



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL APPEAL NO. E 044 OF 2021**

**JOHN OCHIENG OGIRA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal case NO. 304 of 2020 of the*

*Principal Magistrate's Court at Oyugis by Hon. C.A. Okore-Principal Magistrate)*

**JUDGMENT**

1. John Ochieng Ogira, the appellant herein, was convicted of the offence of threatening to kill contrary to section 223 (1) of the Penal Code. He was also convicted of the offence of using abusive language in a manner likely to cause a breach of the peace contrary to section 95 (1) (a) of the Penal Code.
2. The particulars of the offences are that on 27<sup>th</sup> June, 2020 at Koderia South location, Rachuonyo South Sub County within Homa Bay County, while armed with a machete threatened to kill Sylvia Osewe Mureira. On the same day and at the same place used abusive language to Sylvia Osewe Mureira.
3. The appellant was sentenced to serve one year imprisonment in count one and in count two to six months imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. The appellant was represented by the firm of G.M Nyambati & Company Advocates. He raised grounds of appeal as follows:
  - a) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to 1 year for count 1 and 6 for count 2 imprisonment by failing to evaluate the evidence on record.
  - b) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without taking into account the contradictory evidence given in court.
  - c) That the learned trial magistrate erred in law and fact by failing to appreciate the law and evaluate the entire evidence tendered in court.
  - d) That the learned trial magistrate erred in law and fact by dismissing the appellant's evidence.
  - e) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without taking into account that there was a land dispute between the accused and the husband of the complainant.
  - f) That the learned trial magistrate erred in law and fact by not appreciating the provisions of Section 169 of the Criminal Procedures code.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. At the trial court, the appellant pleaded an alibi. When an accused has pleaded an alibi, the onus is on the prosecution to prove that the alibi is not true. In the case of **Kiarie vs. Republic [1984] KLR** the Court of Appeal held:

**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

This burden does not leave the prosecution even when it is raised for the first time during defence. In the case of **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal rendered itself as follows on the issue of alibi:

**It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.**

I will therefore evaluate the evidence tendered by the prosecution and weigh it against this defence.

8. There were two purported eye witnesses who testified about the incident complained of. Sylvia Osewe Mureira (PW1) in her evidence, testified that when she found some two boys digging furrows where she had previously planted, she called her husband on phone and asked him why he had hired the two to work on the farm without informing her. After giving one of the boys her phone to talk to her husband, she left for her home. She was with Clinton Odhiambo (PW2), her step son.

9. While going home she met with the appellant who had a machete. He followed her to her house and her step son took off. She locked herself inside her house and the accused insulted her and threatened to kill her one day.

10. Clinton Odhiambo (PW2) gave a different version of the incident. He said when they found two men digging their land, his mother asked them who had sent them there. They told her that it was the appellant. Suddenly the appellant arrived there and told his mother not to tell people that the shamba was hers. He threatened to kill his mother.

11. The evidence of these two witnesses is contradictory as to where, the complained of incident took place and what transpired just before the alleged incident. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**(Madan, Miller and Potter JJA) held:

**The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

12. These two witnesses could not be relied upon. In view of the contradictions in their evidence, the alibi defence of the accused was not displaced. He ought to have been acquitted.

13. From the foregoing analysis of the evidence on record, I quash the conviction on both counts and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

**DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**