Republic v Simon (Criminal Appeal E059 of 2024)
[2025] KEHC 3829 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3829 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E059 OF 2024

RM MWONGO, J

MARCH 26, 2025

BETWEEN

REPUBLIC ..... APPELLANT

AND

BENSON MUCHANGI SIMON ..... RESPONDENT

(Appeal arising from the decision of Hon. J. A. Otieno, Embu MCCR E673 of 2023 delivered on 18th July 2024)

JUDGMENT

The Petition of Appeal

1. The state filed this petition of appeal dated 01st August 2024, challenging the respondent's acquittal through the lower Court's Judgment dated 18th July, 2024. The petition seeks that the appeal be allowed and the respondent be duly convicted. The appeal is premised on grounds that:

    1. The learned trial magistrate erred in law and fact by acquitting the respondent under section 215 of the *Criminal Procedure Code* when the prosecution had proved its case against the respondent beyond reasonable doubt;

    2. The learned trial magistrate erred in fact by failing to consider and take judicial notice of the attitude of the members of the public towards police officers at Kianjokoma since the year 2021 when 6 police officers (popularly known as Kianjokoma 6) were alleged to have murdered 2 boys from Kianjokoma;

    3. The learned trial magistrate erred in law and fact by failing to note that the offence of threatening to kill does not require proof of parties feeling threatened but just the uttering of threatening words;

4. The learned trial magistrate erred in law and fact by finding that the respondent's defense offered sufficient rebuttal to the prosecution's case yet the same, especially the allegation of demand for a bribe by the prosecution witnesses from the respondent, was an afterthought and was raised only during the defense hearing by the respondent;

5. The learned trial magistrate erred in law and fact by finding that there were inconsistencies in the testimonies of the prosecution witnesses yet the same were not fatal to the prosecution case as there was insufficient material to contradict their testimonies.

Background

2. The respondent was charged with 3 counts of threatening to kill, contrary to section 223 (1) of the *Penal Code*. Particulars of the first count are that on 16th October 2023 at Kianjokoma Market, Gatari North location, Embu North Subcounty within Embu County, without lawful excuse, the respondent uttered the words "you will not see the light of day after demonstrations, we will eliminate you", words threatening to kill S/No. 22145 Sgt. Partick Esmonte, S/No. 108107 P.C. John Waweru and S/No. 124946 P.C. Joseph Kamau.

3. The respondent pleaded not guilty to the charges and the plea of not guilty was duly entered for each count. The matter went to full hearing and the prosecution called 4 witnesses.

4. This being a first appeal it is incumbent on this Court to re-evaluate and consider the evidence availed in the trial Court, and make its own findings taking care to note that this Court did not see or hear the witnesses itself nor did it have the benefit of noting the witness' demeanour.

The Prosecution's Case

5. PW1 IP Paul Nyaga of Kianjokoma Police Station stated that on the day of the incident, he received a call from Sgt. Esmonte informing him that in the course of their foot patrol, they had come across a bar with a patron locked inside. He instructed Sgt. Esmonte to stay put and he proceeded to the scene in the company of the driver one P.C Omollo. On arrival, he found that his colleagues had already gained entry and had arrested 6 men and 2 ladies.

6. He arrested them and took them to the police station where the respondent was heard telling the police officers that by Wednesday, they will know that they don't know. In cross-examination, he stated that he did not expressly hear the respondent threatening to kill the police officers but he told them that they will not see the light of day. he understood the words to mean a death threat.

7. PW2 was Sgt. Esmonte of Kianjokoma Police Station who stated that he was on night patrol with his colleagues when they found some 6 men and 2 ladies locked inside a bar. He alerted PW1 who is the officer in charge of crimes at the police station. The respondent, who was among the patrons began shouting saying that those against whom they were planning demonstrations on Wednesday, were there.

8. He accused the police officers of killing 2 boys in Kianjokoma ('Kianjokoma brothers') and that they were now disturbing their peace. The respondent said that they had planned demonstrations to protest against the police officers and he stated that the officers would not see the light of day after those demonstrations. The respondent also incited the community with his words. On cross-examination, he stated that the threatening words were said in Kiswahili and he understood them to mean that the respondent would kill the police officers.

9. PW3 was PC Joseph Kamau of Kianjokoma Police Station who stated that on the material day, he was on foot patrol with PW2 and PC Kamau when they were attracted by noise coming from a nearby bar where patrons had locked themselves in. They asked the owner of the bar to open and he let them in. The respondent was heard saying:

   'wenye wanatusumbua ndio hawa tunapanga demonstrations on Wednesday they won't see the light after.'(we are planning demonstrations on Wednesday to protest against the people who are disturbing us. They won't see the light afterwards).

   'wale watoto wawili police waliuwa wangekuwa polisi hawangekuwa wanaharass watu wa Kianjokoma' (if the 2 children that were killed by police had been police officers, they would not have been harassing residents of Kianjokoma).

   'Sgt Waweru and Kamau Nyaga Lazima tumake sure tumewauwa' (we must ensure to kill Sgt. Waweru and Kamau Nyaga)

10. According to PW3, PW2 called PW1 and the patrons were rounded up. That the respondent was banging doors at the police station and he incited others to also threaten to kill the police officers. On cross-examination, he stated that when they entered the bar, the respondent did not attempt to physically attack the police officers. He did not know in what capacity the respondent was planning the demonstrations. He stated that he recorded 2 statements. In the second one, he provided the context in which the words were spoken by the respondent.

11. PW4 PC John Waweru of Kianjokoma Police Station, stated that on the night in question, he was on patrol with PW2 and PW3 when they were drawn towards noises coming from a bar. As they approached, the bar owner opened the door as he let out one patron. When they gained access to the bar, they found 6 men and 2 women. One of these patrons was the respondent who made a call saying that they were planning demonstrations on Wednesday and the people against whom they planned to protest had arrived to harass them. The respondent called PW2, PW3 and PW4 by their names and told them that they will not see the light of day after the demonstrations because he and others will eliminate them.

12. It was his testimony that PW2 called PW1 informing him about the incident. PW1 arrived at the scene in a police vehicle and the patrons were arrested and taken to the police station. at the police station, the respondent was heard saying that if the Kianjokoma Brothers are said to have been arrested at the same bar and killed by police. That statement about the Kianjokoma brothers seemed to incite the other patrons since the death of the Kianjokoma brothers had created tension between the police and the community.

13. In cross-examination, PW4 denied that the investigation was biased despite the fact that the prosecution witnesses were all colleagues. That the other patrons arrested together with the respondent co-operated with the police but they refused to be summoned as witnesses. That the statements recorded by the witnesses were clarified through further statements. The reason for clarification was to contextualize the threatening words spoken by the respondent.

14. Upon close of the prosecution's case, the court found that the respondent had a case to answer and he was placed on his defense.

The Defense Case

15. The respondent testified as DW1. He stated that on the material day, he was at Summary Bar where he had a drink and at 11PM, he sought to leave. As the bar owner was ushering him out, they met with police officers who asked him to return in the bar and demanded for money but he declined to

give them any. He stated that there were about 25 people in the bar and when they left, PW4 arrested some of them and took them to the police station. At the police station, PW4 interrogated him and the following morning, he was arraigned. He later learned that the counterpart he had been arrested with had bribed police and had been released.

16. He stated that he is a local blogger who vocalizes police injustices in Kianjokoma and that no evidence was brought to support the charges. In cross-examination, DW1 stated that he knows the police officers at Kianjokoma Police station and the animosity that exists between them and the community following the deaths of the Kianjokoma brothers. He denied knowledge of the circumstances that led to the death of the brothers. He stated that PW4 asked the bar owner for a bribe too and that he was accosted by police because he is a blogger. He denied inciting the community against the police.

17. DW2 was Levis Kariuki Fundi, the bar owner. He stated that DW1 was indeed one of his customers on the material night, alongside about 30 others. They watched soccer and when he was ushering DW1 out, PW2, PW3 and PW4 met them at the door and asked for money. He stated that DW1 was a blogger who speaks up against injustice and so he refused to give the money to the police because it sounded like they demanded a bribe. It was his testimony that a few minutes later, PW1 joined them others and the patrons were arrested and taken to the police station. He did not hear DW1 threatening the armed police officers that night and he was there all along. DW1 had drunk some beers but he had full control of his faculties. He stated that an activist is more likely to be accused of incitement and that is what the police were doing to DW1.

18. DW3 was Paul Kariuki who was in the bar that night. He stated that he saw DW2 escorting DW1 to the door but shortly afterwards, they returned with police officers who rounded them up and took them to the police station. DW1 was not drunk or disorderly that night and he did not hear DW1 threatening the police. In cross-examination, he stated that he was not aware of any bad blood between he police and the community at Kianjokoma because of the deaths of the 2 brothers. He stated that when the police officers entered the bar, everything went quiet and if anyone threatened the police, he would have heard it.

Findings of the Trial Court

19. The trial magistrate considered the evidence adduced and found that the offence was not proved beyond reasonable doubt. In its judgment, the trial court noted that there were grave inconsistencies in the testimonies of the prosecution witnesses that stood in the way of the prosecution attaining the required standard of proof. The trial Magistrate found that the testimonies alluding to the respondent uttering the threatening words varied significantly amongst the witnesses. She also believed the defense testimony and, for those reasons, the respondent was acquitted under section 215 of the *Criminal Procedure Code*.

Submissions

20. The parties filed written submissions as directed by the Court.

21. In its submissions, the appellant relied on the provisions of section 223(1) of the *Penal Code* and the case of Martin Ng'ang'a Kamanu v Republic [2020] KEHC 5815 (KLR) where the elements of the offence were established. It referred to the testimonies of the prosecution witnesses and stated that actual threatening words were uttered by the respondent, and that was sufficient to prove the offence.

22. Further reliance was placed on the cases of Joseph Maina Mwangi v Republic [2000] KECA 282 (KLR), Philip Nzaka Watu v Republic [2016] KECA 696 (KLR) and Peter Gachoki Njuki, Anthony Mbogo Njuki & Obed Kariuki Muthike v Republic [2002] KECA 85 (KLR) in support of its

argument that the discrepancies and inconsistencies in the prosecution's case do not discredit the evidence.

23. It submitted that the defense witnesses placed the respondent at the crime scene and it did not dislodge the prosecution's case. it denied that the police officers asked for bribes from the arrested persons and the issue arose from the defense case as an afterthought. It urged the court to allow the appeal since there is sufficient evidence in support of its case.

24. In his submissions, the respondent urged the court to reexamine the evidence adduced at the trial and he relied on the cases of Okeno v Republic [1972] EA 32, Kiilu & Another v Republic [2005]1 KLR 174 and M'Riungu v Republic (1983) KLR 455. Arguing that the prosecution's case was riddled with contradictions and inconsistencies, he relied on the cases of Philip Nzaka Watu v Republic (supra) and Joseph Maina Mwangi v Republic (supra). He stated that the offence was not proved beyond reasonable doubt since the elements thereof were not fulfilled. He further relied on the cases of Nancy Wanja Githaka v Republic [2015] KEHC 4322 (KLR) and Republic v David Kipsang Rono [2010] eKLR.

25. It was also his argument that the evidence was not corroborated according to Section 124 of the *Evidence Act* and he referred to the cases of Ndungu Kamanyi Republic [1976-80] 1KLR and Richard Munene v Republic [2018] KECA 186 (KLR). He urged the court to exercise it judicial authority in his favour and he relied on the cases of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, Phenias Njeru Koru v Republic [2015] eKLR and Sigilani v Republic [2004] 2 KLR, 480.

Issues for determination

26. The key issues for determination are the following:

    1. Whether there were inconsistencies in the prosecution's evidence, and if so, whether they justify an acquittal?

    2. Whether the acquittal should be overturned by this court.

Analysis and Determination

27. As an appellate court, this court is tasked with reexamining the evidence adduced at trial and coming up with its own finding, keeping in mind the advantage that the trial magistrate had in assessing the witnesses firsthand as set out by the Court of Appeal in Okeno v Republic [1972] EA 32. In particular, the Court stated:

> " 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 finding and conclusion; 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."

28. The offence with which the respondent is charged stems from Section 223(1) of the *Penal Code* which provides:

> " 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."

According to the provision, a threat to kill becomes a felony when any person;

1. Unlawfully utters a threat to kill another; or
2. Causes any person to receive a threat to kill, whether written or not.

    1. PW2, PW3 and PW4 were at the scene and they stated that the respondent directly threatened to kill them. PW2 testified that the respondent made a call through which he was telling the receiver that the people against whom they were planning demonstrations on Wednesday were at the scene. That the respondent then turned towards him and said that the Kianjokoma brothers who had been killed would have been police officers.

    2. PW2 further stated that the police officers were disturbing them and on Wednesday after the demonstrations, they (the respondent and others) would ensure that the police officers do not see the light of day. In cross-examination, he stated that he recorded 2 statements and that he needed a second statement because in the first one, he had not included the detail regarding the Kianjokoma brothers. He said that the threatening words were uttered in Kiswahili and by the time he was writing his second statement, the respondent had already been charged.

