IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Appeal No. 0018 of 2017

In the matter between

NYEKO ANTHONY **APPELLANT**

And

UGANDA **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Criminal Law *— Threatening Violence C/s 81 (a) of The Penal Code Act.— For the appellant to be convicted of this offence the prosecution must prove beyond reasonable doubt that ; there were words or conduct that threatened another, the word or conduct were expressed with intent to intimidate and the accused uttered such words or engaged in such conduct— Mere words are not enough for this offence; they must have been uttered under circumstances that reasonably tend to produce a fear that the threat will be carried out. The law requires that the words must have been used in a way that constituted a believable threat. — The threat must have been so clear, immediate, unconditional, and specific that it communicated to the person being threatened a serious intention and the words must be intimidating, unequivocal, unconditional, immediate, and specific as to convey to the complainant a gravity of purpose and an immediate prospect of execution of the threat.*

Criminal Procedure*— Appeals — section 28 (1) of The Criminal Procedure Code Act— a criminal appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, it was incumbent upon this court to consider the merits of the appeal, despite the lapses of the appellant. — The duty of the first appellate court is to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact; to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant was jointly charged with another, with three counts; in the first Count, they were charged with the offence of Malicious Damage to Property C/s 335 (1) of *The Penal Code Act*. It was alleged that the appellant and the other, on 6th August, 2016 at Kanyagoga Zone "C" in Gulu District, wilfully and unlawfully destroyed yam crops, the property of Angeyo Betty. In the second Count, they were charged with the offence of Threatening Violence C/s 81 (a) of *The Penal Code Act*. It was alleged that the appellant and the other, on 6th August, 2016 at Kanyagoga Zone "C" in Gulu District, with intent to intimidate or annoy Angeyo Betty, threatened to cut the said Angeyo Betty with hoes. In the third count, Count, they were charged with the offence of Criminal Trespass C/s 302 of *The Penal Code Act*. It was alleged that the appellant and the other, on 6th August, 2016 at Kanyagoga Zone "C" in Gulu District, unlawfully entered upon land in the possession of Angeyo Betty with intent to intimidate, insult or annoy the said Angeyo Betty.

[2] The appellant pleaded not guilty to all counts. He was tried and acquitted on Counts 1 and 3, but was convicted on Count 2 and sentenced to a fine of shs. 500,000/= or one year's imprisonment in default. He was ordered to pay the complainant compensation in the sum of shs. 600,000/= within two months of his release. He paid the fine and was set free.

The respondent's evidence in the court below.

[3] The prosecution case was that the appellant and the complainant owned adjoining parcels of land. They had a dispute over a common boundary marked by a drainage channel. The appellant's co-accused alleged that the complainant

was letting sewerage to flow into his compound through that channel. He therefore dug up the yams and replaced them with a hedge. While the complainant claimed that the yams belonged to her the appellant claimed they belonged to him. The complainant further claimed that during the altercation, the appellant had threatened to harm her with a hoe.

Judgment of the court below:

[4] In his judgement, the trial Magistrate found that the evidence did not establish that the destroyed yams belonged to the complainant. In her testimony, the complainant stated that the yams belonged to her mother and the she received a report that they had been destroyed by the appellant's mother. There is ample evidence to show that threats were uttered. The words uttered by all means would threaten any person to whom they were directed. Owing to the fact that there is a dispute over the land, the criminal trespass alleged ought to be resolved as a civil matter. The appellant was accordingly acquitted on Counts 1 and 3, but was convicted on Count 2 and sentenced to a fine of shs. 500,000/= or one year's imprisonment in default. He was ordered to pay the complainant compensation in the sum of shs. 600,000/= within two months of his release.

[5] The appellant filed a notice of appeal but did not file a memorandum of appeal nor submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did counsel for the respondent file submissions. However, considering that under section 28 (1) of *The Criminal Procedure Code Act*, a criminal appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, it was incumbent upon this court to consider the merits of the appeal, despite the lapses of the appellant.

Duties of the first appellate court.

[6] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it").

[7] An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 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 finding and conclusion; 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*).

Ingredients of the offence of threatening Violence.

[8] For the appellant to be convicted of the offence of Threatening Violence C/s 81 (a) of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. Words or conduct that threatened another.
2. The words or conduct were expressed with intent to intimidate.
3. The accused uttered such words or engaged in such conduct.

1st issue; <u>whether words were uttered or conduct exhibited that threatened another</u>.

