



REPUBLIC OF KENYA



KENYA LAW
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**Miruka v Republic (Criminal Appeal E061 of 2024)
[2025] KEHC 7241 (KLR) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 7241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E061 OF 2024
A. ONG'INJO, J
APRIL 10, 2025**

BETWEEN

ELLY OTHIAMBO MIRUKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of Hon. C. N. C ORUO (PM) delivered on 25th February 2024 in Rongo CR. Case No. E239 of 2020 Republic V Elly Othiambo Miruka)

JUDGMENT

1. The Appellant was convicted and sentenced to serve 5 years imprisonment for the offence of obstruction of due process of justice contrary to Section 117(b) of the [Penal Code](#).
2. The particulars to the charge were that on the 28th January 2022 at 11.00am at Awendo Township in Awendo Sub-County in Migori County the Appellant dissuaded Lizzy Akoth Odoro from appearing and give evidence in Rongo Court CR. C. No 239 of 2020.
3. The Appellant was aggrieved by the conviction and sentence and he lodged the appeal herein vide Petition of Appeal filed on 25th September 2023 on the following grounds:
 1. THAT the offence was not proved.
 2. That the learned Trial Magistrate disregarded all the open discrepancies in the evidence of the Complainant thereby occasioning an injustice to the Appellant.
 3. That the Trial Magistrate misdirected himself when he failed to critically analyze the entire evidence and realize that the inconsistencies could not sustain a conviction.
 4. That the sentence meted is illegal in its entirety.



4. Reason whereof:- The Appellant prayed that the appeal be allowed , conviction quashed and sentence set aside.
5. The Prosecution's case was that PW1 was with PW2 when he met the Appellant herein on 28th January 2020 when she was on her way from fetching water and the Appellant who was in company of 2 people who were unknown to her threatened that he would kill her before she testified in CR. C. No. 239 Of 2020. PW1 said she was due to appear in court on 16th March 2022 when the Appellant issued those threats. That she reported to police and subsequently went to court and testified. PW1 said the Appellant was her brother in-law and Evelyn was her sister in-law. She said they lived with Evelyn in the same place but other neighbours were not at home on the material day and time as they had gone to work. PW1 in cross examination said that at the time the Appellant threatened her he was armed with a knife.
6. PW2 on the other hand said she heard the Appellant tell PW1 that he would kill her before 16th May 2022 when she was due to go to court and testify. That when PW1 reported the matter to the police PW2 recorded her statement. PW2 said that the Appellant burnt her house and she was also a witness in the case where PW1 was to testify. Whereas PW1 said that the Appellant wore black jacket, grey rubbers, black trousers and black shirt PW2 said that the Appellant was wearing black trouser, red shirt and black shades?
7. PW3 P. C. Murando testified that he was instructed by the OCS take over investigations into the offence of threats issued by the Appellant to the Complainant so that she does not attend court to testify on 16th February 2022 in CR. C. No 239 of 2020. The offence was initially being investigated by P. C. Simon Mwangangi whose statement was produced as Ex P 1. PW3 said that the Appellant went to PW1's house and uttered the words to the effect "if you go to court on 16/2/2022 I will kill you and your husband." PW3 said the Complainant who is wife to the Appellant's brother lived in Awendo and not in the village.
8. When the Appellant was placed on defense he gave sworn evidence and denied having committed the offence. He said that on 23/1/2022 he was in school where he teaches as untrained teacher. He said that on Friday he was arrested by P. C. Mwangangi at 10.00am and he was taken to the police station where he learnt that he was being accused of threatening a witness in an ongoing case. He said the said witness was his sister in-law who claimed he went to her house while armed. The Appellant said he never threatened anybody and he does not carry weapons. He said he had gone to work in school from where he was arrested. He said he did not know where the witness lived and the Complainant and her witness gave different descriptions of how he was dressed on the material day. He said that the offence was a made up story.

This Appeal was canvassed by way of written submissions.

9. The Appellant's submissions were filed on 20th September 2024. The Appellant submitted that the Complainant did not produce OB to confirm she reported that she was threatened.
10. He also submitted that the Trial Magistrate relied on far fetched evidence which the Appellant was not privy to and for which he could not defend himself when he insinuated that the issue of threatening witnesses not to attend court to testify was common in the area.
11. On sentence the Appellant submitted that the same was harsh and excessive in the circumstances.
12. The Respondent's submissions are dated 8th October 2024 is to the effect that evidence of PW1 that the Appellant threatened her was corroborated by PW2 and that the intention was to instill fear in the



Complainant and prevent her from testifying in court. It was further submitted that the Appellant was armed with a knife when threatening the Complainant and that was clear intention to intimidate her.

13. The Respondent argued that inconsistency in the prosecution case was not material and does not affect the substance of the offence.
14. Regarding severity of the sentence the Respondent submitted that the same was provided for by the law and is therefore not harsh.

Analysis and Determination

15. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose vs. R* (2013) eKLR thus ;

... . the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
16. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issue for determination is whether the prosecution proved the charge beyond reasonable doubt.
17. Section 117 (b) of the *Penal Code* it is provided that:

Any person who (b)in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; is guilty of an offence and is liable to imprisonment for five years.
18. The prosecution’s evidence was that the Appellant threatened the Complainant in the presence of PW2. It would therefore be expected that their evidence corroborated each other as far as material facts are concerned. The Appellant and the Prosecution witnesses are related in that the Appellant is step brother to the husbands of PW1 and PW2 who are from the same mother as indicated in the Pre-Sentence Report filed in Rongo CR. C. No 239 of 2020 where the Appellant was charged with the offence of arson and assault.
18. Whereas PW1 said the Appellant threatened her not to attend court on 16th March 2022 PW2 said that the Appellant threatened the Complainant not to attend court on 16th February 2022. On the other hand PW3 who took over investigations from P. C. Mwangangi testified and said that the Appellant dissuaded the Complainant not to attend court and testify on 16th May 2022. These are material contradictions which put into suspicion the evidence of prosecution witnesses as to whether it is true that the Appellant uttered ant words that could have dissuaded the Complainant not to attend court.
19. The Complainant also testified that the Appellant was armed with a knife when he issued threats to her but PW2 did not allude to any such testimony and the court should have questioned why the 2 witnesses who were together did not witness what the other saw and heard in broad day light.
20. The 2 witnesses were also at variance as to what the Appellant was wearing on the material day.
21. PW3 gave the words the Appellant allegedly uttered which words were not the same as those that PW1 said were uttered by the Appellant.
22. In consideration of the fact that there was another case against the Appellant for which the witnesses herein were also involved and in consideration of the inconsistent evidence by the prosecution



witnesses this court finds that it was unsafe to convict the Appellant. It was also harsh and excessive to mete out the most severe sentence against the Appellant in a matter that involved closely related family members based on insufficient and uncorroborated evidence.

23. Based on the above findings this court finds that the appeal has merits and is allowed. The conviction is quashed and sentence set aside. The Appellant is to be released forthwith unless lawfully detained.

Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED THIS 10TH APRIL, 2025

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HON. JUSTICE A. ONGINJO

JUDGE

In the presence of: -

