

IN THE CIRCUIT COURT HELD AT KPANDO ON THURSDAY 21ST DAY OF MARCH 2024, BEFORE HIS HONOUR FRANCIS ASONG OBUAJO, THE CIRCUIT COURT JUDGE.

NO. CC. 61/2022

THE REPUBLIC

VRS.

EBENEZER AGBO KOMLA

J U D G M E N T

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Accused person was arraigned before this court, charged with the offences of threat of death contrary to section 75 of Criminal offences Act, Act 29/60 and assault contrary to section 84 of Act 29/60. Accused person pleaded not guilty to both counts in court.

The brief facts of this case from the prosecution are that accused person is a farmer and a corn mill operator at Sovie Konda. On the 14/10/21 at about 8:00 pm accused visited the ex-wife Bertha Adzato that he had five (5) children with. Accused went there to confront her for not informing him over one of his children that had been admitted at hospital. On getting to that house accused met the ex-wife with the complainant seated together. Accused furiously approached the ex-wife which resulted in a quarrel between them and in the process accused slapped her in the face

in the presence of the complainant. As the complainant tried to stop the accused he resisted and fought with the complainant but the complainant over powered the accused. The complainant left for his house but accused went to his house for his unregistered locally made single barrel short gun with a live AAA ammunition and proceeded to complainant's house. Some neighbours there seized the gun with the ammunition from the accused and a complaint made to the police. Accused then went into hiding and will only come home in the night upon hearing that he had been reported to the police. On the 27/1/22 at about 8:30 pm accused was spotted operating his corn mill machine and was arrested and charged with the offences after the investigation.

With his not guilty plea, the prosecution has a duty of leading credible evidence to establish the elements of the offences charged at the hearing beyond reasonable doubt to secure the conviction of the accused as provided for under sections 11(2) and 13(1) of the Evidence Act 1975 (NRCD 323). It was held in DOMENA VRS COMMISSIONER OF POLICE (1964) GLR 563 at 568 that:

“Our law is that by bringing a person before a Court on a Criminal charge, the prosecution takes upon themselves the onus of proving all the elements which constitute the offence to establish the guilt of the accused beyond reasonable doubt and the onus never shifts. There is no onus upon accused person except in special cases where the statute creating the offence so provides”

See: GLIGAH AND ATISO VRS THE REP. [2010] SCGLR

870 Per DOTSE JSC.

From the provision of the law as referred to which has been further explained in the decided case as stated. It is the duty of the prosecution as a matter of law to lead

admissible evidence at the trial to establish all the elements of the offenses charged beyond reasonable doubt before accused can be convicted.

In proving the guilt of the accused, the prosecution called five (5) witnesses who took turns to tender their witness statements into evidence.

PW1, Richard Hehetror, the complainant gave evidence under oath. He said on the 14/10/21 at about 8:30 pm he was with his wife in her house when the accused came there and without greeting them, started threatening to kill him but he did not make any comment. Suddenly accused started beating up his wife to the ground and PW1 separated them and left to his own house. PW1 added that accused traced him to his house with a gun to kill him. One man collected the gun from the accused and sent it to his uncle place. Accused then threatened to do justice to PW1 wherever he sees him. During cross examination PW1 maintained that accused threatened to kill him in the presence of his wife the night accused came there. And that he saw accused from his window that accused was holding a short gun and came to a section of the road where there was a fence around his house.

Bertha Adzato of Sovie Nyamadzanyi the ex-wife of accused gave evidence as PW2. She added that she had five (5) children with the accused. PW2 stated further that accused told him he will kill PW1 who is the current husband anytime accused saw her. On the 14/10/21 at about 7:49 pm accused came to meet her and the current husband PW1 at home without greeting them. Accused went to the children's room and came out and started advancing towards PW1 and tried to assault him so she get up to stop the accused and accused slapped her left cheek and kicked PW2 to the ground with the foot. While accused was punching her while on the ground. PW1 held accused and he bolted and fell in a nearby gutter and hurt himself. During cross examination PW2 said accused has been threatening to kill PW1 to her maintaining that on the day in issue accused was advancing toward PW1 with pointing fingers

and she quickly went between them then accused slapped her and kick her to the ground with the legs before PW1 came to separate us and accused while running away fell into a nearby gutter and got hurt in the face and legs.

Godwin Adzato a brother to PW2 gave evidence as PW3 that he sent the short gun PW4 gave him to the police and the short gun belongs to the accused. Under cross examination PW3 said he did not see accused with any gun during the incident.

Michael Tulasi, a carpenter of Sovie Abayeme gave evidence as PW4 that on the 14/10/21 at 8:30 pm one Komla Akali brought one unregistered locally made short gun to him at home with live AAA ammunition. PW4 added that Komla Akali told him that earlier that evening one Kofi Dzunu spotted PW1 having an argument and when PW1 left for his house accused traced him there to continue with the argument. Later accused rushed to his house and brought out the said short gun loaded with the live ammunition and was hiding near PW1's house in wait to fire PW1 should he come out of the room that Kofi Dzunu's father went to seize the gun from the accused and later handed it over to be brought to the police. PW4 admitted under cross examination he did not see accused with any gun.

G/CPI George Anane the investigator gave evidence as PW5 that this case was referred to him for investigation on the 18/10/21. He retains the unregistered locally made short gun with a live AAA ammunition and took photograph of them. Visited the scene of crime with the complainant as accused had gone into hiding then. On the 27/1/2022 complainant led the police at about 8:30 pm to the corn mill machine site and accused was arrested. Accused admitted the offence and hence the charge. Caution and charged statements of accused admitted into evidence as Exhibit A and A1 without objections after it had been read and explained to accused in Ewe. The photograph of the short gun admitted into evidence for its probative value as Exhibit B and the physical short gun admitted into evidence as Exhibit B1. During cross

examination accused denied ownership of Exhibit B and B1 and said the gun he gave to PW4 is still with him the accused at home.

DEFENCE OF THE ACCUSED

Ebenezer Agbo of Sovie Old town elected to open his defence under oath that he did not threaten to kill PW1 and did not assault PW2. Accused explained that he was told in town that the child was ill and taken to the hospital so he went to check on the child with the ex-wife PW2. Upon getting to their house he saw PW2 and PW1 at the kitchen. He greeted them but there was no response and he proceed to see the child in the room but the child did not respond to his calling him as the child was asleep. So he came back to where the ex-wife was with PW1 at the kitchen. Accused added he asked PW2 why she did not inform him of the child's sickness and asked whether PW2 will tell him of the child's death should that happen. Then PW2 rose from the chair and used same to hit his head and he also hit her back. Then PW1 also got up and hit accused eye with a fist. Accused then left their place and went away. Under cross examination, accused admitted he is a hunter and has a gun.

Exhibit A caution statement of the accused taken on the 28/1/22. Accused said when he was told that his son Gideon Agbo was ill and taken to the hospital, he went to PW2's house at about 8:00 pm to check on the child. On getting to that house he saw PW1 and PW2 seated together and proceeded to the children's room after greeting them but the children were asleep. Accused came to ask PW2 why she did not tell him of the child's ill health. And that would she wait for the child to die before she informs him. PW2 got up and ordered accused to leave her house. PW2 then took the stool she was sitting on and hit his head and accused also slapped her then PW1 came to slap his face. As he was walking home, he stopped to narrate the incident to Asiwome and others. It was then PW1 came from his house with a cutlass and an iron

rod daring accused to come closer to him. Accused also rushed to his room for his registered short gun and ammunition and walked to where PW1 could see him. Then Komla and others came to collect the gun from him. It was not his intention to kill anyone.

THE LAW AND ANALYSIS

Section 75 of Criminal Offences Act 1960, Act 29 provides:

“75. A person who threatens any other person with death, with intent to put that other person in fear of death, commits a second degree felony”

The main principle underlying most criminal liability is that in all case, the criminal act alleged to have been committed should be backed by an intention of the accused person to commit it. This gave rise to the principle in law that for a crime to have been committed, there should be present an act, referred to as '*the actus reus*', and the evil mind or intention also referred to as "**the mens rea**". It was held in *BEHOME VRS THE REPUBLIC* [1979] GLR 112 that, in the offence of threat of death the actus reus would consist in the expectation of death which the offender is able to create in the mind of the person allegedly threatened; while the mens rea would consist in the realization of the accused that his threats would produce that expectation in that person.

The essential ingredients of the offences of threat of death which prosecution is under obligation to lead credible evidence to establish beyond reasonable doubt to secure the conviction of the accused are:

- (i) There should be a threat of death issued by the accused person.
- (ii) That the accused intended to put the victim in fear of death.
- (iii) That the victim was affected or threatened with the threat of death from the accused person.

The evidence of PW1 shows accused threatened to kill him with a short gun on the 14/10/21 after he left PW2's house prior to separating accused from further beatings of PW2. That night, accused followed PW1 to his house with a gun and threatened to kill PW1. The evidence of PW2 was that accused had threatened to kill PW1 for taking PW2 (the ex-wife of accused) from him. In his caution statement Exhibit A, accused said he rushed into his room for his short gun and ammunition and walked to where PW1 could see him that night of the incident after accused saw PW1 holding a cutlass and iron rod and daring accused to come closer. These pieces of evidence could not be discredited under cross examination by the accused person. The evidence of accused's ex-wife (PW2) that accused had earlier on told her that he will kill PW1 for taking her from him prior to the said day of the incident, and accused repeating the threat of killing PW1 when he attacked PW2 her house. It is my candid view that there is an intention of the accused not only to put PW1 under the fear of death but has actually acted it out on the day of the incident after accused had left PW2's house. By going for the short gun and ammunition and got closed to PW1's house before the gun was taken away from him.

Accused in his defence at the trial denied threatening to kill PW1 with a gun on the day of the incident. This evidence in defence at the trial appears to be an afterthought since it runs contrary to his statement in Exhibit A. The final question of the accused when he cross examined PW5 the investigator, accused said the gun he gave to Komla on that day is still with him as we speak which accused knows for a fact. Accused asked that question in objecting to Exhibit B and B1 as not the exact gun that he gave out to Komla that was tendered into evidence at the trial objecting to Exhibit B as not the very short gun that was taken from him on the day of the incident, equally shows that indeed accused had a gun on him on the day of the incident. Therefore, accused denial that he did not threaten to kill PW1 on the day is untenable and same rejected as an afterthought as held in case of OBUOR VRS THE STATE (1965) GLR 1.

I therefore accept the prosecution's evidence that have been adduced on the offence charged as accused evidence caution statement Exhibit A and his cross examination of PW5 rather corroborates PW1's evidence at the trial.

It is my finding of fact that accused who had been married to PW2 for about twenty (20) years with five (5) children has been divorced. PW2 has gotten married to PW1 within a short time to the anger and displeasure of the accused who believes that PW1 had taken his wife from him as accused asked PW1 at the trial why he was having extra marital affair with PW2. Accused therefore threatened to kill PW1 as accused said so to PW2 personally. Accused person on the day of the incident further threatened to kill PW1 and followed that threat up by going for a short gun and ammunition and went close to PW1's house to more or less carry out his intention. It is therefore my conclusion that accused actually issued the death threat to PW1 with intent to put PW1 into fear of death. The threat of death actually affected PW1 as he felt unsafe from the accused. Prosecution has therefore proven this charge against the accused as required to secure his conviction. Accused is hereby found guilty and convicted on this count.

Section 84 of Act 29/60on assault states that:

"84. A person who unlawfully assaults another person commit a misdemeanour"

Section 85(1) of act 29/60 on different kinds of assault provides:

"85 (1) for the purposes of section 84 "assault" includes

- (a) Assault and battery*
- (b) Assault without actual battery, and*
- (c) Imprisonment.*

(2) *An assault is unlawful unless it is justified on one of the grounds mentioned in the chapter one of this part.*

Section 86(1) of Act 29/60 on assault and battery states that:

“86 (1) A person makes an assault and battery on another person if without the other person’s consent, and with the intention of causing harm, pain or fear or annoyance to the other person, or of exciting the other person to anger, that person forcibly touches the other person”

From the provisions of the laws referred to, the essential ingredients of the offence of assault and battery which the prosecution must establish beyond reasonable doubt are:

- (i) That the accused had unlawful contact with the victim
- (ii) The contact may be physical or not
- (iii) The contact caused fear, harm and pain to the victim
- (iv) The contact was without the consent of the victim

The evidence of PW1 was that accused entered the house of PW2 and started threatening to kill him. Then accused suddenly started beating PW2 to the ground then PW1 went to separate them. The evidence of PW2 on her part was that, when accused came out of the children’s room he suddenly started advancing towards PW1 and tried to assault him and she got up to stop the accused, he slapped her left cheek and kicked her onto the ground with his foot. While accused was punching her while on the ground that PW1 came to hold accused and he bolted.

