



REPUBLIC OF KENYA



**Mang'era v Republic (Criminal Appeal E074 of 2023)  
[2024] KEHC 17021 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 17021 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E074 OF 2023  
RPV WENDOH, J  
JUNE 19, 2024**

**BETWEEN**

**LS DEUS MORONYA MANG'ERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. M. Obiero – Senior  
Principal Magistrate in Kehancha Senior Principal Magistrate's  
Court Criminal Case No. 564 of 2019 delivered on 15/02/2023)*

**JUDGMENT**

1. Ls Deus Moronya Mang'era has filed this appeal against the judgment of the Senior Principal Magistrate, Rongo in which he was convicted for the offence of Criminal Intimidation contrary to Section 238(1) as read with 238(2) of the [Penal Code](#) on Count II.
2. The particulars of the charge are that on 26<sup>th</sup> day of July, 2019 at Makerero Location, Kuria West Sub-County, with intent to cause alarm to Jason Mogwasi, threatened to cause unlawful injury to Jason Mogwasi by chasing him with a panga.
3. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of six witnesses in support of their case namely PW1 Jason Mogwasi; PW2 Samuel Chacha; PW3 Emmanuel Otondi Otieno, PW4 Gladys Nyaboke Chacha, PW5 Robi Harun the Area Chief and lastly, PW6 PC Peter Ngumi, the Investigating Officer attached at DCI Isebania.
4. When placed on his defence, the appellant indicated that he would give a sworn statement and called three witnesses. However, on the date scheduled for defence hearing, the appellant, absconded and/or disappeared without trace. This necessitated the forfeiture of the bond amount and the matter thereafter proceeded in terms of the provisions of Article 50(2) of [the Constitution](#) and the same proceeded for judgment.



5. Upon conviction, the appellant was sentenced in absentia to serve two (2) years' imprisonment. The appellant was arrested and presented to court on 9/8/2023. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 01/09/2023 and Supplementary grounds filed on 04/03/2024 are that: -
  1. The offence was not proved, the trial magistrate misdirected herself when she failed to critically analyse the entire evidence and realize that the inconsistencies could not sustain a conviction.
  2. There existed an open discrepancy in the evidence of PW1 and PW2 who also happens to be the key witness in the case.
  3. The trial court erred in law and facts by relying on a defective charge sheet to convict and sentence him.
  4. That he was denied the right to make his defence and mitigation.
  5. Based on the foregoing the sentence meted is illegal in its entirety.
6. The appellant therefore prays that the Appeal be allowed, conviction quashed and sentence set aside and/or any other order deemed fit to grant.
7. The Appeal was canvassed by way of written submissions. The appellant filed written submissions on 04/03/2024 while the Prosecution counsel Ms. Ikol - Esaba opposed the appeal through their submissions dated 27/03/2024.
8. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it, and arrive to its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal said: -
 

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”
9. PW1, the complainant, told the court that on 26/07/2019, at around 11.00am, the appellant went to Daniel Osike's farm where he was working armed with a machete, the appellant threatened to cut him while advancing towards him, PW1 fell down, the appellant retreated, boarded his motorcycle and left; that before the appellant left, one Chacha went to the farm and found him on the ground; that the appellant has been threatening to kill him if he does not leave Nyametaburo. He reported the matter to the area chief who later advised him to report the same to the police station.
10. PW2 stated that on 26/7/2019, he was going to Nyametaburo at around 8.00am when he saw the appellant chasing PW1 while armed with a machete; that the appellant also threatened to cut the complainant or kill him over a land parcel. The complainant fell down and the appellant left.



11. PW3 – PW5 did not give any evidence with regards to the offence in Count II and this court will therefore not belabour to refer to their testimony since the same was mainly with regards to Count I in which the appellant was acquitted.
12. PW6, the Investigating Officer, stated that the complainant reported what the appellant had done to him, he recorded his statement and thereafter visited the scene. He however conceded that he did not recover any panga from the appellant.
13. The appellant had denied committing the offence even though he disappeared when he was placed on his defence and the matter thus proceeded for judgment without his testimony.
14. In addition to the grounds of the appeal, the appellant submitted that the trial court erred by relying on a defective charge sheet to convict him; that the charge sheet was indicating that the complainants were two who alleged that they were cheated and threatened on different times and therefore the counts cannot be marked as Count I and Count II. That PW1 ought to have lodged his complaint on a different case number and present his evidence. He maintained that the said defect is not curable under the provisions of section 382 CPC.
15. He also submitted that the evidence of PW1 is not cogent because from the charge sheet, the date and time when the offence was committed is not captured. Further, that his right to fair hearing under Article 50(2) (c) was grossly violated since he was not accorded enough time to make his defence and mitigation. It was his submission that he is a family man, sole breadwinner and suffers from Asthma, diabetes, high blood pressure and his left eye is not functioning well. He urged the court to allow the appeal and/or in the alternative to give him reasonable fine terms.
16. In her submissions, Ms. Ikol - Esaba the Prosecution Counsel outlined the statutory provisions for the offence of criminal intimidation and summarized the testimony of the witnesses
17. Counsel further submitted that the appellant threatened to cause harm to property; on threats to reputation, he submitted that the appellant intentionally insulted PW1 that the land does not belong to Kisii, this is contained at page 10; that the said insult was intended to cause breach of peace. She thus maintained that the prosecution proved all the ingredients of the offence and the appellant was convicted accordingly.
18. On the allegations by the appellant that he was denied his right to make his defence, the respondent submitted that the appellant absconded on two different occasions, the second time being after he was placed on his defence. Hence the matter proceeded in his absence since all the efforts to trace him were futile. The appellant cannot thus claim that he was not accorded an opportunity to make his defence. That the evidence of all the prosecution witnesses was corroborated. On the allegations that the chargesheet was defective, counsel submitted that the chargesheet clearly laid out the particulars of each charge. She relied on the case of *Beo vs Republic* [2021] which set out the test of determining whether a charge sheet is defective. She therefore maintained that the charge sheet was not defective. Finally, on the allegations of his health, counsel submitted that the appellant's health conditions can be adequately addressed by the prisons which has a well-equipped health facility with referral facilities to Migori County Hospital. Consequently, she urged the court to dismiss the appeal.
19. I have carefully read and understood the grounds of appeal, record of appeal and the rival submissions.



