



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 27 OF 2018

LUL ABDI DOBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 15 of 2017 by the Senior Resident Magistrate - Hon. J M Wekesa delivered on 15th August, 2018 at Kakuma)

JUDGMENT

1. The appellant LUL ABDI DOBE was charged with the offence of threatening to kill contrary to section 223(1) of the penal code the particulars of which were that on 30th day of September, 2017 at Kalobeyei village 2 Resettlement camp in Turkana West Sub-county within Turkana County uttered **“I WILL HIRE TURKANA MEN WITH RIFLES TO KILL YOU AT NIGHT” threatening to kill MOHAMED SAHANE MUKTAR.**

2. She pleaded not guilty to the said charge, was tried, convicted and sentenced to pay a fine of Kshs.100,000/= and in default to serve two years in jail. Being dissatisfied with the said conviction and sentence she filed this appeal and raised the following grounds of appeal.

a) The trial magistrate erred in law by rejecting her defence without cogent reason

b) The trial magistrate failed to consider the fact that the complainant was a suspect who had been ferrying children to illegal group (al-shabaab).

c) The trial court ruling on witnesses who were not independent and therefore the case was not proved beyond reasonable doubt.

SUBMISSIONS

3. When the appeal came up for hearing before me, the appellant filed written submissions which she relied upon, while the Respondent through Mr. Kahuthu made oral submissions. It was submitted on behalf of the appellant that the prosecution evidence was contradictory and full of exaggeration for which reliance was placed on the case of BAYA LWAMBI HARI - V – REPUBLIC [2017] eKLR where it was held that the evidence of the prosecution witness was so contradicting thus leading credence to defence case that no threat was made by the appellant. It was therefore submitted that the appellant’s conviction was based on shaky evidence, the benefit of doubt created thereon should have been given to the appellant.

4. On behalf of the prosecution, it was submitted that the appellant’s defence was considered and rejected based upon the sufficient evidence tendered by the prosecution, sufficient enough to enable the court put the appellant on her defence.

PROCEEDINGS

5. This being a first appeal the court is under legal duty to re-evaluate the evidence tendered before the trial court to come to its own conclusion while giving allowance to the fact that it did not have the advantage of seeing and hearing witnesses as was stated in the case of OKENO v REPUBLIC [1972] EA 32 thus:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

6. The prosecution case was that PW1 a minor aged 16 years was on the material day on his way from Kalobeyei to Kakuma when the appellant allegedly issued a threat to him on account of her missing son for which she blamed him. On advice of another boy he reported to the police who arrested the appellant. He stated that he used to play with the son of the appellant and knew her. PW2 testified that he was with PW1 in his home when the appellant came and threatened him in his presence together with four others. It was his evidence that the appellant reported the complainant for advising her son to leave for Garissa. He is the one who advised PW1 not to take the threats lightly. He confirmed that he knew that the appellant's son was missing and was in Garissa.

7. PW3 Corp **FRANCIS MUIGAI** recorded the statement from PW1 and PW2 to the effect that the appellant threatened the complainant when he had gone to visit PW2 at Kalobeyei Resettlement area on the ground that he had made arrangements for her son to travel to Garissa which the appellant refuted. When put on her defence the appellant stated that she had her unregistered children of the camp which made her a target of certain people at the camp, who took her son away and brain washed him, one of those who aided her son to run away was the complainant who was allegedly working for Al-shabaab. She reported the matter to the police only for them to turn against her.

8. In convicting the appellant the trial court had this to say:-

“Section 223 (1) of the penal code provides that 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 (10) years.

From the prosecution evidence on record, the accused herein reportedly went to PW2's house and found PW1 herein seated at the said house with PW2's mother and four other boys. She went on to reproach him for having a hand at her son's escape to Garissa. PW1 refuted the claim but the accused threatened to hire Turkana gun men to kill him. The content of the threatening words she used on the complainant herein are well captured and recorded in the charge sheet. The complainant feared for his life and went to report the incident to the police who arrested and charged the accused herein before court with the present offence. PW2 herein, a friend to PW1 and a crucial witness being an eye witness present at the scene saw with his eyes and heard with his ears the uttered words by the accused to PW1 that were death threats. The accused herein has squarely been put at the scene of crime by the prosecution evidence on record being PW2's home and cannot therefore escape. The defence raised has not cast any doubt on the prosecution case which I find to be cogent, precise, flowing and unchallenged. The accused in her defence only blames the complainant herein and has no iota of evidence to prove her allegations. The only report that was made to the police and captured in the OB as testified by PW3 herein is this particular case against the accused herein. The accused did not call one FATUMA as her witness to support her defence. In the foregoing, I find that the accused herein directly caused the complainant herein to receive a threat when she verbally uttered the threatening words captured in the charge sheet to the effect that she would hire Turkana gun men to kill the complainant herein”.

9. The issue for determination in this appeal is whether the prosecution case against the appellant was proved beyond any reasonable doubt and whether the appellant's defence was properly considered. It is clear from the proceedings that there was material contradiction between the testimony of PW1 and PW2. Whereas it was the testimony of PW1 that the appellant met her on the way, PW2's evidence was that the appellant came to his house where he was with PW1 and threatened him in the presence of five other persons including his mother who were never called as witnesses. Whereas the prosecution has discretion on the number of witnesses to call, no reason was given as to why the five were never called to testify against the appellant and on the principles set out in *Bukenya V Uganda* [1972] EA549 failure to call the said witnesses weakened the prosecution case.

10. On the issue of the appellants defence, it is clear that she had lawful excuse to utter the said words as she honestly suspected the complainant to had been involved in the disappearance of her son this fact of which PW1 and PW2 confirmed in their testimony in chief. The appellant's utterance should have been taken in the content of prevailing circumstance in which she suspected PW1 to had influence her son to go to Garissa with a view to joining Al-shabaab. It was not for the appellant to present evidence to prove her allegations in the face of confirmation by both PW1 and PW2 that they were aware of the disappearance of the appellant son. It therefore follows that the trial magistrate shifted the burden of proof upon the appellant and therefore fall into error.

11. Having re-evaluated the evidence tendered before the trial court. It is clear that the prosecution case against the appellant was not proved beyond reasonable doubt and the defence was casually dismissed by the trial court which required her to call witnesses in support of her defence noting that the appellant was only required to tender in evidence on a balance of probability so as to raise doubt in the prosecution case. It therefore follows that her conviction was not safe.

12. By reason of matters stated herein I find merit on the appeal herein which I hereby allow, by quashing the conviction and setting aside the sentence herein. The appellant should be set free forthwith unless otherwise lawfully held.

Dated, delivered and signed at Lodwar this 3rd day of October, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mongare state counsel for the Respondent

Odhiambo for the Appellant

Accused - present

Wafula - Court assistant