



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ali v Republic (Criminal Appeal E029 of 2022)  
[2024] KEHC 2301 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E029 OF 2022  
SM GITHINJI, J  
MARCH 5, 2024**

**BETWEEN**

**LUKEMAN AHMED ALI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of the Lamu PM's Court in Sexual Offences case No. 180 of 2015 by Hon. Iveri M.D – Resident Magistrate delivered on 19th May, 2016)*

**JUDGMENT**

1. Lukeman Ahmed Lali was charged in the lower court with several offences as follows; -

Count Assault causing actual bodily harm contrary to section 251 of the Penal Code, of which

1: particulars are that on the 29<sup>th</sup> day of January, 2022 at around 16.00hours in Wiyoni area Mkomani location in Lamu Central Sub County within Lamu County, the appellant unlawfully assaulted Jennifer Changawa Zawadi, thereby occasioning her actual bodily harm.

Count Malicious injury to property, contrary to section 339 (1) of the Penal Code. The particulars

II: hereof being that on the 29<sup>th</sup> day of January, 2022 at around 16.00hours in Wiyoni area of Mkomani location in Lamu Central Sub – County within Lamu County, the appellant willfully and unlawfully destroyed a door, glasses, caps, tables and “makuti” shade all valued at Kshs. 14,800/= the property of Jennifer Changawa Zawadi.

Count Threatening to kill, contrary to section 223 (1) of the Penal Code. The particulars of this

III: offence are that on the 29<sup>th</sup> day of January, 2022 at around 16.00Hrs in Wiyoni area of Mkomani location in Lamu Central Subcounty within Lamu County, the appellant without lawful excuse uttered words such as “*mimi nikiachiliwa nitahakikisha nimekuua*” threatening to kill Jennifer Changawa Zawadi.



Count IV: Threatening to kill, contrary to section 223 (1) of the Penal Code. The particulars hereof are that on the 29<sup>th</sup> day of January, 2022 at around 17.00hrs in Wiyoni area of Mkomani location in Lamu Central Sub County within Lamu County, the appellant without lawful excuse uttered words such as *“mimi nikiachiliwa nitawaua moja moja, tembea peke yako uone”*, threatening to till Pc Shikuri, Pc Gikonyo, Pc Abdihakim, Pc Ogutu and Pc Sawek who were on due execution of their lawful duties.

Count V; The arrest of a police officer, contrary to section 103 (a) of the *National Police Service Act, 2011*; the particulars being that on the 29<sup>th</sup> day of January, 2022 at around 17:00hours in Wiyoni area of Mkomani location in Lamu Central Sub County within Lamu County, the appellant resisted the arrest of No.114082 Pc Shikuri, No.118500 Pc Gikonyo, No.119636 Pc Abdihakim, No.253852 Pc Ogutu and No.259546 Pc Sawek, Police Officers attached at Lamu Police Station by fighting them back and refusing to surrender his weapon namely a panga when he was ordered to do so, in the due execution of their lawful duties.

Count VI; Going armed in public, contrary to section 88 of the Penal Code. The particulars of this offence are that on the 29<sup>th</sup> day of January, 2022 at around 17:00hours in Wiyoni area of Mkomani location in Lamu Central Sub-County within Lamu County, the appellant without lawful excuse was armed with a panga in the above named area, in such a manner to cause terror to the members of the public.

2. The prosecution case is that the appellant herein and Pw-2 (Jennifer Zawadi Changawa) were partners in Liquor business before they parted ways. Pw-2 however continued selling mnazi beer from a temporary structure in Wiyoni area of Mkomani Location. On 29/1/2022 at about 4.00Pm the appellant showed up at the mnazi beer drinking den, owned by Pw-2. Pw-5 was at the place. The appellant suddenly and out of no apparent reason drew out a panga and cut Pw-5 with it on the top of his head. Pw 2 was called to the scene. When she arrived she found Pw-5 bleeding on the head. She called for a boda boda to rush him to the hospital. After he had left, she got into her business premises and spoke to an eye witness. As she was doing so, the appellant appeared armed with a big stick. He suddenly assaulted Pw -2 with the stick by striking her all over the body. Pw-2 runaway and the appellant pursued her. She sought refuge in an isolated toilet out of his view. The appellant went back to Pw-2's business premises and while armed with a panga destroyed the structure made of iron sheets, furniture and utensils worth about 17,000/= . Pw-2 called Pc Jimmy (Pw-4). Pw 4 linked up with Pc Shikuri (Pw-6), Pc Ogutu (Pw-7), Pc Samek and Pc Abdi. They met at Mkunguni and proceeded to the scene. Upon arrival they found the appellant in the act of cutting down the Makuti structure. Pc Samek shouted commanding him to stop the destruction. The appellant however faced them and charged towards them menacingly armed with the panga. Pc Sawek then drew out his pistol and fired twice in the air to warn the appellant. When the appellant heard the gunshots, he turned to flee. The officers chased after him. Pc Sawek fired once more in the air, ordering the appellant to surrender. The appellant dropped the panga and sat on the ground. Pc Sawek got to him and when he tried to handcuff him he resisted. Others joined and forcefully handcuffed him. As he was being taken to the station they passed near the destroyed structure. Pw-2 was there and when the appellant saw her he threatened to kill her by shouting in Swahili that;-

