IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru & Cockar JJ A)

CRIMINAL APPEAL NO 62 OF 1991

SAMUEL ALWENDA OYANI……...……..….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

at Nairobi (Porter & Mbaluto JJ) dated 1st October, 1990

in HC CR A No 957 of 1989)

JUDGMENT

The appellant's conviction for the offence of demanding property with menaces contrary to section 302 of the Penal Code by the trial court was upheld by the first appellate court.

In this second appeal, his complaints are that in upholding the said conviction, the first appellate court was in error because the charge against him for the offence aforementioned was incurably defective as the menaces alleged against him were not particularised and the demand attributed to him was not proved beyond reasonable doubt. His conviction therefore was unsustainable.

It all started with a New Year's gift of a wrapped bottle of Smirnoff Vodka by Mrs Ajeet Kaur Arora (PWl) to Mrs Anne Chite, the first accused in the trial court, on the morning of 6th January, 1988. Mrs Chite was then the Chairman of Business Premises Rent Tribunal and the gift of the bottle of vodka was delivered to her in her chambers at Uchumi House, Nairobi by PW1. In the afternoon of the same day, Mrs Chite unwrapped the bottle of vodka. The bottle was sealed but the Vodak liquid contained therein had some white particles. These particles according to a Government Analyst with the Government Chemist's Department (PW2), were a result of weatherring of the bottle due to high alkaline content of the vodka liquid attributable to poor manufacturing and production practices by the manufacturers of the bottle. The liquid inside the bottle was genuine vodka by alcohol content but was unfit for human consumption because of the white deposits.

After observing the white particles in the bottle of vodka, Mrs Chite immediately summoned PWl to her chambers. Accompanied by one of her sons, Jaspal Singh Arora (PW4), PW l went to Mrs Chite's chambers. While there, Mrs Chite in a loud and angry voice asked PWl why she was trying to poison her. Mrs Chite then brought the bottle of vodka close to PW l and PW4 and on looking at it PW4 could see

white deposits in the liquid contained therein. Notwithstanding that the bottle was still sealed, Mrs Chite told PWl that she had put poison in it with the intention of killing her (Mrs Chite). The latter then threatened to call the police to come to her chambers to arrest PW l and PW4. Indeed, she rang and asked for a police officer not below the rank of a corporal to come to her chambers for this purpose. PW l started crying. PW4 pleaded with Mrs Chite and after a period of about 15 minutes she allowed him and his mother (PWl) to leave her chambers but she was left with the bottle of vodka.

On 8th January, 1988 Mrs Chite brought the incident concerning the contaminated bottle of vodka to the attention of the appellant who was then the Officer – in – Charge Muthangari Police Station, Nairobi. At about, 7.30 pm on the same day, accompanied by her husband, Mr Chite, she handed over the bottle of vodka in question to the appellant in his office at the above mentioned Police Station. Shortly thereafter, PW1 was summoned to the appellant's office. Accompanied by her three sons, PW1 drove to Muthangari Police Station where she found Mrs Chite waiting for her. In the appellant's office, the appellant asked PWl whether she knew that the bottle of vodka she had taken to Mr Chite had poison inside it. PWl did not reply. Thereupon, the appellant asked whether she realized that a charge of murder could be preferred against her. She did not say anything Mr Chite who was still in the appellant's office then interjected and said that they could settle the matter amicably. They then left the appellant's office and outside the Police Station, Mr Chite suggested to PW1that this matter could be settled by giving something to each of the three parties involved. The total sum required for this purpose was Kshs 300,000/-. Mrs Chite said that she would contribute Ksh 150,000/- while PW1 would contribute Kshs 150,000/-. The total sum of KShs 300,000/ was to be handed over to the appellant on the following day - 9th January, 1988. Thereafter, the Chites and PW1 went back to the appellant's office and told him that they had reached an agreement and that they would see him on the following day. PW1 did not keep her appointment of the following day.

Alarmed by the turn of events relating to her gift of the bottle of vodka to Mrs Chite, PW1 decided consult an advocate, Mr Mbuthi Gathenji (PW 13), who advised her to report the matter to a senior police officer. On l1th January, 1988 accompanied by two of her sons one of whom was PW4, she made the necessary report to the Criminal Investigation Department Headquarters, Nairobi.

Soon after 5.00 pm on 13th January, 1988 the appellant drove to the house where PW1 and PW4 lived. He did not find any of them present. He therefore left a message with workers that the owner of the house should report to Muthangari Police Station and see the Officer-in-Charge of that Station on the following day.When PW4 returned home that evening, he was given this message. On the following day - 14th January, 1988 - PW4 reported this incident to the Criminal Investigation Department Headquarters, Nairobi from where he was fitted with a tape recorder and instructed how operate it. He then proceeded to Muthangari Police Station and went to the appellant's office. As he did so he switched on the tape recorder.

