

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
APPELLATE DIVISION
CRIMINAL APPEAL NO. E028 OF 2025

PATRICK AMISHA.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(BEING AN APPEAL FROM THE CONVICTION AND
SENTENCE BY HON CRISTINE WEKESA (SPM)
DELIVERED IN MARSABIT SPMCR NO E017 OF
2025 ON 19th MAY 2025

BETWEEN

REPUBLIC.....
PROSECUTOR

VERSUS

PATRICK AMISHA.....
ACCUSED

JUDGEMENT

A. INTRODUCTION

1. The Appellant was charged with the offence of ***threatening to kill contrary to section 223(1) of the Penal code***. The particulars were that on the 26th day of March, 2025 at about 05.00 am at Sambamba village, Marsabit South sub county without lawful excuse uttered the words threatening to kill Bernadeta Mselina while telling her, "***Nitakuuwa***", while holding a stone and an empty bottle of beer pointing at the said Bernadeta Mselina.
2. On count II, the Appellant was charged with the offence of ***Malicious damage to property contrary to Section 339(1) as read with Section 339(3),(b) of the Penal code***. The particulars were that on the 26th day of March 2025 at about 05.00hrs at Sambamba village, Marsabit South sub county, Marsabit County willfully and unlawfully damaged ten window panes valued at Ksh.700/= and one metallic gate valued at Kshs.5,000/= the property of Bernadete Mselina.
3. During trial, the prosecution called four witnesses who testified in support of their case. PW1 testified that the Appellant came over to her house at about 5.00 am and started to abuse her, while stating that she had a hand in his uncles' death. He forced his

way into her compound and started to throw stones at her windows, which act broke all of the said windows in the said process. The Appellant was thereafter chased and arrested by members of the public, who handed him over to the police She further confirmed that it was not the first time for the appellant to misbehave as on previous occasions he had stolen from her and her tenants and therefore were not on talking terms with him.

4. PW2 and PW3 were present during occurrence of the said incident and corroborated PW1's evidence as to what the Appellant had done on the said morning and PW4 PC Kipyegon Rotich did visit the scene and confirmed the damaged occasioned by the Appellant, who had been apprehended by members of the public and brought back to the scene, where he rearrested him.
5. The Appellant was placed on his defence and offered to give sworn evidence. He stated that he was 22years old, was a resident of Sambamba village and recalled that on the material morning he was totally inebriated having drank alcohol the whole night with his friend Ian Moran thus could not recall any of the events that occurred. The trial court considered the evidence adduced and found the Appellant guilty on

both counts. After mitigation he was sentenced to serve a sentence of three-year imprisonment.

6. The Appellant, being dissatisfied with the conviction and sentence passed, filed his Petition of Appeal dated 04.08.2025, and raised the following grounds of Appeal;

a. ***That the lower court never afforded him a fair trial.***

b. ***That, the learned trial Magistrate erred in law and fact by failing to take into account his defence.***

c. ***That, the learned trial magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt, when in fact it had not.***

15. The Appellant thus prayed that this Appeal be allowed, conviction and sentence be set aside and he be set at liberty.

B. THE APPEAL

16. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion, while taking into account the fact that it

did not have the advantage of seeing and hearing the witnesses and their evidence, and/or seeing their demeanor. On this, the court is guided by the Court of Appeal in the case of **Gabriel Kamau Njoroge v Republic [1987] e KLR** where, they restated the duty of the first Appellate court as follows:

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.” See also the case of **Kagori Kaboi v Republic [2020] Eklr.**

(i) **Appeal against Conviction.**

7. The state partially concedes to this Appeal and submitted that the Appellant conviction especially on **Count I** was not safe as none of the witness had testified as to the fact that they heard the Appellant threaten PW1, while holding a stone and beer bottle

but had only seen him damage the window panes and the gate. Secondly the Appellant had been sentenced to serve a term three (3) years but unfortunately the trial court had not apportioned the said sentence considering the fact that the Appellant was convicted on two distinct counts. Finally, it was the prosecution considered opinion that having concede the Appeal on Count 1, the sentence handed was harsh considering that the value of the property damaged and thus urged the court to review the said sentence.

8. **Section 339(1) of the Penal Code (Cap. 63, Laws of Kenya)** states:

“Any person who willfully and unlawfully destroys or damages any property is guilty of an offence and is liable to imprisonment for five years.”

9. The elements of the offence of malicious damage to property were stated in the case of **Wilson Gathungu Chuchu vs. Republic [2018] eKLR** as follows: -

- i. Proof of ownership of the property,***
- ii. Proof that the property was destroyed or damaged,***
- iii. Proof that the destruction or damage was occasioned by the accused; and***

iv. Proof that the destruction was wilful and unlawful.

10. Actus reus and mens rea are crucial parameters of criminal law that must both be established to sustain a conviction and the prosecution ought to have established that the Appellant acted with malice. This court is persuaded by the reasoning of the Court in the case of ***Simon Kiama Ndiagui vs. Republic (2017) eKLR*** where Ngaah J. stated as follows:

“In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third that the destruction was wilful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.”

11. Back to the evidence at hand, the PW1, PW2 and PW3 clearly saw the Appellant barge into his aunties (PW1) compound and proceeded to break her window panes for the entire house and also in the said process brought down her gate valued at about ***Kshs.5,000/=***. The Appellant attributed this occurrence to the fact that he had taken too much Alcohol the previous night, but that does not vitiate his pre meditated actions nor does it excuse the

same. I do therefore find that the Appellant was properly convicted on the second count of Malicious damage to property and his Appeal on that score fails.

(ii) Sentence

12. As regards the sentence, it is a general rule that the Appellate court, will not interfere with the sentence passed unless, that sentence is manifestly excessive in the circumstances of the case, or that it is shown that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. See **Bernard Kimani Gacheru vs. Republic [2002] eKLR & S Vrs Malgas (1) SACR 469(SCA) at para 12.**

20. The Appellant was convicted on both counts by the trial court, but the said court fell in error by not apportioning the said sentence as mandatorily required by the Criminal procedure Code. Be that as it may considering the value of the property damaged, the sentence passed of three years is disproportionate and ought to be reduced but this court also cannot be blind to the evidence adduced, which point to the fact that the Appellant is a social misfit and has repeatedly engaged in anti-social acts to the detriment of his family.

21. Under the circumstances, based on provisions of **Paragraph 22.13 of the sentencing policy Guidelines**, I do order that a pre-sentence report be filed by the probation department within the next 21 days before an appropriate sentence is passed.

(C) DISPOSITION

22. The upshot, having considered the entire record of Appeal and submissions made, I do find that the Appeal is partially Successful;

a) The conviction against the Appellant on Count 1 is set aside, while his conviction on Count II is Upheld.

b) Resentencing on Count II, will await the filing of a Presentence Report within the next 21 days.

23. It is so ordered.

Judgment written, dated and signed at Marsabit this 17th day of DECEMBER 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of DECEMBER 2025.

In the presence of;

Present in courtAppellant

Mr. Otieno For O.D.P.P

Mr. Jarso Court Assistant

ORIGINAL