    3. PW3 said that the respondent uttered these very words which were recorded as such by the trial court:

        ‘wenye wanatusumbua ndio hawa tunapanga demonstrations on Wednesday they won’t see the light after.’ (we are planning demonstrations on Wednesday to protest against the people who are disturbing us. They won’t see the light afterwards).

        ‘wale watoto wawili police waliuwa wangekuwa polisi hawangekuwa wanaharass watu was Kianjokoma’ (if the 2 children that were killed by police had been police officers, they would not have been harassing residents of Kianjokoma).

        ‘Sgt Waweru and Kamau Nyaga Lazima tumake sure tumewauwa’ (we must ensure to kill Sgt. Waweru and Kamau Nyaga).

32. In cross-examination, PW3 stated that he also wrote 2 statements with the second one being intended to include issues that had been omitted in the first statement. He also said that in his second statement, he added context to the threatening words spoken by the respondent.

33. According to the testimony by PW4, who was also the investigating officer, the respondent made a call and he was telling the receiver that the people against whom they were planning the Wednesday demonstrations had arrived to harass them. That the respondent then turned to them and addressed the complainants saying that after the demonstrations, the police officers will not see the light of day and that they (the respondent and others) would eliminate the police.

34. In cross-examination, he stated that the witnesses had to record further statements because the first ones were recorded at a time when they were time constrained. That the further statements recorded are the ones that contained the actual threatening words.

35. The respondent's defense was that the complainants demanded for money from him but he refused as there was no reason to give them any money. He denied having threatened to kill the complainants and added that he had a lot to lose by doing so. DW2 and DW3 were also at the bar on the material night and they said that they were in close proximity with the complainants and the respondent. However, they said they did not hear any threatening words spoken by the respondent to the complainants.

36. DW2 and DW3 also said that the respondent is a human rights activist who is likely to be wrongly branded as an inciter; they said he is just vocal about police injustices in the community. Seemingly, the complainants and the respondent are familiar with each other. The respondent said that he is the only one who remained in trouble with the police because he refused to bribe them but his counterparts complied and were released.

37. Inconsistency in evidence is bound to happen from time to time. An inconsistency in evidence is held to be significant when it goes into the root of the matter and may be fatal to the case. In the case of Richard Munene v Republic (supra) the Court of Appeal held:

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

38. In the case of Joseph Maina Mwangi v Republic [2000] eKLR, the court considered this issue and held that:

> "in any trial, there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the *Criminal Procedure Code* whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".

39. Here, the trial court held that the accounts of PW2, PW3 and PW4 on the threatening utterances by the respondent were inconsistent. There is a difference in how the events of that night were narrated. PW3 was more detailed in his account and in his statements, there are actual utterances of threats to kill. PW2 and PW4 said that the respondent told them that they would not see the light after the demonstrations, or words to that effect.

40. The three complainants (who are said to have been armed) were in the same room as the three defense witnesses. Two of the complainants heard a threat but only one heard an actual threat to kill two of the complainants. The three defense witnesses did not hear or utter any threats to kill. PW1 interpreted the words of the respondent by his own standard to mean that it was a threat to kill.

41. There is also the problem, not dealt with in the trial Court, of the content of the first reports or statements. It is trite that the first statement will normally contain the raw detail and impression of the

events; whilst a later statement will tend to be embellished. In the case of Jakerali s/o Korongozi and 4 others v R [1952]19 EACA 259 it was long ago observed that:

> " Their importance [of the first report] can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statement can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [come] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

42. The standard of proof in criminal cases is high; that is beyond reasonable doubt. That means there should be no niggling doubt or uncertainty that the offence was committed. It is imperative that the prosecution must establish that the threat to kill was indeed uttered according to section 223(1) of the *Penal Code*. There may have been, remotely, a threat, but I do not see from the evidence that a threat to kill was established. Further, mens rea and actus rea are absent to prove the offence beyond reasonable doubt.

Conclusion and Disposition

43. There are significant inconsistencies in the prosecution's evidence regarding the utterance of the actual threat to kill. Further, the fact that the first statements of prosecution witnesses had to be supported by later statements that appeared to "clarify" the offensive words uttered is suspect and disconcerting. The evidence by the prosecution and defense, considered in totality does not satisfy the standard of proof for the offence.

44. Accordingly, the appeal is hereby dismissed and the acquittal is hereby upheld.

45. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 26TH DAY OF MARCH, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

Respondent in person

Ms. Nyika for Appellant/DPP

Francis Munyao - Court Assistant