



**Ochieng v Republic (Criminal Appeal E065 of 2024)
[2024] KEHC 16198 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E065 OF 2024
DR KAVEDZA, J
DECEMBER 20, 2024**

BETWEEN

ARNOLD OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 3RD July 2024 at Kibera Chief Magistrate’s Court Criminal Case no. E207 of 2023 Republic vs Arnold Ochieng)

JUDGMENT

1. The appellant Arnold Ochieng was charged and after a full trial convicted for the offences of demanding money with menaces contrary to Section 302 of the Penal Code and Resisting arrest by a police officer contrary to Section 253(b) of the Penal Code. He was sentenced to serve 3 years for each count to run consecutively. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution’s evidence against which he was convicted; he challenged whether the charges were proved beyond reasonable doubt. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The first preliminary issue to deal with is that from the record, I note a clerical error in citing section 254(b) as the applicable section of the charge and the entire trial court proceedings. However, the said section does not exist. The correct provision is Section 253(b), which addresses assault, resistance,



or obstruction of a police officer in the execution of their duties. In the case of *Republic v Lawrence Ntomugania* [2014] KEHC 5797 (KLR) the court asked as follows:

“Is failure to quote the correct section of the law creating an offence fatal to prosecution case?”

Section 382 of the *Criminal Procedure Code* (CPC) provides thus:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.”

5. The paramount consideration is whether the error has occasioned injustice on the accused person. In this case, the appellant who was the accused understood the charges facing him, was represented by counsel, participated in the trial, and put a defence. The court therefore notes no injustice meted upon the appellant due to the error of the trial court.
6. This court hereby cures the defects in the charge and on the record by invoking the provisions of section 382 of the *Criminal Procedure Code*.
7. I will now analyze the evidence on record to ascertain whether the essential ingredients of the offences preferred against the appellant were established to the required standard of proof.
8. The prosecution's case was as follows: PW1, Kennedy Osano, a club owner at Kibera Drive, Bombolulu, testified that on 8th October 2022, he received a call from his manager, Billy Muturi, informing him that an individual named Agogo wished to meet him. Agogo, accompanied by 60 men, demanded a protection fee of Ksh. 80,000/-. Unable to pay the full amount, PW1 transferred Kshs. 5,000/- via mobile banking to Maxwell Dida, the second accused.
9. On 29th October 2022, at approximately 8:00 PM, two men associated with the appellant attempted to enter PW1's club but were denied entry by security. In retaliation, they threw Irish potatoes at the premises. On 28th October 2022, at around 9:00 PM, another individual caused a disturbance at the club, issuing threats to force its closure. The man fled before police arrived, but members of the public identified the appellant as the perpetrator. The appellant later returned, demanding the return of his phone, prompting PW1 to report the matter to the police. PW1 further testified that he continued receiving threats via phone and social media from one of the accused persons.
10. PW2, Joseph Aballa, a security guard at the club, stated that on 11th January 2022, the appellant approached him aggressively while holding a jar of cannabis. When police arrived, the appellant fled, dropping his mobile phone, which the police confiscated. PW2 corroborated PW1's evidence regarding the second accused returning to retrieve the phone two weeks later. On cross-examination, PW2 affirmed the appellant was in possession of cannabis and denied allegations that the appellant's phone had been unlawfully seized.
11. PW3 Police Constable Leleruk, testified that on 3rd January 2023, while on patrol in Kibra, he and fellow officers arrested the appellant at Bombolulu Club. The arrest caused chaos, necessitating reinforcements from Ayany Police Station. PW3 asserted that the appellant was part of a gang extorting local business owners.



12. PW4, the arresting officer, corroborated PW3's testimony. He noted that the appellant's screams during the arrest incited a violent crowd. During cross-examination, PW4 confirmed he was not in uniform during the arrest.
13. PW5, the investigating officer, stated that between October and December 2022, PW1 reported that a group from Kibera had demanded protection fees. PW5 produced a bank statement showing the Kshs. 5,000/- payment to Maxwell Dida, as instructed by the appellant. He recorded witness statements and formally charged the appellant and Maxwell Dida but his case was later withdrawn under Section 87(a).
14. In his defence, the appellant testified that he knew PW1 as the owner of a nearby establishment. On 8/10/22, at 7:30 p.m., he sought shelter from the rain near PW1's joint. PW1 confronted him and a friend, accusing them of smoking marijuana outside the premises. PW1 then called his security team, who forcibly removed him as he resisted. The appellant claimed he attempted to record the incident, but his phone was snatched away before he could do so.
15. On 11/10/22, the appellant returned to PW1's joint to ask for his phone. PW1 promised to help recover it, but no action was taken. The appellant reported the matter at Ayany Police Station but was advised that his case was at Jamuhuri Police Station. He did not pursue the complaint further. The appellant was later arrested on 4/1/23 after again demanding his phone from PW1. He claimed to have resisted arrest, not understanding why he was being apprehended.
16. During the arrest, shots were allegedly fired into the air to disperse the crowd. He denied committing the offence and refuted claims of being a gang leader or having anger issues. When cross-examined, he stated his friend recorded the incident, though the recording was not produced, and he did not have the OB number from Ayany Police Station.
17. DW2, a neighbour and relative, testified that on the day of the arrest, he witnessed three people approach the appellant and one of them grabbing him by the neck. The appellant resisted, prompting a crowd to gather and shots to be fired. DW2 confirmed that the police eventually identified themselves.
18. DW3 corroborated the appellant's account, recalling that PW1's security team manhandled the appellant, leading to the loss of his phone. He claimed to have recorded the incident but no longer had the recording due to changing phones.
19. The offence of demanding money with menaces is addressed under Section 302 of the [Penal Code](#) (Cap 63, Laws of Kenya). The section provides as follows:

