**Kurgat v Republic (Criminal Appeal E003 of 2022)**
**[2023] KEHC 17236 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17236 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL E003 OF 2022**

**JRA WANANDA, J**

**MAY 12, 2023**

**BETWEEN**

**CLETI KURGAT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Arising fom Eldoret Chief Magistrate's Court Criminal Case No 114 of 2016)***

## JUDGMENT

1. The Appellant was charged in Eldoret Chief Magistrate's Court Criminal Case No 114 of 2016.

2. In Count I, he was charged with the offence of threatening to kill contrary to Section 223(1) of the *Penal Code*. The particulars were that on the December 27, 2015 at Kimoning area within Uasin Gishu County without lawful excuse uttered words "I will kill you" to Edward Kipkemei Kosgey which intended to cause fear to the said Edward Kipkemei Kosgey

3. In Count II, he was also charged with the similar offence of threatening to kill contrary to Section 223(1) of the *Penal Code*. The particulars were that on the same date and at the same place as above, without lawful excuse, uttered words "I will kill you" to Raymond Koech Kipchumba which intended to cause fear to the said Edward Kipkemoi Kosgey

### Prosecution evidence

4. The prosecution called 6 witnesses.

5. PW1 was the complainant in Count 1, Edward Kipkemei Kosgei. He testified that the Appellant is his father's brother. On December 27, 2015 at 5 pm he had been given work by one Lucy Kemboi who is the wife of one late Ambrose who was also a brother to the Appellant, he worked until 5 pm using a tractor, the Appellant came driving his Land Cruiser, Lucy's sons Raymond (the complainant

in Count II) and Collins were there to oversee the work, the Appellant alighted from his vehicle and signaled PW1 to stop cultivating the shamba (piece of land for farming), PW1 stopped, the Appellant told PW1 that if PW1 insisted on continuing with the work he would kill him, Raymond came over to where they were and told the Appellant that there was need for threats, the Appellant told Raymond that he would kill him too, Raymond tried to explain to the Appellant that the land was theirs and they had nowhere else to go. The Appellant left but after telling them that when he returns he will kill them if he found them there, they made the decision to leave and go home which they did, since it was already 6 pm they went and reported the next day at Kapsoya Police Station, they were told to return after 3 days, on 31/12/2015 they recorded statements, there is a dispute over land at home and the Appellant had never threatened him before, he just used to make noise.

6. Since the Appellant's Advocate was not in Court when PW1 gave his evidence-in-chief, upon the Advocate's Application, PW1 was later recalled for cross-examination. When recalled, PW1 testified that the land he was tilling was No 1558/5 registered in the name of Thomas Kipkurgat Cheptioni and William Murgor, Thomas was PW1's grandfather and father of the Appellant, he is deceased, Agnes Kurgat and the Appellant are the Administrators since they were given a Grant in a Succession Cause, PW1 had gone to till the land on December 12, 2015, PW1 had asked Agnes if he could go the land, he did not ask the Appellant, the family had not agreed on who would be the Administrators, PW1's mother Ascah had objected in the Succession Cause to the appointment of the Appellant as Administrator, there is a dispute over the land, he was sent to till the land by Lucy Kemboi who is the wife of Ambrose Kurgat who was also the Appellant's brother, Ambrose died in December 2017, he was buried after several months, the burial delayed because Lucy wanted the deceased buried where they had built their house, the Appellant wanted the deceased buried elsewhere, the case went all the way to the Court of Appeal and the decision was in favour of the Appellant.

7. PW1 added that there was a dispute between the Appellant and Lucy over the land, Lucy is tilling it, PW1 reported the case on December 28, 2015 and recorded a statement on December 31, 2015, the officer who recorded his statement was one Corporal Wanyonyi, they spoke in Kiswahili and English, on December 27, 2015 when the Appellant came to the land he spoke to PW1 in Kalenjin and Kiswahili, the threats were issued in Kiswahili, the words were "*nitakumaliza usiposimamisha hiyo tinga wewe ama Raymond*", PW1 was about 10 metres away, the tractor engine was running, there were no Kiswahili words in PW1's statement.

