



REPUBLIC OF KENYA



**Gitonga v Director of Public Prosecutions (Criminal Appeal  
E014 of 2024) [2024] KEHC 6268 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6268 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E014 OF 2024  
TW CHERERE, J  
MAY 23, 2024**

**BETWEEN**

**BONIFACE GITHINJI GITONGA ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(Being an appeal against conviction and sentence Meru MCCR No.  
E610 of 2023 by Hon. D.Nyambu (CM) on 24th January, 2024)*

**JUDGMENT**

1. Boniface Githinji Gitonga (Appellant) was charged with threatening to kill contrary to section 223(1) of the *Penal Code*. The offence was committed on 15<sup>th</sup> May, 2023 in the manner of Appellant uttering the words nitakuua na nikutoe intestines threatening to kill Peter Kimaita Iruura .
2. Peter Kimaita Iruura stated that Appellant was his neighbour. He recalled that on 15<sup>th</sup> May, 2023 at about 07.00pm, he met Appellant who was armed with a walking stick and they parted ways. That immediately thereafter, Appellant who was armed with an iron bar and panga went to his gate uttered the words wapi petro nimuue threatening to kill him. Joshua Kathurima Muriithi stated that he saw Appellant who was armed with an iron bar and panga chasing complainant uttering the words petro walahi leo nitakuua threatening to kill complainant. He stated that he managed to wrestle the Appellant and disarmed him.
3. PC Buyo, the investigating received complainant's report on 16<sup>th</sup> May, 2023, arrested Appellant on the same date and had him charged. He tendered a panga and iron bar that Appellant had allegedly used in the commission of the offence as exhibits.
4. Appellant in his sworn testimony denied the offence and stated that he asked complainant to pay him for work done but he refused and set young men to beat him up and steal cash from him.



5. After the conclusion of the trial, Appellant was convicted and sentenced to serve 4 years' imprisonment.
6. Dissatisfied with the conviction and sentence, Appellant lodged this appeal. By amended grounds of appeal dated 19<sup>th</sup> April, 2024 Appellant contends that:
  1. The testimony of complainant was incompatible with the charge
  2. He was not given the benefit of Section 333(2) of the *Criminal Procedure Code*

### **Submissions**

7. Appellant submitted that the words in the charge sheet are different from the words the witnesses said he had uttered concerning the complainant and urged the court to allow the appeal. Reliance was placed on *Jason Akumu Yongo v Republic* [1983] eKLR where the court of Appeal reiterated the ingredients of a defective charge sheet in terms of section 214(1) of the *Criminal Procedure Code*.
8. Ms Rotich for the DPP urged the court to find that the prosecution case was proved and that the time Appellant spent in custody was considered

### **Analysis and determination**

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odbiamba v Republic* Cr. App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

10. The Court of Appeal in the case of *David Njuguna Wairimu v Republic* [2010] eKLR, cited with approval the decision in *Okeno v R* [1972] EA. 32 in which the Court of Appeal for East Africa laid down what the duty of the first appellate court is and set out the principles that should guide the first appellate court as follows:

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

11. I have reviewed the evidence by the complainant and his witness and noticed that it was at variance concerning the words that Appellant allegedly uttered threatening to kill the complainant and also at variance with those in the charge sheet. Additionally, whereas complainant stated that Appellant went to his gate and threatened him, his witness said he saw Appellant chasing the complainant and threatening to kill him.



12. Listening to the complainant and his witness, I could not help but wonder if they were referring to the same incident.

13. In my considered view, the evidence by complainant and his witness properly evaluated falls in the category of what the Court of Appeal described in *Ndungu Kimanyi v Republic* [1979] KLR 282 as follows;

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he/she is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

14. It is well settled that the legal burden of proof in criminal matters never leaves the prosecution’s backyard. In the case of *Woolmington v DPP* 1935 AC 462 PP 481, it was held as follows on the law on legal burden of proof in criminal matters-

“Throughout the web of the English criminal law one golden thread is always to be seen, that is, the duty of the prosecution to prove the prisoner’s guilt..... no matter where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. The trial magistrate erred in shifting the burden of proof on the appellant.”

15. From the foregoing, I do not find any evidence to suggest that the charge sheet was defective. It is however apparent that the evidence for the DPP did not support the particulars of the charge. The conviction on such evidence was therefore unsafe.

16. Had the appeal been successful, I would have given Appellant the benefit of Section 333(2) of the *Criminal Procedure Code* and directed the 5-year imprisonment term be computed from 16<sup>th</sup> May, 2023 when he was arrested.

17. In the end, it is hereby ordered:

1. The conviction is quashed
2. The 5-year imprisonment term is set aside
3. Appellant shall be set at liberty unless otherwise lawfully held.

**DELIVERED AT MERU THIS 23RD DAY OF MAY 2024**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistants - Kinoti/Munene

Appellant - Present

For DPP - Ms. Rotich (PC-1)

