



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU**

**CRIMINAL CASE NO E468 OF 2021**

REPUBLIC.....PROSECUTION

**VERSUS**

STEPHEN MWANGANGI.....ACCUSED

**JUDGMENT**

**THE CHARGE**

Stephen Mwangangi (hereinafter referred to as the accused person) was charged with the offence of threatening to kill contrary to section 223(1) of the Penal code. The particulars of the charge are that on 29/5/2021 at Nzambani location, Kibwezi Sub-county within Makueni County, the accused person while armed with a *panga*, threatened to kill Samuel Mwangangi Kaula. When the plea was taken, the accused person pleaded not guilty, where after the matter was set down for hearing.

**THE EVIDENCE**

The prosecution called a total of three (3) witnesses in a bid to prove its case against the accused person. PW 1 Samuel Mwangangi Kaula (hereinafter referred to as the complainant) testified that on 29/5/2021 at about 5: 00 pm he was talking his livestock to drink water when he heard a voice behind him stating that he would be killed. That he would be cut into pieces. The complainant looked behind and saw that it was the accused

person who had uttered the words. The complainant stated that the accused person was brandishing a machete. That the accused person wanted to cut the complainant but two boys appeared and intervened. They manage to snatch the machete from the accused person. The complainant reported the matter at Mtito Andei police station and handed over the machete. The complainant stated that the accused person was later arrested and charged. That the accused person was his cousin and they had not quarrelled before.

PW 2 FMS (Minor) testified on oath after the court conducted a brief *voire dire* examination on him. His testimony was that on the material day at about 5:00 pm he was grazing goats when he heard voices from the road. He went to check and saw the accused person holding a machete. That the accused person stated that it was the complainant's last day and that he would kill him. The complainant got hold of the accused person and managed to dispossess him of the machete. PW 2 then left. PW 3 Kyalo Sammy Festus testified that on the material day he was with PW 2 grazing goats. That they heard noises and on checking, he saw the accused person holding a machete. PW 3 stated that the accused person told the complainant that he would kill him. The witness also stated that the complainant managed to snatch the machete from the accused person.

### **The Defence Case**

When the accused person was placed on his defence, he opted to give an unsworn statement without calling any witnesses. The accused person stated that there is a piece of land which was left behind by their parents when they died. That the accused person asked the complainant to co-operate with him so that they could apportion the land amongst themselves but the complainant told the accused person to raise his father from the dead. The accused person stated that the complainant told him that he would be dead by the time the land would be apportioned. The accused person stated that he went home and later at about 8:00 pm, he saw members of the vigilante at his home. They took him to Kambu Police Post.

It was the statement of the accused person that he stayed at the police post until 10:00 pm but the complainant did not turn up. The accused person started coughing and the police allowed him to go home and return the following day. The following day the accused

person returned to the police post in the morning and stayed until 2:00 pm. He was allowed to go home as the person that the police were waiting for did not turn up. While on the way, a police officer appeared while aboard a motor cycle and asked the accused person to return to the police post. He did so and stayed until 6:00 pm then he was allowed to go home. Later on a different date, the accused person went to the police post. The complainant appeared with a machete and stated that the accused person should be taken to court. The accused person was taken to Mtito Andei police station and the following day, he was brought to court.

### **MAIN ISSUES FOR DETERMINATION**

In my view, the main issues for determination are as follows:

- i. Whether the accused person threatened to kill the complainant on the material day;
- ii. Whether the prosecution has proven its case against the accused person to the required standard.

### **ANALYSIS AND DETERMINATION**

I have carefully considered the evidence on record as well as the law applicable. In my considered view, for the case to be proved against the accused person, the prosecution must have proved the following beyond reasonable doubt:

- a) That the offence complained of was indeed committed; and
- b) That the evidence links the accused person to the offence complained of.

It is my further opinion that in order to show that the offence complained of was indeed committed, the prosecution must establish the key ingredients of the offence. In order to prove their case, the prosecution must offer credible and irrefutable evidence in support of each element of a crime.

Section 223(1) of the Penal Code provides as follows:

**"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".**

In the case of *Nancy Wanja Githaka v Republic [2015] eKLR*, the court held that the ingredients of the offence of threatening to kill are:

- a) Existence of a threat to life;
- b) Cause a person directly or indirectly to receive the threat.

I would add that as a key ingredient, the threat must have been made without lawful excuse. In my opinion, the threat could be by way of words uttered or written or by any other means calculated to cause a threat to the person whether directly or indirectly. In *Phenias Njeru Koru v Republic [2015] eKLR*, it was held that the ingredients of the offence consist of the following: -

- a) Without lawful excuse utters;
- b) Or directly or indirectly causes any person to receive a threat;
- c) The threat may be in writing or verbal;
- d) It must be a threat to kill any person.

In *Baya Lwambi Hare v Republic [2017] eKLR*, the court observed that in such cases, the prosecution needs to prove that a threat had been made and that the threat was made without lawful excuse and had reached the victim.

The particulars of the charge indicate that the accused person threatened to kill the complainant while armed with a machete. The complainant testified that the accused person threatened to kill him directly while armed with a machete. That he even took a step to attack him. The testimony of the complainant was clear on how the accused person threatened to kill him. The complainant's testimony was corroborated by that of PW 2 and PW 3 who heard the words being uttered by the accused person. They stated that they saw

the accused person armed with a machete. I find that the evidence of the prosecution witnesses was consistent in material particulars and corroborative. The prosecution evidence indicates a direct threat to kill.

I have considered the accused person's defence. He gave an unsworn statement. In the case of *May v Republic [1981] KLR 129*, it was held as follows:

***"An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."***

It was further held:

***"With reference to Section 1(h) of the Criminal Evidence Act, 1898, which preserved the right of an accused person in England to make a statement without being sworn, Shaw LJ said:***

***'The section makes a clear distinction between the position where an accused person elects to assume the role of a witness in his defence and the situation where he makes an unsworn statement. In the latter case, he is not a witness, and he does not give evidence what is said in such a statement is not to be altogether brushed aside; but its potential value is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences from them in a different light. In as much as it may thus influence the jury's decision, they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence.'***

The accused person's statement tends to suggest that he was framed up because of a land dispute between him and the complainant who is his cousin. The accused person gave a narration of how he was arrested but did not address the evidence that was tendered by

the prosecution. He did not rebut the allegation that he had threatened to kill the complainant. Although the court is not required to draw an adverse inference on the choice of an accused person to give an unsworn statement, the court has to bear in mind that such statement cannot be challenged or tested by way of cross-examination. It is persuasive, rather than evidential.

The prosecution must prove its case beyond reasonable doubt. This standard of proof "*beyond reasonable doubt*" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (*see Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918*).

Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

I do not find anything to discredit the evidence of the prosecution witnesses. The evidence against the accused person is overwhelming and his defence is incapable of debunking the prosecution evidence. I am unable to entertain any reasonable doubt in my mind as regards the prosecution case. I am convinced that the accused person threatened to kill the complainant. The accused persons had no lawful excuse to do so. I see no loose

ends nor gaps in the prosecution case that would warrant the accused person being left off the hook. The evidence does irresistibly point to the accused person's guilt.

**DISPOSITION**

In view of the foregoing, I find that the prosecution has proven its case against the accused person beyond reasonable doubt. Consequently, I make the following orders:

- a) The accused person is found **GUILTY** of the offence of Threatening to kill contrary to section 223(1) of the Penal code;
- b) The accused person is hereby **CONVICTED** in respect of the charge.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 18<sup>TH</sup> DAY OF  
DECEMBER, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**