“Nikiachiliwa nitakuua” (When I get released, I will kill you). The officers had collected the panga he had. As they got near the station, he threatened to kill them in Swahili when he said; -



“Nikiachiliwa nitawaua mmoja mmoja” (When I get released I will kill you one after the other). The appellant was taken to the police station in Lamu.”

3. Pw-8 investigated the case. He obtained the panga and had the scene photographed. Pw-2 was issued with a P-3 form and referred to King Fahd Hospital where she was examined, treated and the P-3 form filled on 30/1/2022. She had lacerations to the lower abdomen and left arm caused by a blunt object. The degree of injury was assessed as harm. The charges in the charge sheet were then preferred against the appellant.
4. Upon the appellant being placed on his defence, he opted to remain mute and called no witness. He thus offered no defence in relation to the preferred charges.
5. The trial court evaluated the evidence and found that all the charges were established by the prosecution beyond reasonable doubt. The appellant was thus convicted and sentenced as follows; -

Count Pay a fine of 150,000/= in default to serve 2 years imprisonment.

I:  
Count Fined Kshs. 50,000/= in default to serve 6 months' imprisonment.

II:  
Count Fined 400,000/= in default to serve 5 years' imprisonment.

III &  
Count Fined 400,000/= in default to serve 5 years' imprisonment.

IV:  
Court Fined Kshs. 300,000/= in default to serve 4 years' imprisonment.

V:  
Count Fined 50,000/= in default to serve 6 months' imprisonment.

4. VI:  
Sentences to run consecutively in case of default in payment of fines. The appellant dissatisfied with the findings of the lower court appealed against the same on the grounds that; -

1. The medical evidence was not produced by the maker and was therefore inadmissible.
2. The evidence on the value of the damaged property was contradictory.
3. Documents were unprocedurally produced as evidence and wrongly admitted.
4. The investigating officer had vendetta against the appellant as he had prosecuted him before in another case.
5. The prosecution case is contradictory and unreliable.
6. Prosecution case was marred with falsehood and hearsay and was unsafe to rely on.
7. The charges were not proved beyond reasonable doubt.
8. Prosecution case was not corroborated.
9. The evidence of Pw-5 was suspect and inconsistent.

5. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
6. I have as the first appellate court gone through the charges, evidence adduce in support, judgment of the lower court and sentences meted, grounds of the appeal and submissions filed.
7. The first count is of assault of Pw-2, causing her actual bodily harm.



