REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E040 OF 2021

JOEL OGADA ……..……..……APPELLANT

VERSUS

REPUBLIC ..……..……..PROSECUTOR

JUDGMENT

1. The appellant herein arises from the Judgment and sentence given by the Honourable D. Wasike in Malindi CMCR E 177 of 2016. the decision was made on 3/12/2021. the court found the accused guilty of threatening to kill and was sentenced to 6 months' imprisonment cash bail was converted to be part of the fine.

2. Before I deal with the appeal, I need to deal with the aspect of cash bail. It is important that it is always returned to the depositor or the Application is made in respect thereof. by making the making of cash bail part of the fine makes have a profound effect in two aspects: -

    a. The first one make cash bail appear as a sentence. the parties will not see that money as security but prior sentencing.

    b. Secondly, it makes depositors abhor depositing cash bail. There should always be a chance for the depositor to retrieve their money.

3. In Victor Kiprono Ngeno v Office of the Director of Public Prosecutions [2021] eKLR, Justice R. LAGAT-KORIR stated as doth:

    "21. The Bail and Bond Policy Guidelines at page 9 paragraph 3.1. (d) underpins the right to reasonable Bail and Bond terms as follows:-

    d) "Right to Reasonable Bail and Bond Terms:

Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.

Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case."

22. The above position has been enunciated in various decisions by the courts as in the case of Andrew Young Otieno vs. Republic (2017) eKLR where Kimaru J. stated as follows:-

"This court agrees with the Applicant that the purpose of imposing bond terms is to secure the attendance of the accused before the court during trial. The terms imposed by the trial court should not be such that it amounts to a denial of the constitutional right of the accused to be released on bail pending trial. The trial court must consider the circumstances of each accused when determining bond terms to be imposed. In the present application, it was clear to this court that the Applicant was unable to raise the bond terms to be imposed by the trial

magistrate. He has been in remand custody for a period of over two years."

4. THE court does nor thus approval direct conversion of bail to fine unless the depositor is the accused. I digress.

5. The appeal consists of 12 odd grounds. This makes the appeal unseeingly, unconcise and may miss the main point. The appeal should always be concrete. Multiplicity of grounds does not enhance chances of success. On the hearing day the Appellant was not present as he had paid fine but submission were on record. I have considered them. Due to the sheer number of grounds. I will consider them in the analysis.

6. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

7. Parties must thus prepare petitions and memorandum of Appeal in more meticulous way to avoid excessive repetition.

Charge

8. The Appellant was charged with threatening to kill contrary to section 223 sub section 1 of the Penal Code. The particulars were that on 2/3/2016, at Kanagoni village in Magani Sub county within Kilifi county, jointly with another not before the court, without a lawful exercise threatened to kill Laban Simiyu Wanjala by uttering "Words we are ready to kill without fear. these

words, must express an intention or desire to cause someone's death. It must have the criminal element and involve the use of threats to harm or end someone's life.

9. It cannot be a translation of the what was perceived. the words are in English. the stated that they are ready to kill. who they were killing is not insinuated. worst of all these words were said jointly. unless it was a song, it is inconceivable that people can utter words jointly. do these words, appear a threat. It is just a piece of information, that the utter is ready to do what he says he was saying. to whom these words were directed remains a mystery.

10. This is the point where the charge ought to have been dismissed. unless it is a choir, it is not plausible to utter these words jointly. thirdly, the charge does not indicate in which language the threat was made. Much is lost in translation.

11. In the case of Josphat Mwinji Kamwara & Another v Republic [2020] eKLR,

> "24. The appellants have on the other hand raised a strong argument regarding their claim over the disputed portions and have raised a valid legal point about the provisions of Section 8 of the Penal Code absolving them of any criminal liability. Section 8 of the Penal Code states as follows:-
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> "A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud."
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> 25. While I agree with the Respondent that the pendency of a suit or a petition in court over a land dispute is not a licence to threaten to kill or commit any other unlawful/criminal acts, it is quite clear that

under Section 8 of the Penal Code bonafide claim over land cannot be criminalized and solved through criminal process. I am persuaded by the decision in Veronica Nyambura Wahome –vs- Republic [2019] eKLR that the evidence tendered by the Appellant shows that they had a claim over that parcels of land held by the complainant and their belief was "neither based on a falsehood or intent to create a false impression". The prosecution failed to prove those two ingredients in the trial court. This court is therefore satisfied that the Appellant's grounds in that regard is well grounded"

12. Section 21 of the Penal Code provide as follows:-

" when two or more persons form a common intention to prosecute an unlawful purpose in conjunctive with another and in the prosecution of such purpose an offence is committed of such nature that its probable consequences of the prosecution of such purpose, each of them is deemed to have committed the offence,"

13. It does not matter whether the words were uttered by one or both of the utters, if there is a common intention. However, the words must be uttered. the language in which they were uttered and the general tenure of the words. they must be a threat. the words indicated are not a threat to the complainant. they are neutral statements.

14. The appellant pleaded not guilty and was released on bond on bond.

Evidence

15. Laban Simiyu Wanjala, PW1 testified that he lives in Katana Hegi near Kongoni Post Kilifi. He is in charge of security at Jumwa Salt Industries. They

found the accused Appellant had firewood which they were bring into charcoal. As they quarreled the accused had an axe and Mzee Kongo had a panga. The said if we continued disturbing them they will kill us and ready for anything.

16. On cross examination the wines stated that the dispute was over threatening not land. He admitted there is a land case between them. The second witness was Emmanuel Kupasi Chego. He stated that they told the accused and Mzee Odoyo not to go into the company to get wood.

17. The accused became haughty and said he was ready for anything. They reported the matter to their supervisor the personnel manager. He stated that he was threatened with an axe. The axe was for carrying on wood. They are the ones who approached the accused. The witness was not cross examined.

18. The Court adjourned the matter to enable the former investigating officers based in Rabai to testify on the adjourned dated they still had the current investigating officer.

19. The investigating officer stated that the scene was not visited. This was reported as OB 15/12/2/2016. I am surprised that they did not realize that OB.15/2/2016 relates to February 2016 long before the commission of the offence.

20. Nevertheless, the accused was placed on his defence. To avoid writing a long Ruling the court found that the evidence was enough to place the Appellant on his defence. I have perused the proceedings and I do not find any evidence for placing, the Appellant on his defence.

21. PW1 was speaking in Kiswahili. The words used are in English. They are uttered jointly by two people. Jointly means.

22. The evidence charged PW1 stated that they said they that if they continue distributing then they will kill us. They said they were ready for a fight. They were not the words in the charge sheet. PW2 stated that the Appellant was harsh and ready for anything. The evidence of PW3 is most useless, I have seen. The investigating officer was to be called as per the order of 18/3/2019. There was non compliance with Section 33 of the Evidence Act. the section states as doth: -

> "33. Statement by deceased person, etc., when Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
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> > b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

23. This is the point The court would have done the needful.

24. DW1 in his evidence stated that he first had of the case on 15/3/2016. It was arrested on 14/3/2016 while at a friend's house. He said he does not burn charcoal.

25. He is a farmer and that there are no trees in the place he firms. He has never met PW1 and PW2. They met in court. The charges are a fabrication. They have a case since 2002. he stated that the year 2000 they were living on the suit land. In 2002 the complainant's company wanted more land, which they got but the Appellant resisted. He produced agreements for sale of land. The company started forceful evictions. He was allowed to stay since he had a court case. He was again charged in CR 677/ 2010 where the complainant was the personnel manager of the Kurawa salt company. he again charged in 2013 in CR 41/2013. He was charged with forceful detainer of the same land.

26. he was further charged in CMCR NO. 713 of 2013 which was dismissed.

27. The Appellant filed another court case, being ELC Petition No. 9 of 2016 in Malindi. On cross examination he stated that people who refused to sell land were also charged. The land they are protesting against is community land.

28. DW2 testified. He said on 2/3/2016, he never said the complaints. The accused was arrested on 15/3/2016 but he never saw the complainant before then. The defence case closed.

29. the court found the appellant guilty as charged and sentenced him to fine of Ksh. 50,000/= and in default 6-months imprisonment.

30. He appealed to this court. The appeal proceeded by way of written submissions. I have not seen the Appellant's submissions

Analysis

31. The appeal must succeed. There was no scintilla of evidence of threatening to kill. On the contrary, what was on record was a scheme, akin to the apartheid South Africa, where Africans were isolated and pushed to the periphery of development by capitalists and Apartheid regime. they were sent to Bantustans and any complaint was followed with illegal arrests and trumped up charges. I cannot fathom how the office of the director of the public prosecution made a decision to charge in this matter. it was glaringly open that the charges were a red herring. there was no genuine complaint. the evidence was completely at variance with the charge sheet. this is not due to human memories lapse but the inability of the witness to witness to fictitious events.

