



REPUBLIC OF KENYA



**Mutisya v Republic (Criminal Appeal E073 of 2022)  
[2023] KEHC 208 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 208 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E073 OF 2022  
GMA DULU, J  
JANUARY 24, 2023**

**BETWEEN**

**JOSEPH MUTUA MUTISYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original judgment of Hon. B. M. Ireri in Makindu Senior Principal Magistrate's Court SPMCR Case No.E1163 of 2021 pronounced on 10th February 2022)*

**JUDGMENT**

1. The appellant was charged under count I with threatening to kill contrary to section 223(1) of the [Penal Code](#). The particulars of offence were that on December 7, 2021 at Makutano Village in Kibwezi Sub-County within Makueni County without lawful excuse uttered the words in Kiswahili language “*nitakuua*” which interpreted in English means “I will kill you” ... while armed with a knife threatened Maria Mutisya.
2. He was also charged with a second count of malicious damage to property contrary to section 339 (1) of the [Penal Code](#), the particulars of which being that on the same day and at the same place willfully and unlawfully demolished a toilet, bathroom and kitchen house valued at Kshs 11,500/= the property of Maria Mutisya.
3. On being brought to court, he pleaded not guilty to the charge of threatening to kill, but pleaded guilty to the offence of malicious damage to property, and was convicted for malicious damage to property.
4. The court thereafter ordered for and received a pre-sentence report from the Probation Officer. The court then sentenced the appellant to serve 10 years imprisonment for threatening to kill, and 1 year imprisonment for malicious damage to property.



5. The appellant has now come to this court on appeal, against both conviction and sentence on the charge of threatening to kill, and also against the sentence on the charge of malicious damage to property.
6. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant and the submissions filed by the Director of Public Prosecutions.
7. I note that the Director of Public Prosecutions has conceded to the appeal against the conviction and sentence on the charge of threatening to kill.
8. In my view, the Director of Public Prosecutions is correct in conceding, as the provisions of Article 150 of the *Constitution* on fair hearing, would require that since the appellant pleaded not guilty to threatening to kill, he should have been tried for the offence, evidence tendered in court and he granted a chance to challenge the same before conviction and sentence. He could not be sentenced on this count merely because he pleaded guilty to count II.
9. The trial court violated the *Constitution* and written law as it neither tried the appellant on count I, nor convicted him before sentencing him, which was an error. I will thus quash the presumed conviction on count I, and set aside the sentence of 10 years imprisonment.
10. With regard to count II for malicious damage to property, in my view, the plea of guilty recorded herein is unequivocal. The conviction was thus proper.
11. The maximum sentence under section 223(1) of the *Penal Code* is five (5) years imprisonment. Thus from the facts disclosed in the case and the pre-sentence report, the sentence of one (1) year imprisonment imposed was reasonable. I will thus not interfere with the sentence.
12. Consequently and for the above reasons, I quash the presumed conviction for threatening to kill and set aside the sentence of ten (10) years imprisonment imposed. I however uphold the sentence of one (1) year imprisonment for malicious damage to property. The appellant will thus serve only one (1) year imprisonment from the date he was sentenced by the trial court.

**DELIVERED, SIGNED & DATED THIS 24<sup>TH</sup> DAY OF JANUARY 2023, IN OPEN COURT AT MAKUENI.**

.....

**GEORGE DULU**

**JUDGE**

