REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 14 OF 2015

NICHOLAS GISEMBA SITINO.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. J. W. Onchuru – PM dated and delivered on the 19th day of June 2015 in the Original Nyamira Principal Magistrate's Court Criminal Case No. 119 of 2013}

JUDGEMENT

The appellant was sentenced to two (2) years imprisonment for threatening to kill contrary to Section 223 (1) of the Penal Code. The particulars of the charge were that on 9th January 2013 at Nyangoge in Nyamira District within Nyamira County without lawful excuse he uttered words in Ekegusii meaning "Abuga why do you allow John to enter your house? I will go and hire thugs from the scheme to come and kill John Nyang'au Nyabate." He pleaded not guilty to the charge.

The prosecution called four witnesses while the appellant made an unsworn statement and the court upon considering and evaluating the evidence found him guilty and sentenced him to two (2) years imprisonment.

Being aggrieved he preferred this appeal. The appeal filed through Bosire Gichana & Co. Advocates is premised on grounds that: -

> **"1. The learned trial magistrate equally erred in law and fact by failing to appreciate that the prosecution had not discharged it's onus proof against the Appellant.**
>
> **2. The learned Magistrate erred infact and in law in shifting the burden of proof to the Appellant.**
>
> **3. The learned Magistrate misdirected himself infact and law by not attracting requisite weight on the defence in total.**
>
> **4. The sentence imposed was manifestly excessive in the circumstances."**

The appellant prays that his conviction be quashed or substituted and the sentence thereon be set aside and/or varied.

On 31st July 2015 the appellant was released on bond pending appeal. The appeal which is vehemently opposed was canvassed by way of written submissions.

I have considered the rival submissions but as is required of a first appellate court, I have also re-considered and evaluated the evidence before the trial court so as to arrive at my own independent conclusion. In doing so I have borne in mind that I did not see or hear the witnesses give evidence and made provision for that. **(See Okeno Vs. Republic [1972] EA 32.**

As correctly submitted by Counsel for the appellant given the definition of this offence, the prosecution was required to prove the following elements beyond reasonable doubt: -

i. That the appellant uttered the words complained of.

ii. That he did so without lawful excuse.

iii. That he directly or indirectly by those words whether in writing or not caused the complainant herein to receive a threat.

iv. That the threat was to kill him, the complainant.

I am satisfied that all those elements of the offence were proved beyond reasonable doubt. The complainant was in the house of William Kangwana Abuga (Pw2) for whom he had stood surety when the appellant with whom he had another case uttered those words to William Kangwana. The complainant heard him while he was in his house. Since he knew him he recognized his voice. The appellant's words were also heard by Kangwana (Pw2) and his son Charles Abuga (Pw3) who was resting in his own house. It was in broad daylight and these witnesses knew him well. Their evidence was consistent and I am satisfied it was credible. The appellant's submission that the trial magistrate shifted the burden of proof to the appellant has no basis. The appellant made an unsworn statement which unlike the sworn testimonies of the prosecution witnesses is of little probative value as it was not tested through cross examination. In **May Vs. Republic [1981] KLR 130** the Court of Appeal held: -

> **"1. An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."**

The unsworn statement of the appellant did not sway the evidence of the prosecution witnesses which as I have stated was cogent and credible. Although the complainant conceded there was a land dispute between his father and the appellant it is clear from the evidence that that was not used to fabricate evidence against the appellant. It is however evident that the land dispute was the genesis of the threats uttered by the appellant to the complainant. The charge was proved beyond reasonable doubt. The appeal on conviction has no merit and it is dismissed.

On the sentence, the complaint is that it was manifestly excessive in the circumstances. The sentence prescribed for the offence is ten (10) years imprisonment. In sentencing the appellant, the court took into consideration that the appellant was a first offender and his mitigation that he had 3 young children and was a widower and the sole bread winner of his family. Given the circumstances and nature of the offence it is my finding that the sentence of two (2) years imprisonment was fair and reasonable. It is also lawful as it does not exceed that which is prescribed in the law for that offence. The appeal on sentence is also dismissed.

Accordingly, the bond granted to the appellant is cancelled and he shall be taken into custody to serve his sentence.

Right of appeal to the Court of Appeal explained.

Signed, dated and delivered in Nyamira this 14th day of March 2019.

E. N. MAINA

JUDGE