In the appellant's office, a conversation lasting between 30 and 35 minutes took place between the appellant. and PW4. That conversation was tape-recorded. Its gravamen was the appellant's acknowledgement of his awareness of the arrangement in which PW1 and Mrs Chite were each to bring a sum of Kshs 150,000/ to him before he could release back the contaminated bottle of vodka to them. Indeed, in that conversation, PW4 told the appellant that he had already obtained the requisite sum of money on behalf of his mother (PW1) and that the same was now in a safe deposit in the Bank. He was ready to withdraw this money on the following day after arrangements had been made regarding its being handed over to the appellant as per the previous agreement. To this, the appellant told PW4 that he would get in touch with him at his place of work and for that purpose he took down the requisite telephone number.

On 15th January, 1988 at about 8.15 am the appellant rang PW4 at his place of work and told him that the necessary arrangements had been made and that they were to meet in the evening of that day. Later on the same morning and in another conversation through PW4's house telephone which had earlier been fitted with a tape recorder, the appellant asked PW4 whether he was ready with the arrangements and on the latter's response that he had the Kshs150,000/- with him, the appellant asked him to meet him at Muthangari Police Station with the money. PW4 declined saying that the police station would not be an appropriate venue for the agreed transaction as he would be accompanied by his mother (PW1). The

appellant then told PW4 that he would contact him at home during lunch time. At about 1.00 pm the appellant, accompanied by Mr Chite, arrived at PW4's home in a white Mazda motor vehicle registration No KRC 278. That vehicle was being driven by Mr Chite. Mr Chite asked PW4 to enter into the vehicle so as to finalise the arrangements but the latter declined saying that the he had visitors in the house. The appellant then finally told him that they would meet at 6.30 pm outside the Post Office at Lavington Green Shopping Centre, Nairobi when he (PW4), would bring the Kshs 150,000/- on behalf of his mother (PW1) and Mr Chite would bring his share of similar amount of money on behalf of his wife, Mrs Chite, and the appellant would then hand over the contaminated bottle of vodka together with the relevant police record of the complaint in respect thereof.

At 6.20 pm on 15th January, 1988, PW4 together with his mother (PW1) proceeded Lavington Green Shopping Centre, Nairobi. They stopped their car outside the Post Office at the said Centre. Shortly thereafter, Mr and Mrs Chite arrived in a blue Mercedes Benz motor vehicle and stopped behind them. The appellant had not arrived. Because of this, Mr Chite decided to drive him. Mrs Chite drove to Muthangari Police Station to check on him. Mrs Chite had then alighted from their vehicle and had joined PW1 and PW4 in their car. While in that car, Mrs Chite revealingy said that she had given the appellant her share of Kshs 150,000/- as he had become a nuisance and was harassing her. Both PWl and PW4 disapproved of this and expressed their doubts whether the appellant would turn up at all. Mrs Chite, however, reassured them that the appellant was certainly going to come to this venue as he was aware of the arrangements. Meanwhile, officers from the Criminal Investigation Department Headquarters, Nairobi who had been alerted of the arrangements by PW4 sprung on them and soon thereafter, Mr Chite arrived without the appellant. Mrs Chite and her husband were immediately arrested but the appellant was arrested on the following day - 16th January, 1988.

The appellant's defence was that after Mrs Chite lodged her complaint about the contaminated bottle of vodka, he summoned PW l to his office. She came with her sons and after interviewing her she asked him to allow her to talk to the Chite family with a view to settling the matter. PW1 and Mrs Chite both of whom were in the appellant's office then left but before leaving that office, PW1 had agreed to come back to record a statement. On 9th January, 1988 the appellant booked Mrs Chite's complaint in the Occurrence Book. Subsequently, PW4 came to his office and talked about money in an attempt to influence him to settle the matter but he refused.

However, when the appellant was cross-examined, he admitted having had a conversation in his office with PW4 lasting about 30 to 35 minutes. He also recognised his voice in the play-back of a tape of that conversation which was properly tendered in evidence at his trial. Likewise, he admitted being aware of an arrangement of a meeting at Lavington Green Shopping Centre, Nairobi as PW4 had asked him to inform Mrs Chite about it. although he did not know the purpose of the meeting and he was not to be at the said meeting.

The foregoing are the facts found by the two courts below. Concerning the first issue of law raised in this second appeal, the first appellate court observed that the non-particularisation of the menaces alleged against the appellant in the charge laid against him did not mean that the offence charged amounted to no offence. Indeed, according to that Court, if the menaces were not sufficiently set out in the charge, the latter was curable under section 382 of the Criminal Procedure Code since as the evidence unfolded and in fact from the outset, the evidence of the complainant (PW l) clearly manifested the menaces alleged against the appellant. The defence had therefore ample time to deal with the matter from the very beginning but there appears to have been no difficulty in regard to the charge as the same as never raised at the earliest opportunity. The first appellate court therefore was of the view that the charge against the appellant was not incurably defective.