[9] Mere words are not enough for this offence; they must have been uttered under circumstances that reasonably tend to produce a fear that the threat will be carried out. The law requires that the words must have been used in a way that constituted a believable threat. The offence is usually constituted by utterances coupled with actions causing imminent threat of harm (see *Mugyenyi James v. Uganda [1974] H.C.B 83* and *Uganda v. Racham Daniel [1977] 52*). There must be a threat to assault coupled with intention to intimidate (see *Ofwono Benedicto v. Uganda [1977] H.C.B 210*). It must be shown that words were uttered or that at least there were gestures made that could clearly be interpreted as a threat (see *Uganda v. Onyabo Stephen and three others [1979] H.C.B 39*).

[10] The threat must have been so clear, immediate, unconditional, and specific that it communicated to the person being threatened a serious intention and the immediate prospect that the threat would be carried out. Imminent means “ready to take place, near at hand, impending, hanging threateningly over one’s head, menacingly near" (see *Holbert v. Noon, 260 P.3d 836*; *PGE v. Bureau of Labor and Industries, 317 Or. 606, 611, 859 P.2d 1143 (1993)* and *Devine v. State, 786 S.W.2d 268*).

[11] The words must be intimidating, unequivocal, unconditional, immediate, and specific as to convey to the complainant a gravity of purpose and an immediate prospect of execution of the threat. An act which causes another person to apprehend immediate and unlawful violence of itself constitutes a threat. It also includes words calculated to instil apprehension of; (a) inflicting physical harm on the person threatened or any other person; (b) subjecting any person to physical confinement or restraint; or (c) committing any felony against another person.

[12] Intimidation is constituted by intentional behaviour that would cause a person of ordinary sensibilities to fear injury or harm. It is not necessary to prove that the behaviour was so violent as to cause mean terror or that the victim was actually frightened but the fear must arise from the conduct of the accused however, rather than the mere temperamental timidity of the victim. The question is whether a reasonable person in the circumstances would think that the course of conduct would cause fear that violence would be used against him or her. The resulting fear has to be lasting and not just momentary.

[13] The threat must have been imminent, rather than something that might happen in the future. The threat to injure involves placing another person under a perception of immediate or eminent physical harm. The threat must have actually caused the person to be in sustained fear for his or her own safety or for the safety of his or her immediate family. The threatened person's fear was reasonable under the circumstances. If the person threatened could not have reasonably feared for her or his safety, because the threat was vague, did not have any immediacy, and / or was conditioned, that does not constitute a criminal threat.

[14] P.W.1 Angeyo Betty testified that the appellant came to her compound at around 7.30 am with a hoe and threatened to cut her if she did not leave. She ignored him and just continued sweeping but her mother told her to move away. The appellant's co-accused joined him later while holding a panga saying, "let's plant the flowers, if Betty comes we shall just cut her with a panga." P.W.2 Acan Hellen testified that she was at home when she heard the appellant telling the complainant "go away with your sweeping or else I will cut you with a hoe." She did not take it seriously because quarrel like this were a common occurrence between the two parties. P.W.3 D/ASP John Kennedy Ocen testified that when he visited the scene on 9th August, 2016 he found soil heaped in a manner intended to mark a boundary. Flowers had been planted on top of the heaped

soil. Crops on the side the complainant claimed to belong to her had been destroyed.

[15] In his defence, the appellant testified that on 6th August, 2016 he was digging around the common boundary uprooting yams and old flowers and replacing them with new ones that are mosquito repellent when he was accosted by the complainant who asked him what he was doing. D.W.2 Akello Stephen testified that when he returned from his garden at around 11.00 am, he found the appellant digging around the common boundary separating his land from that of the complainant. D.W.3 Lanyero Grace testified that on that fateful morning at around 7.30 am she saw the appellant pick a hoe and begin uprooting flowers heaping soil behind his house. He said he wanted to replace them with mosquito repellent ones.

[16] Considered as a whole, this evidence only showed that the words of threat were uttered but not under circumstances that reasonably tend to produce a fear that the threat will be carried out. Indeed an eyewitness to the events, P.W.2 Acan Hellen, testified that she did not take it seriously because quarrels like this were a common occurrence between the two parties. The victim herself testified that it is only her mother who told her to move away. She did not express in her testimony that she was placed under any apprehension of imminent harm. The surrounding circumstances did not present a clear and present danger of harm. The utterances were not imminent to lawless action directed at the complainant. The test of placing another person under a perception of immediate or eminent physical harm underscores the morally salient distinction between speech and action, between saying and doing. Had the trial court properly directed itself, it would have found that this ingredient was not proved to the required standard.

2nd issue; whether the words were uttered or conduct expressed with intent to intimidate;

[17] A person cannot be convicted of a crime based on an act that is accidental. Rather, the prosecution must prove that the accused acted intentionally, knowingly, or recklessly. A person acts intentionally when his or her purpose is to cause a particular result or engage in a particular course of conduct. A person acts knowingly when he or she is aware of the nature of his or her conduct or the surrounding circumstances. A person acts recklessly when he or she is aware of and consciously disregards the risk his or her conduct poses to others. There is a distinction between thinking something, saying something, and intending to do something.

