



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 82 OF 2012

DAVID OGINGA ANDIWO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case number 127 of 2012 of the Principal Magistrate's Court at Bondo)

J U D G M E N T

The petition raises six (6) grounds. The sum total of the same is that the learned magistrate failed to appreciate and evaluate the entire evidence and therefore arrived at a wrong conclusion.

The appellant had been charged with four counts namely:-

Count 1: Creating disturbance in a matter likely to cause a breach of the peace contrary to section 95 (1) (b) of the penal code.

Particulars: On the 18th day of February, 2012 at Barchando sub location in Bondo district within Siaya county created disturbance in a manner likely to cause a breach of the peace by chasing **DOREEN AKINYI ONDIWO** while armed with a panga.

Count 2: Threatening to murder contrary to section 223 (1) of the penal code.

Particulars: On the 18th day of February 2012 at Barchando sub location in Bondo district within Siaya county without lawful excuse uttered a threat to kill **DOREEN AKINYI ONDIWO**.

Count 3: Creating disturbance in a manner likely to cause breach of peace contrary to section 95 (1) (b) of the penal code.

Particulars: On the 18th day of February, 2012 at Barchando sub location in Bondo district within Siaya county created disturbance in a manner likely to cause a breach of the peace by chasing **WILFRED KENO** while armed with a panga and a spear.

Count 4: Creating disturbance in a manner likely to cause of breach the peace contrary to section 95 (1) (b) of the penal code.

Particulars: On the 18th day of February, 2012 at Barchando sub location in Bondo district within Siaya

county created disturbance in a manner likely to cause a breach of the peace by chasing **JOAB AKELLO OWONDO** while armed with a panga and a spear.

Prior to this charge sheet the earlier charge sheet had only one charge but the same was substituted. At the end of the trial the appellant was set free on other counts and convicted on **Count II** hence this appeal.

The brief facts of this case are that **PW1 Dorine A. Ondiwo**, on 17-2-2012 at around 10 p.m heard someone hitting a water tank outside her house for a long time. He called Elijah Matoke and Wilfred Keno who responded.

The village elder and the assistant chief went to the home of the appellant allegedly to inquire whether he knew what was happening.

The following morning the appellant came while armed with a panga and threatened the complainant. The complainant went and hid in her uncle's place.

On being cross examined the complainant said that there were other people in the homestead when the appellant threatened her.

PW2 Wilfred Keno, is a community policing agent. He told the court that on 18-2-2012 at around 10 a.m he was at home and was at home when he was called by PW1 that she was being attacked. They went to the appellant's home and found him with a panga. The appellant told him and others to go away.

PW3 Joab Akelo, is also a village elder. He was among the people who went to the accused's home. According to him the appellant chased them away from his home while armed with a panga.

PW4 Joseph Kiboi, is the investigating officer who established and preferred the charges against the appellant.

The appellant on his defence gave unsworn testimony. His only testimony concerned the events of 21-2-2012 when he was arrested by the police after attending a funeral.

This court is enjoined in law to evaluate the evidence afresh with a view of arriving at an independent finding.

I have carefully evaluated the same, heard both the submissions by the appellant as well as the respondent.

I do not find the evidence of PW1 consistent with those of other witnesses. I do not in anyway find a nexus between the person who hit the water tank and the appellant.

PW2 said that the complainant PW1 told them that somebody had a panga. Yet on the other hand the said PW1 did not come out to check who was hitting the water tank.

Further, the appellant was convicted on the second count, that is threatening to kill. This was based on her evidence that the appellant came the following morning while armed with a panga and threatened to kill the complainant.

Whereas this could be true, her evidence was not corroborated. One Margaret Ogwella or any other person should have been called to verify this.

I do not equally find any reason why other witnesses went to the appellant's house at night. According to PW3 the appellant was busy cooking and he threatened them with a panga and spear. Why did they trespass into his house? Who told them that it was the appellant who was threatening the complainant by hitting the water?

Lastly, the prosecution substituted the charge sheet thrice. The first substitution proceeded well but I however have issues with the final one.

The last charge sheet was substituted after the entire evidence except that of the investigation officer had been tendered. The records shows that the appellant did not object. The evidence that had been tendered was adopted just because the witness had not made any further statements.

Whereas it was the right of the appellant to have objected or not but I think the proper way was to have reopened the case so that witnesses ought to have been recalled and cross examined.

As matter of fact the second charge which convicted the appellant was one of the charges that was introduced in the substituted charge sheet.

The court would have ordered the prosecution at this stage to recall the witnesses since at the time of cross examining them earlier on this count did not exist. The trial court would have also guided the proceedings, without of course showing any partisan interest in directing the recalling of the said witnesses as the new charges that faced the appellant were infact more serious than the earlier charges.

In the premises, I do find this appeal meritorious. The same is allowed. The appellant is set free unless lawfully held.

Dated, signed and delivered at Kisumu this 24th day of June, 2013.

**H.K.
JUDGE**

CHEMITEI

In the presence of:

.....for the state

.....for the appellant

HKC/va