



**Mohamed v Republic (Criminal Appeal E004 of 2023)  
[2023] KEHC 20080 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20080 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL APPEAL E004 OF 2023**

**JN NJAGI, J  
JULY 7, 2023**

**BETWEEN**

**IBRAHIM MOHAMED ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon.C. Wekesa, PM,  
in Marsabit CM's Court Criminal Case No.E149 of 2021 delivered on 15/3/2023)*

**JUDGMENT**

1. The appellant was convicted of the offence of threatening to kill contrary to section 223(1) of the [Penal Code](#) and was sentenced to serve four years imprisonment. The particulars of the offence were that on February 23, 2021 at about 0840 hours at Marsabit law courts area in Marsabit central sub county within Marsabit county without lawful excuse uttered threatening words to wit, “sijes,” in Borana language meaning “I will kill you” threatening Guyo Adu Hirbo (herein referred to as the complainant).
2. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that the appellant was not accorded a fair trial; that the trial court failed to note that the investigations were shoddy; that the trial court did not consider his defence and mitigation and that the sentence meted out was harsh and excessive.
3. The case for the prosecution is that the appellant was at the material time facing a sexual offence case at Marsabit law courts where he was charged with defiling the complainant’s daughter. That on the



material day at around 8.40 am the complainant was outside the gate to the law courts when the appellant arrived on a motor bike. The appellant told the complainant that:

“ You have taken me round this earth with issues, you have become too much in this town so I have to cut your neck today, so that I can be taken back to prison again.”

4. That the complainant entered into the court compound and reported to a lady who was at the gate that the appellant was threatening to cut him into pieces. The lady advised him to enter into open court room. He did so. Later, the magistrate started the court session. He raised up his hand and informed the magistrate of what had happened. The magistrate told him to report to the police. He went and reported at Marsabit Police station. PC Jane Refa PW2 arrested the appellant and charged him with the offence.
5. The appellant in his defence stated in a sworn statement that on the material day he was attending court over a sexual offence case that he was facing. The complainant was a witness in the case. That it was during corona time and members of the public were outside the court entrance. He and the complainant were among the people. He heard the complainant telling the security officer who was manning the gate that he, the appellant, had threatened him. That when the court convened the complainant raised his hand and told the magistrate that the appellant had threatened him. He was asked about it and he denied it. He was charged with the offence. He denied the charge. He said that the case was fabricated. That no independent witness was called in the case.
6. The appeal was canvassed by way of written submissions. The appellant submitted that the threatening words that the complainant told the court were different from those that he reported to the investigating officer, PW2. That the word used in the charge sheet “sijes” was not contained in the evidence of the complainant when he testified in court. Further that there were many people at the court entrance premises but the complainant did not call any of them to testify in the case.
7. The appellant submitted that the complainant was the father to the child in the defilement case that he was facing. That the complainant was in a position to fabricate evidence against him for ulterior motives.
8. The state on the other hand through the learned prosecution counsel, Mr. Otieno, submitted that the particulars of the charge were that the appellant threatened the complainant by uttering the word “sijes” that means in Borana language that “I will kill you.” However, that the complainant in his evidence in court complained of a different threat which the appellant was not charged with. The prosecution thus conceded to the appeal.
9. I have considered the grounds of appeal and the submissions by the Appellant and the learned prosecution counsel. It was clear from the evidence adduced before the trial court that the complainant had a grudge against the appellant over a defilement case wherein the complainant was accusing the appellant of having defiled his daughter. The complainant alleged that the threats were uttered outside the entrance to the court in the presence of other people. However, none of these people was called to corroborate the complainant’s evidence that the appellant uttered threatening words to him.
10. The only word captured in the charge sheet is “sijes” which was said to mean in Borana language that “I will kill you”. The complaint in his evidence in court never mentioned that word or words to that effect. He instead testified that the appellant told him that:

“ You have taken me round this earth with issues, you have become too much in this town so I have to cut your neck today, so that I can be taken back to prison again.”



11. The whole of this phrase does not contain the words to the effect that “I will kill you.” Did the appellant then utter the words as captured in the charge sheet or as testified by him in court? The discrepancy in the evidence created the impression that the complainant was not a credible and reliable person. It may not have been safe to base the conviction on the evidence of the complainant considering that he was the only witness as to what happened on the material day. In the case of *Ndungu Kimani vs Republic* (1979) KLR 282, the Court of Appeal held that:-

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

12. The state conceded to the appeal due to the discrepancy contained in the charge sheet and what the complainant stated in court. I find that the state correctly conceded to the appeal. Considering the fact that the complainant and the appellant were not in good terms, the complainant may have fabricated the evidence against the appellant due to their then ongoing case of defilement. The appellant should have been accorded the benefit of doubt that the case was not proved beyond reasonable doubt. The conviction of the appellant was not safe.

13. The upshot is that there was insufficient evidence to sustain the charge of threatening to kill against the appellant. In the premises, the conviction is quashed and the sentence meted out on the appellant set aside. I order that the appellant be set at liberty forthwith unless lawfully held.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 7<sup>TH</sup> JULY 2023**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

Mr. Otieno for Respondent

Appellant – present in person

Court Assistant - Jarso

14 days R/A.

