



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Law V-P & Musoke JA)

CRIMINAL APPEAL NOS 529 & 721 OF 1976

MICHAEL MUKUNDI THIONG'O

CHRISTOPHER GITONGA APPELLANTS

VERSUS

REPUBLIC.....RESPONDENTS

JUDGMENT

The appellant, Michael Mukundi Thiong'o, is one of three police officers who were charged in a Senior Resident Magistrate's Court at Nairobi with wrongful confinement (in the first count) and demanding property with menaces (on the second count). Two were convicted on both counts and the third was acquitted. The two convicted officers were each sentenced to nine months' and seven years' imprisonment on the two respective counts; the sentences to run concurrently. They both appealed to the High Court against their convictions and sentences. The High Court quashed the conviction of the appellant on the first count but dismissed his appeal against the conviction and sentence on the second count. The second officer's appeal on both counts was dismissed. Both officers have now appealed to this Court against the decision of the High Court.

At the hearing the other officer did not appear nor was he represented and, as it appeared that he had not been served with a hearing notice, his appeal was adjourned *sine die* and we proceeded to hear the appellant's appeal.

The facts in this case are that a party of three police officers arrested one Osman Kassim at his restaurant in the Nairobi industrial area, ostensibly for receiving stolen property. He was taken to his house where the appellant and the other officer told him that his offence was serious and carried a fine of some Shs 10,000 to Shs 15,000, or twenty to twenty-five years' imprisonment. The officers suggested that the matter could be discussed there and then; and they referred to long working hours in the police force, lack of overtime pay and to "food". In this context the word "food" was understood to mean money. Apparently, Osman was released at his house but the party returned to Osman's restaurant where a demand was allegedly made of Osman to pay Shs 5000 to the officers to settle the matter.

Mr Kilonzo for the appellant quite correctly, in our view, submitted that for a charge of demanding with menaces to succeed the prosecution must prove that (1) the accused demanded a valuable thing; (2) he demanded it by menaces or by force; and (3) he demanded it with intent to steal.

Counsel submitted that, as a matter of law, there was no proof in this case that the appellant made any demand or that he offered any menaces. He conceded that if these two ingredients were proved, there was an intent to steal. Secondly, counsel submitted that, as there was no evidence that the appellant made any demand or offered any menaces, no common intention was proved to associate him with any acts or words of the other officer. Alternatively, that if any common intention was proved the appellant had effectively dissociated himself from that common intention. Counsel relied for his submissions on *R v Patel and Patel* (1946) 13 EACA 179; *Okech v The Republic* [1968] EA 508; *Kagori v The Republic* [1967] E A 427; *John Raymond Vaz v R* [1961] EA 320; and *R v Tabulayenka s/o Kirya* (1943) 10 EACA 51. Counsel criticised *R v Antonio Becerra and John David Codrer* (1976) 62 Cr App Rep 212, relied on by the High Court on first appeal, as not representing the law in Kenya on the question of withdrawal from a common intention.

On the questions of demand with menaces and common intention, the trial magistrate held:

I find that [the appellant] and accused 3 were acting in concert with the intention of frightening [Osman] into giving them money. The generous estimates made as to what prison sentences or fine he was likely to receive were hardly intended to re-assure him. References to the lack of pay [overtime] in the police forces, and also to the insufficiency of food could only suggest that they would appreciate help on these matters.

I note [the appellant's] and accused 3's comment to [Osman] when they returned to the restaurant, that it was up to [Osman] 'to decide the matter'. This was a curious option for police to give a man whom they had arrested for an offence.

I also note that accused 3 knew [Osman] to have the day's takings at the restaurant which he suggested [Osman] should give him.

Having asked [Osman] for Shs 5000/-, which was then reduced to Shs 3000/- and then again, to Shs.1000/-, accused 3 left [Osman] telling him 'to think' and reminding him that he should be gaoled.

These features leave me in no doubt that accused 3 (supported [by the appellant's] observations as to the penalties to which [Osman] was exposed) was actively engaged upon intimidating [Osman] in order to extort money from him.

[The appellant] I find obviously assisted accused 3 by what amounted to menaces and I find they acted in concert having formed a common intent to demand with intent to steal.

The judges on first appeal were of the same view and in their own words:

During a protracted interview ... the Ismail brothers understood that money was being demanded of them. The heavy hand was that of the appellant Christopher Gitonga while the appellant Michael Thiong'o played down the menaces (concerned with the heavy punishment which Mr Osman Ismail's offences merited). The appellant Michael Thiong'o offered to forgive Mr Osman. But all this was held to be part of a concerted scheme and the events that followed, if believed, showed that this must be a proper inference ...