8. PW2 was Raymond Koech the complainant in Count II. He stated that on December 27, 2015 his brother Collins and himself were sent by their mother Lucy Kemboi to go and supervise their land at Kimoning being tilled, they were using their cousin's tractor because the Appellant had taken their tractor, PW1 was the one who was tilling the land with his tractor, at about 5 pm the Appellant came and told them not to continue tilling the land, he made noise then left saying that "*ninaenda lakini nitarudi nitawamaliza*", he told PW2 that the beating PW2 had received from the Appellant's sons was nothing compared to what he will do to PW2, PW2 had earlier been assaulted by the Appellant's son, after 1 hour PW2's mother called PW2 on phone and told PW2 that the Appellant had told her he would kill PW2 and that she was in distress, PW2 told her mother to go and report at Tambach Police Station, on December 28, 2015 they reported at Kapsoya Police station, since their father died in 2012 the Appellant took their father's car and tractor and since 2014 the Appellant was cultivating their land by force, the land used to belong to their grandfather, everyone was given a portion, the Appellant sold their tractor recently after he had transferred it to himself without waiting for the Succession case to end.

9. PW2 was also recalled for cross-examination because similarly the Appellant's Counsel was not in Court when PW2 gave his evidence-in-chief. On being recalled he testified that on December 27,

2015 when the Appellant came to the land they spoke in Kiswahili, PW2 stated that "*mukiendelea kulima hii shamba nitauwa wewe na Kemei*", the police officer who recorded their statements was one Corporal Wanyonyi, they spoke to him in English, he told the officer in Kiswahili, there were Kalenjin and Kiswahili words in his statement, the officer is a Luhya and he did not understand Kalenjin, PW2 was educated by his father Ambrose Kurgat, his father Ambrose died in the year 2011, his school fees was paid by one Hillary, the Appellant never paid his fees, in 2019 his father was sick and could not till their land so he leased his portion of the land to the said Hillary, PW2's father left 6 children, there are others whom he does not know, there are some 3 other children whom the Appellant alleges are also PW2's father's children, the Appellant alleges that he is the one who is educating these other alleged children, the Appellant alleges that he wants to lease the land to enable him educate them, when they went to till the land they did not have the Appellant's instructions. In Re-examination, he stated that when the Appellant uttered the words, PW2 was near PW1 who had alighted from the tractor.

10. PW3 was one Collins Kiprop Koech. He stated that he was a university student and testified that the Appellant was his father's brother, the complainant was his cousin, PW2 his stepbrother, on December 27, 2015 at about 5 pm they were sent to the piece of land by their mother, he went with PW2 to check how PW1 was digging the land, at about 5 pm the Appellant arrived and asked what they were doing, the Appellant stated that the land was left to him by his late father so he was the only one who had a right to decide who is to till it, PW1 was using a tractor, he stopped and came to where they were, the Appellant told them "*muache kulima hii shamba mukiendelea nitawamaliza*", the Appellant then drove off, they left and went home, the next day they reported at Kapsoya Police station that the Appellant had threatened PW1 and PW2, they have a land dispute at home over inheritance, the land was being tilled by their father and had leased it to another cousin, when their father died they decided to work on the land by themselves.

11. PW3 was similarly later recalled for cross-examination for the same reason that the Appellant's Counsel was absent in Court when PW2 gave his evidence-in-chief. On being recalled, he testified that they talked with the accused for about 30 minutes, they were talking in loud voices, the Appellant was talking in both Kiswahili and Kalenjin languages. In conclusion, he stated that he recorded his statement at the police station in Kiswahili on December 27, 2015.

12. PW4 was one Daisy Kurgat Cheruiyot. She stated that she was a law student and testified that the Appellant was his paternal uncle, PW1 is her brother and PW2 her cousin, on December 27, 2015 at 5 pm they were at home at Kimoning, she was keeping Lucy Kemboi (widow of Ambrose Kurgat) company, Ambrose was her uncle and brother of the Appellant, Lucy had instructed PW1 and PW2 to go and till the land that Lucy's husband used to till, the Appellant appeared and drove towards where they were, parked next to them and started throwing words at them, the Appellant said that PW1 and PW2 should stop ploughing the land and if they insist on continuing he would kill either of them, PW4 was standing about 5 metres away, she heard him clearly, he spoke in Kiswahilii, he said "*shuka kwa tractor wacha kulima mimi ndiye mwenye shamba mukiendelea kupanda nitawaua*", he also told them that they would face dire consequences, he said "*mukiendelea mutaniona*", since they were afraid they retreated, went home and told them to report to the police, the matter was reported on January 28, 2015, PW4 recorded her statement on December 31, 2015. In cross-examination, she stated that they spoke to the police officer who recorded their statements in English, she did not tell the police officer what the Appellant said in English, she was about 10 metres from PW1, the engine to the tractor was running when the Appellant made the threats, PW1 was off the tractor, when the threats were made the tractor was about 3 metres away from where she was, she was not aware that there is a dispute over the use of the land

