REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 55 OF 2018

PIUS KIOKO MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. E. M. Muiru (SRM) in the Senior Resident Magistrate's Court at Kilungu Criminal Case No.98 of 2017, delivered on 8th September, 2017)

JUDGEMENT

1. The appellant was charged with offence of threatening to kill contrary to section 223 of Penal Code. The particulars were that on the 21st February to17 at Kyandue village, Kitaingo Sub-Location, Kitaingo Location in Mukaa Sub-County within Makeuni County, without lawful excuse uttered words (*nitakua na nikuzike kama yule mama tulizika*) of threatening to kill Christine Kamende Musyoka.

2. He pleaded not guilty and matter went into full trial. He was convicted and sentenced after being found guilty but in sane thus placed in prison at President's pleasure under section 116 Criminal Procedure Code.

3. Being aggrieved by the above verdict, the appellant lodged instant appeal and set out 4 grounds of appeal. During hearing he lodged 3 grounds via amended grounds together with submissions.

4. These amended grounds are:

> **(1) That the honourable trial magistrate erred in matters of law and fact by appreciating that his fundamental constitutional rights were violated thus contravening Article 25(c), 47(1) and 50(2), (b), (c) and (h) of the Constitution.**
>
> **(2) That the honourable trial magistrate erred in matters of law and fact by failing to find that essential witnesses necessary to corroborate the prosecution's case were not availed.**
>
> **(3) That the honourable trial magistrate erred in matters of law and fact by rejecting the cogent defence case which reasonably exonerated him from any wrong doing.**

5. The parties agreed to canvas appeal via submissions but only the appellant filed the same. The prosecution relied on the record evidence.

The Duty of the First Appellate Court:

6. As first appellate court, the duty bestowed before it is to examine afresh the evidence and facts on record, analyze the same and arrive at its own independent conclusion. This is the portion as found in the case of ***Okeno vs Republic (1972) E.A 32.***

Prosecution's Case:

7. PW1 Christine Kamende Musyoka informed the court that the appellant person was her son. She testified that on 21/2/2017 at 7 am, she woke up and stood at the door of her house. Then Kioko her son came to her house and told her that today she would see. He told her to give him a matchbox so that he could burn her house with her in it.

8. PW1 stated that he left to go and get a matchbox at the neighbour's while shouting loudly. She thus became afraid and went to her neighbour's home namely Agnes to hide. They then contacted *nyumba kumi* officials and he was arrested while he was at home going round. He was taken to Uvete AP Camp and later to Kilome Police Station.

9. PW1 further stated that her son told her that just like Mwendwa Yohana did to his mother, he will also kill her and bury her. She informed the court that he had been threatening her severally. PW1 indicated that previously the appellant had been charged but he begged her for forgiveness and she forgave him and withdrew the case. The appellant person had no questions for PW1.

10. PW2 Joseph Kyele informed the court that he was a village elder and that the complainant was his wife's cousin. He testified that on 21/2/2017 at about 8.30 am he was in the farm and received a phone call from Agnes Kamende and she told him that Kioko had caused chaos to his mother.

11. He thus went to Christine's home and did not find her but found Kioko. He asked him where his mother was and he said she was in the shamba. PW2 stated that he went to the shamba but did not see her. Shortly, Christine and Agnes came and he learnt that Christine had gone to hide at Agnes's home.

12. He therefore called *nyumba kumi* colleagues and they came immediately and arrested Kioko and took him to Uvete AP Camp then to Kilome Police Station. PW2 informed the court that Christine told him that Kioko had told her that he would kill her and bury her like it had happened to the woman in Kanduyi. PW2 stated that when they were tying the appellant up, he was saying that they take him to "*state house*."

13. PW3 Agnes Kamende informed the court that Kioko was her grandson and Christine her daugher in-law. She stated that on 21/2/2017 she was in the house in the morning and got out of the house. She saw Christine running into her compound and she wondered what had happened. She asked her what was wrong and she replied that her son wanted to kill her.

14. PW3 stated that her house and that of Christine are not far so upon checking she saw Kioko roaming around from one house to another. She thus made a call to a *nyumba kumi* person namely Florence Waema and told her there was a problem. She then called the village manager and they all went to the scene which was Christine's home. PW3 stated that she got there and saw Kioko roaming around and greeted him and he replied.

15. She indicated that he asked him what the problem was as she got there first and the rest were behind. He told her that he wanted to kill somebody. He further told her that he had a book that he had recorded about his problems. He then entered into the house and she followed him and the rest arrived. They therefore managed to arrest him and tied him up. Florence called an officer from Uvete and he came and re-arrested that appellant person.

16. In cross examination, PW3 stated that the appellant person did not tell her it was well. PW3 indicated that it was not the first time the appellant had caused havoc at home.

Defence Case:

17. The appellant person was later put on his defence whereby he opted to give an unsworn statement and did not call any witnesses.

18. The appellant person stated that he is normally unwell and loses his mind at times. He stated that he was shocked to have done what he did. He informed the court that he became unwell and had confrontation with his mother.

19. He indicated that after he was arrested and brought to court, he was taken to hospital and it was confirmed that he was unwell. He however did not carry the medical documents to court. He opined that were it not for his mental instability he would not have committed the offence.

