IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach & Tunoi JJ A)

CRIMINAL APPEAL NO 185 OF 1988

FRANCIS MACHARIA KARIUKI……..... APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi

(Dugdale & Mbito 33) dated 22nd April, 1988

in HC CR A No 826 of 1987)

JUDGMENT

The appellant was convicted by the Senior Resident Magistrate, Nairobi, of demanding money with menaces contrary to section 302 of the Penal Code and sentenced to 2 years imprisonment.

Following the dismissal of his appeal by the superior court, the appellant has through his advocate, Mr Ramogo, filed a memorandum of appeal containing the following five grounds of appeal:

> "1. That the learned judges erred in finding that a demand had been made and they deviated from the cardinal principle that all the evidence must be weighed by the appellate court in totality and any doubt created therein must be resolved in favour of the accused person.
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> 2. That the learned judges erred in failing to consider the credibility of the prosecution witnesses especially the complainant who had a lot to gain as confirmed by exhibit BII if the accused was convicted.
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> 3. That the learned judges failed to consider that there was no menaces or force against the complainant by the appellant.
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> 4. That alternatively without prejudice to the foregoing if there was such a threat, which is denied, then the said threat was not of such character that it was calculated to deprive the complainant or any person of reasonable and ordinarily firm mind of the free and voluntary action of his mind.

5. That the learned judges erred in failing to consider that the alleged threats could not be calculated to injure the property or character of the complainant as the alleged threat was to inform the complainant's workers of their rightful and lawful wages which the appellant had already done."

The complainant was sub-contracted in July, 1986 to undertake the completion of a building project at Parklands. It was a term of the contract *inter alios* that he would be responsible for "any problems of union or labour or increased prices."

During the material time, the appellant, an official of the Kenya Building, Construction, Civil Engineering and Allied Trade Workers' Union went to the construction site and found the complainant and his workers. The appellant is alleged to have agitated the workers by telling them that they were underpaid contrary to the agreed wages fixed by the construction industry and the union. He exhorted them that they were being cheated and should strike if the anomaly was not rectified. It was the prosecutions' case that, thereafter, he demanded Shs 40,000/=, (and later an additional sum of Shs 10,000/=), from the complainant to forestall the payment of the extra wages. The complainant reported the matter to the police and a trap was set. PW7, Inspector Owino and PW8, Corporal Otenyo of CID Nairobi Area, got a bundle of simulated notes and chemically treated them with APQ powder (anthracene, phenolphthalein and quinine) and recorded the serial numbers of the genuine ones which were placed on the outside. They were then inserted in an envelope and given to the complainant to hand over to the appellant on 5th December, 1986.

On the even date, the appellant drove to the building site but for some reason refused to receive the money thereat. He suggested another rendezvous at the MP Shah Hospital. The police followed and saw him enter the complaint's vehicle with a brief case. At a signal by the complainant they pounced on them and went for them. The appellant was ordered out of the vehicle and searched. Inspector Owino removed from the appellant's right inner coat pocket the treated bundle of money and arrested him. He was subsequently arraigned on this offence.

The appellant made an unsworn statement from the dock in which he told the trial court that he had nothing to say.

The learned trial magistrate held that the sum of Shs 40,000/= was demanded by the appellant with menaces and the same was paid to avoid a possible strike. She found that although the APQ powder was not traced on the clothes or the swabs from appellant's hand, it was sufficiently corroborated that the bundle of money was recovered from his inner coat pocket. This was despite the fact that the envelope was not accounted for.

In a rather diffuse judgment the High Court rejected all the grounds contained in the petition of appeal to that Court, and the submissions put forward by Mr Ramogo.

The offence preferred against the appellant is defined in section 302 of the Penal Code as follows:

"Any person who, with intent to steal any valuable thing, demands it from any person with menaces or force is guilty of felony and is liable to imprisonment for ten years."

The evidence to support the charge must show that: (1) the accused demanded a valuable thing; (2) he demanded it with menaces or force; and (3) he demanded it with intent to steal.

It would appear that whether or not there is a demand is a question of fact; the language used may even be in the form of a request. Moreover the language used and the surrounding circumstances must be looked at: See the case of *Kagori v Republic* [1967] EA 428.

It is clear from the definition that the offence is complete when a demand is made. Whether payment is made or not is immaterial. Further, there must be a use of menace, threat or force capable of arousing fear.

There is no doubt whatsoever that the money found with the appellant was a valuable thing. But the issue is, did he demand it with menaces or force? He is a trade unionist. He could be said to have been perfoming his duties as such when he went to the building site. He was entitled to oblige the complainant to pay his workers the regulated wages. Looking at the surrounding circumstances, it was doubtful whether there was a demand.

The issue whether or not there was a menace cannot be divorced from the consideration as to whether or not there was a demand. There was, in our view, insufficient evidence upon which the learned trial magistrate could find that the demand was accompanied by a menace.

The evidence led did not support the charge as laid and; moreover, in the circumstances, it cannot be said that all the ingredients of the offence of demanding money with menaces had been proved.

Obviously, it was incumbent on the learned trial magistrate and the first appellate judges to consider the evidence in all its respective stages and then arrive at a conclusion on the totality of the evidence after doing so. In this case, there is no indication that either the trial court or the appellate judges did this.

We find that there was conflicting evidence which related to when the demand was made and as to whether the appellant was present on the three occasions preceeding the trap and the arrest. The complainant's evidence was completely at variance with that of his foreman as regards the kind of threat used. These, though material, were never resolved by the two Courts and, in our view, they were such that they could have rendered the trial court's findings of fact unreliable. Thus, we do not have the benefit of any critical analysis by the superior court of the supposed inconsistent evidence. The first three grounds of appeal must, therefore, succeed.

The two courts below failed to consider the suggestion that there was a motive by the complainant to cripple the appellant to forestall the payment of extra wages to the workers. It is obvious that the complainant had a lot to gain by ensuring that the problems created by the appellant were done away with. This becomes evident from the perusal of the sub-contract agreement which was not alluded to by either of the Courts.

The fact that the envelope in which the money was put was never recovered, though the appellant never left the *situ* was significant when considered together with the absence of the APQ powder traces. It would in many respects cast doubt on the evidence of the police officers as to whether or not they actually found the money with the appellant in the manner suggested by them.

The learned state counsel quite rightly conceded this appeal and for the reasons outlined above we think that the appellant's complaints are not without merit. Accordingly, we allow the same, quash the appellant's conviction and set aside his sentence of 2 years imprisonment.

It is so ordered.

Dated and Delivered at Nairobi this 4th day of June, 1993

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL