REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL NO. E026 OF 2024

REPUBLIC .....

APPELLANT

VERSUS

PETER HIUHU WANJOHI.....

RESPONDENT

(*Being an appeal from the Judgment of Hon. N.W. Wanja, Resident Magistrate in Othaya Criminal Case No. E498 of 2023, delivered on 21.05.2024)*

JUDGMENT

1. This is an appeal from the Judgment of the Hon. N.W. Wanja, Resident Magistrate in Othaya Criminal Case No. E498 of 2023 delivered on 21.05.2024.

2. The Respondent had been charged with two counts. Count 1, threatening to kill contrary to Section 223(1) of the Penal Code. Particulars were that on 7.09.2023 at Githunguri Village in Nyeri South Sub-county Within Nyeri county without lawful excuse uttered the words ‘geria o nawe gukuhiriria haha, ngutume ugakome kaburini ya muthee…, meaning: ‘you too, come closer and I will send you to sleep inside my father’s grave,’ threatening to kill Jacinta Wangui Wanjohi.

3. In Count 2, he was charged with creating a disturbance in a manner likely to cause a breach of peace contrary to Section 95(1) (b) of the Penal Code. The particulars were that on 7.09.2023 at Githunguri Village in Nyeri South Sub-county within Nyeri county without lawful excuse uttered the words ‘geria gukuhiriria haha, ngumunye magego mothe, meaning, ‘try to come closer and I will remove all your teeth” towards Paul Kaguru Wanjohi, threatening to harm him with an axe thereby causing a breach of peace.

4. The plea was taken on 11.09.2023 where the Respondent pleaded not guilty and was released on cash bail of Ksh 20,000/=.

5. The court heard three witnesses. The Respondent was placed on his defence. Upon giving unsworn evidence, the court analysed the case and convicted the Respondent on both counts pursuant to section 215 of the Criminal Procedure Code and convicted the Respondent and sentenced him to 60,000/= fine in default 9 months imprisonment for the first count and 30,000/= fine in default 6 months. The sentences were to run concurrently.

6. The state was aggrieved and set forth the following grounds of appeal:
    a) The learned trial magistrate erred in sentencing the respondent to a fine of Kshs 60,000/= in default to serve six months imprisonment for the offence of threatening to kill contrary to section 223(I) of the penal code.

b) The learned trial magistrate erred in failing to consider that the respondent had a previous record being Cr. No. 511 of 2021, where he was charged and convicted for assaulting the victim of the subject appeal.
c) The learned trial magistrate erred in imposing a sentence so low that it is manifestly inadequate and which would shake public confidence in the administration of justice if it was allowed to stand.
d) The learned trial magistrate erred in law and fact in failing to consider and/or disregarding the prosecution's submissions during the sentencing hearing and thus arrived at a conclusion contrary to the law and weight of the charge on record.

7. Given that this is an appeal on sentence, it is unnecessary to set out the evidence. However, the court shall analyse the facts, evidence, mitigation and the sentence meted out. However, a very brief summary is set forth herein.

8. PW1, Jacinta Wangui Wanjohi, testified that on 7.9.2023 she found the accused, her son, cutting a tree near her house and when she questioned him, he advanced menacingly with an axe and threatened to send her to her husband’s grave. PW2, her son Paul Kaguru, stated that upon being called by PW1 he found the road blocked by a felled tree and the accused wielding an axe, who similarly threatened to send him to their father’s grave, causing them fear. PW3, PC Edwin Mutembei, confirmed receiving the report, recorded the complainants’ statements,

visited the scene where he saw the felled tree, and later recovered the axe from the accused's house, which he produced as an exhibit.

9. DW1, the Respondent, denied blocking the road or threatening the complainants, stating that on 7.9.2023 he was with his wife collecting foliage for their animals, and attributed the allegations to long-standing boundary disputes with the complainants. DW2, a Nyumba Kumi elder, testified that he was called by PW1 but on arrival found no tree blocking the road, no threats made, and only saw the accused with his wife at the animal shed; he confirmed strained relations with both parties but did not witness any incident. DW3, the accused's wife, gave the same account as DW1, stating they were collecting dried leaves for animals at the material time, that DW2 visited around 9:20 am., and maintained that the accused did not interact with or threaten the complainants, while noting a history of poor relations between the families.

Submissions

10. Though the matter was to proceed by way of written submissions, the parties found it necessary to eschew filing. The court put off the judgment in order to incorporate submissions but none were filed.

Analysis

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions.

It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

12. An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive re-evaluation and analysis, and to the appellate court's own decision thereon. The first appellate court must itself weigh conflicting evidence

and draw its own conclusions, while bearing in mind that it has neither seen nor heard the witnesses and must make due allowance for that. In the case of **Okeno v Republic [1972] EA 32** at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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 magistrate's findings should 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 Peters v. Sunday Post, [1958] E. A. 424."**

13. There is only one issue for determination in this appeal, that is whether the sentence was manifestly low and as such, will shake the public confidence.

14. The Respondent was charged with two counts. The first is based on section 223(1) of the Penal Code. The said section provides as follows:

(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.**

14. Section 95(1)(b) of the Penal Code provides that:

95. Threatening breach of the peace or violence
(1) Any person who—
(b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.

15. The duty of this court as regards sentence is well settled. The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs Republic** [2002] eKLR restated that:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on

sentence unless, anyone of the matters already states is shown to exist."

16. In the case of **Shadrack Kipkoech Kogo - vs - R** Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

> "sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

17. The Court of Appeal in the case of **Ogolla s/o Owuor vs Republic**, [1954] EACA **270**, pronounced itself on this issue as follows:-

> "*The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."*

18. Sentencing is a vital component of the administration of justice. While it is primarily an exercise of judicial discretion, this Court must exercise caution and refrain from interfering with such discretion unless it is shown to have been improperly applied. In the case of **Hillary Kipkirui Mutai v Republic** [2022] eKLR, Lagat-Korir, J, posited as follows:

> 9. Sentencing is an important aspect of the administration of justice. Noting that sentencing is based on a judicial officer's discretion, this Court must be careful not to interfere with such a decision,

unless it is demonstrated that the sentence was manifestly excessive, was illegal, improper or founded based on misrepresentation of material facts.

Courts are replete with cases that demonstrate the objectives of sentencing. In R. vs. Scott (2005) NSWCCA 152,Howie J Grove and Barr JJ stated:

"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed 'One of the purposes of punishment is to ensure that an offender is adequately punished further purpose of punishment is to denounce the conduct of the offender."

19. The sentencing for count 2 is proper. However, the court is surprised that after giving a fine option, the court proceeded to give concurrent sentence. Preferring fine over sentences is provided in section 2.7.5 of the Sentencing Policy Guidelines, 2023 which provides as follows:

> **Where the option of a fine is provided in the law, the court must first consider it before proceeding to impose a custodial sentence. 85 If in the circumstances a fine is not a suitable sentence, then the court should expressly indicate the reasons why it is not appropriate to impose a fine.**

20. *Ipso facto* the sentence of 30,000/= in default 6 months imprisonment was thus the maximum that could be given. The appeal related to count 2 is dismissed.

21. The issue of consecutive or concurrent sentences is addressed in part under Section 14 of the Criminal Procedure Code and for offences committed during the currency of an existing sentence or before sentencing for a previous conviction, under Section 37 of the Penal Code. These sections provide comprehensive guidance. Section 37 of the Penal Code provides as follows:

> Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:
> Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.

22. Section 14 of the Criminal Procedure Code provides as follows:

> (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several

punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences-

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence

23. On the other hand, on the aspect of concurrency, it is taken into consideration and well settled in the sentencing guidelines as well as section 14 of the Criminal Procedure Code. The guidelines provide as follows:

2.3.21 Notwithstanding the provisions under the Criminal Procedure Code and the Penal Code summarised in paragraph 2.3.4 above, the discretion to impose concurrent or consecutive sentences lies with the court. There are two elements to the concept of totality, and these apply as much to terms of imprisonment as they do to community service and fines.

