



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 58 OF 2018

CHARLES OBUNGA OKOMBO.....APPELLANT

versus

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein is **Charles Obunga Okombo**. He was convicted by the Resident Magistrate Rongo on 1/10/2018 for the offence of creating a disturbance in a manner likely to cause a breach of the peace contrary to Section 95 (1)(b) of the Penal Code.

The Particulars of the charge were that on 27/6/2017, at Awendo Town, Migori County, he created a disturbance in a manner likely to cause a breach of the peace by chasing one Peter Kennedy Omondi while armed with a panga. He denied the charge and after a full trial, the court found him guilty and sentenced him to serve six months probation.

Being aggrieved by the said decision, the appellant preferred this appeal through the firm of Nyamori Nyasimi Advocate.

The court directed that the appeal be canvassed by way of written submissions. Nyamori Advocate filed their submissions on 23/7/2021 but did not serve for long. By 2/12/2021, the submissions had not been served and the court directed the same be served and the Respondent had seven (7) days to reply. I have seen that the Respondent later filed their submissions on 4/1/2022.

In the Memorandum of Appeal, the appellant listed three grounds namely:-

- 1) **That the trial court erred by basing its decision on the demeanor of witnesses rather than the evidence tendered in court;**
- 2) **That the decision of the court was against the weight of evidence on record;**
- 3) **That the prosecution evidence was too contradictory and inconsistent to support a conviction.**

In his submissions, counsel urged that the court failed to analyse the whole evidence in order to gauge the veracity of the testimonies of the witnesses; that the magistrate did not explain what aspect of the witness's demeanor that convinced him that they were truthful. Counsel invited the court to consider the evidence of PW1 and PW2 which were at total variance; that PW2 told the court that PW1 never left the house that day and that the court should have considered these contradictions because PW1 could not have been in two locations at the same time.

On grounds 2 and 3, counsel argued that the court's finding of guilty was not supported by any evidence; that there was reasonable doubt due to the contradictions in the evidence. Counsel relied on the decision of **Richard Munene =vs= Republic (2018) ECLR** where the Court of Appeal held that the court must consider the substantial and fundamental inconsistencies which create doubt in the mind of the Court.

Mr. Kimanathi, the prosecution counsel, relied on the evidence adduced by the prosecution, that on 27/6/2017 about 3:30p.m, the applicant confronted the complainant on Mariwa Awendo Road while armed with a panga, spear and rungu, warned the complainant never to step on the disputed plot; that on the same day at 5:30p.m., he went to the complainants gate, started to bang on it threatening to kill the complainant and that the incident was witnessed by PW2 and PW3. It was his submission that the offence was proved.

This being a first appeal, this court is required to re-examine all the evidence that was tendered before the trial court, analyse it and arrive at its own determinations but bearing in mind that this court neither saw nor heard the witnesses testify. This court is guided by the decision of **Kiilu vs Republic (2005) KLR 174**.

In this case, five witnesses testified. **PW1 Peter Kennedy Omondi Angweyo**, the complainant, recalled that on 27/6/2017, about 3:30p.m, while coming from his plot, the appellant appeared from the opposite direction aboard a motorcycle; that the appellant asked the rider to

stop. The appellant disembarked and was armed with a panga, spear and a rungu and told PW1 that he was lucky he did not find him at the plot otherwise he would have killed him. He warned him that if he found him there, he would die. The appellant went away. PW1 went home and about 5:30p.m he heard a bang on his gate and on going to check, found the appellant armed with two spears and was saying that he would kill PW1.

PW1 said that his houseboy was at the gate. He later reported the matter to Awendo Police Station.

PW2 Michael Ouma Nundu, the complainant's houseboy recalled that on 27/6/2017 about 6:00p.m, he left to go to the shop and after closing the gate, he saw a motorcycle arrive and on it was the appellant who was armed with a panga, rungu (Club) and a spear; that the appellant started to bang on the complainant's gate saying he would kill PW1 if he went to his plot again. PW2 informed PW1 what he had seen. PW2 in cross examination, told the court that PW1 never left the house on that day and they were, there together.

