



REPUBLIC OF KENYA



**Mwangi v Republic (Criminal Appeal E028 of 2022)
[2023] KEHC 24125 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E028 OF 2022
WM MUSYOKA, J
OCTOBER 27, 2023**

BETWEEN

STEPHEN MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, in Busia CMCCRC No. E669 of 2022, of 22nd June 2022 and 5th July 2022, respectively)

JUDGMENT

1. The appellant, Stephen Mwangi, had been charged before the primary court, of threatening to kill, contrary to section 223(1) of the *Penal Code*, Cap 63, Laws of Kenya. The particulars were that on 12th June 2022, at customs yard, Malaba, in Teso North Sub-County within Busia County, without lawful excuse he uttered the words “Nitawagonga muwe chapati,” threatening to kill No. 234976 Chief Inspector Richard Oeri and No. 67810 Police Constable Gilbert Ngeno, police officers in lawful execution of their duties.
2. The plea was taken on 22nd June 2022. The record reflects that the charges were read to the appellant in English/Kiswahili, to which he responded in Kiswahili, “Kweli.” The facts were then stated as per the charge sheet, to effect that he was driving and obstructing, and when stopped by police, he said “Nitwangeni kama chapati,” according to the typescript, or “Nitwagonga kama chapati,” according to the handwritten notes of the original trial record; whereupon he answered, “Ni kweli.” He was convicted on his own plea of guilty, after which he made a statement in mitigation. He was sentenced on 5th July 2022, to 5 years in prison.
3. The appeal herein arises from that conviction, and principally is against the sentence. The appellant avers that he pleaded guilty, was a first offender, was acting under the influence of alcohol, was



- misadvised by the arresting officers, was remorseful, was undertaking to not repeat the offence, never was previously on the wrong side of the law, and his family was suffering as he was the sole breadwinner.
4. The appeal was canvassed by way of written submissions, following directions given on 29th June 2023.
 5. The submissions by the appellant turn around the same issues. He submits that he had regretted the offences and accepted responsibility by pleading guilty; he was a first offender, who acted out of alcoholism, was remorseful and was undertaking to be obedient to the law in future. He prays that he be considered for a non-custodial sentence.
 6. The respondent has cited section 348 of the Criminal Procedure Code, Cap 75, Laws of Kenya, to argue that a person who has pleaded guilty can only appeal against the sentence, to the extent of its legality. *Olel vs. Republic* [1989] KLR 444 is cited, to support that, where it was said that where the plea is unequivocal, an appeal against conviction ought not lie. *Alexander Lukonye Malika vs. Republic* [2015] eKLR was also cited, where it was stated that where the plea is imperfect, ambiguous or unfinished, or the accused was mistaken or under misapprehension, or the charge as laid out did not disclose an offence known in law, or where upon the admitted facts the appellant could not be convicted in law, the appellate may set aside the conviction. It is submitted that the plea was equivocal, as the offence of threatening to kill was not disclosed in the facts read out in support of the charge. It is also submitted that the manner the plea-taking was handled made the trial unfair, as it did not comply with Article 50(2)(b) of the Constitution, and that he was not warned of the danger of pleading guilty. Finally, it is submitted that the sentence was lawful. The respondent urges that as the plea was equivocal, a retrial ought to be ordered.
 7. As indicated above, the appellant does not appear to have an issue with the conviction as such, and he seeks largely to have the appellate court revisit the sentence. His grounds of appeal read more like a statement in mitigation, and so does his written submissions. However, the issues raised by the respondent are more fundamental, for they go to the core of the matter, as to whether the trial court properly handled the trial process when the appellant was arraigned before it.
 8. In the first place, what does the phrase, “Nitawagonga muwe chapati,” mean? A literal translation of it would be that he would hit them until they were like chapati. “Nitawagonga muwe chapati,” would that be a threat to kill? I do not think so. It would simply mean that he would beat them very badly. These facts on their own could not provide a proper basis for a charge under section 223(1) of the Penal Code, for threatening to kill. The phrase is capable of various interpretations, and there was no direct threat there at all in it to kill. I am not at all saying that the offensive and defiant conduct by the appellant, towards police officers on duty, and possibly in uniform, did not disclose an offence; what I am saying is that the offence, if at all, was not a threat to kill, as defined in section 223(1) of the Penal Code.
 9. Secondly, the particulars as read out in open court are not aligned to those in the charge sheet. The charge talks of “Nitawagonga muwe chapati,” while what is in the typescript of the proceedings is “Nitwangeni kama chapati,” which translates to beat me like chapati, suggesting that the appellant was inviting the officers to beat him like chapati. There was no threat there, whether express or implicit, and, least of all, to kill. I believe that the typescript is not an accurate rendition of what the trial court recorded, which was “Nitawagonga kama chapati,” meaning that he would beat them like chapati, which would, again, not amount to a threat to kill, but to hit them badly. Whether it was “Nitawagonga kama chapati” or “Nitwangeni kama chapati,” the same would not convey the same message as “Nitawagonga muwe chapati.” The question is, was the appellant responding to the facts as set out in the charge sheet or as stated orally in court? There was a cloud of ambiguity and lack of clarity



around what the appellant allegedly said to those officers, based on what was stated in the charge, and what was read out in open court.

10. On whether the trial court should have warned the appellant of the danger of pleading guilty, I do not think there is any rule of procedure that makes it a requirement. There is nothing in *the Constitution* and the Criminal Procedure Code on that. Courts have addressed that, in such cases as *Mangwera vs. Republic* [1952] 18 EACA 150, *Chacha vs. Republic* [1953] 20 EACA 339, *Adan vs. Republic* [1973] EA 45, *Boit vs. Republic* [2002] 1 KLR 815, among others, but only with respect to capital charges, such as murder, treason, robbery with violence, and the like. The superior courts have only sounded a caution, but have not made it a mandatory requirement, that precautions must be taken when recording a plea of guilty, particularly for serious offences. The trial court herein was under no duty to inform the appellant of the danger of pleading guilty, but was expected to exercise precaution to ensure that the plea was unequivocal.
11. I am not persuaded that the charge disclosed an offence, under section 223(1) of the *Penal Code*, in the first place, and the appellant should not have been asked to plead to it. Secondly, the trial court, if it was persuaded that there was a proper or valid charge before it, should have been cautious with recording the guilty plea, as the facts, as read out to the accused, were not aligned to those in the particulars. Indeed, the appellant should not have been invited to respond to the facts as read out. In the end, I allow the appeal, quash the conviction and set aside the sentence. I shall not order retrial, as there is no proper or valid charge upon which a retrial can be mounted. The appellant shall be released from prison custody, unless he is otherwise lawfully held. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27TH DAY OF OCTOBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Stephen Mwangi, the appellant, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

