IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

HCCRA NO. E005 OF 2025

STATE……
……..PROSECUTION

VERSUS

ASMAN OTIENO OCHIENG……

ACCUSED

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. C. N. Oruo, PM, in Rongo CMCR No. E617 OF 2024, given on 8.1.2025.

2. The appellant was charged with two counts, but one was withdrawn under section 204 of the Criminal Procedure Code.

3. The appellant was charged in Count 1 with the offence of threatening to kill contrary to section 223(1) of the Penal Code. The Particulars were that, Asman Otieno Ochieng: On the 23rd day of November 2024 at around 2000hours at Rongo Backstreet area, Rongo township sub location in Rongo Sub County within Migori County in the Republic of Kenya, while armed with a panga, without lawful excuse uttered words to wit **“In nyaka abeti matindotindo”** to mean I must cut you into pieces threatening to kill Vincent Opiyo Magambo.

4. Count was a Charge of Malicious damage to property contrary to Section 339(1) of the penal code. The Particulars were that Asman Otieno Ochieng: On the 23rd day of November 2024 at around 2000hours at Rongo CCF area, Rongo township sub location in Rongo Sub County within Migori County in the Republic of Kenya, you willfully and unlawfully damaged door and window panes valued at Kshs. 6,000, the property of Ludefine Aoko Mago.

5. The appellant pleaded guilty and was sentenced to 5 years' imprisonment. Subsequently, he was acquitted of count one under Section 204 of the Criminal Procedure Code. The appeal is limited to the sentence for count 2. He appealed the sentence and filed new grounds, which I admitted in court. The appeal was opposed.

6. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> **“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have**

decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

7. Court is entitled to evaluate all the evidence and reach its own conclusion. In the case of **Okeno v Republic [1972] EA 32 at 36** the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own**

decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

Analysis

8. The duty of the first appellate court regarding sentencing was set out in the case of **Bernard Kimani Gacheru V Republic [2002] KECA 94 (KLR)** where the Court of Appeal posited as follows:

> **"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not**

easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”

9. The appellant pleaded guilty and was sentenced to 5 years' imprisonment. this is the maximum sentence under section 339(1) of the Penal code. The section provides as follows:

(1) **Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.**

10. The appellant pleaded guilty and, as such, was entitled to a sentence other than the maximum sentence. The subject matter was a paltry sum of Ksh. 6,000/=, which had been refunded. The appellant had reconciled

with the complainant on both counts. The complainant in the first court attended the court and confirmed reconciliation. The state opposed the appeal verbally. Though they indicated they had filed submissions, none were in the CTS. However, he submitted orally that the sentence was proper, and not harsh.

11. The appellant submitted that he is 23 years old, with a young wife and child who need him. He prayed for leniency of the court.

12. This court decided, in view of the glaring breach of the sentencing policy guidelines, to deliver this extempore judgment.

13. The court must be guided by the sentencing policy guidelines, 2023. Guideline number 4.3 provides as follows:

> Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt, reflected in a guilty plea:
>
> i. Normally reduces the impact of the crime upon the victims;
>
> ii. Saves victims and witnesses from having to testify; and
>
> iii. Is in the public interest in that it saves public time and money on investigations and trial.

4.3.2 In order to maximise these benefits, and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, this guideline suggests that a reduction in sentence should always follow upon a guilty plea.

4.3.3 However, an accused person should never be pressured to plead guilty.

14. Consequently, an accused is entitled on a plea of guilty to a reduction of the sentence, which was not the case. Secondly, the appellant was a first offender. this was ignored. Furthermore, the amount of goods destroyed was refunded. refund of damages reduced the overall impact on the victim, reducing the degree of harm. The crime was committed while under the influence of alcohol. Though not an excuse, it is different from a full-blown malicious act meant to cause maximum damage.

15. The court did not consider mitigating factors at all. Clause 4.3 of the Sentencing policy guidelines provides as follows regarding factors to consider in sentencing:

In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.

4.5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or,

where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).

4.5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

4.5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.

4.5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.

4.5.6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

4.5.7 A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

4.5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.
ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the Sexual Offences Act No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders.

16. Noting the least possible culpability and the least possible harm, the court, aware of the dire mitigating circumstances, is of the considered view that the sentence is harsh. The appellant is a young person aged 23 years. He has a young wife and a young baby. He pleaded guilty and reconciled with his victims. Further, he made amends by paying for his damage. The state's submission cannot stand in view of the above circumstances. Finally, the harm was a small one to the

victim, amounting to a sum of ksh. 6,000/=. This was subsequently refunded, restituting the victim in integrum.

17. To make matters worse, the court did not even consider a non-custodial sentence. Having so found, the sentence must give way. It is accordingly set aside. The appellant has been in custody since 18.12.2024 for a period of one year and one month. The period served is more than enough for the offence. therefore, I substitute the sentence of 5 years that was imposed with a sentence reducing the period of imprisonment to the period served.

ORDER

18. In view of the above, I make the following orders:

a. ***The sentence given to the appellant of 5 years is hereby set aside. In lieu thereof, the court reduces the sentence for the period served.***
b. ***The appellant shall be released forthwith, unless otherwise lawfully held.***
c. ***The file is closed.***

DELIVERED, DATED, and SIGNED at Migori on this 7th day of January, in the year of our Lord **2026**. Judgement delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr Oimbo for the State/respondent

Pro se Appellant

Court Assistant – Osoo