32. JM MATIVO, J,as he then was, in MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) (Judgment), stated as follows: -

> "Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.[5]The question to be addressed is whether PW1's testimony is contradictory on the occurrence of the event and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. In this regard, we stand to benefit from the definition by the Court of Appeal of Nigeria in David Ojeabuo v Federal Republic of Nigeria[6] that:-
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> > Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are

inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

33. while referring to Theophilus vs State {1996} 1 nwlr (Pt.423) 139, the court contuned as doth: -

> Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.[7] It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from."

34. this must be contrasted with the decision in the case of Robert Peter Kazawali v Republic [2018] eKLR where the Justice D. K. Kemei noted that frailties in human memory may result in minor contradictions. the court stated as doth: -

> "In this regard, I find my bearing in the Court of Appeal's holding in Philip Nzaka Watu v. Republic [2016] eKLR where it was stated:

"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

The main contradiction that the appellant complains about relates to the time when the offence was committed. The prosecution witnesses were clear that they were not testifying to the exact time. They were approximating, to the best of their abilities as common rural folk. The witnesses mentioned various times, ranging from

6.30 pm, 7.00 pm, 7.30 pm and 8 pm. The only exception was the evidence of PW1 where the time is recorded as 6.30 a.m. Granted the consistency of the estimates of the other witnesses, we cannot rule out the possibility that the reference to 6.30 a.m. was in fact a typographical error in the record. The trial court was satisfied that the offence was committed between 6.30 pm and 7.00 pm and we have no basis for concluding that there was material contradiction in the prosecution evidence to warrant interference with the conclusion of the trial court. In any case, the time when the offence was committed is a question of fact, which the two courts below determined."

and the holding in Uganda Court of Appeal in Twehangane Alfred v. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 quoted with approval by the Court of Appeal of Kenya in Erick Onyango Ondeng' v. Republic [2014] eKLR. The Uganda Court of Appeal held:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

35. The other disturbing thing is the selective prosecution. the prosecution is not obligated to charge all persons who are culpable. however, this offence was said to have been committed by the Appellant and DW2. however, DW2 was

not charged. he was also not called as a prosecution witness. failure to do so, calls for a negative inference. Indeed when the defence called DW2, his evidence was adverse to the prosecution. in the court held as doth: -

> Apparently it is the same grandmother who testified for the defence, for her son and not for her grand daughter. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:
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> "143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."
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> 61. In Donald Majiwa Achilwa and 2 other v R (2009) eKLR the Court stated:
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> "The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."
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> 62. In Keter v Republic [2007] 1 EA 135 the court held inter alia:
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> "The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

36. there was no explanation given why the Appellant who has sued the complainant company, and has a land dispute was the only one charged while DW 2 who allegedly committed the offence jointly by uttering those words jointly was not charged. such a decision is shrouded in mystery and mysticism contrary to tenets of the law and article 10 of the constitution. this was earlier dealt with by justice R E Aburili, where she stated as doth in the case of Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR: -

> "167. I find that the impugned decision was also shrouded in mystery and secrecy. The applicant was never confronted with the new evidence to respond to it. As was held by Odunga J in Njuguna S. Ndungu Vs EACC & 3 Others [2014] e KLR:
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> "Transparency is one of the national values and principles of governance enshrined under Article 10 of the Constitution. Section 4 of the office of Director of Public Prosecution enjoins that office in fulfilling its mandate to be guided by the Constitution and inter alia, the principles of natural justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice, prevent abuse of the legal process and public interest and promotion of Constitution. The office cannot be promoting public confidence when its activities are shrouded in mystery and secrecy. Anything done in contravening of the Constitution must be prohibited, to securing fair treatment for all persons brought before the court and to prevent an abuse of the court process."