In his defence, accused person said after he returned from the children room that he went to ask PW2 why she did not inform him of the child’s ill health and asked her whether PW2 will inform him should the child had died. It was then PW2 rose from

her chair and used it to hit his head and he also slapped PW2 in retaliation then PW1 also hit his eyes with a fist. In Exhibit A, accused stated this same account as to what happened at PW1's house how she used the stool she was sitting on to hit him when he returned from the children's room to asked why he was not told of the ill health of the child. So, accused also slapped PW1 and PW2 came to hit him in the face.

Accused appears to put up a denial of the offence raising self defence that he slapped PW2 after she hit him with the stool she was sitting on. This evidence does not avail the accused person to self defence as required by law since accused did not show that he was under a severe threatening attack from PW2. This view has been reached taking into account the defence of the accused. He returned from the children's room to question PW2 for not informing him of the child's ill health before taking him to the hospital. Accused for just walking into PW2's home and walked straight to the children's room as he stated without first of all enquiring from PW2 as to the where about of the said child, shows accused was either angry or not happy at the time he went to PW2's house. Granted that accused upon entry to PW2's house greeted her and PW2 who were sitting together at the time, accused should enquire of the said child from PW2 before proceeding into the children's room to check on them. Per his own evidence which has corroborated the evidence of PW1 and PW2, just walked into the children's room only to return to start questioning PW2. The conduct of accused at this stage is indicative of an angry person.

PW1 and PW2 spoke with one voice that accused entered the house that evening saw them seated together but did not even say a word to them and walked straight into the children's room. It was upon his return from the room that accused advanced towards PW1 to assault him and PW2 was going stop that when accused slapped her and kicked her to the ground. Further evidence of PW2 under cross examination from the accused was that since she got married to PW1 accused was not on talking terms

with her. Accused will either issue threats or cast insinuations at her whenever accused sees her in town.

I will at this point reject the defence of the accused that he was first attacked by PW2 with the stool she sat on before he also slapped her as accused could have walk away to go and report same to the police. Accused from the evidence available at the trial has not accepted the fact that PW2 had divorced him and move on in life with PW1, as accused told the court that PW1 was having extra-marital affairs with his wife (PW2). I will and has accepted the evidence of the prosecution of the attacks of accused person on PW2 in this offence.

It is my finding of fact that accused went to PW2's home where his five (5) children he had with her in their about twenty (20) years of marriage. Accused on the said date at about 8:30 pm to check on the sick son. Accused not happy that PW2 did not inform him of the ill health of his son went to PW2's house angry over the situation. Accused became more angry as he could not talk to his said son as they were all asleep at that time. So, accused came from that room and advanced angrily towards PW1 issuing threat of death to him for having extra-marital affairs with his wife (PW2). As PW2 tried to stop accused from assaulting PW1, accused then slapped PW2 and PW1 came to her rescue.

It was held in the case of ALI YUSIF ISSAH (NO2) VRS. THE REPUBLIC [2003-2004] SCGLR 174

“ What constitute proof beyond reasonable doubt was ably discussed by Lord Denning Mr in the English case of MILLER VRS MINISTER OF PENSIONS [1947] 1 AER 372 at 373. He held thus:- “Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law will fail to protect the community if it admitted fanciful

positions to deflect the course of justice. If the evidence is strong against a man as to leave only a remote possibility in his favour which can be dismissed with the phrase it is possible but not the least probable the case is proved beyond reasonable doubt but nothing short of that will suffice”

It is my candid view therefore that the prosecution has proven the elements of this offence as charged beyond reasonable doubt that shows that accused person had physical contact with PW2 that caused her fear and pain without her consent on the day. I hereby found accused guilty of assault and battery of PW2 as charged and accordingly convict him.

BY COURT:-Does the accused person have anything to say by way of mitigation before sentence is passed.

Oliver Atsu Abada Esq. and Osmond Vulor Esq. took turns to plead for mitigation for the accused persons saying due to the five children accused has with PW2 and the remorse of accused the court should be considerate and lenient with the accused in the sentence.

In sentencing the accused the court has taken into consideration the plea on mitigation, the accused is sentenced to prison for three months on both counts which shall run concurrently.

FINAL ORDER.

Let the locally made short gun with AAA live ammunition be destroyed by burning after 30 days from today under the supervision of the Registrar of this Court, Divisional Police Commander Kpando and Municipal Director of EPA, Kpando within the premise of this court by fire.

FRANCIS ASONG OBUAJO

CIRCUIT COURT JUDGE

21/3/24