



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT MAKUENI

#### HCCRA NO. E15 OF 2021

ALPHONCE MBITHI KITUNGU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

*(Being an appeal from the original judgment of Hon. K. Mutegi in Tawa Senior Resident Magistrate's Court SRM Case No.94 of 2019 pronounced on 21<sup>st</sup> January, 2021).*

#### JUDGMENT

1. The appellant was charged in the magistrates' court with threatening to kill contrary to section 223(1) of the Penal Code. The particulars of offence were that on 11<sup>th</sup> April 2019 at around 5:00 pm, at Iini village Kilyungi Sub-location in Mbooni West Sub-county within Makueni County, without lawful excuse uttered the words (*I will kill you*) threatening to kill Faith Mwendu Benson Musyoka.

2. He was also charged with a second count of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal Code. The particulars of offence were that on the same day and at the same place created disturbance in a manner likely to cause a breach of the peace by chasing, abusing and threatening to cut Faith Mwendu Benson Musyoka with a panga.

3. He denied both charges. After a full hearing he was convicted for the offence of threatening to kill, but acquitted on the charge of creating a disturbance. He was then sentenced to serve two (2) years imprisonment for threatening to kill.

4. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal on the following grounds –

**1) *The learned magistrate misdirected himself in law and fact in finding as he did, a conviction against the weight of the evidence on record.***

**2) *The learned magistrate erred in law in failing to find or hold that the prosecution did not prove its case beyond reasonable doubt as he was enjoined by law to do and further erred in law in finding and or holding that the appellant was guilty of attempted murder.***

**3) *The evidence was self-contradictory and was proved.***

5. The appeal was canvassed through written submissions, and I have perused and considered the submissions of both the appellant and the Director of Public Prosecutions.

6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – See **Okeno –vs- Republic (1972) E.A 32.**

7. In proving their case, the prosecution called three (3) witnesses. Pw1 Faith Mwendu Musyoka was the complainant, who testified that she was Assistant Chief of Kilyungi Sub-location, and that on 11/4/2019 while on her way from Yanga market she passed near the home of the appellant, who called her and shouted that he had been warning her not to pass through that road. She was accompanied by Pw2 who then urged her to hurry up and when she looked behind she saw the appellant holding a panga (machete). As Pw1 started to run away, the appellant shouted “get away prostitute, I will kill you”.

8. Pw2 Christine Mwelu Peter stated in evidence that she was with Pw1 at 4:40 pm that day, and that they were from the market and near the appellant's homestead, the appellant came out insulted Pw1 and chased them with a machete.

9. Pw3 was Cpl. Morris Ouma of Mbooni police station, the Investigating Officer of the case who charged the appellant in court.

10. When put on his defence the appellant tendered sworn testimony denying the offence. He raised an alibi defence that at the alleged time he was at Kikima until 6pm when he returned home.

11. Though the appellant has complained about contradictions in the prosecution evidence, I do not see any contradictions. The evidence of both Pw1 and Pw2 the eye witnesses is very clear and straight forward on what happened that day at 4:30 pm.

12. The appellant has spent time in his submissions on the second count of creating a disturbance. Him having been acquitted of that offence, it is not an issue in this appeal, as he is innocent with regard to that charge.

13. The appellant has also argued that vital evidence was not availed by the prosecution that is the machete. I note that the machete that was referred to was his own property, and there is no evidence or any indication that it was recovered by the police. The appellant is thus not justified in blaming the prosecution for failure to produce the machete as an exhibit.

14. The offence the appellant was convicted of was threatening to kill contrary to section 223(1) of the Penal Code which states 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. In my view, the evidence of the complainant Pw1 was corroborated by that of Pw2. Both heard the appellant utter the words that he would kill the complainant Pw1. Even the background reason is disclosed in the prosecution evidence that the appellant’s son had been reported to Government authorities for misconduct. The evidence on record is also that the appellant did not merely utter the words in a joking or casual manner, but in fact chased the complainant with a machete.

16. In my view, with the evidence of the prosecution on record, the burden shifted on the appellant to give to the court the lawful excuse for his conduct, if he was to escape conviction. He did not do so and instead opted to tender a defence of an alibi, which is not believable.

17. I thus like the trial magistrate, find that the prosecution proved their case against the appellant beyond reasonable doubt for the offence of threatening to kill. The appeal against conviction will thus be dismissed.

18. With regard to sentence, the maximum sentence for the offence is 10 years imprisonment. The appellant was sentenced to serve two years imprisonment after electing not to say anything in mitigation. I find that the sentence imposed is neither harsh nor excessive.

19. Consequently, and for the above reasons, I dismiss the appeal and uphold both the conviction and sentence of the trial court.

**DELIVERED, SIGNED & DATED THIS 8TH DAY OF FEBRUARY, 2022, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**JUDGE**