8. Pw-2 in her evidence in chief disclosed how she was struck all over the body by the appellant using a big stick. According to the evidence of Pw-1, her P3 which was filled the following day at King Fahd Hospital, shows she had lacerations to the lower abdomen and left arm caused by a blunt object. The degree of injury was assessed as harm. The medical evidence to a good degree corroborates the evidence of Pw-2 that she was injured using a stick. Though the said stick was not recovered, the victim had no cause to fix the appellant. I do well agree with the submissions by the appellant that the evidence of Pw-5 is suspect and therefore unbelievable. This is so as he claims to have witnessed the appellant chasing after Pw-2 and thereafter destroying the alleged structure. However, the evidence of Pw-2 shows by the time such happened Pw-5 had been rushed to the hospital. His evidence must have been based on hearsay of which he presented as direct evidence. On the ground I do dismiss his entire evidence. Having said so, I still find sufficient evidence in Pw-2's testimony and the medical evidence of Pw-1, in relation to the first count. The offence is a misdemeanor and the appellant is a first offender. A fine of 150,000/= is on the higher side for the offence and the two years' imprisonment in default. I do reduce it to 10,000/= in default to serve 12 months' imprisonment.
9. The second count is of malicious damage to property. Pw-2 witnessed the destruction as well as Pw-3, Pw-4, Pw-6 and Pw-7. Photographs were taken of the destroyed structure and produced as exhibit. The witnesses disclosed it is the appellant who committed the offence. The damage was not evaluated by an expert to ascertain the exact value and what is given by the witnesses is understood to be an estimate. It's discrepancy is not fatal to the prosecution case. Going by the evidence of the complainant, it should be worth about 17,000/=. Photos show the appellant in the real act of destruction and the trial court saw a video of him in action. There is no doubt he committed the offence and was rightly convicted. The offence is a misdemeanor which carries a sentence of five years' imprisonment. The appellant is a first offender. He was fined 50,000/= in default to serve 6 months' imprisonment. Having destroyed a structure of value of 17,000/=. I find a fine of 50,000/= excessive. I do reduce it to 20,000/= in default to serve the given 6 months' imprisonment.
10. For the 3<sup>rd</sup> and 4<sup>th</sup> counts of threatening to kill, the evidence of Pw 2, Pw 3, Pw-4, Pw-6 and Pw-7 shows the appellant uttered words which amount to threat to kill Pw-2 and Pw-3, Pw-4, Pw-6 and Pw-7. The said evidence is well corroborated and he offered no defence in it's challenge. I find it reliable and believable. He was rightly convicted of the two offences. However, the fines imposed are exorbitant, 400,000/= on each of the two counts. He is a first offender and deserved a lenient sentence. I therefore do reduce the fines for count 3 and 4 to 30,000/= each, in default to serve 2 years imprisonment instead of the given 5 years.
11. The 5<sup>th</sup> count is of resisting arrest by the police officers. I have weighed the evidence of Pw-3, Pw-4, Pw-6 and Pw-7. They do not disclose whether they were in police uniform and how they travelled to the scene. They did not introduce themselves to the appellant when they got to the scene in order to arrest him. There is no evidence that the appellant knew they were police officers or had reasonable cause to know they were. When Pw-3 fired twice in the air, the appellant took on to his heels. Another shot was made and he was ordered to drop the panga. He did so and sat down. It is said when Pw-3 tried to handcuff him he resisted and the other officers joined in and had him handcuffed. Details on how he resisted are not disclosed. He did not also refuse to surrender the panga as alleged in the particulars of the offence in the charge sheet. Given the disclosed lacunas in the prosecution case, I find that this offence was not sufficiently established by the prosecution to warrant a conviction. I therefore quash the conviction and the meted fine of 300,000/= in default to serve 4 years imprisonment.
12. The last count is going armed in public, whereby the appellant was allegedly armed with a panga. The evidence of Pw-2, Pw-3, Pw-4, Pw-6 and Pw -7 shows the appellant had a panga during the arrest of



which he used to destroy a temporary structure, and charged against the officers while armed with. In the case of Wright v State, 772 N.6.2d 449 (Ind App.2002), a public place was defined as

“any place where the public is invited and are free to go upon special or implied invitation, a place available to all or certain segment of the public.”

13. Going by the aforesaid definition, the mnazi beer selling den, operated by Pw-2 at Wiyoni area of Mkomani, is public place. The appellant was at the place armed with a panga of which he dropped after a shot was fired in the air and ordered to. I find the evidence sufficient to have led to conviction for the offence. I however find the fine of 50,000/= to a first offender to be on the higher side. I reduce the same to 10,000/= in default to serve the given 6 months' imprisonment.

The summary outcome of this appeal is that in the first count the appellant will pay a fine of 10,000/= in default to serve 12 months' imprisonment.

On the 2<sup>nd</sup> count he will pay a fine of 20,000/= in default to serve 6 months' imprisonment.

For counts three and four, on each of the count he will pay a fine of 30,000/= in default to serve 2 years' imprisonment.

On the 5<sup>th</sup> Count of resisting arrest he stands acquitted.

On the 6<sup>th</sup> Count he is to pay a fine of 10,000/= in default to serve 6 months' imprisonment.

If fine is not paid sentences to run consecutively from 31/1/2022.

This Court so finds.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 5<sup>TH</sup> DAY OF MARCH, 2024**

**In the Presence of; -**

**1. M/s Mkongo for the State and the Appellant**

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**S.M. GITHINJI**

**JUDGE**