20. The components of a charge sheet are provided under section 134 of the *Criminal Procedure Code*. Section 134 provides as follows:-

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charge, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

21. The Court of Appeal Sigilani –vs- Republic (2004) 2 KLR, 480 in defining what amounts to a defective charge sheet held as follows: -

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

22. I have carefully looked at the record of appeal and the charge sheet in particular and I do note that the charge was clear and concise on the nature of the offence and the particulars thereof, the offence is also known in law. The allegations by the appellant that the two complaints ought to have been lodged in two different cases and further that the date and time when the said offence was committed is not captures are therefore baseless, misconceived and an afterthought.

23. I will now consider the ingredients for the offence of criminal intimidation as outlined under section 238(1) as read with 238(2) of the *Penal Code*. The said sections provide as follows; -

“238.

- (1) Any person who intimidates or molests any other person is guilty of an offence and is liable to imprisonment for a term not exceeding three years.
- (2) A person intimidates another person who, with intent to cause alarm to that person or to cause him to do any act which he is not legally bound to do or to omit to do any act which he is legally entitled to do, causes or threatens to cause unlawful injury to the person, reputation or property of that person or anyone in whom that person is interested.”

24. The above section outlines the necessary elements to be proved in the offence of criminal intimidation. The onus is on the prosecution to demonstrate that the actions of the appellant were aimed at causing or threatening to cause an injury to the complainant and further aimed at causing an alarm or causing them to do something or refrain from doing something. It was the testimony of PW1 that the appellant was armed with a machete, he threatened to cut him while advancing towards him. He further threatened to kill him if he did not leave Nyametaburo. This testimony was corroborated by PW2, who stated that he saw the appellant chasing PW1 while armed with a machete, that the appellant threatened to cut or kill PW1 over a land parcel.

25. From the particulars of the charge, the testimony of PW1 as corroborated by PW2; I find that the elements and the necessary ingredients of the offence of criminal intimidation were proved beyond reasonable doubt. A machete is generally a weapon, in this case, the complainant in his testimony used the exact word used by the appellant and described the particulars of the offence which can only be taken to mean that the said threat was aimed at causing alarm to the complainant to make him leave Nyametaburo over a land parcel. The appellant did not offer any explanation plausible in his defence and the prosecution case remains uncontroverted.



26. The next ground of appeal is on discrepancies. It is the appellant's contention that there were open discrepancies in the evidence of PW1 and PW2, who are the key witnesses and the same therefore ought to have been construed in his favor. I have keenly looked at the record particularly the testimonies of PW1 and 2 and I have noted the difference in the alleged time of commission of the offence. The question that therefore follows is whether the said difference of 11.00am as stated by the complainant PW1 and 8.00am as stated by PW2 is so material and goes to the root of the case that the same would greatly change the outcome of the case.
27. Material discrepancy was defined in the case of Philip Nzaka Watu –Vs- Republic [2016] eKLR where the court held that:-
- However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.
28. In Dickson Elai Nsamba Shapwata & Another v. The Republic, CR APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:
- “In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”
29. In view of the foregoing, it is my considered view that the difference in time referred to by the two witnesses is not so material a discrepancy as to warrant the court to disregard the evidence of either of the two witnesses. It does not point to deliberate untruthfulness. It is unlikely that one will look at his watch, that is, if he has one to determine every event of the day. I therefore find that the discrepancy did not go to the root of the prosecution case or affect the substance of the evidence.
30. Lastly, it was the appellant's contention that he was denied the right to make his defence and mitigation and consequently, his rights to a fair trial as envisaged under Article 50(2) (c) were violated. From the record, it is evident that the appellant was accorded an opportunity to prepare and present his defence. When placed on his defence, the appellant indicated that he would be making a sworn testimony and would call three witnesses. However, he absconded and efforts to trace him were futile. The appellant's surety was given several opportunities to trace him to no avail. The surety had to forfeit the surety sums and the matter proceeded in his absence. This court has also taken cognizance of the fact that the appellant absconded court on two different occasions and was even sentenced in absentia. He cannot therefore allege that he was not accorded an opportunity to present his case. this ground of appeal is not merited.
31. For the above reasons, I find the conviction to be safe and I affirm it. For the sentence, it is lenient having taken into account the appellant's conduct of absconding. The Appeal is not unmerited and is hereby dismissed in its entirety.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 19<sup>TH</sup> DAY OF JUNE 2024.**



**R. WENDOHO**

**JUDGE**

In presence of; -

Ms. Ikol for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistants

