



**Ochola v Republic (Criminal Appeal E027 of 2022)
[2023] KEHC 2039 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E027 OF 2022
KW KIARIE, J
MARCH 20, 2023**

BETWEEN

JAMES OYUNGU OCHOLA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case No. 476 of 2019 of the Chief Magistrate's Court at Homa Bay by Hon. R.B.N Maloba–Principal Magistrate)

JUDGMENT

1. James Oyungu Ochola, the appellant herein, was convicted of the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the [Penal Code](#).
2. The particulars were that on the 8th July, 2020 at Soko village, within Homa Bay County, created disturbance in a manner likely to cause a breach of the peace by chasing Isaac Ochieng Odhiambo alias Raila with a panga.
3. The appellant was fined Kshs. 10,000.00 or in default to serve 3 months imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He was represented by the firm of Moriasi Osoro & Company Advocates. He raised the following grounds of appeal:
 - a. The learned trial magistrate erred in law and fact by finding that the appellant was guilty of an offence that was not subject before her as against the weight of the evidence tendered before her.
 - b. The learned trial magistrate erred in law and fact by finding the appellant innocent in the main charge but on her own motion amending the defective charge without involving the prosecution.
 - c. The learned trial magistrate erred in law and fact by allowing her own perception of the crime tragedy to cloud her summing up notes and the subsequent judgment.



- d. The learned trial magistrate having appreciated that the petitioner was innocent on the main charge but erred in law and fact by amending a defective charge and to charge the appellant under section 95 (1) (b) of the penal code a charge which offence became the basis of the convicting and sentencing the appellant.
4. The appeal was opposed by the state through Mr. Ochengo, learned counsel on the following grounds:
 - a. That the offence was proved.
 - b. That the conviction and sentence were proper.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
6. The appellant had been charged with an offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. He was acquitted for the court disbelieved the prosecution witnesses. These are the same witnesses she believed in respect of the offence for which the appellant was convicted.
7. Isaac Ochieng Odhiambo alias Raila (PW2) testified that when he met the appellant while coming from a shop, he (appellant) told him not to pass through that road again. He went home and reported to his mother. After a short while, the appellant went to their home and threatened to cut their necks. While they were entering into their house, he raised a machete against him. He thereafter chased John into a maize plantation.
8. In the statement he recorded with the police, this witness indicated that as he was entering into their gate, the appellant threw stones at him. When the appellant followed them into the house, he aimed he panga he had at him but missed. Instead, he hit the solar lamp. When they ran out, he chased John into a maize plantation.
9. The evidence of Lilian Adhiambo Odhiambo (PW1) was that the appellant chased her children John Otieno and Paul Onyango while armed with a machete. When he wanted to cut John, he tripped and cut the solar lamp. Thereafter, the appellant chased John Otieno into a maize plantation. In her statement to the police, she said that Isaac Ochieng Odhiambo alias Raila (PW2) reported to her that the appellant had thrown stones at him. Later John Otieno and Paul Onyango went home running and reported that the appellant was throwing stones at them.
10. Paul Onyango (PW3) gave a different versions of events. His evidence was that while in company of his brothers Raila and John, the appellant accused them of throwing stones at his house. They went home and reported to their mother about the accusations. The appellant then went to their home and started to chase them while armed with a panga. When he wanted to cut John, he cut the solar lamp.
11. It is evidently clear that there was no evidence of chasing Isaac Ochieng Odhiambo alias Raila with a panga (PW2).
12. The prosecution case is full of contradictions between the witnesses and each one of them gave a different version from what was recorded with the police. The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a



suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

There was no basis to believe these witnesses.

13. The upshot of the foregoing analysis of the evidence on record, is that the conviction of the appellant was unsafe and was not supported by the evidence on record. I therefore quash the conviction and set aside the sentence. If the fine was paid, the same to be refunded to the appellant. If the appellant was imprisoned, he is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF MARCH, 2023.

KIARIE WAWERU KIARIE

JUDGE

