



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKUENI**  
**HIGH COURT CRIMINAL APPEAL NO. 110 OF 2017**  
**BONIFACE SUMBI MUTUKU....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with an offence of threatening to kill contrary to Section 22 3(1) of the Penal Code particulars being that on 04/02/2015 at Mukyamoni Village, Kilome Sub-location, Mukoa location within Makueni County without lawful excuse uttered words threatening to kill Morris Mbungo Muoki.

2. The Appellant pleaded not guilty and the case proceeded to trial. The trial court in her Judgement found Appellant guilty, convicted him and sentenced him to serve 2 years imprisonment.

3. Being aggrieved by the trial court's decision, the Appellant lodged the instant appeal and set out the following grounds:-

*a) The court erred in law and fact by relying on hearsay evidence.*

*b) The case was unproven against Appellant.*

*c) Case was not proved beyond reasonable doubt.*

*d) Court introduced extraneous matters.*

*e) The court relied on doubtful evidence.*

4. The parties agreed to canvass the appeal via submissions. The respondent via Mr. Orinda, assistant DPP tendered oral submissions and the Appellant relied on his written submissions.

5. The Appellant submitted that the evidence of identification was improper as PW1 alleged he saw Appellant using a torch while at a distance of 200 meters holding a panga and he told him he would kill him. This was at night 9.30 p.m.

6. The court never considered crucial matters as stated in the case of **MAITANYI -VS- REPUBLIC CR. APPEAL 6(1986) KLR** thus:-

*“It is at least essential to ascertain the nature of light available, its size and position relative to the suspect are all important matters helping to test the identification evidence with the greatest*

***care. It is not a careful test if none of these matters are known because they were not enquired into.”***

7. He also relied in the case of **WANGOMBE -VS- REPUBLIC (1980) KLR Page. 149** where court held;

***Thus “in this case guilty turned upon visual identification by one or more witnesses.....a reference to the circumstance, usually requires the courts to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged the position from the accused and the quality of lights.”***

8. The Appellant also complained that the investigation officer never testified in the matter. For that he relied on the case of **RAMSON AHMED –VS- REPUBLIC (1955) VOL. 22 PAGE 22 (EACA)** where court held thus:-

***“It is the burden of the prosecution to avail all material evidence to the court to enable the court to arrive at a fair and impartial decision. The prosecution must summon all material witnesses and avail or present the court with all facts, even whose evidence may have been unfavorable for it.”***

9. The panga allegedly snatched by PW1 was never produced. The Appellant thus prays for appeal to be allowed.

10. Mr. Orinda Assistant DPP submitted that the investigation officer (I.O) ought to have testified on this charge of threat to kill.

11. There are contradictions in witness testimonies PW2 and 3 are wife and mother of the PW1 respectfully. There is land dispute between the parties as Appellant wanted PW1 removed from the land Appellant claims his right over it.

12. There is defence evidence that PW1 and Appellant fought while drunk.

13. The Appellant was arrested in a sloop only to be charged for the offence.

14. The land dispute has since been resolved. PW2 and 3 evidence and time of alleged offence do not agree. Identification is also questionable. The investigating officer ought to have clarified the matter.

15. Thus the Assistant DPP submits that the conviction was unsafe and ought to have been as creating disturbances.

16. Thus the Assistant DPP concedes the appeal and seeks appeal to be allowed.

17. The duty of the trial court is re-evaluate the appeal on record and reach its own conclusion. See **OKENO VS REPUBLIC**. The prosecution called 3 witnesses. PW1 complainant testified that the Appellant is his cousin and they had land dispute.

18. On 04/02/2015 at 9.30 p.m., he was called by his wife (PW1) and informed that the Appellant was insulting people at home. He was told that the Appellant was drunk and threatened his wife and mother (PW2 and 3).

19. On his way from home he saw the Appellant using a torch. At 200 meters away from him. Appellant had a panga and he told him he would kill him. When he reached him, the Appellant threw panga at PW1 and ran away. The Appellant followed him home and while at home, PW1 got hold of him and took panga from him.