13. PW5 was one Anna Jepkoech Komen. She testified in the Keiyo language which was then translated. She testified that the Appellant is her brother-in law, on December 27, 2015 at 3 pm she was in the house when the Appellant called her on phone and asked her whether she had been told that PW5's brothers had beaten her son and injured him, she told him that that they would be back to finish the job and beat Kipchumba (her son), she then called her son and informed him of the phone call, the son told her to report, PW5 then went and reported at Tambach, Kipchumba told her that he had been assaulted by the Appellant's sons and that they had disagreed over land. In cross-examination, she stated that she recorded her statement at Tambach police station, her son who had been assaulted is Raymond Kipchumba Koech (PW2), the Appellant's phone call was at 3 pm, she has a child with the Appellant's brother, she has a phone on which she had saved the number, she had not told the Court the number, she did not have the call records, the voice on the other side was the Appellant's.

14. PW6 was one Corporal David Wanyonyi. He stated that he was formerly of Kapsoya Police Post, he was the investigating officer in this case, on December 28, 2015 at 3 pm PW1 and PW2 came to the station and recorded statements that they had on January 27, 2015 at 4 pm been threatened by their uncle who is the Administrator of their late father's estate, the Appellant found the two in the shamba tilling with a tractor and threatened that if they did not stop tilling the land he would kill either of them, that they removed the tractor and went home, and that on the same day the Appellant called PW2's mother and told her to go and tell her son to forget about the land or he would kill him, PW6 recorded the statements of PW1 and PW2 and those of their witnesses and came to the realization that the complainants had been threatened, in his investigations he also found that the Appellant's son Robert Kemboi had assaulted PW2, following the threats of the Appellant they decided to report to the police, PW6 summoned the Appellant, gave him police bond and he was later charged before Court.

15. In cross-examination, he testified that the threats were made at 4 pm, the complainants came to the station at 3 pm the next day, the land is about 20 kms from Kapsoya Police Staion, he confirmed the statement that PW5 (PW2's mother) had been called on phone by the Appellant, the mother gave PW6 her phone number and that of the accused, he however did not have records to show that the phone communication took place, he later found that there was a land dispute between the complainants and the Appellant, in his investigations he found that the threats were made in the Kiswahili language, that the Appellant said "*nitakumaliza wewe na Raymond msipo simamisha hiyo tinga*", he however conceded that there is no Kiswahili words in his statement nor in the Charge sheet nor in his investigations file, he will be surprised if anyone were to tell him that the conversation between the complainants and the Appellant was in the Kalenjin language, he did not establish in whose name the land was, he was told that the Appellant was the administrator and that he was not investigating the power of administration.

16. At the close of the prosecution case, the Court made a finding that there was a case to answer and put the Appellant to his defence.

**Defence evidence**

17. In his defence, the Appellant gave sworn testimony as DW1. He stated that on December 26, 2015 he had sent his son Kipkemboi Robert to till the land of his brother, the land belongs to the family, it has not been subdivided, he is the Administrator of the estate of his father Thomas Cleption, on December 27, 2015 he went there by himself, on January 26, 2015 his son had been chased away by the complainants (PW1 and PW2), they used to till the land so that they could pay fees for the children of his late brother Ambrose Kurgat, when he went there on January 27, 2015 PW2 who had also been educated using proceeds from the same land was tilling it, the Appellant told them to stop because there are 3 other children who were to go to secondary school, they did not stop, they were about 8 of

them including PW1, the Appellant told them that he was going to get elders to come and resolve the issue, before he could call the elders he was called to the police station and charged with threatening to kill the complainants, he only told them that they should not disagree over land because there are many people who have killed each other over land.

