her child to die, she gave in and sent the money. It submits that the Appellant demanded the money and obtained it fraudulently with intent to steal and has relied on the M-Pesa transaction statement as proof of the same.

22. The State contends that the Appellant was identified positively after the police managed to trace him to Mosa area where with the assistance of the Chief he was arrested.

23. This court has considered this appeal and the response made. As I have observed above, the Appellant was charged and convicted of two counts namely:-

*(i) Obtaining property with menaces.*

*(ii) Money laundering.*

24. With respect to the first count, the Appellant faults the trial court by relying on the evidence of PW3 which he claims were hearsay evidence.

25. I have re-evaluated the evidence of Muli Makonge (PW3) the person who lost his Identity Card and whose Identity Card was used by the Appellant to perpetrate fraud. The witness testified that his Identity Card got lost in 2015 and though no evidence was tendered to show whether he obtained a Police Abstract after reporting the loss, he told the trial court that he obtained a new Identity Card unbeknown to him that his lost Identity Card had fallen into wrong hands. He gave his Identity Card Number as number xxxx which the Investigating Officer confirmed was the Identity Card number of the Muli Makonge. I do not find the evidence of PW3 to be hearsay because he testified on what he did after losing his Identity Card. There was no doubt that he was the actual Muli Makonge whose name and Identity Card was being used by the Appellant to conceal his true identity. The complainant clearly testified that when he first sent the first batch of the amount demanded by the Appellant the name that appeared was that of Muli Makonge.

26. The M-Pesa transaction statement tendered by Investigating Officer (PW4) as P Ex 1 supports or corroborates the evidence adduced by the complainant (PW1). That evidence was relied by the prosecution and it was direct evidence and not hearsay as submitted by the Appellant.

27. I am also not persuaded that the evidence (P Ex 1) obtained from Safaricom M-Pesa Statement from the line that was fraudulently registered was insufficient. The trial court evaluated that evidence well and arrived at the correct conclusion that the Appellant had used the lost Identity Card belonging to Muli Makonge to fraudulently register a line to conceal his crime.

28. It is true that the Complainant should have perhaps be more cautious when she noticed that while the caller had identified himself as Kinyamasyo, the name that popped up when she sent money through M-Pesa was that of Muli Makonge. This court however takes judicial notice of the fact that in this region when a matter of witchcraft is raised, it sends shivers down the spines of many residents. As I observed at the beginning of this judgement, the street mantra “*witchcraft is real*” aptly captures the reality on the ground in this County of Kitui. The Appellant well aware of that notoriety took the chance and used it to cause and drive fear into the complainant which perhaps explains why she was able to send Kshs. 45,606 in tranches of Kshs. 5,700, Kshs. 4,300, Kshs. 4,200, Kshs. 5,000, Kshs. 6,084, Kshs. 2,400, Kshs. 1,028, Kshs. 5,000, Kshs. 4,046 and Kshs. 1,700. This court is satisfied that the Appellant used menaces to get that sort of money sent via many transaction all captured by M-Pesa Statement. The Court of Appeal decision in the cited case of ***Samuel Alwenda Oyani versus Republic (Supra)*** is a well guiding in that respect.

29. The Appellant has stated that the Investigating Officer should have done more investigation to establish if Keyth Mutua Mwanza was the same person as Keyth Mwanza. While I agree that the Investing Officer should have done a little more in the forensic investigation to put the matter to rest, I am satisfied that the Prosecution’s case against the Appellant was overwhelming. Keyth Mutua Mwanza is the same person as Keyth Mwanza. The two set of names refer to one and the same person-the appellant herein.

30. It is clear that the Area Chief (PW2) knew the Appellant well and when the Investigating Officer tracked the use of fraudulent line he traced it to Mosa Town where the said Chief directed them to the home of the Appellant. The Appellant apparently got wind of his imminent arrest and that explains why he was able to escape the arrest but only for a while. I find that the prosecution should have done more by connecting the destruction of the Appellant’s mobile phone recovered in his house with attempts to destroy evidence but that notwithstanding, I am still satisfied that the prosecution’s case met the threshold of proof beyond reasonable doubt in respect to the first count. The Appellant’s intention in using a fraudulent line was clear. He intended to steal money from the complainant. It is true that the evidence from the Chief regarding Appellant’s past misdeeds of defrauding other victims were not proven but his conviction was not in respect of his past but money he obtained by menaces from the complainant.

31. In regard to the second count, that is the offence of money laundering, a look at what the section provides will bring the facts in this instance and the charge in the correct perspective. **Section 3 (b) (i) of Proceeds of Crime and Anti-Money Laundry No. 9 of 2009**

provides:-

**“A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect it to conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof.”**

32. It is clear from the above that the ingredients of the offence are as follows:-

**(i) The accused person should know or ought to have known that the property/money formed part or is proceeds of crime.**

**(ii) The accused did an act aimed at concealing or disguising, the nature, source or movement of money or property.**

33. This court has re-evaluated the evidence tendered at the trial court and I am satisfied that the trial court evaluated the evidence well and arrived at the correct conclusion. The amount of Kshs. 45,606 sent to the Appellant was proceeds of crime. The money was obtained by Appellant from Complainant by means of menaces. The recipient of the money was concealed by the Appellant via fraudulent use of someone's lost Identity Card and name. The Appellant did this in attempt to conceal his tracks but the Director of Criminal Investigations Officer (PW4) unearthed the same through the M-pesa Statement tendered as P. Ex1.

34. I am satisfied that the Appellant despite trying to conceal his tracks, was positively identified despite the fact that the Complainant did not know him, the tricks used which I have observed above was a mixture of threats of witchcraft and other tricks worked and that is why the Complainant sent Kshs. 45,606 to him despite not knowing him. I am persuaded by the Respondents contention that the movements of money from the M-pesa Statements tendered showed beyond doubt that the Appellant was involved in obtaining money illegally and concealing the actual true receipt.

The prosecution's case was proved to the required standard in respect to the second count.

35. From the foregoing, this court finds that the conviction of the Appellant was safe because the evidence tendered was sufficient to support both the counts.

36. In respect to the sentences meted out, I agree with the Respondent that the sentence prescribed by **Section 16 (1) (a) of Proceeds of Crime and Anti Money Laundering** is upto 4 years. While Count I attracts a sanction of upto 10 years imprisonment. The Appellant states that the sentence was excessive and harsh but I find that in meting out the sentences, which were to run concurrently, the trial court exercised his discretion well. I do not find any basis to interfere with the discretion of the trial court.

37. In the premises, for the aforestated reasons, this court finds no merit in this appeal. The same is disallowed. Both the conviction and sentence are upheld.

**DATED, SIGNED, AND DELIVERED AT KITUI THIS 10<sup>TH</sup> DAY OF NOVEMBER 2021.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**