THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CRIMINAL APPEAL No. 0017 OF 2017

(Arising from Gulu Chief Magistrate's Court Criminal Case No. 1180 of 2015)

BENJAMIN OTEKA ……..……..…… APPELLANT

VERSUS

UGANDA ….……..……..……..……..……..…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the Court below, the appellant was charged with two counts of threatening violence C/s 81 (a) of *The Penal Code Act*. In the first count, it was alleged that on 8th September, 2013 at Acholi Inn, the appellant with intent to annoy and intimidate her, threatened to assault Caroline Ward. In the second count, it was alleged that on the same day and at the same place, with intent to annoy and intimidate her, the appellant threatened to assault Lisa Coggin.

The prosecution case was briefly that the two complainants had convened a Board meeting of "Favour of God Church" at the above mentioned venue. The appellant went to the table where they were seated and in a fit of rage, slammed the table, flipped it over, picked a laptop of Caroline Ward and raised it above her head threatening to hit her with it, all the while shouting threats and demanding for his property. The husband of Lisa Coggin, P.W.4 Keith Coggin intervened and restrained the appellant. The appellant continued to utter threats directed at Caroline Ward to spill her blood and kill her. The two, Caroline Ward and Lisa Coggin fled and locked themselves in a toilet. In his defence, the appellant stated that it is Caroline Ward who called him to that meeting. He never got anywhere close to the table. He politely asked Caroline Ward to give him his passport and when she refused, he walked away. He sought the intervention of the then L.C.5 Chairman to mediate.

P.W.1 Lisa Coggin, testified that the appellant met and threatened her and P.W.5 as stated in the charge sheet. He began by pulling a chair and joining them at the table. He began talking to P.W.5 harshly demining for his property and then slammed his hand onto the table. He pointed to a laptop P.W.5 had and claimed it to be his. He raise it above the head of P.W.5 and threatened to hit her with it. When she intervened, the appellant turned to her and threatened to hit her with it as well. She screamed attracting the attention of onlookers which forced the appellant to slam the laptop on the table, scattering all items that were on the table in the process. He then told P.W.1 "I am going to kill you," which utterance cause P.W.3 to intervene and restrain him. Two other men intervene and attempting to calm him down but in a fit of rage he picked a plastic chair and slammed it down breaking it to pieces saying, "blood is going to be spilled." The Manager of the Hotel called the police. She rushed P.W.5 to the safety of the bathroom.

P.W.2 Betty Okello narrated the same story only adding that the appellant is the husband of P.W.5 and a former Board member of "Favour of God Church." There was disharmony in the leadership of the Church and that meeting was intended to re-establish harmony. The appellant interrupted the meeting in that violent manner. P.W.3 Okello Alfred narrated the same story only adding that the appellant was not a member of the Board of the Church but only part of its Management. When he came to the meeting, he was demanding for his passport from P.W5. The appellant was so violent ahs he participated in restraining him. In the meantime, P.W.5 ran to the toilet for her safety. The police later came and arrested the appellant. P.W.4 Keith Coggin too narrated more or less the same story and added that he was waiting from a vehicle parked at that hotel when his wife, P.W.1, called him and told him that the appellant was in a fit of rage. He rushed to the scene and tried to restrain the appellant. When the two victims ran to the safety if the washrooms, the witness stood outside guarding them until the police arrived.

P.W.5 Caroline Ward, testified that the appellant was an employee of that Church before his services were terminated by the Board. The test of his narration as to how the events unfolded is similar to what the other witnesses told court. She was so terrified by the appellant's conduct that evening that she ran to the safety of the toilets. She had to be escorted out of the hotel later and was too afraid to return to the home of the appellant. She spent the night at a guest house.

P.W.6 SP Denis Odoch testified that he was called to the scene after the commotion. He escorted the two victims from the scene.

In his defence, the appellant testified that P.W.5 is his wife but he never committed any of the offence charged. He only went to pick his passport, Academic documents and other documents relating to land, from P.W.5 which were given to him the following day. She found the two victims at a Board meeting but he did not demand for the passport acrimoniously but rather in a cordial manner. P.W.5 claimed to have had the passport in her handbag and pretended to be walking towards the Hotel Counter and he never saw her again. The following day P.W.5 was called to the same venue and through the mediation of the L.C.5 Chairman she returned the passport to him. In her e-mail to him later, P.W.5 expressed her profound love to him and never adverted to any threat to assault her.

In his judgment, the trial magistrate found that the identify of the appellant was not in question. He was very well know to the witnesses and the offence was committed in the early evening hours before nightfall. The accused himself admitted having been at the scene. The prosecution witnesses gave an eyewitness account in graphic detail as to how the supplant raised a laptop and threatened to hit the two victims with it. He had to be restrained to prevent him from doing so. He did not only raise the laptop but he uttered threats to hurt the two victims. The appellant's account of the events in implausible. The conduct of the accused constituted the elements of the offences he was charged with. He was convicted and sentenced to serve two years and six months' imprisonment on each count, both sentences running concurrently.

The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Chief Magistrate failed to properly consider the evidence before him and therefore arrived at several wrong conclusions of facts contrary to the truth of the matter thus occasioning a miscarriage of justice.
2. The learned trial Chief Magistrate was utterly biased against the accused and made several rejections of credible evidence that would be in favour of the accused / appellant thus occasioning a miscarriage of justice.

3. The learned trial Chief Magistrate erred in law and in fact when he concluded that the prosecution proved beyond reasonable doubt that the accused threatened violence as charged thus occasioning a miscarriage of justice.
4. The learned trial Chief Magistrate erred in law and fact when he ignored crucial instances of evidence that would clearly show that the accused / appellant never could have committed the offences charged.
5. The learned trial Chief Magistrate erred in law and fact when he awarded a custodial sentence against the appellant given the circumstances of the case.