37. In the said case of Bitange Ndemo v Director of Public Prosecutions & 4 others [Supra] the court stated as doth: -

> "162. Where it is clear like in the instant case that the decision to prosecute the applicant was unreasonable and irrational, this court is called upon to intervene. As was held in the Republic Vs Attorney General exparte Arap Ngeny case, that:
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> " A prudent and cautions prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution. Otherwise the prosecution will be malicious and actionable."
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> 163. In the view of this court, the decision to review the decision that closed the inquiry file cannot be justified. It was discriminatory, selective and therefore unconstitutional and unlawful. As was held in the Githunguri case (supra) "The people will lose faith in the Constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society."
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> 164. In Republic V Commissioner of Co-operatives exparte Kirinyaga Tea Growers Co-operative Savings & Credit Society Ltd CA 39/97 [1999] EALR 245 the Court of Appeal warned that:
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> "……it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith."
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> 165. In HC Miscellaneous Application 1769/2003 Nairobi Republic Vs Ministry of Planning and Another

Exparte Professor Mwangi Kimenyi, the court held, concerning malafides:

" So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power. The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner."

166. In my view, the power conferred on the DPP is not absolute power. Absolute power is open to abuse and that is why the Constitution found it fit to provide checks."

38. The mistreatment of the Appellant is apparent from the proceedings. the court totally disregarded evidence that the appellant has been subjected to a plethora of cases all of which have ended in his favour. they are both in Malindi and Garsen law courts. equally handing currently. by charging the Appellant in other matters in both Malindi and Garsen, formatters that arose basically within the jurisdiction of Malindi Law Courts, at Kanagoni Village in Magarini, the state was overreaching. For the students of geography, the Malindi law courts is in Magarini Subcounty while Garsen law courts is in Garsen Sub county of Tana river county.

39. As alluded earlier, the complainant was behaving exactly like apartheid regimes in parts of the world where they invade other people's lands and then accuse the original and community elders of starting intifada. The complainant, Laban

Simiyu Wanjala was a pawn in a long term game meant to tire the Appellant into surrendering his quest to hold onto and retain his land, which from the evidence has salt.

40. the court of Appeal**MAKHANDIA, OUKO & M'INOTI, JJA)**, encountered another pawn in the case of **A A M v Republic [2016] eKLR, where they said as doth: -**

> "Given all the foregoing, we are satisfied that the criminal proceedings instituted against the appellant were designed to achieve ulterior motives by PW2 and 3. They were invoked to settle scores after the relationship between the appellant, PW2 and her relatives turned sour following the fall out and the complainant was unfortunately used as pawn. This indeed is despicable. "

41. the Environment and Land Court had an occasion, to deal with similar circumstances where they stated as follows: -

> "10. The Court of Appeal in Commissioner of **Police and Director of Criminal Investigations Department-v- Kenya Commercial Bank and others (2013) eKLR** also held as follows on concurrent criminal and civil proceedings on the same issues:-
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> **"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings?**

It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court…."

42. The court failed to see the open lie was and malice on part of complaint who was a hired had by Kurawa Salt industries. If the complaint was to be believed, the accused had an axe while Mzee Kombo had a panga. Nothing actualizing the threat. The only reason they did not actualize the threat is because, it never happened.

43. Indeed, PW2 handed to have grown a conscience midstream he stated that they were harsh and ready for anything. No killing was mentioned. Not due to lapse of memory but due to the thing never happening. The evidence of DW2 was cogent and was not shaken. He had not been with the Appellant on the material day. No wonder the prosecution objected to the question that he knew had been raised throughout the proceedings. It is high time the prosecution stops being used to settle land scores. I was surmised that the court upheld a baseless objection on relevancy of evidence.

44. The defence is entitled to deal with any of the defences at their disposal under the sun. they could even raise an act of god and threaten to call the Almighty as a witness. the trial fell far to short of the required standards. it was a sham

and the conviction cannot be sustained. There is absolutely no need of the defence disclosing their strategy or evidence prior to tendering the same.

45. In Thomas Patrick Gilbert Cholmondeley v Republic[2008] eKLR, the court of Appeal stated as doth: -

> "Of course this appellant is a person who cannot be compared to a tame and helpless lamb. He is clearly a well-heeled member of society, the type the Court referred to in the case of PAUL MWANGI MURUNGA V. REPUBLIC, supra. He has, through his able lawyer Mr. Ojiambo, fought the State to a stand-still since Muga Apondi, J made his ruling nearly one year ago. The appellant himself, if not exactly a lion, can be compared to a tiger, able to wage his own battle against the State. He certainly is not representative of the persons who day in and day out pass through our criminal justice system. It is not surprising that Mr. Tobiko in the end asked us to confine any principle we may make to be applicable only to the circumstances of the appeal. It would clearly be contrary to the spirit if not the letter of our Constitution to lay down a principle that the prosecution is entitled to demand and receive in advance a disclosure of evidence from well-heeled Kenyans but not from the poor and vulnerable. We reject any such distinctions being introduced in the criminal justice system. We think there is merit in the complaints raised by the appellant in grounds one, four, five, six and seven of the grounds of appeal."