18. In cross-examination, he stated that Ambrose was his elder brother, the land belonged to their father who died before Ambrose, Ambrose was residing on that land, they used to till the land and use the proceeds to pay school fees, Ambrose's wife lives on the same land, PW1 and PW2 are sons of Ambrose by 2 other women, the Appellant used to cultivate the land even when Ambrose was alive, the complainants did wrong to cultivate the land without telling the Appellant, they have another parcel of land, there however are no orders stopping them from cultivating, Ambrose said that his children should not cultivate the land until all the children had finished school. In Re-examination, he stated that he sent his son to cultivate the land because he used to cultivate it and pay fees for Ambrose's child.

**Judgment of the trial Court**

19. After analyzing the evidence, on December 17, 2021 the trial Court found the Appellant guilty and convicted him. Afterwards, a pre-sentence Probation Report was prepared and submitted to the Court. After mitigation and upon considering the Report, on January 21, 2022 the trial Magistrate sentenced the Appellant to 18 months' Probation.

**Grounds of Appeal**

20. Being dissatisfied with the decision, the Appellant lodged this appeal on 23/1/2022. The Petition contained 6 Grounds as follows:

    i. That the learned trial Magistrate erred in law and fact in relying on contradictory evidence to convict him.

    ii. That the learned trial Magistrate erred in law and fact in failing to find that there was absolutely no evidence to support the charge of threatening to kill, contrary to Section 223(1) of the *Penal Code*.

    iii. That the learned trial Magistrate erred in law and fact in introducing extraneous factors to the case and in particular ignoring the circumstances in which the offence is alleged to have been committed.

    iv. That the learned trial erred in law and fact in convicting the Appellant on uncorroborated evidence and totally disregarding the defence case.

    v. That the learned trial Magistrate erred in law and fact in failing to establish the exact word(s) alleged to have been uttered by the Appellant.

    vi. That the learned trial Magistrate erred in law and fact in failing to find that the prosecution did not prove their case beyond reasonable doubt.

21. Parties then filed written submissions. The Appellant's Submissions were filed on January 26, 2023 through Messrs F. Omondi & Co. Advocates while the Respondent's Submissions were filed on January 17, 2023 through Prosecution Counsel Hellen Githaiga.

**Appellant's Submissions**

22. The Appellant's Counsel stated that although the Petition of Appeal comprises 6 grounds, he was consolidating the same and submitting on a singular ground, being

> "whether the prosecution proved its case against the Appellant to the required standard".

He also emphasized that the Appeal is on conviction only.

23. He began by quoting the decision in Nairobi High Court Criminal Appeal No 35 of 2019: - Martin Nganga Kamanu in which he submitted that the Court laid down the ingredients of the offence of threatening to kill. He submitted that the first thing that the prosecution ought to have proved was that the Appellant without lawful excuse uttered the words "I will kill you", according to PW6 (the investigating officer) the complainants made a report about being threatened by the Appellant, in cross-examination the officer stated that the alleged threat was made at once to the two complainants in Kiswahili, the words allegedly uttered were "*nitakumaliza wewe Raymond msiposimamisha hiyo tinga*', the charge sheet was prepared by the officer on the basis of the alleged statement, evidently the complainants never told the officer that the Appellant uttered the words quoted in the charge sheet, PW1-PW4 were all present when the Appellant allegedly uttered these words, however evidence on record show that each heard different words uttered, these witnesses were young and educated, it is inconceivable that they all heard different statements,

24. He added that the witnesses never testified to hearing the accused utter the words "I will kill you", the prosecution therefore failed to prove that the Appellant uttered those words. He posed the question that; assuming that indeed the Appellant uttered the words "*nitawamaliza*" could that amount to threatening to kill someone within the context of the case? the word simply translates to "I will finish you" which can mean many things including "I will defeat or exhaust you", context was therefore key, the Appellant was the Administrator of the estate of his deceased estate's father, the land the complainants were cultivating forms part of the estate, the Appellant was therefore within his powers, without clear proof that he threatened to kill the complainants it cannot be argued that he was possessed of a criminal mind.

25. On proving that the complainants perceived that they were under threat of losing their lives, Counsel argued that the evidence of the complainants does not bring out any perception by them that their lives were in danger, whereas the accused was all alone the complainants were in the company of PW3 and PW4, the evidence of PW1's mother was not corroborated by any call logs to show that the witness and the Appellant had a conversation, the Appellant's evidence was not shaken, the Court fell in error when it termed this evidence as not being corroborated, there is no such requirement in law, PW1 told the Court that the Appellant made the threats in Kiswahili, the Appellant was 10 metres away, the tractor engine was running, it is inconceivable that a person's voice would be audible from 10 metres when a tractor engine is running, PW2 on the other hand stated that the Appellant spoke in Kalenjin, if indeed the threat was made in one statement it stands to reason how PW1 could hear it in swahili and PW2 in Kalenjin. He prayed that the Appeal be allowed.

**Respondent's Submissions**

26. On his part, the Respondent's Counsel submitted that there was no lawful excuse for the accused to utter the word "*nitawamaliza*" to the complainants, the complainants had a right to the land and there was no order barring them from utilizing it.

27. On the ingredient that it "directly or indirectly causes any person to receive a threat", Counsel quoted the decision in *Phenias Njeru Karanja v Republic* [2015] eKLR in which he submitted that it was stated that the trial magistrate required to consider the offence in the aspect of lawful excuse "utters or indirectly or directly causes any person to receive a threat", the Appellant was very specific when he uttered the word "*nitawamaliza*" to the complainants, it was meant as a threat.

28. On the ingredient that "the threat may be in writing or verbal", Counsel submitted that the words were uttered by the Appellant, clearly heard and the intention well noted, the witnesses corroborated each other and that the words were uttered in the Kiswahili language. On the ingredient that "it must be a threat to kill any person", Counsel submitted that the word "*nitakumaliza*" translated to English would mean "I will finish you" and that the finality of this statement would simply translate to death.

29. Counsel submitted that although the words in the charge sheet were in English there was no prejudice suffered as the Appellant was able to plead and even defend himself against the same and that the witnesses corroborated each other. He prayed that the Appeal be dismissed.

**Analysis and determination**

30. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned Judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses (see *Okeno vs Republic* [1972] EA 32)

**Issues for determination**

31. In my view, the single issue that arises for determination in this appeal is "whether the prosecution proved its case beyond reasonable doubt. I now proceed to analyse and answer the said issue.

32. Section 223(1) of the *Penal Code* provides as follows:

> " 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."

33. The prosecution was therefore required to establish that the Appellant, without lawful excuse, uttered words which amounted to a threat to kill the complainant. It must also be established that the uttering of these words was made in the context that the complainants perceived that they were under threat of losing their lives. 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 (see *Phenias Njeru Koru v Republic* [2015] eKLR)

34. In this case, the charge sheet states that in both counts, the Appellant uttered the words "I will kill you". However, in the prosecution evidence, it was stated that the words were uttered in the Kiswahili language. The first burden for the prosecution was therefore to demonstrate that, considering the context involved, the words used in Kiswahili actually translated to the meaning stated in the charge sheet as "I will kill you".

35. What this Court must first establish is whether in the first place, there is room in our criminal laws for the words uttered in a different language to be translated and reproduced into the charge sheet in the English language. In other words, in this instant case, was it proper for the words alleged to have

been uttered in Kiswahili to be reproduced in the charge sheet in the English language when the same were uttered in Kiswahili?

36. The second question is whether, in a charge sheet, the actual words uttered must be reproduced verbatim and in the same language in which they were uttered and in their entirety.

37. In *Mary Mati v Republic* [2015] eKLR, the Appellant was charged with the offence of creating a disturbance in a manner likely to cause a breach of the peace. In dismissing the ground of Appeal that the charge sheet was defective, Thuranira Jaden J held as follows:

> " The particulars of the offence were that on the "10th day of June 2009 in Kyuso District within Eastern Province created a disturbance in a manner likely to cause a breach of the peace by telling BNJ that she has Aids in her hotel in presence of customers.". In reference to the ground of Appeal that the charge sheet was defective, Thuranira Jaden J held as follows:
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> The particulars of the offence as stated in the charge sheet refers to the complainant being told that she has AIDS. The other abusive words to wit murderer or witch, prostitute and bleeding were not stated in the charge sheet. According to the Appellant, this made the evidence to be at variance with the particulars of the offence, thereby making the charge sheet defective. However, the court's view is that the charge sheet is not defective as it is clear and discloses an offence known in law. As stated in the case of Sigilani –vs- Republic (2004) 2 KLR, 480;
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> "The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".

38. In *Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko (Interested Party)* [2020] eKLR,, the Petitioner had been charged before a criminal Court with the offence of incitement to violence. He filed a constitutional Petition challenging the criminal charge on various grounds. One of his grounds was that the words he was alleged to have uttered did not contain any elements of violence, incitement or hate and that if one gave the said words their natural meaning, they would not meet the threshold of incitement to violence as contemplated under the relevant provisions of the Penal Code.

39. In dismissing this one ground, a three Judge High Court bench held as follows:

> " 46. The law contemplates that there may be occasions when there may be an error, omission or irregularity in a charge sheet. In addition, there may be errors, omissions or irregularities that may defeat a charge. However, whether such an error, omission or irregularity is incurable will depend on whether it occasions a miscarriage of justice. This is the foundation of Section 382 of the Criminal Procedure Code[21] which provides:
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> > "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this

Code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice shall have regard to the question whether the objection could and should have been raised at an early stage in the proceedings."

40. In *Chelagat Mutai v Republic* [1977] eKLR, the Appellant had moved to the Court of Appeal to challenge her conviction on a charge of incitement to violence and disobedience of law. In dismissing the Appeal, the Court stated as follows:

> " Mr Muthoga for the appellant argued three grounds of appeal before us. The first was that the charge was defective, in that the actual words allegedly uttered by the appellant were not particularised. Mr Muthoga submitted that the failure to state the actual words meant that the appellant did not know what was alleged against her, and that this had led to a failure of justice. The High Court, in dealing with this submission, held that the charge as framed was legally valid, as it satisfied the requirements of section 134 of the Criminal Procedure Code, in that it supplied the appellant with such particulars as were necessary for giving reasonable information as to the nature of the offence charged. We are of the same opinion. Mr Muthoga sought to draw an analogy between the charge in this case and a charge of sedition in which, according to him, "the actual words used must be set out". No forms of stating offences contrary to section 96 of the Penal Code, or section 57 which deals with seditious offences, are prescribed in the Second Schedule to the Criminal Procedure Code, but reference to Archbold: Criminal Pleading, Evidence and Practice (38th Edn), paragraph 3150 gives the following precedent for particulars in a sedition charge, "A B ... uttered a seditious speech the purport of which was (state in ordinary language)". This does not support Mr Muthoga's submission that in cases of the nature of the one now under consideration, the actual words allegedly uttered must be particularised. This ground of appeal fails.

41. What I understand from the foregoing is that as long as the charge sheet contains or discloses an offence known in law, the same is sufficient. Elaboration on the rest of the particulars is then a matter for evidence. Secondly, an error, omission or irregularity in a charge sheet will only be deemed to be fatal where it occasions a miscarriage of justice. Lastly, it is not mandatory that the actual words uttered must always be reproduced verbatim and in their entirety in a charge sheet.

42. In the circumstances, I find and hold that in this instant case the charge sheet was properly drawn as it disclosed an offence known in law. It supplied the appellant with such particulars as were necessary for giving reasonable information as to the nature of the offence charged. The burden on the prosecution was to then produce evidence during the trial that would align with the particulars stated in the charge sheet.

43. This now leads back to the second question; did the prosecution during the trial discharge its burden of producing evidence that aligned with the particulars stated in the charge sheet?

44. The Appellant's Counsel has argued that the first thing that the prosecution ought to have proved was that the Appellant without lawful excuse uttered the words "I will kill you". He argued that according to PW6 (the investigating officer), the complainants (PW1 and PW2) made a report about being threatened by the Appellant, that in cross-examination the officer stated that the alleged threat was made at once to the two complainants in Kiswahili, that the words allegedly uttered were "nitakumaliza

wewe Raymond msiposimamisha hiyo tinga', the charge sheet was prepared by the officer on the basis of the alleged statement, that evidently the complainants never told the officer that the Appellant uttered the words quoted in the charge sheet, PW1-PW4 were all present when the Appellant allegedly uttered these words, however evidence on record shows that each heard different words uttered.

45. He added that the witnesses never testified to hearing the accused utter the words "I will kill you". He posed the question that; assuming that indeed the Appellant uttered the words "*nitawamaliza*" could that amount to threatening to kill someone within the context of the case? the word simply translates to "I will finish you" which can mean many things including "I will defeat or exhaust you".

46. I agree with the Appellant's Counsel that in the circumstances of this case "context was key". However, my interpretation of the context in this matter goes against the Appellant. This is because in this case, there was a long-standing land dispute between the parties arising from family inheritance and succession. There was therefore an established motive to form a basis for issuance of the threat. I also take into account that there is evidence that earlier, the Appellant's son had a physical altercation with the complainants before the Appellant himself came to the scene in person ostensibly after receiving a report of the altercation.

47. The Appellants Counsel submitted that PW1 told the Court that the Appellant was 10 metres away when he made the threats and that the tractor engine was running. According to Counsel, it is inconceivable that a person's voice would be audible from 10 metres when a tractor engine is running. With due respect, I would term this submission as mere speculation which was not been proven in Court either scientifically or otherwise. In any event, I do not at all share the belief that a person's voice would not be audible from 10 metres when a tractor engine is running.

48. I also take into account PW2's testimony in which he quoted the Appellant to have stated, in cross-examination, that "*mukiendelea kulima hii shamba nitawaua wewe na Kemei*". Translated verbatim into English, the said words mean that "If you continue cultivating this land I will kill you and Kemei". PW4 also testified that the Appellant stated that "*shuka kwa tractor wacha kulima mimi ndiye mwenye shamba mukiendelea kupanda nitawaua*", (alight from the tractor, stop cultivating, I am the owner of the land, if you continue to plant I will kill you).

49. Although the natural and literal meaning of the word "*nitakumaliza*" as allegedly uttered by the Appellant, translated into English, means simply that "I will finish you", viewed from the unique context of this case as set out above and also the other subsequent words uttered by the Appellant as stated by the witnesses, I agree with the State Counsel's submission that the word was in this case intended to mean that "I will kill you". The word "*nitakumaliza*" as uttered by the Appellant, cannot in this case be considered on its own or in isolation as alluded to by the Appellant's Counsel. Considering the entire context, it is clear that the intended message was a death threat. I am convinced that the appellant did not merely utter the words in a joking or casual manner, but was in fact knowingly issuing a death threat.

50. The above is buttressed by the fact that there is evidence that immediately after uttering the said words. The Appellant called PW2's mother (PW5) on phone and angrily expressed his disapproval of the conduct of PW1 and PW2 and also appeared to boast and take pride in the fact that his sons had earlier reportedly assaulted PW2. He is even reported to have told PW5 that his sons would return to "finish" the job. Although the Appellant's Counsel has argued that the alleged phone conversation between the Appellant and PW5 was not proved to have taken place, I find that PW5's evidence was cogent and credible. Like the trial Magistrate, I choose to believe her.

51. The Appellant had no lawful excuse to issue the threats to the complainants. In his defence he referred to the long-standing land or succession dispute between him and the complainants. To this Court, it

was irrelevant that there was a pending land dispute or that he was the Administrator of the estate in contention. He appeared to allege that he had a lawful excuse to intervene because the incident arose from the land dispute. In this case, the land or succession dispute pending in court was independent of the criminal charges. The burden for the prosecution was simply to prove the criminal charges against the appellant as required by law. There was no justification for the appellant to issue death threats to the complainants. Furthermore, the appellant did not show in his defence that he was maliciously and falsely accused by the complainants.

52. Like the trial magistrate therefore, I find that the prosecution proved the case against the appellant beyond reasonable doubt for the offence of threatening to kill. The Appeal against conviction will thus be dismissed.

**Final Orders**

53. In the premises, the Appeal is found to be devoid of merits and is hereby dismissed.

**DELIVERED, DATED & SIGNED AT ELDORET THIS 12TH DAY OF MAY 2023**

**.....**

**WANANDA J. R. ANURO**

**JUDGE**