In their written submissions, Counsel for the appellant**,** M/s Latigo & Co. Advocates, combining grounds 1, 2, 3, and 4 argued that the appellant only attempted to pick a bag from P.W.5 because his passport was kept there and he had an imminent journey to Australia. The lighting at the time was poor. The appellant had no intention to annoy any of the victims. He asked for his passport politely. The fact that P.W.1 was able to make a phone call to her husband and that P.W.5 had to be advised to run away before she did, is an indication that none of them was threatened. Moreover the case was inexplicably reported two years later. With regard ground 5, she submitted that the custodial sentence was unwarranted, harsh and excessive given the nature of the offence. The period of remand not taken into account. Caution would have been an appropriate sentence. He had served six months before grant of bail.

In reply, the Senior Resident Senior State Attorney submitted in respect of grounds 1 and 2 that the complaint is that the elements of the two counts are the same but with different complainants. In count one, P.W.5 and in count two, P.W.1. Their evidence at page 37 - 39 is that on that day they were at a holding meeting at Acholi Inn Hotel when the appellant came to where they were meeting under a tree, looked angry, yelling and screaming at them and slammed his fist on the table. He flipped the table over scattering all item that were on the table. He picked a computer and raised it high over the head of P.W.5 in order to smash her head. P.W.1 came in between and the accused turned against her in a similar fashion. The husband of P.W.1 who testified as P.W.4 came from the parking yard an tried to restrain the appellant. He uttered word that he was to shed blood that night and that he would kill her. P.W.5 and P.W.1. fled to the toilets for over two

hours and later spent the night in a guest a house which she left the following day to travel to the USA.

Intention to intimidate or annoy is evinced by the testimony of all the prosecution witnesses. There is direct evidence of eyewitnesses; as to threat to injure, it must be immediate or eminent. He was physically in their presence. They were all in close physical proximity. The threat combined conduct and utterances. The complainant looked terrified. There is no possibility of mistaken identification. They all knew him very well. It was at around 6.00 - 8.00 pm and there was visual and audio identification. He placed himself at the scene in his defence. At page 9 - 10 of the judgment, the trial magistrate said there was no reason to frame the appellant as none of them had a grudge against him. There is no legal justification for the appellant's conduct. He said he had gone to retrieve his passport. It is not a justification to using violence.

Regarding sentence, the maximum sentence is four-years' imprisonment. While sentencing the appellant at page 14 - 16, the magistrate considered the relevant factors and sentenced him to two years and six months on each count to run concurrently. Under s. 75 (1) of the *Magistrates Courts Act* the sentences are meant to run consecutively. The magistrate exercised his discretion and cannot be faulted. The sentence is lawful and reasonable. I pray that the appeal be dismissed.

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”). 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*).

With regard to grounds 1, 2, 3, and 4, under section 81 (a) of *The Penal Code Act*, the offence is committed by any person who with intent to intimidate or annoy any person, threatens to injure, assault, shoot or kill any person, or to burn, break or injure any property. Mere words are not enough; it is 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.B39*).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*).

The evidence of the three witnesses being in the nature of visual identification, the court had to determine whether or not these identifying witnesses were able to recognise the appellant. In circumstances of this nature, the court is required to first warn itself of the likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R (1953) 20 EACA 106*; *Roria v. R [1967] EA 583* and *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*).

In doing so, the court considers; whether the witnesses were familiar with the offender, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the offender and the proximity of the witnesses to the offender at the time of observing him. As regards familiarity, the three identifying witnesses knew the appellant prior to the incident. In terms of proximity, the offender was relatively close to them as only a few metres separated them. In terms of light, the confrontation occurred at 5.00 pm, in broad day light and their vision was not impeded or obstructed. As regards duration, each took a reasonable period of time, long enough a period to aid correct identification. None of the witnesses was

motivated by malice or grudge to implicate the appellant, since none was advanced in the appellant's defence. I find that he was properly recognised that that the prosecution evidence effectively disproved the appellant's defence. An act which causes another person to apprehend immediate and unlawful violence of itself constitutes a threat. Raising a laptop above the head of another while uttering threats of death constitutes a threat of violence. I find no merit in the appeal against conviction.

As regard the appeal against sentence, the law is that an appellate Court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignore to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle (see *Kiwalabye Bernard v. Uganda, S. C. Criminal Appeal No. 143 of 2011*). Under section 81 of *The Penal Code Act*, the maximum punishment for the offence is four years' imprisonment.

Under section 162 (1) (a) of *The Magistrates Courts Act*, a Chief Magistrate may pass any sentence authorised by law. The principle of proportionality requires that a sentence should not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. I have considered the sentence imposed by the trial court. It is on the face of it a lawful sentence passed within the range of the court’s sentencing powers as regulated by section 162 of *The Magistrates Courts Act*.

When sentencing the appellant, the trial magistrate took into account both the aggravating and mitigating factors submitted to him. As long as the trial court considered the proper factors and the sentence is within the statutory limits, the appellate court will not set it aside unless it is so excessive as to shock the public conscience. A sentence will be considered harsh and excessive if it has the tendency to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances of the case. Having found that the sentence imposed in the instant case is legal and is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people. I have

not found any reason to interfere with it. It was a fitting penalty for the offence. It is not excessive in light of the facts of the case.

In the final result, I do not find any merit in the appeal and it is accordingly dismissed. The appellant's bail is cancelled and he is to return to prison custody to serve the rest of his sentence.

Dated at Gulu this 6th day of December, 2018

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Stephen Mubiru
Judge,
6th December, 2018.