

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT MALINDI
CR. CASE NO. 177 OF 2016

REPUBLIC
-VERSUS-
JOEL OGADA

JUDGMENT

BACKGROUND

Joel Ogada the accused herein is charged with:-

Threatening to Kill contrary to Section 223 (1) of the Penal Code and the particulars are on 02.03.2016 at Kanagoni Village in Magarini Sub County within Kilifi County, jointly with another not before the court without lawful cause, threatened to kill Laban Simiyu Wanjala by uttering words "we are ready to kill without fear".

The accused persons pleaded not guilty to the charge.

SUMMARY OF EVIDENCE

Summary of the Prosecution Case

The Prosecution called 3 witnesses before closing its case. A summary of the Prosecution case is that the accused person was found in Kurawa Salt Industries farm by the complainant on patrol. He was there with the intention to burn charcoal. When accosted, he threatened to kill the complainant.

PW1- the complaint- Laban Simiyu Wanjala stated in his evidence that on 02.03.2016 he was being the in charge of security at Jurawa Salt Industries was on patrol with his colleague Emmanuel Pasi. It was his evidence that he found the accused with one Mr. Mkongo and they wanted to burn charcoal. He informed them that they were not allowed to carry out any activity in the farm. It was his evidence that the accused had an axe in his hand and Mzee Kongo a panga and they said they were ready to fight and if they continued disturbing them, they would kill them. It was his evidence that being

scared of their life, they left and reported the same to the management and later to Marereni Police Station. He identified the accused as the one who threatened to kill him.

In cross examination he stated that it was the accused who threatened to kill them while in the company of Mzee Bongo. Further, that the delay in reporting was because he had to go off duty before proceeding to report.

PW-2 Emmanuel Kupasi Chengo in his evidence stated that he is a security supervisor at Jurawa Salt. It was his evidence that on the material day while on patrol with the complainant, they met the accused and Mzee Bongo who wanted to burn charcoal and the accused was holding an axe and Mzee Bongo a panga. On informing them that they were not supposed to be there, the accused became harsh and told them he was ready for anything.

In cross examination he stated that the accused had earlier worked at Kurawa. It was his evidence that the accused threatened them with the axe he was carrying.

PW3-PC No. 101632 Lekuye Nanu the current investigating officer informed the court that on the material day, the complainant reported that he and his colleague had been threatened by the accused who were armed with a Panga.

Summary of the Defence Case

The accused person gave sworn evidence. He called one witness.

DW 1- Joel Ogada the accused stated that he was arrested on 14.03.2016 while at his friend's place and only heard of the case on 15.03.2016. It was his evidence that his work is farming and he does not burn charcoal and only heard of the incidence when he was arrested. It was his evidence that the charges are a fabrication as Jurawa want more land for their farm and they are neighbours and it was due to the forceful evictions that were being done.

It was his evidence that it was not the first time he was being brought to court by staff of Kurawa.

On cross examination he stated that the complainant was just an employee of Kurawa and is not part of the family that wants that land.

DW 2- Kombo Kalu in his evidence stated that on 02.03.2016 he never saw the complainant and his colleague. It was his evidence that he was at home on 14.03.2016 when the accused who had come to visit him was arrested.

ANALYSIS OF FACTS & EVIDENCE

Section 223 of the Penal Code states inter alia:

“Threats to kill

(1) 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.”

The Prosecution laid its case. It was PW-1's the complainant's evidence that the accused threatened to kill him while wielding his axe. This evidence was corroborated by Pw-2.

In his defence the accused talked of the long standing land dispute between him and Kurawa Company where the complainant works. He denied having been on Kurawa's land on the material day or having anything to do with the threats.

As stated in the case of *Phenias Njeru Koru v Republic [2015] eKLR* as is in this case, the land dispute is independent of the criminal charges. The most important thing is for the prosecution to prove the criminal charges against the accused as required by the law.

The ingredients of the offence consist of the following:-

1. *Without lawful excuse utters;*
2. *Or directly or indirectly causes any person to receive a threat;*
3. *The threat may be in writing or verbal;*
4. *It must be a threat to kill any person.*

The prosecution adduced evidence that the accused had no lawful excuse to make the death threat to the complainant. It was irrelevant that there was a pending land dispute. The evidence of PW1 as to the threat made was sufficiently corroborated by the evidence of PW2. Although the accused in his defence claimed that he knew nothing about being on the farm on the same day, it is notable that DW-2 who was his witness and was said to have been together with the accused neither disputed to have been in the company of

the accused nor stated where he was on 02.03.2016. The accused also did not state where he was on 02.03.2016. DW-2 evaded answering where he was on 02.03.2016 and only insists that they knew about the charge on 14.03.2016.

Whether the accused was arrested on the same day the report was made or after 14 days is immaterial as to the fact in regard to whether he made the threats or not.

Although the alleged weapon namely an axe was not produced in court, it is not a requirement of the law that for a criminal offence to be proved, the weapon used to commit the crime has to be produced. A criminal case may be proved by evidence other than that of production of exhibits. In the case of *JOHN WACHIRA MUTHIKE VS REPUBLIC [2014] eKLR* the appellant complained that exhibits were not produced in court. It was held that failure to produce exhibits in court is not necessarily fatal to a prosecution case and that each case depends on its own circumstances.

On the last limb that is must be a threat to kill, it was held in the case of *NANCY WANJA GITHAKA VS REPUBLIC [2015] eKLR* that the prosecution was required to establish and prove that the appellant directly or indirectly, whether in writing or verbally caused the complainant to receive a threat to kill her. This I have dealt with above, the accused verbally in the presence of PW-2 stated that he was ready to do anything on the complainant while holding an axe. This can be construed that he wanted to kill the complainant.

The burden of proof in a criminal case is beyond reasonable doubt. I am satisfied that from the Prosecution evidence, this burden as against the accused has been discharged. There is no doubt that the accused threatened to deal with the complainant while carrying an axe in the presence of PW-2. It is also not in doubt that this is because of outstanding land disputes.

FINDING

From the above, I am satisfied that the Prosecution has proved the charges against the accused beyond reasonable doubt and I therefore find the accused Joel Ogada guilty of *Threatening to Kill Laban Simiyu Wanjala contrary to Section 223 (1) of the Penal Code Cap 63 of the Laws of Kenya.*

Dated and delivered at Malindi this


HON. D. WASIKE

day of December 2021

SENIOR RESIDENT MAGISTRATE

14 days Right of Appeal