IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HELD IN CAPE COAST ON THURSDAY THE 16TH OF APRIL, 2024, BEFORE HIS LORDSHIP JUSTICE JOHN-MARK NUKU ALIFO "J"

CRIMINAL APPEAL: SUIT NO. F22/32/23

KOJO ABEDU **APPELLANT**

VRS.

THE REPUBLIC **RESPONDENT**

APPELLANT PRESENT
EBENEZER TSIQUAYE-GRANT ESQ. FOR THE APPELLANT
JOSEPHINE DEBORAH AWAH (SA) FOR THE RESPONDENT

JUDGMENT

This is a Criminal Appeal against the Judgment of the Circuit Court, Mankessim delivered by Her Honour, GLORIA NAA BOTOR LARYEA delivered on the 12th April, 2021. The Appellant was charged with one (1) Count of Threat of Death contrary to **Section 75 of the Criminal Offences Act, (Act 29) of 1960.** He pleaded guilty simpliciter and was convicted on his own plead and sentenced to serve six (6) years imprisonment IHL.

GROUND OF APPEAL

Being aggrieved by the conviction, Appellant on 13th July, 2023 filed the present appeal on the sole ground;

1. That the sentence is harsh and excessive having regard to the fact that he is a young offender, that he pleaded guilty simpliciter and was remorseful at the trial.

BRIEF FACTS

The complainant in this case Kweku Nyarko is a palm wine tapper and a native of Abeadze Edumanu. The Appellant is Koko Abedu is a driver and a native of the same village. That on 24/3/2012 around 12:30 pm, the complainant went to his oil palm plantation farm at Abeadze Edumanu and met the Appellant and a friend smoking Indian Hemp. The complainant sternly warned the Accused Person and his friend to desist from using his farm as a ghetto. That later in the day around 6:00 pm, the complainant returned from only to see the Appellant and holding knife on the mother. This act attracted people to the house and the knife was collected from the Appellant. On 25/03/2021, around 6:00 pm, was in the house when one Kofi Essuon and Kofi Nyarko who are witnesses in this case which the Appellant rushed on him with a cutlass and threatened to kill him but those around the scene saved him. That on 26/03/2021, the complainant was on his way to the farm when the Appellant again rushed on him and threatened to inflict cutlass wounds but managed to escape unhurt. The complainant looking at the repeated threats on him by the Appellant reported the incident to the police. On 27/03/2021, the Appellant was arrested and he admitted the offence in his Investigation Caution Statement. After Investigation the Appellant was charged with the offence as stated on the charge sheet to appear before the Honourable Trial Court.

At the trial, the Appellant pleaded guilty simplicter and was convicted on his own plea and sentenced to six (6) years imprisonment in hard labour.

Dissatisfied with the sentence, the Appellant, on 13th July, 2023, filed his Petition of Appeal.

The sole the grounds of Appeal is;

1. That the sentence is harsh and excessive having regard to the fact that he is a young offender, that he pleaded guilty simpliciter and was remorseful at the trial.

The Appellant in his Petition of Appeal is seeking that the Appellant's sentence imposed should be reduced to the barest minimum or considering the period spent, the appellant should be released from prison.

On 2nd November, 2023, leave was granted to the parties to submit their Written Submissions and legal arguments to facilitate effective and complete determination of the case.

ISSUES FOR DETERMINATION

The Petition of Appeal engendered only one issue for determination gleaned from the only ground of appeal:

1. Whether the sentence is harsh and excessive having regard to the fact that he is a first time young offender and that he pleaded guilty simpliciter?

GROUND OF APPEAL

THAT THE SENTENCE IS HARSH AND EXCESSIVE HAVING REGARD TO THE FACT THAT HE IS A YOUNG OFFENDER, THAT HE PLEADED GUILTY SIMPLICITER AND WAS REMORSEFUL AT THE TRIAL.

ARGUMENTS OF COUNSEL FOR THE APPELLANT

In canvassing legal arguments in support of this ground, learned Counsel for the Appellant segmented his submissions under three headings; harsh and excessive sentence and young offender; Appellant pleaded guilty at the trial; and appellant was remorseful.

Counsel for the Appellant argued that imposition of sentence is at the discretion of the judge which must be exercised judiciously within the remit of the law as statutory obligation where the law prescribes the period and length of sentence. Learned Counsel for the Appellant then relied on the case of **Haruna Vrs. Republic [1980] GLR 189-192** and submitted that Trial Judge was inordinately speculative of what would have happened to the complainant in sentencing the Appellant to six (6) years imprisonment. He argued that the Trial Judge ignored factors capable of mitigating a deterrent sentence on the Appellant, such as he being in his late prime age and a first time offender with propensity to fit into society and not revert to his old ways of handling issues. He added forcefully that the Courts are now disposed and more favourable adopting the reformative and rehabilitative theories of punishment when young and first time offenders have brushes with the law. The argued that long custodial sentences will only bring the Accused Persons close to criminals and may be forever lost to decent society which phenomenon will defeat the aim of reformation. He fortified this view with the cases of **Badu Vrs. Republic (1970) CC 91; Frimpong a.k.a Iboman Vrs. The Republic [2012] 1SCGLR, 297 and Ameshina Vrs. The Republic (Civil Appeal). Suit No. H2/18/2010, Dated 22/18/2020.**

Counsel for the Appellant submitted that as the Appellant pleaded simpliciter and did not waste the time of the Court with a long trial and was also remorseful these

should have weighed on the Trial Court to impose a less harsh sentence. He cited the cases of **Dabla & Ors Vrs. Republic (1980) GLR 501-502; Kofi Marfo Vrs. Republic (2020) 152 G.M.J, R Vrs. Harper (1967) 3 ALL ER C.C.A at 619 and Agyemang Vrs. The Republic (1974) 2 GLR 380** to persuade the Court.

Learned Counsel for the Respondent in her rebuttal cited a myriad of case law including **Razak & Yamoah Vrs. Republic (2012) 2 SCGLR 750, Kamil Vrs. The Republic (2011) 1 SCGLR 300, Asamoah Gyan Vrs. The Republic (2019) 132 GMJ 178 C. A** and **Apaloo & Ors Vrs. Republic (1975) 1 GLR 156** to argue that the Appellant had utterly failed to demonstrate any mitigating circumstance which may justify tempering of his sentence by this Honorable Court and that when a Court decides to impose a deterrent sentence, the fact that the Appellant pleaded guilty simpliciter become irrelevant. Appellant had also failed to show by evidence the relative harshness or injustice regarding the sentence handed down by the Trial Court.

She further argued that the fact that a Court differently constituted may have passed a different or lesser sentence should not justify a reduction of the original sentence per the principle of law enunciated in the case of **Apaloo Vrs. The Republic [1975] 1 GLR 156 – 192 at pg. 191.**

Counsel for the Respondent further stated that, the penalty for Threat of Death is a term of imprisonment not exceeding ten years. Counsel argued that in the instance case the trial judge took into consideration the statement of mitigation by the Appellant before pronouncing the sentence of six (6) years imprisonment on the Appellant. Counsel for the Respondent stated that the Trial Judge after convicting the Accused on his own plea, listened to the statement on mitigation by the Appellant and confirmed that the Appellant was not known before proceeding to sentence the Appellant accordingly. The Trial Judge at page 4 of the Record of Appeal stated thus:

"In sentencing the Accused, the Court takes into account the weapon utilized by the Accused during the incident and the possible injuries and likely death that could have occurred had the complainant not escaped that fateful day. The Court shall therefore impose a heavy sentence on the Accused.

Accused is sentenced to six (6) years imprisonment".

Counsel for Respondent submitted forcefully that the Trial Judge had the discretion to impose the maximum term of ten years upon his conviction but the Court was lenient in the punishment having considered the mitigating circumstances such as the mitigation statement of the Appellant as well as the fact that the Appellant was a first time offender and demonstrated leniency by sentencing the Appellant to six years imprisonment. Counsel argued that the sentence awarded to the Appellant by the trial Circuit Court was in exercise of the judicial discretion of the Court and in accordance with its statutory jurisdiction.

Counsel for Respondent dislodged the argument of Counsel for the Appellant suggestive of the fact that the Appellant was a "young offender" at the time he committed the crime.

She submitted that per **Section 60 of the Juvenile Justice Act, 2003 (Act 653)** *"young offender" means a young person who has been convicted of an offence for which the Court has power to impose a sentence of imprisonment for one month or upwards with the option of a fine;*

"Young person" means a person who is eighteen (18) years or above eighteen years but is under twenty-one.

Learned Counsel for the Respondent submitted that the Appellant at the time of commission of the offence was twenty-seven (27) years and cannot be deemed as a young offender and cannot benefit from the consideration given to young persons by the Court in an appeal against sentence.

Counsel for Respondent therefore submitted strongly that the case of **Dabla & Ors Vrs. The Republic (supra)** can be distinguished clearly from this case as in that case the Appellants therein were young offenders whose conduct of remorse were evident from the record since there even assisted the police in retrieving the stolen articles and there was no premeditation in the commission of the offence. She stated that in this case the Appellant was neither young person nor his conduct of remorse shown anywhere in the Record of Appeal during or after the trial prior to his sentence. Counsel added that the Appellant`s conduct was premeditated and calculated and not done on the spur of the moment.

At the end of her submission, Counsel for the Respondent urged this Honourable Court to disregard the particular submission of the Appellant`s Counsel to consider the lessons learnt by the Appellant during his years of incarceration and the preparedness of the Appellant to lead a meaningful life upon grant of the appeal for reduction of his sentence as irrelevant to the determination of this appeal.

DISCUSSION AND ANALYSIS BY THE COURT

Indeed, it has been held that an appeal is by way of rehearing. Thus, in the case of **Bakana Ltd Vrs. Osei [2014] 77 GMJ 68 at 76,** the Court held that *"an appellate Court as a rehearing Court is to rehear an appeal as if the rehearing were the original hearing of the case and hence may comprehensively review the whole case by analysing the entire record of appeal, taking into account the testimonies and all the documentary evidence adduced at the trial before arriving at a decision".* See also the cases of **Apaloo Vrs. The Republic (supra); Tuakwa Vrs. Bosom (2001-2002) SCGLR 61; Brown Vrs. Quashigah (2003-2004) 2 SCGLR 930 Praka Vrs. Ketewa 1964 GLR 423 SC; Dexter Jonson Vrs. The Republic (2011) 2 SCGLR 601; Henry Kwaku Owusu Vrs. The Republic (2016) 98 GMJ 95 SC and Quarcoopome Vrs. Sanyo Electric Trading Co. Ltd & Anor. (2009) SCGLR 213.**

It is trite law that in an appeal, after the review of the entire records, it behooves on the appellate Court to make its own findings or come to a different conclusion from the Trial Court.

It was eruditely stated by the venerable Dotse JSC in the **Dexter Johnson** case **(supra)** at pages 669-670 as follows: ***"What is therefore meant by an appeal being by way of rehearing is that the appellate Court has powers to either maintain the conviction and the sentence or set it aside and acquit and discharge or increase the sentence".*** I fully endorsed this position in this judgment which I cannot depart from by way of the principle of stare decisis.

Thus, this Court is enjoined by law to refer to the record to form its own opinion of the facts, case law and relevant statutes to determine whether the sentence of 6 years is too harsh and excessive in the particular circumstances of the case.

The Appellant was convicted of Threat of Death and sentenced to 6 years imprisonment by the Trial Court. **Section 75 of the Criminal Offences Act, (Act 29) of 1960** which is the offence creating provision described Threat of Death as a second felony.

Section 75 of Act 29 provides as follows:

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

The punishment for a second degree felony is clearly stipulated in **Section 292 (2) of Criminal and Other Offences (Procedure) Act, (Act 30) of 1960** as follows:

Section 296 (2) of Act 30.

