REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 113 OF 2010

JOHN NDERITU KARIUKI…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal against conviction and sentence in the judgment delivered in Nanyuki Senior Principal Magistrates' Court Criminal Case No. 1631 of 2009 (Hon. H.N. Ndungu) on 1st March, 2010)

JUDGMENT

The appellant was charged with the offence of threatening to kill contrary to **section 223(1)** of the **Penal Code (Cap. 63).** According to the particulars of the offence, on the 7th day of July, 2009 at Cottage Estate of Nanyuki Township in Laikipia East District within the Rift Valley Province, without lawful excuse, the appellant uttered a threat to kill **Samuel Wambugu Kabiru**.

At the conclusion of the trial, the trial court found the appellant guilty and sentenced him to ten years imprisonment. Since the appellant was dissatisfied with the conviction and sentence, he has appealed to this court against the decision of the subordinate court. In his amended petition, the appellant has faulted the trial court's judgment on the following grounds:-

1. The learned magistrate erred in law and in fact in convicting the appellant when the proceedings were not explained to him contrary to the requirements of **section 198(1)** of the **Criminal Procedure Code (Cap. 75)**;

2. The learned magistrate erred in law and in fact in convicting the appellant without considering that **PW2** who was the source of information of the alleged threat never made a report to the police;

3. The learned magistrate erred in law and in fact in convicting the appellant in the absence of any independent witness;

4. The learned magistrate erred in law and in fact in imposing a harsh sentence against the appellant.

At the hearing of the appeal, the appellant sought to rely on his written submissions that had earlier been filed in court. He reiterated that the proceedings were not interpreted to him as required by section **198 (1)** of the **Criminal Procedure Code** and to that extent he was prejudiced.

Secondly, the appellant argued that **PW2** who was the source of information of the alleged death threat to

the complainant did not make any report to the police. It is the appellant's argument that the allegation that the report was made to the complainant (**PW1)** was not true.

Thirdly, the appellant argued that going by the nature of this case, an 'independent' witness ought to have testified. The appellant urged that there was evidence of an existing family feud and that all the prosecution witnesses except the police officer were members of the same family with which he had differences.

Finally, the appellant urged the court to find that the sentence meted out against him was harsh and excessive.

Counsel for the state, Mr Njeru Njue, opposed the appeal and in his submissions, he argued that the record shows that the proceedings were conducted in English and interpreted in Swahili language. The appellant participated actively in the proceedings and even cross-examined the prosecution witnesses; he ultimately defended himself in an unsworn statement. The question of breach of **section 198(1)**, of the **Code**, according to counsel, does not arise at all.

As for whether a report ought to have been made to the police, counsel urged that the complainant PW2 was accosted by the appellant who threatened him with death on 7th July, 2009. On the same day, the appellant was arrested by members of the public who came to the complainant's rescue when he raised the alarm; the appellant was soon thereafter taken to the police for re-arresting. According to counsel, the events of 7th July, 2009 were part of the transaction or *res gestae* that constituted the offence with which the appellant was charged.

On the claims of bias against the appellant, counsel argued that there was no evidence of such bias and also there was no indication whatsoever that the prosecution witnesses gave false evidence.

The learned counsel for the state submitted that the maximum sentence meted out against the appellant was lawful as it is consistent with section **223(1)** of the **Penal Code** under which the appellant was charged; in any event, the learned magistrate gave her reasons for imposing the maximum sentence as by law provided. The state counsel urged this court to dismiss the appeal.

In order to appreciate the submissions by the appellant and the learned counsel for the state it is necessary to look at the evidence presented at the trial. Again, being the first appellate court, this court has the legal obligation to analyse and evaluate the evidence afresh and come to its own conclusions regardless of the conclusions that the trial court may have arrived at; the only precaution that this court has to take into account in this exercise is to be mindful that it is incapable of assessing the demeanour or the disposition of the witnesses as it is only the trial court that could enjoy such advantage. This position of the law was reiterated in the case of **Okeno versus Republic (1972) EA 32** where the Court of Appeal said:

> **An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).**

The trial court record shows that the trial against the appellant commenced on 8th July, 2009; according to the proceedings of that particular day the appellant is recorded to have said that he understood Swahili language; the charge was therefore read to him in English and interpreted in Swahili. He entered a plea of not guilty.