Regarding the second issue of law put forward by appellant in this appeal, the first appellate court noted that the appellant associated himself with the initial demand made by the Chites by blowing up a situation which he had good reason to treat as innocent and requiring no bogus threat of investigation and arrest of the complainant - PW1. That Court therefore found basis for interfering with the holding of the trial Court that the appellant made the demand necessary in the offence with which he was charged. In the circumstances, his conviction was upheld.

The argument of counsel for the appellant in regard to the issues of law raised in the appeal before similar to that advanced on behalf of the appellant in the first appellate court and the latter court had dealt with it as is indicated above. The submission of counsel for the respondent, however, was that there was no requirement to particularize the menaces. According to him, once the necessary information was laid out on the charge, there was no further need to set out the menaces. Concerning whether the demand of Kshs 150,000/- was proved beyond reasonable doubt, counsel contended that such demand need not be made expressly. The demand could be deduced from conduct and in the present appeal, the demand was made by Mrs Chite and the appellant virtually took it over. The complainant had to seek advice from an advocate over this matter, counsel concluded.

Section 302 of the Penal Code is in the following terms:

> "302. Any person who, with intent to steal any valuable thing, demands it from any person with menaces or force is guilty of a felony and is liable to imprisonment for ten years."

The essentials of the offence under the foregoing section are that the accused person demanded a valuable thing from some person ; that he demanded it with menaces or force; and that he demanded it with intent to steal. The particulars of the offence in a charge of demanding property with menaces under the above mentioned section must embrace these ingredients.

The particulars of the offence with which the appellant and others were charged before the trial court were as follows:

> "(1) Anne Chite (2) Hannington Chite (3) Samuel Oyani:-
>
> On diverse days between 6th and 15th January, 1988 in Nairobi within Nairobi area, with intent to steal, jointly demanded with menaces the sum of Kshs 150,000/- from Mrs AJeet Kaur Arora."

According to the appellant, the foregoing particulars did not set out the nature of the menaces with which he was alleged to have demanded the sum of KShs 150,000/- from PWl and because of this omission, the charge against him was fatally defective.

Menaces substantially means the same thing as threats. The test for menaces in the offence under section 302, *supra,* is the answer to the question whether the menaces were such, if proved, that they were likely to operate on a person ordinarily firm and courageous minded. It is not necessary that in order for such offence to be established it must be proved that an intended victim of the demand must in fact himself have been alarmed by the menaces held out to him. What must be proved is, among other matters, that the person charged with the offence under the above mentioned section had the intention to alarm his victim by means of menaces which would have affected the mind of a person of ordinary firm courage and character. Whether such menaces affected the mind of the alleged victim or not is not an essential matter. In some cases such menaces might; and in others as where the targeted victim is of strong character, or for other reasons there would be no effect upon him. It is essential therefore when considering what would be the effect of the menaces on the mind of a person of ordinary firm courage and character to first put him in the position revealed by the facts of the case. Hence, once the demand with menaces of the valuable thing has been stipulated in the particulars of the offence as was so in the present appeal, the sufficiency of such menaces towards the proof of the offence under section 302 of the Penal Code is a matter to be disclosed under by the facts of the case. In this appeal therefore, failure to particularize the menaces alleged against the appellant did not render the charge against him for the offence under the aforementioned section defective.

For the purpose of the offence under section 302 of the Penal Code, the demand for a valuable thing need not be express. The conduct or demeanour of the accused person and the circumstances of the case may be such that an ordinary reasonable man would understand that a demand for the valuable thing in question was being made upon him. From the findings of facts by the two lower courts as are outlined above, after the initial demand of Kshs 150,000/- by the Chites from PW1, the appellant entangled himself in their plot and in no time deliberately allowed himself to be a tool of their contrivance. He not

only asked PW1 while she was in his office at Muthangari Police Station on the evening of 8th January, 1988 whether she realized that a charge of murder could be preferred against her over the alleged poisoned bottle of vodka which she had given to Mrs Chite but subsequently actively endeavoured to have the Kshs 150,000/- handed over to himself for the purpose of having the matter concerning the contaminated bottle of vodka settled. This had unsettled PW1 to the point that she had to seek legal advice from an advocate subsequent to which she made a report to the Criminal Investigation Department Headquarters, Nairobi. In these circumstances, the first appellate court was not wrong in observing that the appellant associated himself with the initial demand made by the Chites by blowing up a situation which he had good reason to treat as innocent and requiring no threat of investigation. Indeed, as counsel for the respondent pointed out, the appellant virtually took over the whole exercise from the Chites his conduct manifested both the menaces and the demand. There is therefore no merit in his complaint before us that the demand of Kshs 150,000/- attributed to him was not proved beyond reasonable doubt.

Dated and Delivered at Nairobi this 24th day of September, 1993

J.E. GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL