



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwenda v Republic (Criminal Appeal E046 of 2022)  
[2023] KEHC 18768 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18768 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E046 OF 2022  
MS SHARIFF, J  
JUNE 20, 2023**

**BETWEEN**

**DUNCAN MWENDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the original conviction and sentence of R. Ongira Resident Magistrate Tigania In Criminal Case No. E 053 of 2020 delivered on the 16 th day of February 2020)*

**JUDGMENT**

**Introduction**

1. The appellant was convicted and sentenced to imprisonment for 7 years for the offence of threatening to kill contrary to section 223(1) of the [Penal Code](#), with particulars as follows:

“Duncan Mwenda: On the August 28, 2020 at Marimba village in Tigania central Sub-county within Meru South county, jointly with another before court without unlawful excuse uttered words threatening to kill Asunta Kagendo Kabiritu.

2. The offence of threatening to kill is set out in section 223 (1) of the [Penal Code](#) as follows:

“223. Threats to kill

- (1) 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.”

3. The appellant’s case was consolidated with criminal case No 474/2020: *R v Alex Marete*.



- 4) The prosecution called four witnesses and the appellant when placed on his defence gave sworn testimony but did not call any witness.

### **The Appeal**

5. Being dissatisfied with the judgment of the court, the appellant filed an appeal on March 11, 2022 challenging both his conviction and sentence on the following grounds:
  - i. That the appellant has a piece of land where he grew vegetables and the complainant, his immediate neighbor let her chicken into the farm and his vegetables were destroyed.
  - ii. That the complaint was a framed up one and that when the appellant had met the complainant he only told her to lock up her chicken lest he poisons and kills all of them.
  - iii. That the appellant and his co accused were from the farm and indeed had machetes but only told the victim to lock up her chicken and did not threaten her.
  - iv. That the appellant is an orphan who engages in casual work but the world has been un fair to him and his conviction was not grounded on factual evidence and that the sentence of 7 years imprisonment meted on him was harsh and the trial court disregard his mitigation. Further that he was law abiding and reformed.

### **Appellant's Submissions**

6. The appellant filed written submissions on January 11, 2023 titled appellant's grounds of appeal and proceeded to set out four new grounds of appeal as hereunder:
  1. That the prosecution's case was not proved beyond any reasonable doubt.
  2. That the trial court relied on contradicting and un collaborated (sic) evidence.
  3. The trial court failed to consider an existing feud between the appellant and the complainant's family.
  4. That his defense was rejected without cogent reasons.
7. The appellant then proceeded to submit on his new grounds of appeal without complying with the provisions of section 350 (2) of the *Criminal Procedure Code* cap 75 Laws of Kenya which provide as follows;

350.

- (1) ..
- (2) A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal:  
Provided that—



- (i) subject to the provisions of paragraph (ii), where, within five days of the date of the judgment or order appealed against, the appellant or his advocate has applied to the subordinate court which passed the judgment or made the order for a copy of the record of the proceedings before that court, and where the appeal is entered within the period of limitation prescribed by section 349 but before receipt by the appellant or his advocate of the copy of the record, the petition of appeal may be amended on notice in writing to the Registrar of the High Court and to the Director of Public Prosecutions and without leave of the High Court, within seven days of the receipt by the appellant or his advocate of the copy of the record applied for;
  - (iv) save as provided in paragraph (i), a petition of appeal may only be amended with the leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose;
  - (v) notice in writing of an application for leave to amend a petition of appeal shall be given to the Registrar of the High Court and to the Attorney-General not less than three clear days, or such shorter period as the High Court may in any particular case allow, before the application is made; and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open court.
8. The amended grounds of appeal are therefore improperly filed and I thus expunge them from the court record. The submissions that are based on the said expunged grounds of appeal suffer the same fate and are inconsequential to this appeal.
9. In the absence of submissions on his valid grounds of appeal I note the said grounds although unsubstantiated contain admissions that the appellant and his friend were armed with machetes when they accosted the victim and the appellant was desirous of poisoning and ultimately killing the complainant's chicken

### **Respondent's Submissions**

10. The state opposed the appeal in submissions dated 13<sup>th</sup> January 29, 2023 and cited the case of *Martin N'gan'ga Kamanu v Republic* (2020)eKLR which held that for a successful prosecution for the offence of threatening to kill it must be established ;
- a) That the appellant without lawful excuse uttered words amounted to a threat to kill the complainant.
  - b) The uttering of these words must be made in the context that the complainant perceives that he is under the threat of losing his life.
  - c) 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.

### **Analysis Of Evidence**

11. Given that this is a first appellate court, I am duty bound to analyze and re-evaluate the evidence and make my own conclusions while bearing in mind that I do not have the advantage of the trial court



which saw and heard the witnesses and was able to assess their demeanor. In *Okeno v R* (1972)EA 32 the court rendered itself as hereunder:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* [1957 EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters v Sunday Post* 1978) EA 424.”( Also see *Pandya v R* ( 1957) EA336.)

12. PW1 testified that the appellant and his co accused who were both carrying machete’s accosted her on her way home after coming from her neighbor Benjamin Ratanya and informed her that they were going to kill her as she was the one who was encouraging people to report the crimes of the appellant and his accomplice. They intimated that after killing her they would kill her husband were he to show up. the complainant screamed and her screams attracted Peninah a neighbor who was approaching. The latter admonished the assailants and whilst the appellants and his accomplice attention was momentarily diverted the complainant ran to the house of Maina who in turn got out and warned the appellant and his friend who were in earnest pursuit of the complainant while still wielding their machetes, not to kill the complainant in his home into the house and the complainant the ran to the house of David Mwaniki where she locked herself in. The appellant and his friend pursued her and banged furiously on Davids house door and only relented when David’s father one John Maina Mtoikiba who was in his farm was drawn out by the screams emanating from his homestead and hence went to establish what the cause of the noise was.
13. PW2 corroborated PW1’s testimony and said that after hearing the complainants screams he left his farm and went home only to find the appellant and his co accused who were armed with pangas telling the complainant that they must cut her up. This witness admonished the appellant and his accomplice in vain and they persisted in threatening the complainant who continued screaming thus attracted a crowd. The appellant and his friend ran away when the crowd started to grow.
14. PW3 corroborated PW1 and PW2 testimonies: she heard screams and went to investigate the cause only to find the appellant and his friend who both had pangas telling the complainant that they would kill her and her husband were he to come to her rescue. She pleaded with the appellant and his friend to leave the complainant alone. She thereafter went and made a report recoded at Kunati Police Station.
15. PW4 who took over the file from the initial investigating officer testified on the events as per the police file. He confirmed that PC Peter Maina had upon receiving the complaint and recording witnesses’ statements visited the scene. Arrests were later made on September 6, 2020 and October 20, 2020 as the appellant and his accomplice were at large.
16. The appellant gave sworn defence. He conceded that indeed on the material day he and his friend were carrying pangas when they met the complainant but he maintained that they were coming from his farm hence the presence of the pangas. He explained that he had a long standing land boundary dispute with the complainant who habitually let her chicken fed on the appellant’s vegetable farm despite pleas from the appellant to confine them. He maintained that the charges were trumped up and that he was assaulted by the police who declined to hear his side of the story.



## Determination

- (17) I have analyzed, scrutinized and re-evaluated the evidence of both the prosecution and the appellant and I find that the prosecution had indeed proved that the appellant and his co accused had threaten to kill the complainant contrary to the provisions of section 223(1) of the *Penal Code* beyond any reasonable doubt.
- (18) The appellant and his co accused did not only make the requisite utterances but went ahead and pursued the complainant in Maina's homestead and eventually in David Mwaniki's house, save for the intervention of the neighbours they would have camped outside that door awaiting the complainant's exit. The proximity of the appellant to the complainant was widen by the afore narrated intervening factors thus prevented the appellant and his friend from striking any blow at the complainant, in which event their actions would have constituted the offence of an attempted murder.
19. The appellant has consistently been unremorseful throughout the trial and during the pendency of this appeal. The probation report was unfavourable.
20. The appellant spent 14 months and one week in custody prior to his conviction wherefore I accordingly invoke the provisions of section 333(2) of the *Criminal Procedure Code* and subject his sentence to a remission of the said period.

## Orders

1. On the balance I find that the appellant's appeal lacks merit and the same is dismissed.
2. The appellant's sentence imposed by the trial court shall be computed from October 21, 2020.

Order accordingly.

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF MARCH 2023**

**MWANAISHA. S. SHARIFF**

**JUDGE**

### Appearances:

Appellant in Person.

Prosecution Counsel for the DPP.

