IN THE COURT OF APPEAL

AT NAKURU

(Coram: Masime, Gicheru & Kwach, JJ A)

CRIMINAL APPEAL NO 67 OF 1992

Between

EVANS MOSESSAETA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a judgment of the High Court of Kenya at Nakuru (Tanui, J) dated the 24th day of October, 1991

in

HCCR A No 248 of 1991)

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JUDGMENT

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 10 years."

To support a charge under the foregoing section, there must be evidence showing 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.

See the case of *Rex v Fulabhai Jethabhai Patel and another* (1949) 13 EACA 179 at page 182.

On 4th July, 1991 the appellant was convicted of demanding Kshs 1,000/= with menaces contrary to section 302 of the Penal Code by the Nakuru Resident Magistrate, Miss H Owino, and sentenced to 18 months imprisonment. His appeal against conviction and sentence to the High Court at Nakuru was on 24th October, 1991 dismissed in its entirety. In this second appeal, his complaint is that there was no proof that he had demanded the Kshs 1,000/= from one John Kiarie Mwaura, the complainant, with

menaces.

A demand with menaces need not be express. The demeanor of an accused person together with the circumstances of a particular case culminating with the victim's understanding that a demand was being made upon him and that that demand was accompanied with menaces so that his balance of mind was upset would amount to a demand with menaces. The latter means no more than threats which have to be proved to be calculated as likely to operate upon or work upon or have effect upon the mind of an ordinary person. The test of the menaces is the answer to the question whether the menaces were such, if proved, that they were likely to operate on or affect the mind of a person of ordinary firm courage and character by placing such person in the position revealed by the facts of the particular case. See *R v Thomas James Collister and Another* (1955) 39 Cr App R 100 and *Regina v Clear* [1968] 1 Q B 670.

The appellant, an Administration Police Corporal, had arrested the complainant on 28th November, 1989 at about 1.00 pm for the reason that he was felling trees on Haraka Farm in Molo South without a permit notwithstanding the complainant's explanation that the duplicate of the requisite permit was with the owner of the trees while the original thereof was with the person who had bought the trees. As the appellant escorted the complainant together with his companion, David Ndungu Mwaura, to Molo South Chief's Camp he told him (the complainant) to give him something small so as to finalise the matter concerning his arrest. When the complainant asked him how much was something small, the appellant told him that Kshs 6,000/= would do. The complainant told him that he did not have that sum of money and in response thereto, the appellant told him that in that case he would be charged and defend himself. The complainant and his companion were carrying with them the power saw and the axe they were using in felling trees on Haraka Farm. At about 6.30 pm they arrived at the chief's camp where the appellant got into his house and came out with a book wherein he made entries of the complainant's identification particulars. He then took the complainant's power saw and axe and kept them in a store. Thereafter, he released the complainant together with his companion and told the former to bring the original permit.

On 30th November, 1989 the complainant took the permit to the appellant who said that it was wrongly worded because it should have indicated the measure of the trees to be cut down in metres rather than in acreage. The complainant's short answer was that if there was any fault in the permit the same could only be attributed to the officer who issued it. The appellant then asked the complainant to give him Kshs 1,000/= so as to end the matter and in consequence thereto release the complaint's power saw and axe. The complainant told him that he only had enough money for his fare. Appellant then suggested to the complainant that he could go and get the money from the person in whose name the permit was issued. Realizing that the appellant was not inclined to prefer any charge against him, the complainant decided to report this matter to Molo CID office. He therefore asked the appellant where he would meet him and the latter told the complainant to see him at his house the next day in the evening. On 1st December, 1989 the complainant reported this matter to Molo CID office. Subsequent thereto, the CID personnel gave him Kshs 500/= treated with APQ powder and another untreated sum of Kshs 500/=.The complainant was to bargain with the appellant to accept Kshs 500/= and if he accepted that sum, he was to be given the treated Kshs 500/= but if he refused, then he was to be given both the treated and the untreated money. An arrangement was made so that once the money was handed over and received by the appellant, by some signal, this would immediately be communicated to some CID officers who though incognito would be near the scene.

On 2nd December, 1989 the complainant together with some CID officers proceeded to Molo South Centre. Outside a bar called Silent Bar, the appellant accepted to receive Kshs 500/=. The complainant gave him the treated Kshs 500/=. As soon as he received this money, CID officers moved in and arrested him. The treated Kshs 500/= was recovered from him.

With this kind of evidence, the trial magistrate concluded that on 2nd December, 1989 at Silent Bar in Molo South Centre the appellant had demanded with menaces Kshs 1,000/= from the complainant. The first Appellate Court was of the same view and that that demand was with intent to steal that money.

The events leading to the complainant giving the appellant the Kshs 500/= mentioned above on 2nd December, 1989 reveal the appellant's desire to obtain some money from the complainant on account of

having arrested him as is set out above. This desire manifested itself at the first instance when he importuned the complainant to give him Kshs 6,000/= so as to finalise the matter concerning the arrest aforementioned. It then descended to Kshs 1,000/= and finally settled at Kshs 500/= which the appellant accepted on 2nd December, 1989.

Placing the complainant in the facts outlined above and his reactions to the circumstances appertaining thereto, we cannot say with certainty that the appellant's importunity for money from him amounted to a demand nor that it operated upon his mind so as to affect his balance and thereby acceded to it unwillingly. It was more in the nature of a corrupt solicitation and the agreed Kshs 1,000/= which was to be given to the appellant on 2nd December, 1989 was the result of such solicitation and not because of a demand with menaces addressed to the complainant. We think therefore that there is merit in the appellant's complaint before us that there was no proof that on 2nd December, 1989 he demanded Kshs 1,000/= from the complainant with menaces. In the absence of such proof, the charge of demanding this money with menaces could not stand against him. His conviction was wrong. Accordingly, we allow this appeal, quash the conviction and set aside the sentence of 18 months imprisonment although when this appeal came up for hearing on 22nd September, 1992 the appellant had been released from prison.

It is so ordered.

Dated and delivered at Nakuruthis 23rd day of December 1992

J.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR