



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 40 OF 2015

LAWRENCE OTIENO OCHACHO.....APPELLANT

versus

REPUBLICRESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. P.Y. Kulecho, Resident Magistrate in Migori Chief Magistrate's Criminal Case No. 686 of 2014 delivered on 29th April 2015)

JUDGMENT

1. The appellant herein, **LAWRENCE OTIENO OCHACHO**, was initially charged with the offence of creating disturbance in a manner likely to cause a breach of peace. He denied the charge. The State later on substituted the charge with that of **threatening to murder** contrary to **Section 223(1)** of the **Penal Code, Chapter 63** of the Laws of Kenya and the appellant still maintained his innocence by denying the substituted charge.
2. Three witnesses were called to prove the prosecution's case. They were **John Ochacho Joakim**, the father to the appellant and **the complainant** as **PW1**, the investigating officer as **PW2** and the arresting officer as **PW3**.
3. It was the prosecution's case that on 17/10/2014 while the complainant was from his farm he met the appellant who is his only son on the way carrying a puppy. The appellant then threatened the complainant with death and while the complainant was wondering what the problem was, his said son, the appellant rushed to his house and armed himself with a panga. The complainant then ran away and hid himself in the bush behind his house. The appellant thinking that the complainant had entered his house went back to his house and took a knife and a spear.
4. The complainant while still in hiding called the Area Chief and informed him of what had happened. He was advised to report the matter to the nearest Masara Administration Police Camp which he did and went back to his home where his other family members were gathering for a family meeting. As the complainant joined the rest of the family members in the meeting, he saw the appellant also present and armed with a knife. The complainant then got more scared and rushed back to his home. Fearing for his life, the complainant did not stay in his house but instead hid in the bushes up to 19/10/2014 when he managed to call the administration police officers who eventually arrested the appellant at his home and recovered some exhibits. The appellant was then taken to Migori Police Station and was subsequently arraigned in court.
5. When the appellant was placed on his defence he reiterated how he was arrested from his house in the night of 20/10/2016 and charged with an offence he knew nothing about. The appellant was found guilty and convicted. He was sentenced to three years imprisonment.

6. Being aggrieved with the conviction and sentence the appellant, albeit late, sought for and was granted leave to appeal out of time.

7. In his Petition of Appeal filed on 08/06/2015 the appellant challenged the conviction and sentence on three grounds being that the complainant's evidence was not corroborated, the charge was not proved and that the sentence was excessive.

8. At the hearing of the appeal the appellant appeared in person and wholly relied on his filed written submissions where he expounded on the grounds in the Petition of Appeal in calling upon this Court to allow the appeal and set him at liberty. The State on its part opposed the appeal and prayed that it be dismissed,

9. As this is the appellant's first appeal, the role of this Court is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. The starting point is a look at the law creating the offence of **threatening to murder**. That is **Section 223(1)** of the **Penal Code** and it states as follows:

'Threats to kill:

(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 to imprisonment for ten years.'

11. Deriving from the above, it therefore means that for an accused person to be found guilty of the above offence, the State has to prove the actual threat uttered or how the accused person caused the complainant to receive a threat on his or her life. The threat may be in writing or not and need not to have been directly made to the complainant.

12. When the initial charge was substituted with the current one, the particulars of the charge were as follows:

'On the 17th day of October 2014 at Mukuro Village within Migori County in Republic of Kenya, without lawful excuse while armed with a panga, spear and a sword threatened to kill JOHN OCHACHO JOAKIM'

13. When the complainant testified he stated that when he met the appellant on a road the appellant threatened to kill him. He then wondered why and asked the appellant the reason behind that utterance. However the record does not have the actual words allegedly uttered by the appellant that amounted to the alleged threat to kill. What followed was that the appellant rushed to his house and came back with a panga. The complainant then ran for his life and hid in the bush behind his house. The record is again silent on what the appellant actually did with the panga. Did the appellant utter any words while so armed? Did the appellant pursue the complainant while armed? Did the appellant do or conduct himself in a manner likely to suggest his intention to kill the complainant? How long did it take for the appellant to return to his house to collect the spear and the knife? And the questions seem unending.

14. The main question that therefore begs an answer is whether the appellant had any encounter with the complainant when he was first armed with the panga or when he was subsequently armed with the panga, a spear and a knife. Again it appears like no such encounter was proved. I say so because the complainant went into hiding immediately on sensing danger. There is no mention as to what the appellant said or did while so armed and further if the complainant was able to even see the appellant armed while in hiding or if the complainant heard the appellant say anything while armed. The

complainant only called the Area Chief and reported the matter.

15. There is also another twist into the matter. The complainant stated that when he was advised by the Chief and so went and reported the matter to the police he went back home where there was a family meeting and found the appellant also in that meeting, but armed with a knife. When the complainant saw the appellant in the said family meeting he became so fearful and left the meeting. He then spent two days in the bush before he again returned to the police. However the complainant did not allude that when he met the appellant in the meeting the appellant threatened him in any way or at all. The complainant was not alone in the family meeting. There were other family members well before he arrived. Even if this Court is to believe that the appellant was indeed armed with a knife in the meeting, there is no mention that the appellant threatened the complainant with that knife in that meeting or if the other family members were uncomfortable with the appellant carrying that knife in the meeting. Further there was no better place for the complainant to inform the rest of the family members of the alleged death threats to him by his son than in that family meeting. That however did not happen.

16. The appellant argued further that the complainant's evidence was not corroborated in any material form. It is alleged that the complainant spent two days in the bush fleeing from the appellant. During that time he called the police on two occasions and attended a family meeting. However, truly as submitted, there is no one who ever witnessed the said incident. The complainant did not even inform any of his family members either at the meeting or at all. No witness was called to confirm that indeed the complainant was on the run for two days fleeing from the appellant. All what happened was between the complainant and the police. The police ought to have sought for any corroboration especially when PW2 found out in the course of the investigations that there was the underlying land issue between the appellant and the complainant. Needless to say there were also no investigations made to preempt that the complaint made was not aimed at either settling scores on the land issue or just framing up the appellant as he so alleged in his defence. The Court hence finds the testimony of the complainant highly doubtful and unbelievable.

17. Another important issue relates to the exhibits. Whereas the threat was allegedly made on 17/10/2014, the appellant was arrested on 20/10/2014 at around 08:00pm while in his house. The exhibits were also recovered from the appellant's house. The appellant rightly so agreed that the exhibits were part of his household items used in the normal day-to-day life. That was indeed a plausible and reasonable explanation given that indeed they are such normal items. The trial court therefore erred in finding that the appellant did not disown the exhibits.

18. From the foregone analysis it is clear that the State failed to prove that the appellant made any threat to the complainant or that the appellant caused the complainant to receive any threat for his life. Convicting the appellant on such uncorroborated evidence and in light of the defence put forth would amount to shifting the burden to the appellant. To that end and respectfully, this Court is therefore unable to affirm the decision of the Learned Magistrate.

19. Whereas there is evidence that the relationship between the complainant and his son, the appellant, has for a long time not been a good one, the above discourse leaves this Court with only one option in law and that is to find for the appellant. The upshot is that the charge of threatening to murder was not proved as required. The conviction cannot stand and is hereby quashed and the sentence set-aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 07th day of November 2016.

A.C. MRIMA

JUDGE