



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 52 OF 2016

ADAN MOHAMED GURHAN APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Mandera Senior Resident Magistrate Criminal Case No. 114 of 2016 by Hon. P. N. Areri (SRM))

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Mandera with threatening to kill contrary to section 223 (1) of the Penal Code. The particulars of the offence were that on 29th May 2016 at Bulla township area in Mandera East Sub-County within Mandera County, without lawful excuse threatened to cut Asli Musa Hassan into pieces with a panga.
2. He denied the charge and after a full trial he was convicted and sentenced to serve ten (10) years imprisonment.
3. He has now come to this court on appeal. He filed his initial appeal on 26th July, 2016. Before his appeal was heard however, he filed an amended petition of appeal and written submissions which he relied upon.
4. In his petition of appeal he complained that the charge sheet was fatally defective; that the people who arrested him did not testify in court; that no exhibit was brought to court to support the complainant's allegation; that PW2 was a minor but was not examined on her intelligence and whether she knew the importance of saying the truth; that the magistrate did not consider that there existed a grudge before the alleged incident.
5. At the hearing of the appeal the appellant relied on his written submissions which I have perused and considered. He added orally in court that while in jail his mother died and he did not know the person who currently cared for his children.
6. Learned Principal Prosecuting Counsel Mr. Okemwa opposed the appeal and said that the appellant threatened to kill his mother and that three (3) witnesses were called by the prosecution. The appellant did not cross examine the complainant PW1 as it was clear that he threatened her while in fact he shared her house with his wife and his children. In addition, the appellant refused to say anything in his defence and in mitigation. Therefore, both conviction and sentence be upheld.
7. This is a first appeal. As a first appellate court, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences. In doing so, I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanour and give due allowance for that fact. See the case of **Pandya vs Republic [1957] 336**; and the case of **Okeno vs Republic [1972] EA 32**.
8. I have evaluated the evidence on record. I have perused the judgment of the trial magistrate. I have also considered the submissions of the appellant both written and oral as well as the submissions of the Prosecuting Counsel. I observe that the appellant has raised many grounds of appeal.
9. PW1 Asli Musa Hassan was the mother of the appellant and she testified that the appellant and his wife and children lived with her in her house in Mandera town. That on 29th April 2016 at around 2 pm the appellant threatened to cut her with a panga into three (3) pieces in the presence of PW2 Wilo Mohamed Gurhan her daughter. She locked herself in the house but the appellant came and attempted to break the door when members of the public restrained him and called the police. PW3 PC Mohamed Dolali from Mandera Police Station confirmed that he was called to the scene by good Samaritans and arrested the appellant who was surrounded by a crowd around 4.30 pm.
10. The appellant chose not to say anything in his defence though initially he had indicated to the trial court that he would tender sworn testimony and call one witness. In my view, with the above evidence on record, the prosecution proved their case beyond any reasonable doubt. Consequently all the complaints of the appellant in his petition of appeal regarding the conviction are thus dismissed. I uphold the

conviction of the trial court.

11. The appellant has raised a complaint also against the sentence. Sentencing is the discretion of the trial court based on the particular circumstances of a case and surrounding factors such as the mitigation of an accused person, as well as the previous criminal record of an accused.

12. The appellant was treated as the first offender as the prosecution said that they did not have his previous record. The appellant did not say anything in mitigation which means he did not ask for mercy. The maximum sentence imposed under section 223 (1) of the Penal Code for the offence of threatening to kill a person is ten (10) years imprisonment, and the magistrate imposed the maximum sentence for this first offender.

13. It is worth noting that the victim who was the complainant, said before sentence that she wanted the appellant to be imprisoned. This statement must have led the magistrate to impose the maximum sentence.

14. In my view, however, because the prosecution said that the appellant was a first offender, and though the appellant did not say anything in mitigation and the mother (complainant/victim) said that he should be jailed, the maximum sentence was not justified though indeed a harsh sentence was appropriate. On that basis, I will interfere with the discretionary power of sentencing exercised by the trial court. I will reduce the sentence imposed to six (6) years imprisonment.

15. I thus dismiss the appeal against the conviction and uphold the conviction of the trial court. I however set aside the sentence of ten (10) years imprisonment ordered by the trial court, and instead order that the appellant will serve a sentence of six (6) years imprisonment from the date on which he was imprisoned by the trial court.

16. It is so ordered.

Dated, signed and delivered at Garissa this 13th July, 2018.

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George Dulu

JUDGE