[18] The offence is committed when a person intentionally or knowingly threatens another person with imminent bodily injury, i.e. intentionally or knowingly putting another person in fear of bodily injury. A person cannot recklessly commit the offence. The element requires not a mere foresight of fear as an unavoidable consequence of the utterance or act but rather a deliberate intention to bring about as a consequence, fear of imminent violence. The accused must have intended that his or her statement be understood as a threat of an imminent violent attack. Alternatively, it must be proved that the accused was aware that his or her conduct was reasonably certain to cause fear of an imminent violent attack. Acting intentionally within this context is acting for that specific reason. It must therefore be proved either that; (a) it was the accused's conscious objective or desire to threaten another person with imminent physical pain or injury; or (b) the accused was aware that his or her conduct would be reasonably certain to threaten another person with imminent physical pain or injury.

[19] Being a mental element, the intention may be deduced from utterances, or certain acts designed to intimidate. Before the court may rely on circumstantial evidence to conclude that the accused had the required intent, it must be

convinced that the only reasonable conclusion supported by the circumstantial evidence is that the accused had the required intent. If the court can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the accused did have the required intent and another reasonable conclusion supports a finding that the accused did not, the court must conclude that the required intent has not been proved by the circumstantial evidence. However, when considering circumstantial evidence, the court must accept only reasonable conclusions and reject any that are unreasonable.

[20] Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved (see *Sinnasamy Selvanayagam v. R [1951] AC 83 at 87*). If there are no admissions, to be found guilty of this offence, the circumstantial evidence must be of such a quality that the only rational inference open to the Court to find in the light of the evidence must be that the accused intended to intimidate by threatening to do some unlawful act. The intention to intimidate may be gathered from the utterances, conduct, and surrounding circumstances (see *Uganda v. No.39 PC Lochoro [1982] H.C.B. 80*). It must be shown that because of the prevailing circumstances, the utterances were intended to create a clear and present danger and indeed created a corresponding fear that the threat would be carried out. It must be shown either that in the circumstances, immediate violence was to be expected or was advocated with a clear intention of backing it up with action.

[21] It was the testimony of P.W.1 Angeyo Betty testified that the appellant came to her compound at around 7.30 am with a hoe and threatened to cut her if she did not leave. She ignored him and just continued sweeping but her mother told her to move away. It was not specified whether the threat was by utterances or gestures, yet the offence is directed at circumstances in which saying can be tantamount to doing, or close thereto. Evil words are not criminal in themselves

except where such words are directed at producing fear of imminent violence and are uttered in circumstances likely to incite or produce such fear.

[22] The question in every case is whether the words used were of such a nature and were uttered in such circumstances as were intended to create a clear and present danger and indeed created a corresponding fear that the threat would be carried out. Evil words are not always necessarily intended to create fear and they do not always result in fear of action, hence the phrase “empty threats,” threats that the person making them has no intention of backing up with action. It is always a question of capacity, proximity and degree. The utterances in the instant case were not coupled with actions causing imminent threat of harm. The vehemence of the language used is not alone the measure of the power to create fear. The fear which it kindles must constitute an imminent, and not merely a likely, violent act. The threatened violence must not be remote or even probable; it must immediately imperil. Had the trial court properly directed itself, it would have found that this ingredient too was not proved to the required standard.

3rd issue; whether the accused uttered the words or engaged in the conduct alleged;

[23] There should be credible direct or circumstantial evidence placing the appellant at the scene of crime as an active participant in the commission of the offence charged. In his defence, the appellant admitted being at the scene but made no comment on the utterances he allegedly made. P.W.1 Angeyo Betty testified that the appellant came to her compound with a hoe and threatened to cut her if she did not leave. P.W.2 Acan Hellen testified that she was at home when she heard the appellant telling the complainant “go away with your sweeping or else I will cut you with a hoe.” This evidence was not discredited by cross-examination and neither was any other evidence adduced to controvert it. I therefore find that the trial court came to the right conclusion when it found that the prosecution had proved beyond reasonable doubt that the evidence placed the appellant at the scene and established the fact that he made the utterances.

[24] However, in light of the findings made in respect of the other two ingredients, this finding is inconsequential. Having found that the court misdirected itself on its findings on two elements of the offence, the appeal succeeds.

Order:

[25] In the final result, the judgment of the court below is set aside. Instead the conviction is quashed, the sentence set aside and the appellant is acquitted of the offence of Threatening Violence C/s 81 (a) of *The Penal Code Act*.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant :

For the respondent :