“ Any person who, with intent to steal, demands money or other property from any person, with menaces or by force, is guilty of a felony and is liable to imprisonment for ten years.”
20. In the case of [Elias Ndungu vs Republic](#) [2010] (KLR), the court noted that “ “The offence of demanding by menaces will be proved when menace is shown to have been present in the conduct of the accused. Menace has been held to go hand in hand with the demand. In this case that demand was clearly present and as menace does not have to have its exhaustive definition, I find that this demand was accompanied by menace. The menace need not be expressed for it to be proved – *Kagori vs R*. Criminal Appeal No. 26/1967”
21. In this case, PW1 testified that the appellant, acting through an intermediary, made a clear demand for Kshs. 80,000 as protection money. This demand was accompanied by threats of harm or consequences should the demand not be met. Furthermore, PW1 confirmed having made a partial payment of Kshs. 5,000 to Maxwell Dida, the second accused, through a mobile banking transaction. This payment was made under duress, validating the claim of coercion. In addition to the demand, there was a pattern



- of intimidating behaviour exhibited by the appellant. This included throwing Irish potatoes at the complainant's club and issuing verbal threats to close down the business. These actions were intended to instill fear in the victim, furthering the coercive nature of the demand. The appellant continued to exert pressure through repeated threats made via phone calls and social media platforms.
22. The testimony of PW2, a security guard, corroborated the threatening conduct of the appellant. PW2 observed the appellant's aggressive behaviour, including his possession of alleged cannabis, which strengthened the claim of the appellant's intimidating presence and intent to coerce the victim.
 23. The bank statement submitted as evidence further corroborates the complainant's account. It shows the payment of Kshs. 5,000 to the second accused, substantiating the financial transaction linked to the unlawful demand.
 24. Taken together, this body of evidence effectively establishes the offence of demanding money with menaces under Section 302 of the *Penal Code*, demonstrating the appellant's intent to unlawfully obtain money through intimidation and coercion. The conviction of the trial court on this count was therefore proper and is affirmed.
 25. The appellant was also convicted for the offence of resisting arrest contrary to section 253(b) provides that; Any person who — assaults, resists, or wilfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer; or is guilty of a misdemeanour and is liable to imprisonment for five years.
 26. In this case, PW3, Police Constable Leleruk, stated that on 3rd January 2023, while attempting to arrest the appellant, chaos ensued, requiring reinforcements. This disturbance suggests the appellant resisted arrest. PW4, the arresting officer, further corroborated this, noting that the appellant's screams incited a violent crowd, indicating his active opposition to being detained.
 27. The court noted that PW3 and PW4, police officers, were lawfully executing their duties when the appellant obstructed and resisted arrest. The evidence, including that from DW2, confirmed that the appellant actively resisted, hindering the officers from carrying out their duties. Under Section 253(b) of the *Penal Code*, a police officer can arrest without a warrant if resistance or obstruction occurs. In his own defence, the appellant admitted to resisting arrest on 4th January 2023, claiming he did not understand why he was being apprehended. Additionally, DW2, a neighbour, testified that the appellant resisted when approached by individuals who grabbed him by the neck, causing further commotion.
 28. These accounts collectively demonstrate that the appellant resisted arrest, fulfilling the elements required for the offence under Section 253(b).
 29. Finally, when weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court. Having analysed the totality of the prosecution's case, I find that the prosecution proved their case beyond reasonable doubt for the offence of resisting arrest by a police officer. The conviction is consequently upheld.
 30. The appellant was sentenced to serve 3 years imprisonment on each count to run consecutively. During sentencing, the court considered the appellant's mitigation and the pre-sentence report.
 31. The *Sentencing Policy Guidelines* provide as follows: -
 - “7. 13 – Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the



course of multiple transactions and where there are multiple victims the sentences should run consecutively”.

32. The Court of Appeal has defined the phrase ‘same transaction rule’ in the case of *Republic v Saidi Nsabuga S/O Juma & Another* [1941] EACA and revisited it in *Nathan v Republic* [1965] EA 777 where the court stated as follows: -

“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”

33. In the present case, the offences in both counts arose from a continuous sequence of events. After committing the first offence, the appellant proceeded to commit the second offence while being arrested for the initial offence, establishing a direct connection between the two offences. His actions were connected by the proximity of time, criminal intent, by the relation of cause and effect, constituting the same transaction. In my view, the trial court ought to have ordered the sentences to run concurrently. The trial court indeed acted on wrong principles in that regard.

34. The upshot of the above analysis is that the appeal partially succeeds. The sentence of three (3) years imposed for counts II and count V is maintained. However, the sentences shall run concurrently.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

