

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIBERA
CRIMINAL APPEAL NO. E124 OF 2025

REPUBLIC.....

APPELLANT

VERSUS

JASPER IRERI MBUNGU.....

.....RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 21ST August 2025 by Hon. Z. Abdul (PM) at Kibera Chief Magistrate's Court, Case No. E123 of 2024 Republic vs Jasper Ileri Mbungu)

JUDGEMENT

1. The respondent was charged and after a full trial convicted by the Subordinate Court of the offence of threatening to kill contrary to section 223(1) of the Penal Code. The particulars were that on the 15th Day of October 2020, Langata Sub-County within Nairobi City County, without lawful excuse, directly caused ALEX SIMIYU MASIKA to receive a mobile phone call in which you uttered the words 'Mimi nataka nikuue. Nataka ukufe kabisa uache ujinga, meaning, I want to kill you. I want you to die for you to stop your nonsense,' threatening to kill Alex Simiyu Masika. The respondent was acquitted of the offence under section 215 of the Criminal Procedure Code.
2. Being aggrieved, the prosecution filed an appeal challenging the respondent's acquittal. In the petition of appeal, the prosecution challenged the totality of the prosecution's evidence against which he was acquitted. The prosecution urged the court convict the respondent accordingly.
3. This is the first appellate court and in **Okeno v. R [1972] EA 32**, the Court of Appeal for East Africa laid down what the duty

of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

4. PW1 testified that his wife, Dr Phanice Nafula, deserted the matrimonial home on 21st December 2019. On 25th September 2020, their minor son disappeared from PW1's brother's house, where he had been staying due to COVID-19 restrictions. Later that evening, PW1 received a call from his wife informing him that she had taken the child to Nairobi and denying him access to speak to the minor.
5. PW1 obtained children's court orders restraining the transfer of the child to another school. Shortly thereafter, he began receiving threats. Three days after the orders were issued, the respondent called him repeatedly and threatened to kill him unless he released his two daughters to their mother within seven days. PW1 reported the matter at Langata Police Station.
6. PW1 further testified that after filing proceedings in the children's court and obtaining restraining orders, the threats escalated. One night at about 10.00 pm, he found six missed calls from the respondent's number. When he returned the call, the respondent threatened to kill him if he failed to release the children.
7. PW1 recorded some of the threatening calls using another phone after his battery died, with the assistance of a police officer. The respondent continued to threaten him, claiming knowledge of his workplace and family. A further call was recorded in the presence of a pastor, during which the respondent openly threatened to

kill PW1, uttering the words “*nataka ukufe kabisa,*” and identifying himself.

8. The following day, PW1 received further threatening messages from the respondent and his wife. His siblings and parents confirmed that they too had received similar threats. On 17th October 2020, PW1 informed his son of the threats, and later visited the police station where the recorded audio was successfully transferred.
9. During cross-examination, PW1 stated that he did not previously know the respondent and only met him at the police station. On re-examination, he stated that he recorded the calls because the threats persisted.
10. PW2, Brenda Susan Masika, testified that on 15th October 2020 she received a call from an unknown number. The caller, who identified himself as Jasper Ileri, threatened to kill her and her family unless PW1 complied with his demands. Her brother and mother confirmed receiving similar calls. She also produced a text message showing attempted calls from the same number.
11. PW3, Brian Lubanga, corroborated PW1’s account. He heard the respondent threaten PW1, including the words “*nitakuua wewe,*” and make violent remarks about beheading and mutilation.
12. PW4, Inspector Kennedy Kalonji, testified that officers from the DCI Cyber-Crime Unit analysed the recordings and produced forensic reports. The audio was played in court and contained threats consistent with the witnesses’ accounts. He confirmed that the recordings were retrieved from the relevant mobile phones.
13. PW5, Kennedy Masika, testified that on 15th October 2020 he received a call from the respondent, who introduced himself as Jasper from Meru and warned him to tell PW1 to stop interfering

with his wife. His siblings and parents also confirmed receiving similar threats.

14. PW6, CP Macharia, corroborated the evidence of PW1, PW3 and PW4. He testified that the respondent threatened to kill the complainant if the children were not released and that the decision to charge the respondent was based on the forensic analysis of the recorded calls.

15. In his defence, the respondent testified that that he was with the complainant's ex-wife Phanice when he got a call from the complainant. PW1 was abusing Phanice maintaining that should would never see her children. When the respondent intervened, the complainant got abusive. He maintained that through there was an argument he never threatened to kill the complainant or utter the words alleged.

16. Dr. Phanice Nafula reiterated the respondent's stated in defence. She maintained that her marriage with the complainant was violent and she feared for her life. Further that the respondent was innocent of the charges. Japer Ireri testified that the complainant called the DW2

17. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.

18. Section 223 (1) of the Penal Code provides;

“Any person who without lawful 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.”

19. The ingredients of the offence of threatening to kill consist of the following:-

a. Without lawful excuse utters

b. Or directly or indirectly causes any person to receive a threat

c. The threat maybe in writing or verbal

d. It must be a threat to kill any person

20. It was held in the case of **Nancy Wanja Githaka v Republic [2015] eKLR** that the prosecution was required to establish and prove that the respondent directly or indirectly, whether in writing or verbally, caused the complainant to receive a threat to kill him.

21. In the present case, the prosecution's case rested almost entirely on alleged telephone calls and audio recordings said to contain threats by the respondent. From the record, several witnesses testified that threatening words were uttered, the audio recordings produced and played in court. However, they did not contain any clear or express words amounting to a threat to kill. None of the recordings captured the specific words alleged by the witnesses. The forensic report merely confirmed that the audio files were retrieved from mobile phones but they it did not confirm the content as constituting a threat to kill, nor did it attribute the voice on the recordings to the respondent. In the absence of explicit words of threat on the recordings, the core element of the offence was not proved.

22. Further, there was no credible evidence linking the telephone number from which the alleged threats originated to the respondent. No call data records were produced to demonstrate ownership, registration, or exclusive use of the number by the respondent. No voice identification evidence was tendered, and no expert analysis was conducted to match the voice on the recordings to the respondent. The mere assertion by witnesses that the caller identified himself as "Jasper" was insufficient,

without independent corroboration, to fix criminal responsibility upon the respondent.

23. Equally lacking was proof that the alleged threats were in fact made by the respondent to PW1. The prosecution relied on secondary witnesses who claimed to have received similar calls, yet none of this evidence conclusively connected the respondent to the communications. The chain of attribution was speculative and left room for doubt as to the identity of the caller and the authenticity of the alleged threats.
24. In criminal proceedings, suspicion, however strong, cannot take the place of proof. The evidentiary gaps in this case were fundamental. The prosecution failed to establish the existence of a threat to kill, failed to prove authorship of the alleged threats, and failed to link the respondent to the offending telephone number. The essential ingredients of the offence were therefore not proved beyond reasonable doubt.
25. The trial court was thus correct in acquitting the respondent. There is no basis upon which this court can interfere with that finding. The prosecution appeal is accordingly dismissed, and the acquittal is affirmed.
26. Before parting with this matter, the court notes that this dispute arises from a deeply personal and familial conflict involving custody and access to children. Protracted criminal litigation in such circumstances rarely serves the best interests of the parties, and least of all the children. The court urges the parties to pursue reconciliation and amicable resolution through lawful family processes.
27. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.
Orders accordingly.

**Judgement dated and delivered virtually this 27th day of
January 2026**

**D. KAVEDZA
JUDGE**

In the presence of:

Mutuma for the Appellant

Usiku Oyugi for the Respondent

Karimi Court Assistant.

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