Issues:

20. After going through the evidence on record I find the issues are; **whether the prosecution proved its case beyond reasonable doubt? and whether defence of insanity would obtain in the circumstances?**

Analysis and Determination:

21. The charges before court were brought under **section 223(1) of the Penal Code** which 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 years."**

22. The ingredients to be satisfied are whether:

> ***i. Without lawful excuse appellant uttered;***
>
> ***ii. Or directly or indirectly caused any person to receive a threat.***
>
> ***iii. The threat was in writing or verbal.***
>
> ***iv. It must be a threat to kill any person.***

23. The complainant herein testified that her son the appellant person threatened to kill her and told her that he would kill her just like one Mwendwa Yohana had done to his mother. PW1 further stated that he wanted to burn her house with her in it and had gone out to look for a matchbox. She then managed to seek refuse at PW3's home.

24. The appellant in his defence admitted to have committed the offence but claimed that he was not in the right frame of mind when he did it. He thus contended that were it not for his mental instability he would not have committed the offence.

25. He told the court that upon his arrest and remand at Makueni remand he had been taken to hospital and it was confirmed he was unwell. He however stated that he had not carried the medical documents to court to proof the same.

26. The trial court observed that PW2 stated that when they arrested the appellant on the material date, he was telling them to take him to ***"state house."*** PW3 on the other hand stated that she saw the appellant person roaming around in their homestead and when she got to him, he told her that he had a book he had written his problems.

27. From the foregoing it is notable that the appellant person admited to the offence but raised a defence of insanity at the time of commission of the offence. The evidence of PW2 and PW3 also demonstrate that the appellant person was acting unusually. Noting that no medical evidence was availed before the court, the court did on its own motion refer the appellant person for psychiatric review however due to unknown reason no proper medical analysis was presented before the court.

28. In ***Godiyano Barongo Rugwire vs Rex [1952] 19 EACA,*** it was stated that the burden resting on the appellant when attempting to rebut a natural presumption which must prevail unless the contrary is proved will never be so heavy as that which rests on the prosecution to prove the facts which they have to establish and it will not be higher than the burden which rests on a plaintiff or defendant in civil proceedings. It must however at least establish the possibility of what is sought to be proved.

29. In ***Rex vs Kibiro S/O Karioko [1952] 25 KLR 164*** **(Windham and Connell JJ)** it was held that medical evidence is not essential to prove insanity as it is for the court and not for medical men to determine the issue of insanity. The only evidence of the appellant's mental state at the time the crime was committed was that of the appellant himself corroborated by defence witness who testified that the appellant exhibited unusual behaviour. The High Court on revision declined to interfere with the verdict of the trial court.

30. In ***Bichuru Ngori Ondieki vs Republic CA CRA No. 87 of 1994*** **(Chunga CJ, Gicheru and Lakha JJA)** where the court relied on medical evidence to determine whether the appellant's mental state at the time of the commission of the offence of murder, the prosecution called a physiatrist who testified that he examined the appellant on two occasions and found that the appellant was normal, as he suffered no mental sickness and he also found that there are many conditions where people talk to themselves without being necessarily mentally ill. The appeal against his conviction was consequently dismissed.

31. The appellant did inform the court that he was shocked to have done what he did and thus blamed his mental instability. Having further considered the evidence of PW2 and PW3, it demonstrated that the appellant person was acting unusually to them. The trial court did form the opinion in the circumstances that the appellant person was not in the right state of mind on the material date.

32. However it found that the prosecution had duly proven that the appellant person did threaten to kill his mother as the evidence of PW1, PW2 and PW3 were duly consistent. It was notable that the appellant person did not put any questions to PW1 and PW2 hence their evidence stood uncontroverted whereas PW3 evidence was not shaken in cross examination.

33. Thus the court found him guilty but insane and thus ordered that he to be detained at the pleasure of the president. The court purported to apply section 166 of the CPC cap 75 LOK.

34. In the persuasive case of ***H.C. Constitutional Petition No. 570 of 2015- A.O.O & 6 Others vs Attorney General & Another [2017] eKLR,*** **Mativo, J**. declared the sentence of holding a convicted person during the President's pleasure as unconstitutional since it violated **Articles 53(1)(f)(i)&(ii), 53(2) and 160(1) of the Constitution**…..the learned Judge's sentiments was that, a sentence to detention during the President's pleasure does not only amount to indeterminate sentence but also implies that an accused person remains psychologically tormented at the whim of the executive thus taking away the discretion of sentencing from the Courts which is really an abdication of judicial authority to the executive.

35. In ***S vs Tcoeib 1996(1) SACR 390 (NmS), 1996(7) BCLR 996 (NmS)*** the Court held that:

> ***"It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and unpredictable to retain for the prisoner a sufficient residue of dignity which is left un invaded."***

36. The court finds that neither in the light of the above there was first no evidence that the appellant was insane when he committed the offence nor at the time of the trial.

37. Thus the trial court erred in holding appellant guilty but in insane and proceed to order detention as aforesaid.

38. Thus this court makes the following orders ;

> ***(i) The order on guilty but insane is set aside and substituted with order of conviction of offence of threatening to kill contrary to section 223 of Penal Code.***

(ii) The matter is referred back to the magistrate court at Kilungu for sentencing.

(iii) The appellant shall be sentenced after mitigation.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

C. KARIUKI

JUDGE