From then on, the proceedings were either conducted or interpreted in Swahili language and the appellant

is recorded to have actively participated in the proceedings by cross-examining the prosecution witnesses. When he was put on his defence, he gave an unsworn statement in Swahili language.

Section 198 (1) of the **Criminal Procedure Code** that is alleged to have been contravened reads:-

> ***198. Interpretation of evidence to accused or his advocate***
>
> ***(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.***

There is clear evidence from the record that the proceedings were conducted or interpreted in Swahili, a language that the appellant himself said he understood. The appellant's argument that the proceedings were not interpreted to him when the record shows that they were not only conducted or interpreted in Swahili language but also that the appellant himself participated is without any foundation and this ground of appeal is not merited at all and is dismissed at the outset.

The complainant, **Samuel Wambugu Kabiru (PW1),** testified that on 7th July, 2009 at about midday, he walked out of his house only to meet the appellant waiting outside while armed with an iron bar. Three days earlier, he had received information from one of his cousins called **Patrick Kinyua Wachira (PW2)** that the appellant had threatened to have the complainant's head together with those of his brother Abdi Rashid and his mother. When he found the appellant armed outside his house, he sensed danger and quickly retreated to the house and closed the door behind him. While in the house, the complainant phoned his brother **Abdi Rashid** to report the matter to the police.

Apparently, when the appellant heard the complainant talking to his brother, he started moving towards the gate as if he was leaving. The complainant, thinking that the appellant had left, opened the door and came out of the house. At that point the appellant rushed back at him still armed with the metal bar. The appellant screamed for help and in the process the appellant fled; members of the public who responded to the alarm raised by the complainant pursued the appellant and managed to arrest him in a nearby bush.

The complainant testified that this was not the first time the appellant had made an attempt on his life because way back in 2002, he had threatened to kill him; a report was made to the police but the matter was later settled out of court.

Before the complainant was cross-examined the trial magistrate directed that the appellant be taken to Nyeri Provincial General Hospital and examined to confirm whether he was mentally fit. The magistrate also directed the probation office to make a social inquiry in respect of the complainant's and the appellant's families to establish the extent of the differences between them. The psychiatrist report and the social inquiry report were subsequently submitted and being satisfied with their contents, the learned magistrate proceeded with the appellant's trial.

Patrick Kinyua Wachira (PW2) testified that sometimes in March 2009 at around 6.00 am the appellant came to his house and knocked at the door; seemingly this witness did not open the door but the appellant is said to have gone round the house and called out this witness' name; when he responded, the appellant told him that he wanted his head and those of **Rashid Kariuki (PW3)**, the complainant and **Alice Wangui**. When he told his brother **Rashid Kariuki (PW3)**about this threat, the latter advised him to move from Umande, where he used to live to Likii.

Mr Rashid Kariuki (PW3) testified that on 7th July, 2009 the complainant telephoned him and asked him to go to his home because the appellant was standing next to his door with a metal bar. Fearing for his brother's life, the witness rushed to the scene because two weeks before, the appellant had told **Patrick Kinyua Wachira (PW2)** that the appellant wanted the complainant's head together with his and that of their mother. He said that they arrested the appellant in a maize plantation and took him to Nanyuki police station.

The police officer who received the appellant at the station was Constable **Ben Lelesimol (PW4)** who was then stationed at Nanyuki police station. He testified that on 7th July, 2009 members of the public brought the appellant to the station on allegations that he had threatened the life of the complainant. The members of the public also had with them a metal bar which the appellant is said to have been armed with. This bar was produced and admitted in evidence. This witness said that he did not investigate the case but that he simply rearrested the appellant.

When he was put to his defence, the appellant gave unsworn statement and said that he was a casual labourer and there existed a grudge between him and the complainant since the year 2002. He testified that the complainant had even alleged that the appellant had killed his father as a result of which he was placed in police custody for some time but was released for lack of evidence. He also claimed that in April 2009, the complainant and his brother had beaten him up and that it is them who had been threatening him. He said the charges against him were made up because of the existing grudge between them.

From what I gather, the major issue in the appellant's trial ought to have been whether the foregoing evidence was consistent with the offence with which the appellant was charged and closely related to this issue is the question whether the appellant was convicted against the weight of evidence. In analysing the evidence, therefore, it is important to keep in focus the charge against the appellant.

