



**Makokha v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 814 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E004 OF 2023
SC CHIRCHIR, J
FEBRUARY 1, 2024**

BETWEEN

ALI MAKOKHA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the Judgment of Hon. Dolphina Alego-SPM in kakamega criminal case no 679 of 2020 delivered on 11/1/2023)

JUDGMENT

1. The Appellant herein was charged with two counts of threatening violence contrary to section 95(2) of the penal code, one count on intimidation contrary to section 238(1) of the penal code, one count on preparation to commit a felony and one count of creating disturbance in a manner likely to cause a breach of the peace. He was was found guilty of all the charges.
2. On count 1, the charge was that on the 17th day of August 2009 at about 9 pm at Nderema village Lusumu sub location, Bunyala west location in Navakholo sub county within Kakamega county with intent to intimidate or annoy Moses Mukhayo Makokha threatened to break or injure a dwelling house belonging to Moses mukhayo makokha.
3. On Count 2 the charge was that on the 17th day of August 2009 at about 9 pm at Nderema village Lusumu sub location, Bunyala west location in Navakholo sub county within Kakamega county with intent to intimidate or annoy Saina ataya makokha threatened to break or injure a dwelling house belonging to Saina ataya makokha.
4. On count 3 he was charged that on the 17th day of august 2009 at about 9 pm at Nderema village Lusumu sub location, Bunyala west location in Navakholo sub county within Kakamega county with intent to cause alarm to Moses Mukhayo Makokha threatened to cause unlawful injury to Moses Mukhayo Makokha.



5. On count 4, the particulars were that on the 17th day of August 2009 at about 9 pm at Nderema village Lusumu sub location, Bunyala west location in Navakholo sub county within Kakamega county was found armed with a dangerous /offensive weapon namely panga in circumstances that indicated that he was armed with intent to commit a felony namely assault.
6. Lastly on count 5 the charge was that on the 17th day of august 2009 at about 9 pm at Nderema village Lusumu sub location, Bunyala west location in Navakholo sub-county within Kakamega County created a disturbance in a manner likely to cause a breach of the peace by going armed with panga in public.
7. On 14.12.2022 the Trial court delivered Judgment in which the Appellant was convicted on all counts. He was later sentenced as follows:
 - a). Count 1, a fine of Kshs. 10,000/- and in default 6 months in custody.
 - b). Count 2, Kshs 10,000 in default 6 months in custody.
 - c). Count 3 Kshs 30,000/- in default one year in custody.
 - d). Count 4 Kshs. 100,000/= in default two years custodial sentence,
 - e). Count 5 Kshs. 5,000/= in default 3 months in custody.

The Appeal

8. The appellant being aggrieved by the judgment and the sentence and filed the present Appeal setting out the following grounds:
 - a. The learned trial court erred in law and in fact by finding that the prosecution had proved their case beyond reasonable doubt.
 - b. The learned magistrate erred in law and in fact by relying on contradicting evidence of the prosecution tendered by the prosecution to convict the appellant.
 - c. The trial court erred in law and in fact by convicting the appellant without giving reasons for the same as Mandatorily provided for under section 169 (1) of the *Criminal Procedure Code*.
 - d. The trial court erred in law and in fact by convicting the appellant without stating the particular section of the penal code under which she convicted him with respect to the five counts, contrary to the mandatory legal provisions of section 169(2) of the *Criminal Procedure Code*.
 - e. The learned magistrate erred in law and in fact in not finding that the ingredients of all the diverted charges and the particularized in the five counts had not been proved against the appellant.
 - f. The learned magistrate erred in law and in fact by convicting the appellant without due consideration of the relevant provisions of the *evidence Cat* Cap 80 of the Laws of Kenya especially the one on burden of proof in criminal cases.
 - g. The learned magistrate erred in law and in fact by not giving the Appellant an option of either fine or non- custodial sentence particularly for the misdemeanour counts.
 - h. The learned trial court erred in law and in fact in meting harsh sentences against the appellant in the circumstances.



- i. The sentencing meted were excessive in the circumstances.
- j. The trial court erred in law and in fact by convicting the appellant against the weight of the evidence tendered by the appellant/accused in the trial court.

Appellant's submissions

9. In his submissions dated 17th October 2023, the Appellant states that he was no longer challenging the conviction . He has only challenged the fact that the period he had spent in custody was not considered, seeks for a more lenient sentence and that there was an error on the committal warrant on how the sentences were to run.
10. The Respondent did not file submissions.

Evidence in Brief.

