



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mangi v Republic (Criminal Appeal E090 of 2023)  
[2025] KEHC 3542 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E090 OF 2023  
M THANDE, J  
MARCH 14, 2025**

**BETWEEN**

**KAZUNGU SULUBU MANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from the judgment of Hon. Olga Onalo, SRM  
delivered on 27.10.23 in Malindi Criminal Case No. E470 of 2020)*

**JUDGMENT**

1. The Appellant herein charged in Malindi Criminal Case No. E470 of 2020 with the offence of threatening to kill contrary to Section 223(1) of the *Penal Code*. The particulars of the offence are that on 15.6.2020 at Mtangani area in Malindi sub county within Kilifi County, the Appellant without lawful excuse uttered the words” ukikanyaga kwa hii ploti tena nitakuuwa” (if you step in this plot I will kill you) which words were calculated to eliminate or to kill Mohamed Osman Noor.
2. Following trial, the Appellant was on 22.9.23 convicted of the offence and was on 27.10.23 sentenced to pay a fine of Kshs. 100,000/= and in default 1½ years’ imprisonment.
3. Being aggrieved by the decision of the trial court, the Appellant, filed the Petition of Appeal before me dated 27.10.23 against conviction and sentence. The grounds of appeal are reproduced below:
  1. The Learned Magistrate misdirected herself in the fact and law by not appreciating that the Appellant did at no time threaten to kill as corroborated by the Prosecution’s witness PW1, Osman Mohamed who admitted not being threatened and or frightened by the Appellant.
  2. The Learned Magistrate misdirected herself in fact and law by not appreciating that the Appellant did not threaten to kill as corroborated by the Prosecution’s witness Pw1, Osman



Mohamed's actions of reporting the incident two (2) days later clearly proving the action as being an afterthought.

3. The Learned Magistrate misdirected herself in fact and law for failing to take into account the fact that there was an existing land dispute between the Complainant and the Appellant and his family that precipitated the filing of the complaint with the police.
  4. The Learned Magistrate misdirected herself in fact and law for failing to appreciate that the evidence adduced by the prosecution witnesses was fraught with contradictions and malice.
  5. The Learned Magistrate misdirected herself in fact and law by not appreciating the evidence of the Prosecution Witness PW2, Liwali Fondo clearly indicating that the Appellant is a peaceful person therefore making it impossible that he made threats to kill.
  6. The Learned Magistrate misdirected herself in fact and law by not appreciating that at the time of the alleged offence, the Appellant was on his family's piece of land and the complainant was digging a trench to construct a house on the said piece of land as corroborated by the Prosecution's Witness Pw2, Liwali Fondo who confirmed that the Appellant and his family have been living on that land since 1955.
  7. The Learned Magistrate misdirected herself in fact and law by not appreciating that the evidence of PW3, Mazera there was no investigations done clearly corroborated the fact that there was malice on the part of the Complainant.
  8. The Learned Magistrate misdirected herself in fact and law by not attaching requisite weight on the cogent and plausible defence of the Defence Witness DW1, Kazungu Sulubu Mangi (the Appellant herein) by regarding it as an afterthought before reaching the impugned decision.
  9. That the fine of Kenya Shillings One Hundred Thousand (Kshs.100,00/=) in default a custodial sentence of one and half years' imprisonment imposed was harsh and excessive in the circumstances.
  10. That in the premises therefore, the Appellant urges the Court to allow the Appeal, quash the conviction and set aside the custodial sentence that was imposed on him.
4. The Respondent opposed the Appeal in submissions dated 18.6.24 in which it was submitted that all the elements of the offence had been established. The Respondent submitted the prosecution was able to prove that the Appellant stated the words in question. In terms of the context, it was submitted that the Complainant perceived that he was under threat of losing his life. The Further that after weighing the Appellant's defence, the trial court found that the same was a mere denial and rightly found him guilty and that his conviction was safe.
  5. As a first appellate Court, I have subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial Court, I neither saw nor heard the witnesses. (See *Okeno v Republic* [1972] EA 32 and *Gabriel Kamau Njoroge v Republic* [1987] eKLR).
  6. The Appellant was convicted of the offence of threatening to kill, contrary to 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.



