



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.35 OF 2019

(An Appeal arising out of the conviction and sentence of Hon. J. Kamau - SRM

delivered on 18th February 2019 in Kibera CM. CR. Case No.4741 of 2014)

MARTIN NG'ANG'A KAMANU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Martin Ng'ang'a Kamanu was charged with the offence of **threatening to kill** contrary to **Section 223(1)** of the **Penal Code**. The particulars of the offence were that on 18th September 2014 at Ngure Village in Nairobi County, without lawful excuse, threatened to kill Anne Wangari Kamanu. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve three (3) years imprisonment. He was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he was convicted despite the fact that the prosecution had failed to prove the charge. The Appellant faulted the trial magistrate for failing to appreciate that the evidence adduced by the prosecution witnesses was fraught with contradictions and malice. The Appellant accused the trial court for failing to take into account the fact that there was an existing land dispute between the complainant and the Appellant that precipitated the filing of the complaint with the police. The Appellant was aggrieved that his cogent and plausible defence was not taken into consideration before the trial court reached the impugned decision. He was of the view that the custodial sentence of three years imprisonment imposed was harsh and excessive in the circumstances. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, the court heard oral rival submission made by Mr. Kanyi for the Appellant and by Ms. Kimaru for the State. In his submission, Mr. Kanyi noted that the Appellant was convicted on the basis of contradictory evidence that could not sustain a conviction. He observed that the Appellant was initially charged with the offence of creating disturbance likely to cause a breach of peace but the charge was later substituted with the offence that he was convicted of. He submitted that the dispute between the Appellant and the complainant was a family dispute over land that was criminalized. Learned counsel stated that the claim by the complainant to the effect that the Appellant had attempted to kill her by driving his motor vehicle into her door was not established. There was no evidence that indeed the Appellant aimed at hitting the complainant using the motor vehicle.

The allegation that the Appellant's motor vehicle sustained broken indicator lights during the alleged incident was not established. He wondered why the complainant, if the complaint was genuine, took three days before she reported the incident to the police. He pointed out a curious fact that even though the complainant alleged that there was an altercation, no neighbours were called to testify for the prosecution in the case. The actual words that the Appellant is alleged to have uttered to threaten the complainant was not clear. Learned counsel submitted that the trial court overlooked the fact that there existed a long standing land dispute between the Appellant and members of his family which ought to have informed the court before it reached the verdict that the Appellant was guilty of the offence that he was charged with. The evidence adduced by the prosecution witnesses was contradictory and inconsistent which was a pointer to the fact that the complaint was lodged as a result of malice and the existence of a grudge. As regard sentence, learned counsel submitted that the trial court ignored the probation report which clearly established that the Appellant was suitable to be sentenced to serve a non-custodial measure. In the premises therefore, he urged the court to allow the appeal.

Ms. Kimaru for the State opposed the appeal. She submitted that the prosecution established to the required standard of proof that the

Appellant intended to kill the complainant. The Appellant drove his car towards the family compound and then reversed into the door to the complainant's house. This was clear indication that the Appellant wanted to harm the complainant. During the course of the incident, the Appellant uttered words to the effect that he was going to kill the complainant. According to learned prosecutor, the Appellant's conduct was consistent to that of someone who wanted to harm the complainant. The Appellant later followed the complainant to the farm where she was watering her plants and pushed her. While conceding that there existed bad blood between the complainant and the Appellant, learned prosecutor urged the court not to be distracted by this fact and reach the verdict that the prosecution indeed proved that the events narrated by the prosecution witnesses actually occurred.

As regard the allegation by the Appellant that the evidence adduced by the prosecution was inconsistent and contradictory, she submitted that such inconsistency and contradiction were minor and did not discredit the thrust of the prosecution's case. She was emphatic that the prosecution established to the required standard of proof beyond any reasonable doubt the charge that was brought against the Appellant. She pointed out that, taken in the context of the evidence that was adduced which was to the effect that the Appellant had uncontrollable temper, it was clear that the Appellant committed the offence. She urged the court to dismiss the appeal both on conviction and sentence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution proved the charge of **threatening to kill** contrary to **Section 223(1)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

Section 223(1) of the **Penal Code** provides thus:

“Any person who without lawful excuse utters, or directly or indirectly causes any person to receive, a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years.”

