REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NO. E116 OF 2024

REPUBLIC ……

APPELLANT

VERSUS

ELIJAH MAKORI……

……RESPONDENT

JUDGMENT

1. This appeal arises from the ruling of the trial court, Hon. P.C. Biwot, Chief Magistrate in Ogembo SPMCCRC No. E116 of 2024 as consolidated with No. E521 of 2024 delivered on 14.10.2024.

2. The Appellant was charged with the offence of threatening to kill contrary to Section 233(1) of the Penal Code. The particulars were that on 10.11.2023, at Nyanthira Sub-location Assistant Chief's Office in Gionsaria Location, Nyamache sub-location of Kisii County, the Respondent jointly with Samson Ntabo Mbaka, without lawful excuse uttered words threatening to kill Laban Atandi Akuma.

3. The trial court considered the case and rendered the ruling. The court found no *prima facie* case against the Respondent and his co-accused and acquitted them under Section 210 of the Criminal Procedure Code.

4. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal dated 28.10.2024 raised 4 grounds, that the learned trial magistrate erred in law and fact in:

    (a) Failing to find that the Appellant proved the ingredients of the offence.
    (b) Disregarding the evidence of the prosecution witnesses.
    (c) Failing to find that the prosecution had discharged its duty of proving that the suspects were guilty.
    (d) Making a ruling against the weight to evidence.

5. By the submissions dated 20.8.2025, the Appellant submitted that the court erred in finding that the Appellant had not proved a *prima facie* case against the Respondents.

6. It was submitted that there could have been discrepancies but they were minimal as to dislodge a prima facie case. Reliance was placed on **Kimeu v Republic** (2002)1 KAR 757.

7. It was also submitted that prima facie case needed not be a case that leads to conviction. That the Appellant had called evidence and established a case and section 210 of the

Criminal Procedure Code was not applicable. They cited **Republic v Nicholas Kamwanjara Mwatha & 2 Others** HCCR No. 5 of 2020.

8. The Respondent also filed submissions dated 1.9.2025. It was submitted that the trial court correctly found no prima facie case. The Respondent cited inter alia **Nancy Wanja Githaka v Republic** (2015) eKLR based on which it was submitted that the Appellant's evidence was marred with contradictions and failed to establish that the Respondent directly or indirectly caused the complainant to receive a threat.

9. It was also submitted for the Respondent that the onus was always on the Appellant to prove case and they failed to demonstrate a prima facie case. The Respondent cited **R.T Bhatt v Republic** (1957) EA 332-335.

10. The Appellant called 4 witnesses. The requirement of a *prima facie* case places upon the prosecution the burden for establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In demystifying prima facie case, this court in **Republic vs. Abdi Ibrahim Owl [2013] eKLR** stated as follows:

> "Prima facie" is a Latin word defined by Black's Law Dictionary, 8th Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "Prima facie case" is

defined by the same dictionary as "The establishment of a legally required rebuttable presumption". To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:

"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence…It is may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence

11. In establishing a prima facie case, the trial court is not required to give reasons for holding that an accused has a case to answer. It has proved embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. The court in the case of **Festo Wandera Mukando vs The Republic (1980) KLR 103** discouraged giving reasons for its findings at this stage. The court stated as follows;

> **"...We once draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of "no case" is rejected, the court should say no more than that it is. It is otherwise where the submissions is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned.**

12. Consequently, exhaustive discussion of the merits of the witness testimonies need not be entertained as the court in so doing runs into the risk of prejudicing the fair trial to the detriment of the accused person. This position was also echoed by Muriithi J in **Republic v Daniel Kipkurui Kibowen [2020] eKLR** in finding a case to answer as doth:

> Upon considering the evidence presented herein by the Prosecution and the written submissions

dated 23rd April 2020 thereon by Counsel for the Accused, without exhaustive discussion of the merits so as not to prejudice the fair trial of the case as counseled by *Kibera Karimi v. R* (1979) KLR 36, and *Festo Wandera Mukando v. R* (1976 – 80) KLR 1626, and having considered as held in KBT HCCRC No. 13 of 2017, that –

> *"A trial Court is under a duty, as held by the Court of Appeal in Murimi v. R (1967) EA 542, to acquit an accused if the Prosecution "failed to make out a case sufficient to require the accused to enter a defence" and further that such a case is made out when a prima facie case is established being "one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence." See Ramanlal T. Bhatt v. R (1957) EA 332, 335*

13. It follows that at prima facie case stage, the court is not to be concerned with the standard of proof. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This was held in **Ronald Nyaga Kiura vs. Republic [2018] eKLR** wherein paragraph 22 stated as follows:

> "It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his

> defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of RAMANLAL BHAT - VS- REPUBLIC [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence."

14. The rule against discussion and drawing inferences from prosecution witness testimonies at prima facie case stage appears to amplify the principle that justice must not only be done but also seen to be done. The accused person ought not to be convicted, or their defense washed away at no case to answer stage.

15. In this case, the court notes that the trial court established that the evidence of PW2 contradicted the evidence of PW1 and PW3 and that if the Respondents were to keep quiet, the court would have nothing to pin them down. Based on this summation, I do not see the manner in which the trial court analysed evidence. The court properly confined itself to the principles of the duty of court at case to answer stage.

16. The Appellant submitted that the contradictions on the part of PW2 did not go to the root of the charge sheet and relied on **Wanjohi & Another v Republic** (2024) eKLR.

17. The court has considered the testimonies by PW1, PW2 and PW3. Without much ado, I find no basis for interfering with the exercise of discretion by the trial court. PW2 testified on cross examination that the Respondent did not issue any threats. Considering this testimony against the offence as disclosed in the charge sheet, I have no difficulty finding that the learned magistrate did not err in her finding that there was no prima facie case to necessitate putting the Respondent to defend himself. I say so because the particulars of the offense were that the Respondent issued the threats while at the Assistant Chief's (PW2's) office. The contradictions thus went to the root of the charge on allegations of threatening to kill and cannot be shunned away as trivial.

Determination

18. I make the following final orders:-

a) The appeal lacks merit and is dismissed.

b) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **13th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Njeru for the Appellant

Mr. Onguti for the Respondent

Respondent – present

Court Assistant – Michael