



**Republic v Onyango (Criminal Appeal E097 of 2025)
[2025] KEHC 14392 (KLR) (15 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E097 OF 2025
DR KAVEDZA, J
OCTOBER 15, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

WALTER OTIENO ONYANGO RESPONDENT

JUDGMENT

1. The respondent was charged and after full trial acquitted by the Subordinate Court of the offence of offensive Conduct contrary to section 94(1) of the Penal Code, Cap 63 Laws of Kenya. The particulars were that on 17th July 2020 at Kibera Ayany estate used threatening words towards Maureen Muyembeli Muhati saying that “she has touched a live wire, and besides being a water vendor, he can even kill and that she will know who he is” with intent to provoke a breach of peace.
2. Being aggrieved, the appellant filed an appeal challenging the acquittal. The grounds raised in support of appeal were that the trial court failed to consider the totality of the prosecution’s case. The trial court erred in holding that the ingredients of the offence were not proved beyond reasonable doubt. The appellant’s urged the court to set aside the acquittal and convict the respondent.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The prosecution’s case was that PW1, the complainant, testified that on the material day, she was returning from work when she saw Walter and Mercy speaking to her son. Upon alighting from her vehicle, the respondent addressed her saying, “You mama, umeshika live wire this time. Mbona umeninyang’anya mtoto?” The “child” referred to was one CO, a schoolboy who had previously



- been under her care with the knowledge of the parents and the children’s officer. She added that the respondent had earlier been arrested for kidnapping the same child.
5. PW1 stated that following the earlier incident, the OCS at Kilimani had directed the OCS at Ayany Police Station to pick up the child. The respondent allegedly abducted the boy again, introduced him to street life, and threatened to kill her. Two men who overheard the threats confronted the respondent, who charged at them. PW1 was thereafter advised to report the matter to the police. Her son later informed her that the respondent had enquired about her movements.
 6. PW1 reported the incident at Ayany Police Station and later at Kilimani Police Station, where she had earlier lodged a missing child report. The respondent was arrested and warned not to approach her home. He disregarded the warning, relocated, but continued to threaten her and her son, leading to his re-arrest. During cross-examination, PW1 stated that the respondent frequently visited her house when she was away and reiterated that there existed an agreement between her, the child’s mother, and the children’s officer. She maintained that the child was not a domestic servant.
 7. PW2, Fredrick Ouma, testified that on the material day, he saw a young man confronting a woman and asking where she had taken a child. When she referred him to the police, the respondent shouted, “This time umeshika live wire,” and added, “Nitakumaliza,” before pushing PW2. He advised the complainant to report the matter. During cross-examination, he confirmed witnessing the threats and described the respondent as wearing white clothes with dyed hair.
 8. PW3, Gordon Aura Wamboka, testified that he had given the complainant a lift. Upon reaching Ayany, he observed a man talking to a boy and pointing at the complainant, saying, “Ndiye huyu.” The respondent asked, “Where is the boy?” and when told to ask the police, he responded, “You have stepped on a live wire.” During cross-examination, PW3 stated that it was his first encounter with the respondent and interpreted the phrase “live wire” as a threat of danger. The complainant later informed him of a dispute between her and the respondent over the child.
 9. PW4, Police Constable Doreen Wakhungu, testified that the incident was reported by that the complainant had been threatened by the respondent while he was supplying water. The complainant reported the matter out of fear. Under cross-examination, PW4 stated she was unaware of any allegation of sodomy or the child’s background.
 10. In his defence, the appellant testified that in June 2020, having returned from Kampala, he was at his Ayany residence when a 13-year-old boy knocked on his door at midnight, crying and alleging that Mama Daisy had evicted him for failing to do laundry. The complainant contacted a youth leader who, together with the police, took them to Ayany Police Post. Mama Daisy arrived and accused him of stealing the boy. The police, after inquiry, allowed the boy to spend the night at the appellant’s house. The next morning, he was summoned to Kilimani Police Station, where he learnt of allegations of child theft and sodomy.
 11. The appellant stated that after seven days in custody, the OCS summoned them, and the boy requested to go home. The OCS allowed him to accompany the boy. Later, on 1 July 2020, he learnt that the boy had been taken away, and Mama Daisy had reported that he threatened her. He alleged he was assaulted by police and denied being given a fair hearing. During cross-examination, he named his witnesses as Baly (a youth leader) and Steve, reiterated that he had been assaulted at the police station but had not reported to IPOA, and denied threatening the complainant.
 12. DW2, Janet Omondi Odera, a youth leader from Kibera, testified that the respondent brought a boy to her, claiming that the woman he lived with was sexually abusing him. They took the matter to Ayany



- Police Station, where a woman appeared claiming to know the boy's parent, and the boy was handed over to Hamisi.
13. DW3, Joyce Apiyo, stated that she knew the respondent as an artist but had no knowledge of the incident and was not present when the alleged offence occurred.
 14. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
 15. Section 94 (1) of the Penal Code provides that;
 94. Offensive conduct conducive to breaches of the peace,

Any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence and is liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both.
 16. The prosecution was thus required to prove that;
 - i. The incident took place at a public place
 - ii. While at a public place the respondent used abusive words against the complainant
 - iii. The intent was to provoke the breach of peace
 17. In the present case, PW1 testified that upon alighting from her vehicle, the respondent uttered the words, "You mama, umeshika live wire this time. Mbona umeninyang'anya mtoto," at Ayany Estate, outside her gate. This established the occurrence of the incident and satisfied the first ingredient of the alleged offence. PW2 and PW3 corroborated the complainant's version, confirming that the respondent indeed used threatening words capable of provoking a breach of the peace, thus satisfying the second and third elements of the offence.
 18. However, upon careful consideration of the evidence, this court notes that the central issue revolved around the welfare and custody of the minor, who was the subject of dispute between the complainant and the respondent. The record reveals longstanding wrangles between the two concerning the child's care and residence. It is therefore plausible that the criminal complaint arose within the context of these differences rather than from an independent criminal act.
 19. Significantly, the child, who was present during the alleged confrontation and whose welfare lay at the centre of the dispute, was not called as a witness. His testimony would have been vital in clarifying the events leading to the altercation and shedding light on the truth of the allegations. The failure to call the minor, a key and material witness, created a serious evidentiary gap in the prosecution's case.
 20. The Court of Appeal in *Bukenya & Others v Uganda* [1972] EA 549 held that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be adverse to its case, and that where vital witnesses are not called, the court may infer that their evidence would have been unfavourable to the prosecution. Similarly, in *Juma Ngodia v Republic* (1982–88) 1 KAR 454, it was held that:

"The prosecutor has, in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution."



21. Applying the above principles, this court finds that the prosecution failed to discharge its burden of proof beyond reasonable doubt. The omission to call the minor witness, coupled with the existence of clear personal disputes between the complainant and the respondent over the child's welfare, raises doubt as to whether the respondent's words were genuinely intended to threaten or merely uttered in the heat of an ongoing domestic disagreement.
22. In view of the foregoing, this court is persuaded that the conviction cannot stand. The prosecution's evidence was insufficient to establish the offence charged to the requisite standard.
23. Accordingly, the appeal is found to be lacking in merit and dismissed in its entirety.
Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15TH DAY OF OCTOBER 2025

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D. KAVEDZA

JUDGE

In the presence of:

In the absence of the parties

Karimi Court Assistant.

