



**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: BOSIRE, WAKI & NYAMU, JJA)

CRIMINAL APPEAL NO. 36 OF 2011

BETWEEN

ABDALLAH KITENGO OTIENOAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu (A. Aroni, J.) dated 11th March, 2011

in

H.C.CR.A. NO. 140 OF 1020)

JUDGMENT OF THE COURT

The appellant before us is ***Abdalla Kitengo Otieno***. He was convicted by Kisumu Senior Principal Magistrate, Ezra Awino on 6th October, 2010 on two counts of threats to kill contrary to ***section 223*** of the Penal Code and was sentenced to serve two years imprisonment on each count, both sentences to run concurrently. His subsequent appeal to the High Court (Ali-Aroni, J) was dismissed on 11th March, 2011, hence this second and final appeal.

The particulars of the charge were as follows:

“Count 1:

On the 4th day of March, 2005 at Kibos market in Kisumu district within Nyanza Province, without lawful excuse, indirectly caused Erick Gor Sungu to receive a threat to kill him.”

“Count 2:

On diverse dates between 14th and 19th June, 2005 at Kolola Market in Kisumu District within Nyanza Province, without lawful excuse indirectly caused CARILUS AKEDE RAKUOM to receive threats to kill him.”

The matter has had a long and chequered history. The appellant was arrested on 19th June, 2005 but his first appearance in court for plea was 21st June, 2005. The hearing of the case subsequently commenced on 14th February, 2006 before A-El-Kindy, Principal Magistrate who heard seven prosecution witnesses and eleven defence witnesses up to 7th December, 2007. An order was made for final submissions, but before then, the trial magistrate was interdicted and eventually left the Judiciary.

The file was assigned to another Principal Magistrate, A.C. Onginjo (Mrs) on 22nd October, 2008 when an order was made for the trial to commence afresh. Mrs. Onginjo heard all the five witnesses called by the prosecution but was transferred before hearing the defence case. An order was made by the Chief

Magistrate (B. Olao) that the hearing shall proceed before a new trial magistrate, Mr. E. Awino (SPM). On 14th April, 2010, he proceeded under **section 200** of the Criminal Procedure Code, without objection from the appellant, to hear the case from where Mrs. Onginjo had stopped. Mr. Awino subsequently heard four defence witnesses and closing submissions before delivering judgment on 6th October, 2010. The appellant's appeal to the High Court was not decided until 11th March, 2011. Throughout those proceedings, the appellant was not represented by counsel except for a brief period at the trial before counsel withdrew from acting for him.

At the time when the alleged offences were committed, the complainant in the first count, **Erick Gor Sunguh** (PW1) was a Member of Parliament for Kisumu East Constituency having been elected on an LDP ticket. He was also the Chairman of the Committee formed by Parliament to investigate the death of the late Minister for Foreign Affairs, Dr. Robert Ouko. The appellant on the other hand was a retired Prisons Officer who had joined politics and was elected the local Chairman of KANU in Miwani Ward of neighbouring Muhoroni Constituency as well as the Secretary of the party in the constituency.

Three of the key witnesses who testified for the prosecution were also politicians. **Carilus Akide Rakuom** (PW2) (Akide), also named as the complainant in count 2, was the local KANU youth leader where the appellant was Ward Chairman, and also ran a hotel as the appellant's tenant in a semi permanent building in Kolola market in Kibos which building doubled up as the KANU office. **Andrew Ocham** (PW3) (Ocham) was also a KANU politician and Chairman of the party in Miwani Location after defeating the appellant. **Joram Dudo Osumba** (PW4) (Osumba) was also a KANU politician in Muhoroni constituency. All three KANU politicians-Akide, Ocham and Osumba,- testified that there was bitter rivalry in the party between two factions, one led by Biwott the other by Uhuru, and the three of them were in the Uhuru Camp while the appellant was in the Biwott Camp. There were indeed KANU party elections conducted in Nairobi on 1st February, 2005 where those factions played out.

According to Akide, on 2nd February, 2005, the appellant arrived in Kibos from Nairobi where he had gone for KANU elections and they met. The appellant then asked him whether he knew people they could work with to eliminate Hon. Gor Sunguh but Akide said he did not know. The following day there was a meeting in the local KANU office where the delegation which had gone to the Nairobi KANU elections was to give its report. Present in the meeting was Akide, the appellant, the Secretary **Marion Fatuma**, Vice Chairman, **Khalifa Omar** (DW1) and an elder and retired Chief **Hesbon Ogada Wamariba** (DW3). At some point during the meeting, one person came and greeted them. The person then went out with the appellant who also called Akide. He introduced Akide to the person (one **George**) as the one who would accomplish the task he told him about the previous day. Akide went back to the meeting as the appellant escorted the man.

Nothing seems to have happened for a whole month thereafter until 2nd March, 2005 when Akide informed one **Cornel Olum** (not a witness), an aide to Hon. Sunguh, about what he had heard from the appellant. Olum told him to report to the police and Akide recorded a statement at Central Police Station, Kisumu. Olum in turn informed Hon. Sunguh about the plans to eliminate him on 4th March, 2005 and Sunguh reported to the police for investigations. Sunguh was concerned about the information because the Parliamentary Committee he was chairing at the time was seeking to interview **Hon. Nicholas Biwott** and there were rumours of other threats made to members of his Committee. He did not know the appellant and never met him.

More than one month later on 14th June, 2005, Ocham testified that he met the appellant at Kolola market and the appellant told him that Akide had disclosed a secret which would have earned the appellant a lot of money. He did not tell him the secret but said he would have to finish Akide's life. Four days later on 18th June, 2005, Ocham met Akide and informed him what the appellant had said and Akide told him the secret was to eliminate Hon. Sunguh. Akide reported to the police and Ocham recorded his statement on 20th June, 2005. On 15th June, 2005 Osumba had also met the appellant at Kibos market when the appellant told him that Akide had disclosed a secret to kill Hon. Sunguh and so he was going to kill both Hon. Sunguh and Akide. Osumba reported to the police on 20th June, 2005. In cross-examination he

admitted that he was a KANU politician in the Uhuru camp while the appellant was in the Biwott camp and both camps were rivals. The Uhuru camp had defeated the Biwott camp in elections. He also admitted that he had a previous land dispute with the appellant.

No investigation officer was called to testify in the matter and the only officer who appeared was the arresting officer **Cpl. Luka Bungei** (PW5) who simply said the OCPD sent him together with other officers to arrest the appellant at Kibos and they did so on 19th June, 2005.

The appellant denied ever uttering the words he was accused of either on 2nd February, 2004, 14th June, 2005, or 15th June, 2005. He produced documents, during the abortive first trial before El Kindy (PM), to prove that he was away in Nairobi between 30th January, 2005 and 4th February, 2005, and therefore never met Akide on 2nd February, 2005. Those documents were however lost by the court and were not available in the second trial before Awino (SPM). He nevertheless called witnesses who testified that the KANU elections in Nairobi took place on 1st February, 2005 and the delegation in which the appellant was, returned to Kisumu on 4th March, 2005. The witnesses in the delegation included **Hesbon Ogada** (DW3), the retired chief and KANU elder, **Khalifa Khamis** (DW1), and **Joseph Ogondi Aloo** (DW2). The appellant contended throughout that the false allegations by the three prosecution witnesses were born out of political rivalry. He also called a police officer, **Inspector Samuel Maosa** (DW4) the Officer Commanding Station (OCS) Kisumu Central Police Station who produced the Occurrence Book (OB) for the station to confirm that there never was any complaint lodged by anyone relating to count 2 of the charges laid out.

The trial court as well as the High Court reviewed the evidence and in the end believed that the appellant had uttered the words he was alleged to have uttered. They rejected the alibi put forward by the appellant, the trial court stating in part:

“Firstly, the accused person and his witnesses raised the defence of alibi that between the period of 27th January to 5th February, 2005 they attended KANU delegates meeting in Nairobi where National elections were held and that accused was a delegate.

However, the charge in count 1 is for the period of 4th of March, 2005. This is nearly one month after the delegate’s conference. The defence alibi is therefore not available for the accused because the date of their conference did not coincide with the date of this offence.”

The High Court on its part stated:

“There are 2 glaring issues in this matter. One that the dates given by prosecution witnesses when the appellant made utterances of threat against PW1 is when defence witnesses DW1 to DW3 allege to have been in Nairobi. Apart from their assertion the defence witnesses did not produce any evidence in support of their allegation of having travel (sic) to Nairobi or the alleged Kanu elections where they were with the appellant. Their alibi in my view did not displace the evidence of the prosecution witnesses whose evidence was consistent.

As regards the evidence on the second count the alibi is totally out of place.”

The conviction was thus maintained.

As stated earlier, the appeal before us is the second and probably the last, and can only lie on issues of law. As the appellant was not represented by counsel, he drew up a lengthy memoranda of appeal raising 17 grounds and thereafter two supplementary memoranda of appeal containing 4 and 8 more grounds respectively, as well as a lengthy document on submissions. Much of the material in those documents relates to matters of fact which we are not at liberty to review unless the two courts below made factual findings without any evidence or on a perverted appreciation of the facts or generally if no reasonable tribunal considering such facts could make the findings, which is the same thing as stating that the judgment was bad in law. A good example is the finding by the two courts below that the alibi put

forward by the appellant did not cover the period mentioned in count 1. On the evidence, the offending words are alleged to have been uttered on 2nd February, 2005 although they were reported to the complainant on 4th March, 2005 and therefore the alibi put forward cannot be said to have been irrelevant to the first count as stated by the two courts.

Two issues of law were raised by the appellant in his submissions. The first one was that the complainant in the second count never testified in respect of that count and therefore both courts below erred in convicting the appellant thereon. The complainant stated in the charge sheet was Carilus Akide Rakuom and he attended court and testified as PW2. His testimony however was limited to count 1 and he said nothing about the allegations made in count 2. It was also proved through the OCS Kisumu Police Station that there was no report made to the police on that count. He submitted therefore that count 2 ought to have been dismissed under **section 202** of the Criminal Procedure Code. That submission was readily conceded to by learned State Counsel Mr. Kiprop, and we think on the facts and the law, he was right to concede. In the event we allow the appeal on count 2, quash the conviction and set aside the sentence imposed on the appellant thereon.

The second issue of law was that the appellant did not have a fair trial when evidence he had tendered before the court was either destroyed or went missing in the custody of the court and was not available for the resumed hearing of his case *de novo*. There were also other statements recorded by the police which were not capable of production as exhibits due to the same reason. Mr. Kiprop for his part submitted that the trial was fair inspite of those complaints and there was sufficient evidence to support count 1.

We have considered this complaint anxiously and we think in the end that the tenets of a fair trial were infringed when it became impossible for the appellant to submit evidence before the court, for reasons that were not blameable on him. The evidence he intended to produce, and which he had evidently tendered in an abortive trial, was not considered by the trial court or the High Court and we cannot say what conclusion they would have arrived at if they had seen and perused that evidence. It is not a mere technicality or a matter that can be said to have caused no prejudice and therefore curable under **section 382** of the Criminal Procedure Code. In our view it goes to the very essence of a fair trial and we uphold the complaint raised by the appellant.

In the result, we allow the appeal, quash the conviction on count 1 and set aside the sentence imposed on the appellant. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held. It is so ordered.

Dated and delivered at Kisumu this 3rd day of November 2011.

S.E.O. BOSIRE
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JUDGE OF APPEAL

P.N. WAKI
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JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR