



REPUBLIC OF KENYA



**Mutisya v Republic (Criminal Appeal E063 of 2022)
[2023] KEHC 618 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E063 OF 2022
GMA DULU, J
FEBRUARY 10, 2023**

BETWEEN

JACOB KITHEKA MUTISYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original judgment of Hon. B.N Ireri in Makindu Senior Principal Magistrate's Court Criminal Case No.E043 of 2022 pronounced on 3rd February 2022)

JUDGMENT

1. The appellant was charged in the magistrate's court with threatening to kill contrary to section 223(1) of the [Penal Code](#). The particulars of offence were that on 14/01/2022 in Kibwezi Sub-County within Makueni County without lawful excuse uttered the words in Kiswahili language "siku moja nitakuua" which interpreted in English means "one day I will kill you" while armed with a *panga* threatening to kill Regina Mutisya
2. Under count II, he was charged with offensive conduct contrary to section 94(1) of the [Penal Code](#). The particulars of offence being that on the same day and at the same place willfully and unlawfully used abusive words in Kiswahili language by calling the complainant "xxxx, *mjinga*" which interpreted in English means "anus and fool" with intent to provoke a breach of the peace against one Regina Mutisya.
3. When he appeared before the trial court on 17/01/2022, he was recorded as having pleaded guilty to both charges.
4. He was then convicted on his own plea, and sentenced to 7 years in jail.
5. The appellant has now come to this court on appeal, relying on the following grounds:-
 1. That he pleaded guilty to the offence, before the magistrates' court.



2. That he did not threaten to kill, the complainant was only framing him.
3. That he is a first offender and pray to this court for leniency.
4. That he humbly prays for non-custodial sentence.
6. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, as well as the submissions filed by the Director of Public Prosecutions. I note that the appeal herein is against both conviction and sentence.
7. I have perused the proceedings of the trial court. I note that on 17/01/2022 when the two charges were read to him, the appellant admitted each of the two charges.
8. The facts were then read to him and he admitted the facts.
9. When the appellant was asked to say something in mitigation however, he said that he wanted to clear grass not to attack the complainant.
10. In my view, what the appellant said in mitigation above with regard to the charge of threatening to kill was a plea of not guilty.
11. When the matter came up for mitigation and pre-sentence report on 03/02/2022, the facts were again read by the prosecutor, and the appellant admitted the facts unreservedly. He was then convicted again.
12. It is not clear whether both charges or any charge was read to him this time.
13. What followed thereafter, from the record, is that he was sentenced to 7 years imprisonment for threatening to kill his own mother, and it was noted that the appellant had another ongoing case in court Number 3.
14. In view of the muddled trial court record as enumerated above, it cannot in my view, be said that the conviction of the appellant on a plea of guilty satisfies the requirements set down in the case of *Adan -vs- Republic* (1973) EA. In my view, it is not clear whether the appellant entered an unequivocal plea of guilty, nor that he was properly sentenced, and for what offence.
15. I will thus quash the conviction and sentence of the magistrate herein, and remit the file back to the magistrates' court for fresh plea taking, and for further progress.
16. I thus allow the appeal, quash the conviction and set aside the sentence imposed. I however order that the file be transmitted by the Deputy Registrar back to the magistrates' court for fresh plea taking from the appellant on the same two charges, and for further proceedings depending on the plea that will be recorded from the appellant.
17. In the meantime, the appellant will remain in prison custody, and be produced before the magistrates' court for fresh and proper plea taking.

DELIVERED, SIGNED & DATED THIS 10TH DAY OF FEBRUARY 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

