REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 43 OF 2017

LUCAS OMBABA ONYAMBU.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. J. Mwaniki – Senior Principal Magistrate delivered on the 10th day of July 2017 in Keroka SPM CR No. 463 of 2016]

JUDGEMENT

The appellant was found guilty and convicted on two counts of threatening to kill contrary to Section 223 (1) of the Penal Code and subsequently sentenced to a concurrent term of imprisonment for seven (7) years. It was alleged that on 23rd April 2016 at Keginga village in Borabu Sub-county within Nyamira County jointly with others not before court without lawful excuse he uttered threatening words to the effect that he would cut the heads of Abigael Kerubo Mokua and Florence Mosigisi.

He pleaded not guilty to the charge but after hearing the evidence of three prosecution witnesses and his defence, the trial magistrate found the charges had been proved beyond reasonable doubt and convicted him on both counts. Being aggrieved with the convictions and sentence the appellant filed this appeal. His petition is premised on the following grounds: -

1. The Learned Trial Magistrate erred in Law and fact in holding that there was sufficient evidence to prove the charges of threatening to kill when the Prosecution had not discharged its onus of proof as required by law.

2. The Learned Trial Magistrate erred in Law and fact in convicting the Appellant on uncorroborated evidence.

3. The Learned Trial Magistrate erred in Law and fact in relying on the Prosecution evidence which piece of evidence was full of contradictions and discrepancies.

4. The Learned Trial Magistrate erred in Law and fact in holding that the offence was preference in the area when he was supposed to decide the case on its own facts.

5. The Learned Trial Magistrate misdirected himself in forming an opinion that there was sufficient evidence of an offence of threatening to kill when there was no such evidence on record.

6. The Learned Trial Magistrate did not properly consider, analyse and/or simultaneously or otherwise the evidence on record on its entirety and thus arriving on a wrong conclusion contrary to the weight of evidence on record.

7. The Learned Trial Magistrate erred in law in disregarding, ignoring and/or failing to consider the evidence adduced by the Appellant in his defence without assigning any credible reason and/or basis for such disregard.

8. The sentence passed by the Trial Court against the Appellant was manifestly excessive in the circumstances of the case.

The appeal was canvassed by way of written submissions. Counsel for the appellant submitted that the evidence adduced did not warrant a conviction; that in the first count the complainant did not say who in fact uttered the words complained of. Counsel also submitted that the complainant's evidence was not corroborated and that the trial magistrate did not analyse the evidence before it properly otherwise he would not have arrived at the decision that he did. He urged this court to allow this appeal, quash the conviction and set aside the sentence.

The appeal is vehemently opposed. Prosecution Counsel submitted that the treat to kill was made and that there was no possibility of mistaken identity as the complainants and the appellant are relatives. Counsel submitted that it was evident the complainants believed those threats. Counsel also submitted that the defence was a mere denial and the allegation that the complainants had a grudge against the

appellant was not expounded. Counsel urged this court to dismiss the appeal and uphold the conviction and sentence.

As the first appellate court, I have reconsidered and evaluated the evidence in the lower court while making provision for the fact that I neither heard nor saw the witnesses. It is my finding that the charges against the appellant were not proved beyond reasonable doubt.

Abigael Kerubo Mokua (Pw1) the complainant in count 1 was clear in her evidence that the threatening words were uttered by someone else not the appellant. She stated and I quote – ***"At about 2 pm the accused came in company of others. One of his colleagues said that "kichwa moja ile kichwa tunataka ni hii."*** She stated that the person uttered the words while pointing at her. It was not clear who that person was saying those words to and what role the accused person played other than being present when those words were uttered. As for Florence Mosigisi it is apparent that she did not see the person who threatened her. Her evidence was – ***"I heard someone say they wanted my head. That was Lucas the accused at (sic) the dock who was saying that."*** It is however noteworthy that she was not prodded to say how she knew it was Lucas, all that she did was to hear but not see. It is also apparent that no investigations were carried out in this serious crime. All Pw3 did was to book the report and arrest the appellant and did not bother to find out if indeed there was a grudge that would have caused the complainants to lie against the appellant.

Moreover, the appellant being a first offender and considering the circumstances of the case, the sentence of seven years' imprisonment was excessive. I am satisfied the appeal has merit. The same is allowed, the conviction quashed and sentences set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Signed, dated and delivered in Nyamira this 11th day of October, 2018.

E. N. MAINA

JUDGE