20. His brother came to the scene and so is his wife and mother PW2 and 3.

21. His brother (Michael) separated them. He reported at police station and Appellant was arrested and charged later. He said the Appellant threatened him due to land issues.
22. PW2 Ann Nduku Mbungu is PW1 wife. She testified that on 04/02/2015 at 9.30 p.m. while with her mother in law (PW3) at home, the Appellant went there drunk and said he would kill someone. He had a panga and stood at their gate. She called PW1 and while calling the Appellant left.
23. Later she heard noises outside and on getting out of the house, she saw Appellant holding PW1 and said he must kill PW1. She went and called her brother-in-law who came and separated the two. PW1 went and reported to the police.
24. PW3 Janet Katule Muoki PW1's mother testified that on 04/02/2015 while with PW2 at house, the Appellant went there and abused them and left. Later in the night he went back there and abused them using obscene words.
25. They called PW1 who told them that he was on the way. When Morris came, he snatched panga from the Appellant. Appellant left and said he will be back with bows and arrows.
26. PW1 reported to the police and Appellant was arrested and charged later.
27. The prosecution closed its case at this stage without calling arresting officer and the investigating officer.
28. The Appellant was put on his defence on a ruling by the trial court after finding him to have a case to answer.
29. He called two witnesses and he gave unsworn statement. The Appellant stated that he was drunk on 04/02/2015 and he was with PW1 and 3. They called elders to solve their case but they disagreed.
30. However the following day, they called a village elder who reconciled them. However since the report had been made to the police no action was taken.
31. After a month during operation at Kilome, he was arrested and charged with the offence.
32. DW2 Hassan Mutuku Muoki testified that at 9.00 p.m., he heard noise and when he went out he found PW1 and Appellant who were drunk fighting on the grass. He found Appellant bleeding from the forehead and told them to report to the police.
33. Appellant was referred to the hospital by the police and was issued with a P3 form. He did not have money to get same filled. He was later arrested during crack down and charged with the offence.
34. DW3 did not witness the incident but he was involved in the reconciliation over the land issues.
35. The defence closed its case at this stage.
36. After going through the material before the court, the evidence on record and the tendered submission, I find the only issue arising is:-

**1. Whether the prosecution proved its case beyond reasonable doubt?**

37. Section 223 of the penal code stipulates that:

***“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 10 years.....”***

38. The charge the Appellant faced talked of him threatening to kill PW1.
39. PW1 talked of Appellant making the threat to kill him while 200 meters away from him at night at about 9.30 p.m. or so. He had a torch. He does not say the words actually uttered or whether he torched the Appellant.
40. 200 meters away is quite a long distance to recognize somebody even in day time. It is even difficulty to get the words uttered by a person who is this far.
41. It is not credible that the PW1 actually recognized Appellant at that distance of 200 meters and even heard the threatening words uttered by the Appellant.
42. When PW2 called him, he says that she reported to him that the Appellant abused them.
43. PW2 did not tell PW1 that Appellant threatened to kill PW1. PW1 confirms that at home he had a scuffle same night with the Appellant and they were separated by his brother Michael. He attributes the source of their problem with the Appellant to the land dispute they have with the Appellant.
44. PW2 testified that Appellant went to their house at 9.30 p.m. drunk and threatened to kill someone. She never said the someone referred to was PW1. She confirms that at home in the same night the Appellant and PW1, had scuffle and had to be separated by her brother-in-law.
45. PW3 narrated that at 9.30 p.m. Appellant abused them using obscene words. Later PW1 and Appellant had scuffle at home and PW1 snatched panga from the Appellant. She never mentioned that Appellant threatened to kill PW1 at any moment.
46. The only person who talks about threat to kill PW1 is himself PW1. The court already found that at the distances he alleges to have heard the threat made was not possible to get the words uttered, and identify the person issuing threat, thus his testimony on threat to kill is rejected.
47. What emerges is that there was a scuffle at PW1 home between PW1 and the Appellant. PW3 confirmed it and so is PW1, and 3 plus DW2.
48. The court ought to have noted that the evidence tendered did not support the charge the Appellant was facing. The investigating officer and arresting officers ought to have testified to clarify on various issues emerging in the case including the fact that other witnesses at the scene were not called to testify.
49. The chances are that PW2 and 3 (wife and mother of PW1 respectively) were biased against Appellant.
50. In summary the prosecution case was not proved as per the fact in the charge and the ingredients in the offence charged. The court therefore agrees with the Assistant DPP concession that the conviction was unsafe.
51. The court therefore allows the appeal, quashes conviction and sets aside the sentence. The appellant shall be set free unless otherwise held.

**SIGNED AND DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF JUNE, 2017.**

**C. KARIUKI**

**JUDGE**

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