The prosecution was required to establish the following ingredients of the charge: that the Appellant without lawful excuse uttered words which amounted to a threat to kill the complainant. The uttering of these words must be made in the context that the complainant perceives that he is under threat of losing his life. The context must come out in the evidence that will be adduced by the prosecution witnesses and the explanation given by the accused in his defence.

In the present appeal, it was the prosecution's case that the Appellant not only uttered words to the effect that he was going to kill the complainant, but put into action the threat by reversing his motor vehicle into the complainant's door and thereby damaging it. *What was the context of this case?* The Appellant and the complainant are brother and sister. They reside in the same compound but in different houses. Within the same compound, is the house of PW3 Mary Njeri Kamanu, their mother. From the evidence adduced, it was clear that there existed a long standing land dispute between the Appellant and his mother. The dispute related to the desire by PW3 to sell part of the land where the family was residing.

According to the Appellant, the land was ancestral and therefore could not be sold. On the other hand, it was PW3's contention that since she purchased the particular land, she had the right to sell the same without reference to the Appellant. This dispute has spawned several criminal cases. From the evidence, it emerged that three criminal charges had been lodged against the Appellant. The charges were mostly related to the offence of creating disturbance likely to cause a breach of peace. It was apparent that in so far as the outcome of the charges lodged against the Appellant was not custodial sentence, more criminal charges of a similar nature were laid against him. It was clear that PW3 wanted to get the Appellant out of the way so that she could achieve her objective of selling the land. Indeed, PW3 succeeded in selling the land during the pendency of the Appellant's trial. The Appellant has always been consistent in asserting that the charges brought against him were fabricated with a view of getting him out of the way so as to enable his mother sell the land. That is the context.

What was the evidence that was adduced by the prosecution to support the charge that the Appellant threatened to kill the complainant? The evidence adduced by the prosecution witnesses, and confirmed by the Appellant in his defence, was that on 18th September 2014, there was an altercation between the Appellant and his sister, the complainant. There has been a long running animosity between the Appellant and the complainant. In the assessment of this court, the animosity arose from the fact that the Appellant formed the view that the complainant supported their mother in the land dispute. On the particular day, according to the evidence, words were exchanged between the Appellant and the complainant. The Appellant called the complainant a dog.

During the course of the argument, the Appellant sought to park his car. This is where the testimony of the complainant is at variance with that of the Appellant. Whereas the complainant testified that the Appellant deliberately reversed his car into the door of her house, it was the Appellant's testimony that the complainant deliberately left the door open while he was reversing the vehicle. The vehicle crushed the door. The vehicle was being driven at a low speed. It did not cause any considerable damage to the door. The door was made of steel. It was not clear from the evidence where the complainant was at the particular time that the Appellant was reversing his car into his parking position within the compound. Furthermore, the motor vehicle that was the subject of the charge was not produced into evidence to establish that it was damaged during the incident. The thrust of the prosecution's case to the effect that the Appellant deliberately reversed the vehicle with a view to aiming at the complainant was not therefore proved. The complainant was nowhere near the motor vehicle when it was being reversed in the family compound.

It was the prosecution's case that the Appellant's behaviour of being temperamental supported the prosecution's case that he intended to kill the complainant on the material day. *Is this assertion supported by evidence?* PW2 and PW3 both testified that on the material day they were in close contact with the Appellant. The Appellant was not armed with any weapon. In fact, PW3 testified that when she heard of the altercation between the Appellant and the complainant, she went to the Appellant's house. She confirmed that she was not in fear of her life when she went to see the Appellant. In the discussion she had with the Appellant, the Appellant insisted that the complainant was behaving foolishly and her foolish behaviour could lead to her death.

In the assessment of this court, this conversation does not amount to someone threatening to kill another. PW2 testified that the Appellant followed her to her nearby garden where she was watering her plants. The altercation continued resulting in the Appellant pouring water on her. *Is this an action of a person who wanted to kill?* This court has its doubts. The Appellant's conduct on the material day is completely at variance with the charge that was laid against him. The prosecution failed to establish to the required standard of proof that indeed the Appellant uttered any words showing his intention to kill the complainant.

The upshot of the above reasons is that the appeal lodged by the Appellant has merit. It is hereby allowed. His conviction is quashed. He is acquitted of the charge. The sentence that was imposed against him is set aside. He is ordered set at liberty forthwith. Since the Appellant was released on bail pending the delivery of this judgment, the sum that he deposited in court to secure his release shall be refunded to him. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF MAY 2020

L. KIMARU

JUDGE