"Where a criminal offence which is not an offence mentioned in subsection (5), is declared by an enactment to be a second degree felony and the punishment for that offence is not

specified, a person convicted of that offence is liable to a term of imprisonment not exceeding ten years".

Before I will go into the merits of the appeal, I wish to state that the basic or fundamental rule in all criminal prosecutions is that a person charged with an offence is presumed innocent until he is proved guilty or he has pleaded guilty in a Court of competent jurisdiction. Article **19(2) (c) of The 1992 Constitution** captures it thus;

"A person charged with a criminal offence shall……be presumed innocent until he is proved or has pleaded guilty."

In its simple form, it means that irrespective of the nature of the crime, how it was committed or whether a person was caught in an act, the accusation, remains a mere allegation until evidence has been produced to prove that he is guilty. It is during the trial that the issue of the "burden of producing evidence" and "the burden of persuasion" (burden of proof) becomes relevant. In criminal trials, the term refers to the duty to provide sufficient evidence at the trial to convince the Court of the existence or otherwise of a fact.

In order to secure the conviction of an Accused Person in a Criminal Trial, the Prosecution has the burden of proof, in other words, it is duty-bound to prove by the adducing sufficient evidence in proof of all the essential elements of the offence beyond reasonable doubt. This duty is set down in law under **Section 11(2) And 13 (1) of the Evidence Act, 1975 (NRCD 323)** as follows:

"11 (2) In a Criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to

produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt." And, "13 (1) In a Civil or Criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt."

Generally, an accused person is not required to prove his innocence. He is not required to do anything. The only thing he is required to do is to raise a reasonable doubt as to his guilt. **Section 11(3) of the Evidence Act, 1975**, reads;

"In a criminal action the burden of producing evidence, when it is on the accused as to any fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on all the evidence a reasonable mind could have a <u>reasonable doubt</u> as to guilt".

Section 13 (2) of the Evidence Act also reads;

"Except as provided in section 15 (3), in a criminal action the burden when it is on the accused as to any fact the converse of which is essential to guilt, requires only that the accused raise a <u>reasonable doubt</u> as to his guilt."

Section 22 of Act 323 also reads;

"In a criminal action, a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the

basic facts that give rise to the presumption are found or otherwise established <u>beyond reasonable doubt,</u> and, in the case of a reputable presumption, the accused need only raise a reasonable doubt as to the existence of the presumed fact."

However, under Section 171 of the Criminal Procedure Code, 1960 (Act 30) where the accused pleads guilty simpliciter as in this case, the Prosecution would be deemed to have discharged its burden and the Trial Court will proceed to convict the accused on his own plea and sentence or make orders against him, unless there shall appear to it sufficient reasons to the contrary.

Article 19 (11) and 296 of the 1992 Constitution relied on by Counsel for the Respondent provide as follows;

"No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.

Where in this constitution or in any other law discretionary power is vested in any person or authority

a) *That discretionary power shall be deemed to imply a duty to be fair and candid;*
b) *The exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law and*
c) *Where the person or authority is not a Justice or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not with the provisions of this constitution or that other law to govern the exercise of the discretionary power".*

In the case of **Victor Ocloo Vrs. The Republic [2014] 69 G.M.J. 173,** it was held that "*sentencing is at the discretion of the court as long as it falls within the statutory limit imposed by law. Under Article 296 of the 1992 Constitution, when discretionary power is conferred on a person, he is enjoined to exercise it fairly and candidly in accordance with due process and devoid of any arbitrariness or personal dislike".*

See the case of **Banda Vrs. The Republic [1975] 1GLR 52,** where it was held that "*The exercise of the power of sentencing lay entirely within the discretion of the Trial Court,*

and provided the sentence fell within the maximum permitted by the statute creating the offence and the trial judge duly considered those matters that go in mitigation of sentence, an appellate Court should not disturb the sentence only because it would have felt disposed to impose a lighter sentence if it had tried the case at first instance".

The records show that the Appellant was charged with the offence of Threat of Death contrary to **Section 75 of the Criminal Offences Act, (Act 29) of 1960** and was convicted and sentenced on his own guilty plea to serve 6 years imprisonment.

It is trite learning that one of the most essential elements of a crime is the 'punishment.' In the case of **Proprietary Articles Trade Association Vrs. A.G for Canada (1931) AC 310,** the Supreme Court of Canada stressed this fact when it observed that without criminal sanctions (punishment), all statutory prohibitions become mere moral codes. Punishment is derived from the Latin word, *Poene.* It can be defined as the act of inflicting suffering, pain or any unpleasant consequences on another lawfully, by a person or agency in authority, on an offender, for the commission of a prohibited act. The imposition of a sentence by a Court is always regulated by law.

Where a statute clearly indicates the sort of punishment to be meted out to a convict, the Court cannot impose any punishment not authorized by the statute. In the case of **Addo Vrs. Republic (1974) 1GLR 254**, the accused was charged before the District Court with the offence of nuisance under **Section 296(2) of Act 29.** The punishment for an offender was a fine not exceeding fifty pounds. In the course of passing sentence, the magistrate made reference to relatives of the accused who had allegedly been bragging that they had money and so after all they are in a position to pay the fine. The magistrate then went ahead and imposed a custodial sentence of 3 months on the appellant. The High Court upheld the appeal. The Court, per Wiredu J. held thus;

> ***"It is apparent from the above that the Trial magistrate failed to appreciate his powers under section 296 of Act 29. It is not clear where he quoted the penalty prescribed from. Be that as it may the one thing clear is that he allowed irrelevant outside influences to weigh with him in imposing an otherwise unauthorized sentence on the appellant who did nothing himself to deserve this deviation from the authorized sanction. It is trite law that where a statute creating an offence lays down in no uncertain terms the sort of punishment to be meted out to offenders against that statute it is incumbent on the Court called upon to enforce the law to act within the strict language of that statute".***

From the definition of the offence of Threat of Death and the prescribed punishment, the Judge acted within the law in imposing a sentence within the maximum term of 10 years sentence on the Appellant.

Section 296 (2) of Act 30 provides thus:

"Where a criminal offence which is not an offence mentioned in subsection (5), is declared by an enactment to be a second degree felony and the punishment for that offence is not specified, a person convicted of that offence is liable to a term of imprisonment not exceeding ten years".

It is obvious that Counsel for the Appellant's only gripe with the sentence imposed by the Trial Judge has to do with its alleged intensity or harshness and not the legality. He argued that based on all the factors enunciated above, the Trial Judge ought to have exercised her discretion to pass a less harsh sentence allowed under the law.

Learned Counsel for Respondent resisted fiercely the arguments by the Appellant`s Counsel and submitted that this Court should disregard the particular submission of the Appellant`s Counsel to consider the lessons learnt by the Appellant during his years of incarceration and the preparedness of the Appellant to lead a

meaningful life upon grant of the appeal for reduction of his sentence as irrelevant to the determination of this appeal. According to Respondent`s Counsel considering the fact that the offence was premeditated the punishment was appropriate and will serve as a deterrent to other like-minded citizens.

It is the considered opinion of this Court that Respondent Counsel`s view is consistent with Jeremy Bentham's General Deterrence Theory which propounds that punishments must be meted out in respect of an offence so as to send a clear signal to other members of the society with similar propensity to crime and violence that they should abstain from committing a similar offence, or else the same fate would await them.

The principles upon which sentences are imposed have been stated in the *locus classicus* case of **Kwashie Vrs. The Republic [1971] 1 GLR 488 at 493** where it was stated thus: -

"In determining the length of sentence, the factors which the Trial Judge is entitled to consider are:

i. The intrinsic seriousness of the offence.

ii. The degree of revulsion felt by law abiding citizens of the society for the particular crime.

iii. The premeditation with which the criminal plan was executed.

iv. The prevalence of the crime within the particular locality where the offence took place, or in the country generally.

v. The sudden increase in the incidents of the particular crime.

vi. Mitigating or aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed."

Following closely on the heels of the **Kwashie Vrs. The Republic** case **Supra**, is that of **The Republic Vrs. Adu-Boahen, [1972] GLR 70-78** where the court stated thus:

"Where the Court finds an offence to be grave, it must not only impose a punitive sentence, but also a deterrent or exemplary one so as to indicate the disapproval of society of that offence once the Court decides to impose a deterrent sentence the good record of the accused is irrelevant." Emphasis mine.

See also the caution of the Supreme Court in the unreported case of **Kamil Vrs. Republic, Criminal Appeal No. J3/3/2009** dated 8th December 2010 where the Supreme Court, speaking through Ansah JSC stated in relation to the harshness or otherwise of a sentence as follows: -

"Where an appellant complains about the harshness of a sentence he ought to appreciate that every sentence is supposed to serve a five-fold purpose, namely to be punitive, calculated to deter others, to reform the offender, to appease the society and to be a safeguard to this country considering the sentence of 20 years which was passed on the appellants in the KAMIL Vrs. REPUBLIC case supra, and considering also the principles on sentencing enunciated in the case of HODGSON VRS. REPUBLIC (2009) SCGLR 642, this Court held on the said sentence as follows:"- Considering all this we find no good reason to disturb the sentence on the appellant by the Court of Appeal, and think it was even on the low side and should have been increased."

In considering all the factors and principles enunciated in the above cases, it would appear that the Trial Court was quite harsh in passing the sentence it imposed on the Appellant.

In applying the principles set down in the **Kwashie** case **Supra**,

"In determining the length of sentence, the factors which the trial Judge is entitled to consider are:

vi. Mitigating or aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed."

It is a significant fact that the Appellant acknowledged his folly and pleaded guilty to the charge of Threat of Death and by doing so did not waste the time of the Court with any lengthy trial he having no legal representation at the trial.

The Court missed a very crucial piece of statement in the mitigation statement of the Appellant. The Appellant when called upon to make the mitigation plea simple said *"I was drunk. I plead for mercy".* This is a profound statement that was sadly missed by the Trial Judge in here sentencing which is as follows:

"In sentencing the accused, the Court takes into account the weapon utilized by the accused during the incident and the possible injuries and likely death that could have occurred had the complainant not escaped that fateful day. The Court shall therefore impose a heavy sentence on the accused.

Accused is sentenced to six (6) years imprisonment".

It apparent on the record that the Trial Judge only considered the aggravating circumstances. The fact that the Appellant was a first time offender and pleaded guilty simpliciter and that the Appellant was under the influence of alcohol which were obvious mitigation circumstances were not considered by the Court before imposing the rather harsh sentence of 6 years imprisonment in the circumstances of the case.

In deed the repetitive nature of the Appellant`s action demonstrates his intention to hurt the complainant which is abhorable and must be condemned in no uncertain terms. He ought to be punished to learn a lesson that such actions will not be countenanced in the decent and peaceful society we want to build as a nation, where citizens must live in peace harmony and communal affection and to be each other's keeper. But long custodial sentence will not serve any useful purpose in our request to lean towards the reformative and rehabilitative principles of punishment.

See the cases of **cases of Badu Vrs. Republic (supra); Frimpong a.k.a Iboman Vrs. The Republic (supra) and Ameshina Vrs. The Republic (supra).**

The Appellant though has been established as not being a young offender in the rendition above is still in his prime youth with a lot of energy if well maintained can be put to good use for his own benefit and the general good of his family and society as a whole. Long custodial sentence would serve no useful purpose and rather than being transformed will be counter-productive where he shall mingle with hardened criminals and morals will be further corrupted to his detriment.

Having spent 3 years of his youthful life in lawful detention, I am convinced the Appellant has learnt his lessons.

The Appeal therefore succeeds on this sole ground as the 6 years sentence on the totality of the case is harsh and excessive.

I hereby set aside the sentence of 6 years imprisonment and substitute it with a sentence of 3 years to commence from the date of the sentence of the Trial Court, being 12th April, 2021.

(SGD)
JOHN-MARK NUKU ALIFO "J"
(JUSTICE OF THE HIGH COURT)