2.3.22 Firstly, all courts when sentencing for more than one offence should pass a total sentence which reflects all the offending behaviour in a way that is just and proportionate. This is whether the sentences are consecutive or concurrent and will usually mean that concurrent sentences will result in a longer sentence overall than a single sentence for one offence. However, the court must avoid 'double counting' where the additional offences are ancillary to the main offence e.g., robbery with a weapon – the presence of a weapon – an intrinsic part of the main offence of robbery - will likely aggravate the sentence on robbery and so the weapon offence should run concurrently and will not necessarily exceed the sentence for the robbery itself.

2.3.23 Secondly, it is rarely possible to arrive at a just and proportionate sentence by simply adding together single sentences for each offence. The court must address the offending behaviour as a whole together with the personal circumstances of the offender. Accordingly, the court must bear in mind the purposes of sentencing set out in paragraph 1.3.

2.3.28 In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence.

24. Therefore, the court was plainly wrong in ordering that the two sentences run concurrently having imposed fine. The proper order was for the sentences to run consecutively and not concurrently. In the recent decision of **Peter Mbugua Kabui v Republic** [2016] KECA 713 (KLR), the court of appeal [Kihara Kariuki (PCA), Karanja & Otieno-Odek, JJ.A] addressed the question of sentencing as follows:

> The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now old hat. The predecessor of this Court, in the case of Ogolla s/o Owuor vs Republic, [1954] EACA 270, pronounced itself on this issue as follows:-
>
> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-
>
> sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

> In the more recent case of Kenneth Kimani Kamunyu -vs- R. (2006) eKLR, this Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful…
>
> As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

25. Before addressing the sentence, it is important to note that the court did not address the issue of section 333(2) of the Criminal Procedure Code. Time spent in custody has to be regarded. The sentencing guidelines provide as follows:

> 2.3.18 Section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.
>
> 2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts

should make an enquiry particularly with unrepresented offenders – for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.

2.3.20 An offender convicted of a misdemeanour and who had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be deemed to have served their sentence and be released immediately.

26. Section 333(2) of the Criminal Procedure Code provides as follows:

> (1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
> (2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held

in custody, the sentence shall take account of the period spent in custody.

27. The question to ask is whether the sentence of 9 months is lenient. The probation report recommended non-custodial sentence. The court notes that though the offender uttered the said words, the first complainant who was the mother was the aggressor. The mother was on one side of a divided family which disintegrated upon the demise of the patriarch. The matriarch has since ganged up with other siblings to make the respondent's life a living hell. The respondent did not go to get the axe to confront the complainant. He also did not take any overt steps. He simply threatened the complainants not to come closer. Unlike other threats which this court has seen where an accused becomes irate and goes for the weapon, in this case he was already cutting a tree in their home to build a house for his son.

28. This court observed him in court. Despite being under no obligation to attend court, he came to court and filed submissions. The problem that I foresee is that sentence will not solve the deep seated divisions in the family. There is a need after all is said and done, for succession proceedings to be concluded to avoid the wrangles.

29. The image portrayed of the accused is different from the community. The dispute is really the question of land left behind by the late Wanjohi Gichithu. The postulations that the Respondent sells cannabis sativa were refuted by the local administration.

30. The evidence on record, did not disclose the offence charged. However, there was no appeal in respect of the same. Having been fined and having been in custody for 4 days, I note that the sentence meted out was proper in the circumstances, indeed given the circumstances, notwithstanding the earlier dispute, the sentence is fair.

Determination

31. In the upshot, I make the following orders:

a) Except that the sentences were to run consecutively, the appeal fails and is dismissed.

b) For the fullness of record, the order that the sentence is to run concurrently is set aside and substituted with an order that the fines and sentence in default, as imposed by the lower court is to run consecutively having regard to the period spent in custody.

c) File is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **15th** day of **October, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kimani for the Appellant

Respondent – present

Court Assistant – Michael