At the restaurant, a conversation took place; the appellants only accepted coffee and they suggested that the matter be brought to a finish. Mr Osman instructed his wife to put one Shs 100 note into each of two envelopes and bring them in a book. That was done, but the appellants thought that they might be arrested. So Mr Osman Ismail took them into a store, where the appellants were each given an envelope. Then the appellant Michael Thiong'o looked in his envelope, said nothing and put it back in the book. He walked out in disgust. The appellant Christopher Gitonga stayed on. It was too small a sum; he said he wanted Shs 5000. Mr Osman Ismail did not have that much. The sum was reduced finally -Mr Osman Ismail was given time to raise it.

As this Court held in *Patel's* case (1946) 13 EACA 179:

the question as to whether the accused person's act amounted to a demand is purely one of fact, and as said by the Court of Criminal Appeal in *R v Studer* (1915) 2 Cr App Rep 307 'It is not necessary that the language should be explicit; it may be in the language of a request. Surrounding circumstances may show that, whatever the language employed, the words in fact amounted to a demand.

In our view there is evidence to support the concurrent findings of fact by the two courts below that there was a common intention to demand money with menaces having regard to the discussions in Osman's house and also at his restaurant. It has not been shown that this Court should interfere in these findings of fact.

We must now consider whether the appellant withdrew from the common intention to commit the offence. On this question Mr Kilonzo referred to two instances which, in his view, showed that the appellant had effectively dissociated himself from the acts of the other officer. First, counsel submitted that when the appellant was handed his envelope in the store containing Shs 100 he left it there and walked out in disgust leaving the other officer behind. The disgust was at the idea of being bribed. From that point onwards the appellant dissociated himself from any acts of the other officer who remained in the store. The demand for Shs 5000, which was the subject-matter of the charge, was made in the absence of the appellant. Secondly, he went on, the next day the appellant met Osman and far from renewing or referring to any demand for money he, the appellant, told Osman not to mention the matter to the police. This, counsel submitted, re-inforced the argument that the appellant had in fact withdrawn from any acts of demanding money with menaces which may have been perpetrated by the other police officer. This last point is a double edged sword. If indeed the appellant had withdrawn and did not wish to be associated with any demands for money, then what is it that he did not wish to be reported to the police?

Be that as it may, the trial magistrates does not appear to have considered the first point raised by counsel specifically, but he dealt with the matter in this way:

I believe [the appellant] to have had second thoughts as to whether the risk he ran in such an enterprise was worth the Shs 100 which he refused and that he called on [Osman] next morning to enquire whether [Osman] had reported the matter to the police and to advise [Osman] to say nothing about [sic] ... Unfortunately for [the appellant], and what I believe to have been his change of mind, I consider that he and accused 3 had already committed the offence charged under count 2 on 11th September 1975 and I find accordingly.

The judges of the High Court commented on this passage thus:

What is meant by these passages, we think, is that the two appellants had demanded an unspecified sum during the course of the second conversation at the house and in the restaurant. To that extent the appellants had committed the type of offence charged. But then if Michael Thiong'o had dissociated himself before the demand for Shs 5000 was made, as is actually charged in count 2, had he committed that particular offence?

The judges then considered *Becerra's* case (1976) 62 Cr App Rep 212 and, re-evaluating the facts, held that there was no withdrawal from the common intention by the appellant.

The case of *Tabulayenka* (1943) 10 EACA 51, relied on by Mr Kilonzo, does not assist us on the question of withdrawal. On this issue, it goes no further than merely state that a common intention may be inferred from presence, actions and omissions to dissociate oneself from the actions of the others. The Court did not elaborate as to what amounts to dissociation. The matter was, however, dealt with in *Becerra's* case, relied on by the judges in the court below. They quoted the headnote. We reproduce below, with approval, part of the quotation from the judgment of Sloan JA of the Court of Appeal of British Columbia in *R v Whitehouse (alias Savage)* [1941] 1 WWR 112, 115, adopted by the British Court:

After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it, What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

In the instant case we agree that merely walking out of the store in disgust by the appellant and leaving behind the other officer who continued with the demand did not (as was found by the court below) amount to withdrawal by the appellant from the common venture. In the circumstances of this case, the disgust must relate to the meagreness of the sum of Shs 100 offered, bearing in mind that up to that moment no specified sum of money had been demanded and the sum of Shs 5000 which was thereafter demanded. If these were not the intentions, the appellant could have informed or somehow indicated to his companion that he was abandoning the venture. We are satisfied that it has not been shown that the High Court erred in coming to the conclusion that it did. Accordingly, we dismiss the appeal.

Appeal dismissed

Dated at Nairobi this 27th Day of October 1977.

S.W.W. WAMBUZI

.....

PRESIDENT

E.J.E. LAW

.....

VICE – PRESIDENT

J.S. MUSOKE

.....

JUDGE OF APPEAL