11. Pw1 was one Moses Mukhayo. He told the court that on 17.9.2020 at 9.00 pm he was at home, when he heard someone shouting. On peeping outside, he saw the accused Shouting and swearing that he would finish him. He heard the Accused say : Musa get out, today I must finish you” He further stated that the accused started banging the door and hauling threats at him. On opening the door, the accused ran away. The neighbours came and they started looking for the Appellant but could not trace him. The Accused damaged the house. He estimated the loss at between ksh. 6000- 7,000. He reported the matter to the police and the Accused was arrested a week later.
12. On cross examination, he stated that he was able to identify the accused since they were brothers and that the Accused was armed with a rungu. He stated that the accused had been threatening the family ever since their father died.
13. Pw2, testified that the Accused was her step- son. ; She testified that on 17.8.2020 she was at home at 9.00 pm when the accused started threatening her . He pushed the door in an attempt to open it. He keeps threatening her and has blocked her access to her land.
14. On cross examination, she testified that she was able to identify the Accused as there was moonlight and that the Accused had a touch. The Accused was armed with a panga and a stick.
15. PW3, was the wife to PW1. She told the court that on 17.8.2020, she was with her husband when the accused came to threaten her husband. The Accused started banging the door and the walls, which were made of iron sheets. She further stated that she heard the Accused tell PW1 “ Today you will know who am”; that he would kill him that night. After that, they peeped through the window and saw the Accused heading to her mother-in – law’s house. Sensing that his mother was in danger, PW1 opened the door and went after the Accused. The Accused ran away
16. On cross examination, he identified the accused as her brother -in -law ; that the accused who was armed with a torch, “rungu,” and a panga. It was her evidence that the Accused was threatening the whole family.
17. The last prosecution witness was the investigations officer. He stated that on 5.9.2020 at 12.45 pm, the complainant went to the station, accompanied by his mother to report that they had been threatened by the accused. That the Accused had gone to their respective homes, shouting and threatening them. He called the Accused on telephone but he did not respond. He later traced, and arrested him.



18. On cross examination, he stated that he had investigated the case and charged the accused on 21st September 2020. He told the court that the accused had ploughed the public access road and had denied the complainant access to drinking water.
19. On being put in his defence DW1, opted for unsworn statement and called two witnesses. He refuted the claims that he had committed any offence claiming that the complainants' intention is to disinherit him from his ancestral land.
20. DW2, testified that the accused was her husband and that he usually left home in the morning and came back in the evening and that on the particular day, DW1 never left the house.
21. DW3, a village elder claimed that the tussle was over a family land and the dispute had been forwarded to the District Officer. He claimed that he was at home on the eventful day and he never heard any commotion.

Determination

22. From the Appellant's submission as aforesaid, this Appeal is against the sentence only.
23. The issues for determination therefore are:
 - a). Whether the sentences passed were too excessive
 - b). whether the Accused spent any period in custody and whether the said period should be taken into consideration.
 - c). whether there was an error on the committal warrants.

Whether the sentences were too excessive

24. It is trite law that sentencing is at the discretion of the Trial court and the principles upon which an Appellate court may interfere with the said discretion are well settled. In the case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR held :“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
25. In this case, the appellant had been charged with the offence of threatening violence contrary to section 95 (2) of the *penal code* as well of 4 other counts. He was convicted and sentenced in all the counts and given an option of custodial sentence, and in the alternative a fine in all of the counts.
26. From the perusal of the trial court proceedings, the trial magistrate considered the pre-sentencing report dated 09th January 2023 as well as the mitigation offered by the appellant. On count 1 and 2 the Appellant was sentenced to 6 months against the maximum of 4 years prescribed under the penal code. On count 3 he was given a sentence of one year against the maximum of 3 years prescribed; on count 4 he was sentenced to two years against the prescribed period of between 7 to 14 years and finally on count 5 he was sentenced to 3 months against the maximum period of 6 months. In each count,



the Appellant was given an option of a fine. The sentences were to run concurrently and fines were to be paid cumulatively.

27. The trial court considered the Accused mitigation as well as the findings of the presentencing report. Am unable to find any factor that was omitted or any factor that ought not to have been considered. Further against the maximum sentences prescribed for the various offences, am of the view that the Appellant escaped with quite lenient sentences. The options in fines are also reasonable when considered against the period of sentences which are otherwise applicable. I therefore do not find any merit in this complain and I hereby dismissed it.

Whether the period spent in custody prior to conviction, if any , should have been considered.

28. From the, the Appellant was arrested on 20.9.2020. He was then given bond and on 22.9.2020 a release order was issued. On 25.5. 2021 the bond was cancelled upon Application by the prosecution on grounds that he had failed to comply with the bond terms. On 16.6. 2021 he was re-admitted to bond and remained outside of custody for the rest of the trial period. He was thus in custody for a negligible period of 21 days. However it is his entitlement in law. The sentence will therefore run from the date of conviction less the 21 days he spent in custody

Whether there was an error on the committal Warrant.

29. I have perused the committal warrant dated 11.1.2023, and I have noticed that it omitted to indicate that the sentences were to run concurrently. I believe this was a clerical error that did not need to await an Appeal.
30. In conclusion I will proceed to make the following orders:
- a. The Appeal against the sentences is hereby dismissed and the sentences as passed by the trial court are hereby upheld
 - b. The sentences will run from the date of conviction less the 21 days that the Appellant spent in custody.
 - c. The committal warrants to be amended to indicate that the sentences will run concurrently.

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF FEBRUARY, 2024

S. Chirchir

Judge

In the presence of:

Rono- Court Assistant

The Appellant

Mr.Leina for DPP