The law under which the appellant was charged is **section 223(1)** of the Penal Code; it says:-

> **223. 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.**

According to the particulars of the offence, the appellant is alleged to have "uttered a threat to kill" the complainant. The complainant in his evidence told the court that three days before 7th July, 2009, **Patrick Kinyua Wachira (PW2)** had told him that the appellant had sent him to tell the complainant that the wanted his head amongst two others; to be exact, the appellant had sent **Patrick Kinyua Wachira (PW2)** to deliver this message on three different occasions.

If these utterances were made three days before 7th July, 2009, then the exact date they were made should have been on or about the 4th July, 2009; however, **Patrick Kinyua Wachira (PW2),** in his evidence, testified that it was in March, 2009 that the appellant told him that he intended to have the heads of the complainant and two other people.

On his part, **Mr Rashid Kariuki (PW3),** testified that the same **Patrick Kinyua Wachira (PW2)** had told him that two weeks before 7th July, 2009 the appellant had threatened decapitate them; these would mean that the utterances to kill the complainant were made on or around 23rd June, 2009.

The picture created by these three witnesses is that the dates given as to when the utterances are supposed to have been made are inconsistent and contradictory and there appears no plausible explanation for this inconsistency and contradiction. If the source of information on when the utterances were made was one person, that is, **Patrick Kinyua Wachira (PW2)**, why should the evidence of the complainant on the same issue differ from that of **Mr Rashid Kariuki (PW3)** and even at variance with the evidence of **Patrick Kinyua Wachira (PW2)** himself?

Worse still, the particulars supporting the charge state that the utterances were made on 7th July, 2009; even in their contradictions none of the witnesses ever stated that the appellant uttered the threat on 7th July, 2009. When the complainant met the appellant outside his house on 7th July, 2009 no words, let alone threats, were exchanged between them. In these circumstances the charge as framed is not supported by evidence.

The inconsistencies and the contradictions cast a reasonable doubt whether indeed the appellant uttered any threat as alleged or at all.

I am aware that under **section 382** of the **Criminal Procedure Code** an error, omission or irregularity on the charge sheet may not necessarily result to reversal or alteration of a finding, a sentence or an order passed by a court of competent jurisdiction; this section provides as follows:-

> **382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings**
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> **Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.**

Considering the appellant's defence and noting that it was not in dispute that there was a longstanding grudge between him and the complainant and members of his family who testified against him, it cannot be assumed that the date on the charge sheet was a mere error which can be disregarded under **section 382** of the **Criminal Procedure Code**; and even if it was to be so assumed, one would want to know which of the three contradictory dates would have been adopted as the correct date when the appellant made the foul utterance? In my view, any of those dates would still have contradicted the evidence of the rest of the witnesses.

If the date indicated on the charge sheet was to be deemed to be an error, omission or irregularity, though I did not hear the state pursue that line of argument, then it is an error, omission or irregularity which in the words of **section 382** of the Code occasioned a failure of justice. I also doubt the proviso to that section of the law would apply in this particular instance considering the variant dates given by the prosecution witnesses; in any case, the appellant was acting in person and he would not be expected to raise the kind of objection contemplated under that proviso.

It must also be noted that the case against the appellant was never investigated at all. The only police officer who testified Constable **Ben Lelesimol (PW4)** told the court that all he did was to re-arrest the appellant; he was categorical that he was not the investigating officer.

Without investigations, it is not clear how the police came to the conclusion that the appellant had committed the offence with which he was charged. As noted, in both the prosecution witnesses' testimony and the unsworn defence statement, the appellant and the complainant were embroiled in a family dispute for a long time prior to his arrest and prosecution; against this background investigations were necessary to ascertain, in the very least, the circumstances under which the offence is alleged to have been committed. Such allegations as there having been a previous criminal case of the nature that was before court against the appellant and which was alleged to have been settled out of court needed to have been established; whether the appellant threatened the complainant in March 2009 and why such threats were not immediately reported to police until July, 2009 when the appellant was apparently frog-marched to the police station are questions that could only have been answered through an investigation. Without investigations and answers to these pertinent questions, there were gaping holes in the prosecution case which could not sustain a safe conviction.

In the premises, I am persuaded that the appellant's appeal is merited and it is hereby allowed; his conviction by the trial court is quashed and the sentence set aside. The appellant is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 6th February, 2015

Ngaah Jairus

JUDGE