



REPUBLIC OF KENYA



**Barnabas v Republic (Criminal Appeal E056 of 2022)
[2023] KEHC 23475 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E056 OF 2022
GMA DULU, J
OCTOBER 11, 2023**

BETWEEN

JOSEPH NDUNGE BARNABAS APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case No. E199 of 2022 at
Taveta Law Courts delivered on 24th June 2022 by Hon. C. L. Adisa (RM))*

JUDGMENT

1. The appellant was charged with threatening to kill contrary to section 223(1) of the *Penal Code*. The particulars of offence were that on 11th November 2021 at Vikwani village within Taita Taveta County, without lawful excuse uttered words threatening to kill Mwarabu Gabriel.
2. He was also charged with a second count of malicious injury to property contrary to section 339(1) of the *Penal Code*, the particulars of which being that on 4th October 2021 at Vikwatani village Taveta Sub County of Taita Taveta County, wilfully and unlawfully damaged the semi-permanent house, the property of Robert Okwemba Odiaga.
3. He denied the two charges. After a full trial, he was convicted on the charge of threatening to kill but acquitted of malicious injury to property. He was sentenced to ten (10) years imprisonment for threatening to kill.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-
 1. Whether the trial Magistrate considered all the circumstances of the case before convicting him.



2. Whether the prosecution had powers to summon all the witnesses who were mentioned by PW1 for conformity with issues raised before court.
3. Whether the evidence of PW1 was corroborated by the evidence of PW2.
4. Whether he had any burden to prove his innocence.
5. 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.
6. This being a first appeal, I have to start by reminding myself that I am duty bound to reconsider and re-evaluate all the evidence on record, and come to my own conclusions and inferences – see *Okeno =Versus= Republic* [1972] EA 32.
7. At the trial, the prosecution called four (4) witnesses. On his part the appellant tendered sworn defence testimony stating that he merely met the complainant PW1 at his farm on the material day and stopped him to talk to him because he previously cut his fence.
8. From the evidence on record, both for the prosecution and the defence, it is clear that the appellant and the complainant knew each other well.
9. It is also clear that they met in broad daylight that day with the complainant passing on land which the appellant claimed to belong to him.
10. The difference between the prosecution and defence version of what transpired is that the complainant said in evidence that he was threatened with death by the appellant, while the appellant stated that he only stopped the complainant to talk to him because the complainant had previously cut his fence.
11. I note that the only witness who was called to support the complainant’s contention was his son PW2 Gabriel Mwarabu a minor of 8 years and who tendered unsworn evidence, and stated that the appellant “threatened to cut my father with a panga.” In cross-examination however, PW2 stated that this threat was in 2014, not the date of the alleged incident which was on 11th November 2021.
12. In addition, when the appellant stated on oath in his defence that the allegation of him threatening to kill the complainant was not true, and the prosecutor did not ask him a single question, thus leaving the sworn defence of the appellant to stand undoubted.
13. In view of the unchallenged sworn defence testimony, I have no alternative but to allow the appeal, as the appellant had raised therein sufficient doubt to the prosecution allegations to entitle him to an acquittal, as the prosecution had the burden to prove the allegation beyond reasonable doubt.
14. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF OCTOBER 2023 AT VOI IN OPEN COURT.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant



Ms. Ondeyo for State

