



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 78 OF 2015

(From original conviction and sentence in criminal case No. 47 of 2015 of the Principal Magistrate's court at Mwingi – K. Sambu PM).

FRANCIS MUTETI NZINZI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the Magistrate's court at Mwingi with threatening to kill contrary to section 223(1) of the Penal Code. The particulars of the offence were that on diverse dates and time between 16th January 2015 and 24th January 2015 at Kuuvya sub location Mwingi Central District of Kitui County without lawful excuse uttered words threatening to kill Karimi Musya. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on the following grounds:-

1. That the magistrate erred both in law and fact when he relied on contradictory evidence to convict him.
2. That the learned magistrate erred in convicting him when the complainant PWI was actually his lover who lived with him for over 6 months.
3. The learned magistrate erred when he convicted him without considering that the complainant framed him because he built a kiosk and planted farm produce in her farm but she did not want to pay him money which she owed him for the rent of the kiosk and instead accused him of threatening to kill.
4. That he was tortured by the mob which arrested him following the report of the complainant before being taken to the police station which was a violation of the rights of an accused person.
5. The learned magistrate did not consider that he was a first offender.

During the hearing of the appeal, the appellant made oral submissions and said that on 14th September 2014 the complainant went to his home and asked him to build a house for her. He stated that he took measurements, dug the ground and built the house and asked for payment of Kshs 4,000/= but she paid him Kshs 1,000/=. When he finished the work, she befriended him and when the rain came they planted crops on her land and thereafter he asked for his money and as a result she became angry and reported

him to the chief. According to him the report that he threatened to kill her was false because he only asked for payment of his money.

Learned Prosecuting counsel Mr. Okemwa opposed the appeal. Counsel submitted that the prosecution proved that there was a threat to kill made by the appellant on the complainant without lawful excuse. The prosecution also proved that the person to who the threat was directed believed that it would be carried out. According to counsel this proved for the charge of threatening to kill.

Counsel submitted further that according to the evidence of both PW1 and the appellant, both had a love affair which went sour and thereafter the appellant threatened to kill the complainant. According to counsel, the threats were not made once but on several occasions which made the complainant believe the threats and report to the Assistant

Chief. Counsel emphasized that the threats were intentional and without lawful excuse.

Counsel added that the prosecution called 6 witnesses who tendered consistent evidence. PW3 gave evidence that the appellant actually gave chase to the complainant who took refuge in his house. According to counsel, the appellant wanted to intimidate a vulnerable victim, a woman. Counsel submitted that the appellant had other avenues of pursuing the money owed to him.

In response to the prosecuting counsel's submissions, the appellant maintained that he did not threaten the complainant and added that if he did so, then it was a mistake and asked for forgiveness.

In brief the prosecution called 6 witnesses in the case. The evidence was that the complainant PW1 Karimi Musya was a woman who wanted someone to build a house for her. She approached the appellant who agreed to build the house for her and they agreed to payments. However before the work was completed, the complainant and the appellant fell in love and they lived together for sometime.

After they disagreed because of the bad behaviour of the appellant, the appellant made several threats on the life of the complainant. He was promised to be paid more money by the complainant after the harvest but he continued to threaten while armed with a machete.

One of the people who witnessed the threats was PW3 Mutemi Kieti who on 21st January 2015 saw the appellant chasing the complainant and threatening to kill her. In addition PW5 Joyce Kiami on 24th of January 2015 witnessed the appellant with a machete asking for the complainant and saying that her days were numbered.

The matter was reported to the village elder Elizabeth Muyoki PW2 who made a report to the Assistant Chief and the appellant was arrested and charged with the offence.

When put on his defence, the appellant gave sworn testimony. He stated that the complainant requested him to construct a brick shop for her. He stated also that the complainant who was a woman married by another woman under Kamba customary law, fell in love with him and they agreed that of the construction charges of Kshs 4,000/= he would waive Kshs 2,000/=.

They then lived together, cultivated on the land of the complainant, but the complainant after harvesting plenty of green grams sold all the crops and paid him only Kshs 1,000/= and demanded that they should part ways. He stated that he informed the village elder about the matter, who advised that because he was involved in a love affair with the complainant, he should not claim his money or debt. However the next day he went to demand for his debt and a share of the sale price of the green grams and the complainant reported him to the Chief.

This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences taking into account that I did not see witnesses testify to determine their demeanor see the case of *Okeno -vs- Republic (1972) EA 32*.

I have evaluated the evidence on record. The complainant PW1 stated that she was threatened severally by the appellant. PW3 confirmed that the complainant took refuge in her house when the appellant chased her with a machete. PW2 and PW5 saw the appellant carrying a machete and threatening the complainant on the 24th of January 2015.

Both the appellant and the complainant agree that the complainant requested the appellant to construct a house for her. They agreed that there were construction monies to be paid to the appellant by the complainant. They also agree that the two ended up being lovers and lived together for some months and that part of the money due to the appellant was not paid by the complainant. They also agreed that the complainant chased the appellant from her house after they disagreed. It was thereafter that the appellant was said to have threatened the complainant with killing. The appellant claimed that he was merely demanding for his money.

Having reevaluated all the evidence on record, I see no reason which suggests that PW3, PW2 and PW5 were lying. Each of them saw the appellant carrying a machete and threatening the complainant. The threats were on various days. It was in broad daylight. There is no doubt that the prosecution proved that the appellant threatened to kill the complainant. I find no contradictions in the evidence of prosecution witnesses.

The appellant has complained that he was beaten or assaulted by the mob during arrest. The record of the trial court does not indicate that the appellant complained about that assault. As such I find no basis for this complaint. I think it is an afterthought.

I will uphold the conviction.

With regard to the sentence the learned magistrate stated as follows:-

“accused sentenced to serve the mandatory 10 years imprisonment”.

My reading of section 223 (1) of the Penal Code convinces me that there is no mandatory sentence of 10 years imprisonment provided by law. I will reproduce the section here under for clarity.

“223 (1) 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 for imprisonment for 10 years”.

The statute clearly uses the words ***“liable to imprisonment”*** which means that the 10 years imprisonment sentence is the maximum for the offence. It is not a mandatory sentence. The learned magistrate was thus wrong in holding that the sentence of 10 years imprisonment was mandatory. I will thus interfere with the sentence imposed.

In my view based on the facts of the case and the mitigation of the appellant wherein he asked for forgiveness, a sentence of 3 years imprisonment would have served the purpose. I will thus reduce the sentence to 3 years imprisonment from the date on which the appellant was imprisoned by the trial court.

To conclude I dismiss the appeal on conviction and uphold the conviction of the trial court. I however, set aside the sentence imposed by the trial court and order that instead the appellant will serve imprisonment for a term of 3 years from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 6th day of June 2016.

GEORGE DULU

JUDGE