46. As to ground two, we think the fault lay with the investigating officer refused to come. Instead, another person came in by stead. It is my holding that should the investigating officer have come, his evidence will have been adverse.

47. There was absolutely no explanation on how come, the threat was recorded in February before it happened. What comes out are malicious and insidious machinations by Kurawa sault industries and the complaint who are their pawns to forcefully take the plaintiff's land. Let them know that the appellant had the law on his side. I do not need to deal with other sentence though I note that the same is excessive in the circumstances.

48. Nevertheless, the conviction is hereby set aside. the case was malicious from the word go.

Sentence

49. The appellant was convicted to serve 6 months. The Appellant had already served a period of 4 months, when he was in custody. the same were not taken into consideration. The court should always have regard to Section 333 (2) of the Criminal Procedure Code which provides as doth:-

"333. Warrant in case of sentence of imprisonment

(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."

50. It is unnecessary to go into the grounds of appeal. I will use the words the court of appeal used in the case of Stanley Munga Githunguri v Republic [1986] eKLR, where the court, C.B.MADAN, CJ , D.K.S.Aganyanya, J.E.Gicheru, as then they were, stated as follows: -

"A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. The present incumbent of the Office of the Attorney-General is in a difficult position through no fault of his own. His right to prosecute has receded by having the ground tactically cut off from under his feet completely by the Attorney- General who decided not to prosecute. He ensured it by publicly informing the applicant accordingly. The Attorney-General who succeeded him practised inertia. The second Attorney-General who succeeded him reinforced the applicant's case by stating in the National Assembly that it had been decided not to prosecute the applicant. Instead of merely crossing the t's and dotting the i's he could have used his own mind to use his powers under section26 of the Constitution.

Stanley Munga Githunguri! You have been beseeching the Court for Order of Prohibition. Take the order. This Court gives it to you. When you leave here raise your eyes up unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the juridical system of Kenya."

51. the last order I will deal with is the futility of the orders I am giving. as shown before, the complainant will again bring another case and take the Appellant though the same process and keep him in court *ad inifinitum*. the Appellant will file and succeed in malicious prosecution be paid and be brought to court again till he is fatigued. the high court is entitled to craft orders that will safeguard the integrity of the judicial process from abuse.

52. The current complainant, Kurawa salt industries and its employees have taken this particular appellant to held and back. he is not out of the woods yet. for reasons that will be of interest to studies regarding Article 73 of the constitution, a decision to charge will still be made notwithstanding the court's sentiments.

53. However, our constitution has inherent safeguards. the power to prosecute has been placed in the hands of the director of public prosecution. the power to prosecution has been placed wholly in his hands and he may delegate. this delegation for this particular Appellant has already been abused.

54. this has resulted in disjointed prosecutions where the appellant has been taken to a myriad courts over the same issues to push him from his land. this has to stop.

55. Consequently, I direct that the office of the director of public prosecution shall not refer any other charges arising from or connected with Kurawa Salt Company its lands or employees without it being in the personal hand of the Director of Public Prosecution in the specific case. such consent shall be given prior to any arrest of the Appellant.

56. They will avoid the abuse of prosecutorial powers and harassment unlawful arrest and malicious prosecution that the appellant has been subjected to so far in the last several.

57. This order be transmitted to the director of Public prosecution for noting and further action.

Determination

58. The court makes the following orders: -

(a) The appeal here is allowed.

(b) The conviction and sentence are set aside. The appellant is released forthwith unless otherwise lawfully held. to JOEL OGADA enjoy your freedom. The courts in this country work as uMkhonto we Sizwe.

(c) The fine paid shall be refund to the Appellant.

(d) Cash bail be refunded to the depositor.

(e) An order is hereby issued that the office of the director of Public Prosecution shall not prefer as charges related to land and or employees Kurawa Salt Industries Ltd or their affiliates, unless under personal hand and consent of the Director of Public Prosecution in each particular case, given prior to the arrest. consent other than by the person holding office as the director of public prosecution shall not suffice.

(f) This judgment be served upon the director of Public Prosecution for noting and further action.

DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of November , 2023. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr Onyango for the Accused

MISS MUTUA FOR the state

Court Assistant - Brian