7. In this appeal, the central issue for determination is whether the prosecution proved the charge against the Appellant, to the required standard. The elements that are to be established in the offence of threatening kill were set out by Kimaru, J. (as he then was) in *Martin Ng'ang'a Kamanu v Republic* [2020] eKLR as follows:

The prosecution was required to establish the following ingredients of the charge: that the Appellant without lawful excuse uttered words which amounted to a threat to kill the complainant. The uttering of these words must be made in the context that the complainant perceives that he is under threat of losing his life. The context must come out in the evidence that will be adduced by the prosecution witnesses and the explanation given by the accused in his defence.

8. The prosecution's case was that the Appellant uttered words to the effect that he would kill the complainant.
9. The Appellant contended that the evidence on record shows that the complainant and PW2 heard different words and their evidence was contradictory. In submissions dated 20.5.24, the Appellant, submitted that the complainant and PW2 were present when the Appellant allegedly uttered the words in question but that the evidence shows that both heard different words. It was submitted that the complainant heard the Appellant state "ukikanyaga tena kwa hii shamba nitakuua" while PW2 heard "wewe hutaweza kukanyaga tena na ukikanyaga tena nitakumaliza". The Appellant argued that it was inconceivable that they heard different statements.
10. Our Courts have often been called upon to consider contradictions and inconsistencies in evidence adduced in court. On this, I find useful guidance in the case of *Philip Nzaka Watu v Republic* [2016] eKLR, where the Court of Appeal had this to say:

"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In *Dickson Elia Nsamba Shapwata & Another v The Republic*, CR. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

11. I have noted the inconsistencies in the testimony of the complainant and PW2 regarding the words uttered by the Appellant. As stated by the Court of Appeal in the cited case, the nature of human recollection is such that no two witnesses will recall exactly the same thing to the minutest detail. It is expected that there shall be some discrepancies due to the fallibility of human recollection. When it comes to remembering uttered words, the likelihood of remembering the exact same words is not always possible. The inconsistencies cited by the Appellant are in my view minor and inconsequential



and do not go to the root of the prosecution case. As such, they have not shaken the prosecution case that the Appellant did indeed utter the words in question.

12. I now turn to the context. That the Appellant uttered the words in question is clear from the evidence on record. The context here is that the Appellant and the complainant have a long-standing land dispute which is the subject of Malindi ELC No. 286 of 2016. Indeed, PW2 stated that the Appellant's parents and grandparents have been on the land even before the Appellant was born. From the evidence, it would appear the Appellant got agitated when he saw the complainant digging trenches on the disputed land and uttered the words.
13. From his evidence the complainant stated that when the Appellant stated the words in question, he was about 2 metres away from him. Initially, he said the words did not scare him. In re-examination however, he stated that he was scared for his life. Other than that mere statement which contradicted his earlier statement, the complainant did not place any evidence before the trial court to demonstrate that he felt under threat of losing his life when the said words were uttered. Indeed, neither him nor PW2 stated that they fled after hearing the Appellant's words. Further, PW3 stated that from investigation file, the complainant did not flee nor was it mentioned in the statement that there was fear. Additionally, the words uttered were a warning and conditional upon the complainant entering land which the Appellant claimed to be his.
14. In the assessment of this Court, and all these factors taken together, the words uttered by the Appellant do not amount to any threat to life. The prosecution did not establish, to the required standard of proof that the Appellant's words demonstrated an intention to kill the complainant.
15. In the end and in view of the foregoing, this Court finds that based on the evidence on record, the conviction of the Appellant was not safe. The Appeal succeeds and is hereby allowed. The conviction is quashed and the sentence that was imposed against the Appellant is set aside.

**DATED SIGNED AND DELIVERED THIS 14<sup>TH</sup> DAY OF MARCH 2025**

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**M. THANDE**

**JUDGE**