PW3 Gedion Odero told the court that he was with PW1 on 27/6/2017 about noon at his office when PW1 informed him of his plot on which people had trespassed and they reported to the Chief; that at about 3:30p.m, while with PW1 the appellant came from opposite direction on a motorcycle, armed with a spear, panga and rungu (Club); that the appellant told PW1 that if he had found him at the plot, he could have killed him.

PW4 IP Gordon Nyamweya arrested the appellant on 21/7/2017 after PW1 served on him an order of arrest.

PW5 PC Maimuma Makokha of Awendo Police Station received a report from PW1 of the threats to kill him made by the appellant.

When called upon to defend himself; the appellant in his unsworn statement stated that on 27/6/2017, he travelled by his motorcycle to Muhuru Bay to get fish for his business and returned to Ranen at 4:00p.m. He sold the fish and went home and that in July he was arrested and charged for this offence he did not know any thing about and he denied having had any dispute with the complainant.

I have considered all the evidence on record afresh the grounds of appeal and submissions of counsel.

The appellant complains that the trial court did not consider the contradictions in the prosecution evidence. In the case of **David Ojeabuo vs Federal Republic of Nigeria (2014) LPELR 22 555(CA)** the court of appeal described what contradictions entail. The court said:-

“Now, contradictions mean lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they were inconsistent. On material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

The question that this court will have to consider is whether the differences between the evidence of PW1 and PW2 were a contradiction or mere discrepancy.

I have read the judgment of the trial court and I find that indeed the trial court never bothered to address the contradictions in the testimonies of PW1 and PW2. PW2 in cross examination told the court that PW1 had not left the house that day and that they had been together in the home the two of them. That evidence is in sharp contradiction of PW1's evidence, who says he was from his plot going to Awendo stage when the appellant first accosted him.

In my view, that is not a mere discrepancy but a contradiction in the evidence. PW1 could not have been in two places at the same time. Either of them is lying.

Looking at the evidence of PW1 and PW2 closely, there are more contradictions because whereas PW1 stated that at 5:30 p.m. of the same day the appellant banged at his gate and he actually opened it and the appellant threatened him. To the contrary, PW2 said that he was already outside the gate when he met appellant on a motorcycle 10 metres from the gate. PW2 had closed the gate. PW2 never said that PW1 ever saw the appellant. PW2 was specific that he called PW1 to tell him what happened after the motorcycle with the appellant had left. From PW2's evidence, it means PW1 never saw or met the appellant at the gate at 5:30 p.m. It means that if the appellant uttered any threats to kill PW1, it is only PW2 who heard and saw the appellant utter the threats to kill and bang the gate and then he left. Again this contradiction in PW1 and PW2's evidence is irreconcilable. One of them must be telling lies. The court cannot tell which of them.

In **Richard Munene vs Republic (2018) eKLR** the Court of Appeal said:

“ It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

I find the contradictions in PW1 and PW2 to have been fundamental that the trial court should have attempted to resolve them before generally arriving at the conclusion that it did. This court is left in doubt as to whether the incident at the gate occurred.

Coming to the scene that took place on the road at Awendo; PW1 was with PW3 and that testimony was consistent as to what transpired.

The question is whether what happened amounts to an offence under Section 75 (1) (b) of the Penal Code.

The ingredients of the offence are that the offender either brawls or creates a disturbance in a manner likely to cause a breach of the peace.,

According to PW1 and PW3, the appellant uttered the words that 'had he found him at the plot, he would have killed him.' Apart from the allegation that the appellant was armed, there is no evidence that the appellant caused a brawl which is defined as a rough or noisy quarrel or fight. Further, there is no evidence that the appellant threatened a breach of the peace. He merely made a statement and left. That is not sufficient to constitute a brawl or cause a breach of the peace.

Further, the above evidence does not support the particulars of the charge which state that the appellant chased the complainant while armed with a panga.

In the end, I find that the ingredients of the offence were not proved. I find merit in the appeal and I hereby allow it. The conviction is quashed and sentence set aside.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 24TH DAY OF MARCH, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Maatwa for the Respondent.

Appellant present.

Nyauke Court Assistant