



**Okutto v Republic (Criminal Appeal E016 of 2024)
[2024] KEHC 10044 (KLR) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E016 OF 2024
RE ABURILI, J
AUGUST 7, 2024**

BETWEEN

JOSEPHAT OTIENO OKUTTO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence by the Hon. J. Kimetto delivered on the 22nd March 2024 in the Principal Magistrate’s Court at Maseno in Maseno SPM Criminal Case No. 35 of 2020)

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of threatening to kill contrary to section of 223 (1) of the [Penal Code](#). The particulars of the charge were that on the 20th December 2019 at Dago sub-location in Kisumu West sub-county within Kisumu County jointly with others not before court without lawful cause uttered words to wit “if you don’t leave this homestead you will find your dead body outside the compound” words threatening to kill Maryleen Thome.
2. The appellant also faced a second count of creating disturbance in a manner likely to cause a breach of peace contrary to section 95 (1) (b) of the [Penal Code](#) the particulars being that on the same date and place, jointly with others not before the court, the appellant created disturbance in a manner likely to cause breach of peace by chasing away Maryleen Thome from her home and threatening to lynch her.
3. The appellant pleaded not guilty to the charge and the case proceeded to full trial. After considering the evidence on record, the trial court found the appellant guilty on both counts and sentenced him to serve seven years’ imprisonment.



4. Aggrieved by the trial court's conviction and sentence, the appellant filed his Petition of Appeal dated 27th March 2024 raising the following grounds of appeal:
 - i. The learned trial magistrate completely failed to notice that the appellant did not take any plea on the second charge but still went ahead and dealt with it in the judgment which was a fundamental flaw in the entire trial.
 - ii. The learned trial magistrate erred in law by failing to consider the evidence before her in an objective manner hence coming to a wrong decision.
 - iii. The learned trial magistrate considered extraneous matters that were neither proved by evidence or otherwise thus coming to a biased conclusion.
 - iv. The learned trial magistrate failed to consider the background of the matter that gave rise to this case as being matrimonial dispute which would make her consider evidence of the defence in totality.
 - v. The trial magistrate failed to consider the findings of the pre-sentencing report which advocated for non-custodial sentence thus arriving at an extremely harsh sentence that is not commensurate with facts of this case.
 - vi. That the evidence on record does not support the conviction and the sentence.
5. The parties filed submissions to canvass the appeal.

The Appellant's Submissions

6. It was submitted that the prosecution did not prove all the ingredients of the alleged crime such as the utterance of the words "I will Kill you" as required. Reliance was placed on the case of *Martin Nganga Kamanu* Nairobi High Court Criminal Appeal No. 35 of 2019. It was further submitted that the words alleged to have been uttered in their plain and ordinary meaning did not meet the threshold of threatening to kill.
7. Reliance was placed on the case of *Martin Ng'ang'a Kamanu v Republic* [2020] eKLR where on appeal, the court set aside the appellant's conviction on a charge of threatening to kill in a case where the appellant and complainant were siblings and had been involved in a protracted land dispute that pitted one sibling against the other.
8. It was submitted that the trial court erred by failing to consider the pre-sentencing report which detailed the animosity between the complainant and her husband and that the appellant had on numerous occasions sought out the complainant for reconciliation.
9. It was further submitted that the trial court further failed to consider the circumstances under which the alleged offence was committed specifically that the appellant was not armed during the incident, he never used violence towards the complainant, did not have a criminal history etc. and as such, the appellant proposed a non-custodial sentence as was recommended by the pre-sentencing report. Reliance was placed on the case of *Rishad Hamid v Republic* [2012] eKLR where the appellant was fined Kshs. 10,000 and in default sentenced to serve 6 months' imprisonment.
10. The appellant further submitted that the mandatory nature of sentences had been made unconstitutional by virtue of the holding in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR.



The Respondent's Submissions

11. It was submitted opposing the appeal on conviction but that the one on sentence was conceded as the sentence was shocking considering the special relationship of all the parties involved and the clouding factor which is a marital dispute and that the best the trial court could have done was to give an opportunity for reconciliation or even fine the appellant.

Analysis and Determination

12. This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. This is what the Court of Appeal held in the case of *Okeno v. R* ([1972] EA 32 and reiterated in *Njoroge v Republic* [1987] KLR 19 at P.22 that:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see *Pandya v R* [1957] EA 336, *Ruwalla v R* [1957] EA 570).”

13. I find the issue for determination by this court is whether the prosecution proved the charge of threatening to kill contrary to Section 223(1) of the *Penal Code* to the required standard of proof beyond any reasonable doubt and therefore whether the sentence imposed was manifestly excessive having regard to the circumstances of the case and mitigations.
14. Section 223(1) of the *Penal Code* which provides as follows:

“223(1) Any person who without lawful excuse utters, or directly or indirectly causes any person to receive a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years.”

15. The prosecution was required to establish the following ingredients of the charge: that the Appellant without lawful excuse uttered words which amounted to a threat to kill the complainant. The uttering of these words must be made in the context that the complainant perceives that she is under threat of losing her life. The context must come out in the evidence that will be adduced by the prosecution witnesses and the explanation given by the accused in his defence.
16. The prosecution's case was that the Appellant threatened the complainant by ordering her to remove her personal belongings from the house and leave or she would find herself lifeless or dead. What was the context of this case? The appellant is the complainant's nephew and had been sent by the complainant's husband to ensure that the complainant did not enter or continue staying in the matrimonial home as the complainant and her husband, the appellant's uncle, had separated or were in the process of separating. This dispute related to a matrimonial dispute between the complainant and her estranged husband and the matrimonial home where the complainant wanted to access.
17. The evidence adduced by the prosecution witnesses was that the appellant and a group of rowdy youths descended on the complainant's matrimonial home seeking to have her leave as she was not welcome there. The complainant who testified as PW1 stated that after getting access to the home through cutting of the live fence, the appellant accompanied by a crowd surrounded the home and



that the appellant and another not before court managed to access the house where they dragged the complainant to the bedroom and forced her to pack her belongings and that the appellant also threatened her to leave or she would find herself lifeless or dead. The complainant testified that the appellant was receiving instructions on the same from her estranged husband who called him and even urged him to “do it faster.”

18. The prosecution witness, particularly PW3 and PW4 also testified that they managed to convince the complainant to leave the home as it was not safe and that as they left, the complainant shared her car with the appellant as she gave him a lift to his destination before proceeding to the hotel where she spent the night.
19. PW1 testified that the appellant and Kevin dragged her upstairs into her matrimonial bedroom telling her to get out of the house or find her lifeless body as a dead person that was before they dragged her downstairs and carried her luggage downstairs, leaving some behind. She did not say that the appellant repeated those words once they were downstairs. PW2 and PW3 testified that they were present when the appellant uttered the threatening words to PW1. However, PW3 who was a police officer did not say that he followed the complainant upstairs where the appellant was with the complainant with Kevin
20. In addition, PW2 who was the personal assistant to the complainant did not say that he went upstairs with her. PW1 was clear that the threats to kill were uttered to her when she was dragged upstairs and not downstairs. I find the evidence of PW1,2 and 3 fragmented. There is no evidence that the three were together when the threats to kill were uttered against the complainant.
21. Further, in re-examination, PW3 stated that he did not know what Kevin, Maryline and Josephat were saying. He then changed his testimony when the court asked him a question and he stated how he heard the complainant and the appellant and Kevin talk in low tones and Also heard Josephat the appellant tell her to take her items and leave or go and come back she will find her lifeless body outside her house. He does not say at what stage he heard these words being uttered, yet the complainant stated that she was threatened while she was upstairs, where the other witnesses were not with her at that time.
22. I am alive to the fact that in the offence of threatening to kill, it is immaterial whether the offence was premeditated or not. The question, from the above evidence and circumstances is whether the actions of the appellant indicated a person who wanted to kill. In my humble view, the Appellant's conduct on the material day does not demonstrate that he went to the complainant's home with the intention of threatening to kill her but to prevent her from getting into and remaining in her house.
23. The appellant, acting on instructions from the complainant's estranged husband, was well intent on having the complainant not spend the night at the home. He did admit this fact in his defence. It is clear from the testimonies of the prosecution witnesses that the complainant's husband was similarly pushing the appellant to remove the complainant from the matrimonial home. The complainant even spoke to him on phone using the appellant's phone and she heard him tell the appellant to finish it. This is not to say that the appellant did the right thing to accept to be used by this uncle to settle their matrimonial woes as the appellant had every right and power to refuse to accept such push and influence.
24. In the instant case, it is my humble view that had the appellant threatened to kill the complainant as alleged, as opposed to preventing her from accessing and or occupying the house on instructions from her husband, which fact the complainant acknowledges as her husband had previously done the same to her, the complainant could not have allowed the appellant into her vehicle to be driven by her in her vehicle as she left to a safe place. There was no evidence to suggest that the appellant compelled the complainant to give him a lift. The complainant in my view could not have kept company of a person



who had threatened to kill her. If anything, the lesser charge of creating disturbance which the trial court dismissed is the one which was established but because the prosecution did not file any appeal on the same, I say no more.

25. In my view, the prosecution failed to establish to the required standard of proof that indeed the Appellant uttered the words showing his intention to kill the complainant. The upshot of the above reasons is that I find the appellant's appeal merited. It is hereby allowed. The conviction is set aside. Consequently, sentence of seven years imprisonment which was manifestly excessive as the appellant was a first offender and having regard to the circumstances of the case and mitigation as well as the detailed probation report, is quashed. He is acquitted of the charge. The sentence that was imposed against him is set aside. He is ordered set at liberty forthwith.
26. Unless otherwise lawfully held, the appellant is hereby set at liberty. Signal to issue to prison.
27. This file is closed. The lower court record and copy of judgment to be returned.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

