

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARSEN
CRIMINAL APPEAL NO. E019 OF 2024
REPUBLIC..... APPELLANT

VERSUS

HEBLA MWANAHADIE RESPONDENT

*(Being an appeal against acquittal in a judgment by Hon. L N. Wasige (Mrs),
SPM, in Garsen Senior Principal Magistrate`s Court Criminal Case No.E011 of
2023 delivered on 2/8/2022)*

JUDGMENT

1. The Respondent herein was acquitted by the trial court in a charge of threatening to kill contrary to section 223 (1) of the Penal Code wherein the particulars of the offence were that on the 17th of January 2023 at around 1230 hours at Mchelelo village Matangeni sublocation in Tana Delta sub county within Tana River County without lawful excuse while holding a knife uttered words “umeponea leo ilikuwa siku yako umbwa wewe” threatening to kill Eunice Njunge (herein referred to as the complainant).
2. The state which is the Appellant was aggrieved by the acquittal by the trial court and lodged the instant appeal on the following grounds;
 - 1) That the learned trial magistrate erred in law and fact by acquitting the Respondent against the weight of the evidence tendered by the prosecution.

- 2) That the learned trial magistrate erred in law and in fact by failing to consider the evidence of PW1 which was corroborated by that of PW2 which evidence was sufficient to secure a conviction.
- 3) That the learned trial magistrate erred in law and in fact by failing to consider that the Respondent herein was found with a weapon (knife).
- 4) That the learned trial magistrate erred in law and in fact by failing to consider that the prosecution had discharged the burden of proof to the required threshold.

Prosecution case

3. The case for the prosecution is that the complainant is a police officer and works in Nairobi. Her husband PW2 has bought a shamba at Mchelelo village from the father of the Respondent.
4. It was the evidence of the complainant that on the material day at around 5.30 pm she was sitting under a tree within her compound while holding her baby. The Respondent who was unknown to her came along while holding a knife. She passed by her but after a short distance she turned back and went to where she was. She lifted up the knife as if to stab her. The complainant stood up with her child and started to run away. The Respondent chased her while holding the knife. The complainant ran for safety towards a well where there were people fetching water. The Respondent then

uttered the following words to her; “umeponea sana leo, ilikua ni siku yako. Mbwa wewe”. The complainant called her husband PW2 who went to where she was. They went back home. The Respondent went to the complainant’s home and pointed the knife at her husband. The complainant and her husband went to Kipini Police station and made a report.

5. It was the evidence of the complainant that her employee PW2 witnessed the accused pointing the knife at her.
6. The complainant’s employee, Kadzomba Changawa PW2, told the court that he was employed as a shamba hand by the complainant’s husband PW3. That he started working for him on 1/1/2023. That on the material day at around 5.30 pm he was about to leave his employer’s shamba. The wife to his employer, the complainant, was at the time sitted while breast feeding her baby. He then saw the Respondent walking towards where the complainant was while holding a knife on her hand. When the complainant saw her she stood up and ran away. The Respondent chased her while holding the knife. The complainant ran towards a nearby well where there were people. The Respondent saw the people at the well and stopped chasing the complainant. She insulting the complainant by calling her a dog and told her that that day would have been her day. The complainant then called her husband who went to the place. He was told what had happened. He, PW2, then left for his home.

7. The complainant's husband, PW3, testified that the Respondent is a neighbor at Mchelelo village where he has a farm. That he bought the farm from the complainant's father in the year 2019. That on the material day he left his home at around 5 pm and took his children to a nearby field to play. He had left his wife, the complainant, PW1 at home. That after a while she called him and informed him that a lady had gone into their compound while armed with a knife and wanted to stab her. He rushed home and found the complainant and his employee PW2 who informed him as to what had transpired. He then started going around and found the Respondent cutting mangoes from a tree with a knife. He and his wife went to Kipini police station and made a report.
8. The case was investigated by PC Baraza PW4 of Kipini police station. It was his testimony that on the material day at 5.30 pm, the complainant reported to them over phone that she had been threatened with a knife in her compound by a certain lady. That he and his colleagues went to the home of the complainant who narrated to them what had happened. She pointed out to them the home of the suspect. That he investigated the case and found that the complainant's husband PW3 had bought land from the Respondent's family who were at the time claiming it back. That they went to the home of the Respondent and found her. He asked her about the knife and she handed it over to him. She said that she

had only gone to the complainant`s home with the knife to cut mangoes. He charged her with the offence. During the hearing of the case in court, the investigating officer produced the knife as exhibit, P. Exh. 1.

Defence case

9. When placed to her defence, the Respondent stated in a sworn statement that on the material day she had arrived home from the local polytechnic where she is a student. That she did not find food at home. She picked a knife and went to a mango tree outside her compound to pluck some mangoes. She climbed up the mango tree and started cut mangoes with the knife and eating them. That while there she saw the complainant passing but they did not speak to each other.
10. That in the evening her family cooked supper and went to sleep. That at 10pm they heard a knock on the door. He mother screamed for help. Their village headman went to check what was happening. The people who were knocking said they were police officers. They demanded to arrest her mother for threatening the complainant. She told them that she had seen the complainant passing while she was on top of the tree eating mangoes. The police arrested her instead and took her to the police station. She denied threatening the complainant with a knife. She was placed in the cells. On

the following morning PC Baraza demanded that she admits that the land belongs to the complainant. She refused. She was then charged.

11. It was the evidence of the Respondent in cross-examination that the complainant and her husband did not have an employee at the time that she was arrested. That the witnesses lied that she threatened the complainant with a knife.
12. The Respondent called two witnesses in the case. Bashora Said DW2 told the court that he is a neighbor to the Respondent at Mchelelo village. That he was aware that the father to the Respondent sold a parcel of land to the complainant but that the family of the Respondent did not want the land to be sold. That on the material day at 10.30 pm he was at home when he heard the mother to the Respondent screaming at their home. He went there and found four police officers who wanted to arrest the Respondent`s mother but they were not giving any reason as to why they wanted to arrest her. The Respondent`s mother refused to open the door. The headman was called and he went there. He asked the police officers why they wanted to arrest the said woman. The Respondent thereupon said that she had seen the complainant passing when she was atop the mango tree. The police officers said that they will arrest the Respondent instead. The Respondent showed them the knife she had used to cut mangoes. She handed it over to

them. She took the police officers to the place she had cut the mangoes and they saw the remains. They took photos. She was taken away.

13. The village headman, Bakari Hiribae DW 3, on his part stated that he is a grandfather and a neighbour to the Respondent. That he did not know the complainant before the case was filed in court. That on the material day at 10 pm he was at his home when he was called by a “nyumba kumi” elder who asked him to go to the home of the Respondent. He went there and found four police officers. He asked them what the problem was and they told him that they wanted to arrest the mother to the Respondent for threatening the complainant. They later changed the story and said that the person they wanted to arrest is the Respondent. The Respondent showed them the knife she had used to cut mangoes from a mango tree. The police officers went there and saw the mango remains and took photos. They nevertheless arrested the Respondent and took her to the police station. On the following day he went to the police station to find out her fate but the police rebuffed him and she was taken to court.

Submissions.

14. The appeal was canvassed by way of written submissions.
15. The appellant submitted that the identity of the Respondent was not in doubt as she was identified by PW1

as the lady wearing a red dress who approached her and threatened to stab her. That the evidence on identification was corroborated by the employee PW2 who said that he knew the respondent very well. That PW2 was an eye witness to the incident. That the evidence of the two witnesses was sufficient to convict the respondent.

16. It was submitted that the complainant's husband PW3 saw the Respondent cutting mangoes with a knife later after the incident on the complainant. That it was possible for one to chase another with a knife and at the same time use the same knife 15-30 minutes later to cut mangoes.
17. The Appellant submitted that the defence of the Appellant that the case was fabricated due to a land dispute with PW3 was an afterthought because she did not ask PW3 any question about the land dispute. The Appellant urged the court to allow the appeal.
18. The Respondent on other hand submitted that the burden of proof remained on the prosecution to prove the case against the Respondent beyond reasonable doubt. That the trial magistrate considered the evidence of PW1 and PW2 and found it to be contradictory. That the evidence of PW3 contradicted that of the complainant PW1 wherein PW1 claimed that the respondent pointed a knife at PW3 whereas PW3 in his testimony stated that he found the accused cutting mangoes from a tree. It was submitted that the inconsistencies in the case undermined the credibility of the

entire prosecution case as affirmed in **Republic v Ismail Hussein Ibrahim (2019) eKLR**. More so that corroboration ought to be independent, consistent and credible, as stated in the case of **Republic vs Peter Njuguna Kamau (2015) KEHC 1882 (KLR)**, which was not the case in this matter.

19. It was submitted that possession of a knife is not an offence under Section 223(1) and further the element must be proven by words or actions coupled with intent. It was submitted that the investigating officer, PW4 admitted that upon investigation, it was revealed that the Respondent had gone to cut mangoes with the knife.

20. The Respondent submitted that the prosecution did not call any witness from the well where the complainant sought refuge. That the evidence showed that there was a land dispute between the complainant's husband and the family of the Respondent. That this proved a motive to lie against the Respondent.

Analysis and determination.

21. This being a first appeal, the duty of this court is to analyze, re-evaluate and re-examine afresh the evidence adduced before the trial court and make its own independent conclusions while bearing in mind that this court did not have the advantage of the trial court which saw and heard the witnesses and was able to assess their demeanor. In **Okeno v R (1972) EA 32** the court rendered itself as hereunder on that principle:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters v Sunday Post* 1978) EA 424.” (Also see *Pandya v R* (1957) EA336.)

22. The trial magistrate in dismissing the case against the Respondent said that there were inconsistencies in the prosecution case that created doubt whether the offence was committed. Among these is the inconsistency between the evidence of the complainant and her husband wherein the complainant stated that after her husband returned home and she upraised him of what had happened, the

Respondent went to their home and pointed a knife at her husband. That her husband never mentioned that the Respondent returned to their home and threatened him with a knife but said that he found her in the shamba eating mangoes with a knife. That the evidence of the complainant`s husband gives credence to the evidence of the Respondent that she was using the knife to cut mangoes from a tree.

23. The trial magistrate said that the complainant did not know the Respondent before the date of the incident and therefore there was doubt on her identification of the Respondent. That there was no reason for the Respondent to threaten to kill her since she was not known to her before and the Respondent had no grudge against her.
24. The court further held that the Respondent was not well known to the complainant`s employee PW3 as he was not from the area and had only worked there for 2 weeks. That his identification of the Respondent was doubtful.
25. The court further held that the investigating officer made a finding that there was a land dispute between the Respondent`s family and the husband to the complainant, PW3. That it did not come out clearly why the investigating officer charged the Respondent with the offence when in his investigations he found that the Respondent had gone to the complainant`s home with a knife to cut mangoes. That his evidence did not touch on the Respondent threatening to kill

the complainant. More so that the defence evidence showed that policemen went to the home of the Respondent with the intention of arresting the Respondent`s mother. That it is not clear as to why they turned on the Respondent. That the foregoing led the prosecution evidence unsafe to convict on.

26. 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.

27. In the case of **Martin Ng`ang`a Kamanu v Republic [2020] KEHC 5815 (KLR)**, Kimaru J. (as he then was) discussed the ingredients of the offence of threatening to kill as herunder:

“The prosecution was required to establish the following ingredients of the charge: that the Appellant without lawful excuse uttered words which amounted to a threat to kill the complainant. The uttering of these words must be made in the context that the complainant perceives that he is under threat of losing his life. The context must come out in the evidence that will be adduced by the prosecution

witnesses and the explanation given by the accused in his defence.”

28. The burden of proof lay on the prosecution to prove that the appellant threatened to kill the complainant and the standard of proof was one of beyond reasonable doubt.
29. I have considered the grounds of appeal, the record of the trial court and the submissions filed by both the Appellant and the Respondent. The issue for determination is whether the trial court erred in acquitting the Respondent of the offence.
30. I do not agree with the finding of the trial court that the identification of the Respondent was in doubt. Though the complainant did not know the complainant before the material date because she lived in Nairobi, the evidence is that Respondent`s home neighbours that of the complainant. The complainant said that the incident happened during the day at 5pm. Their employee PW2 said that he had worked for PW3 for 2 weeks prior to the date of the incident. It was his evidence that he knew the Respondent very well as her home is next to that of his employer PW3. That he used to sleep at his employer`s home when he and his wife were not around. That on the material day when the Respondent threatened the complainant with a knife she was wearing a red dress. The complainant similarly said that the Respondent was on that day wearing a red dress. The complainant`s husband PW3 similarly said that the

Respondent was wearing a red dress when he found her cutting mangoes.

31. In my consideration, the complainant`s employee PW2 had known the Respondent for a period of two weeks before the date of the incident as her home was next door neighbour to the home of the complainant. Two weeks was sufficient period for PW2 to have known the Respondent for purposes of identification. The reason given by the complainant that she had not known the complainant before that day because she lived in Nairobi was believable. She all the same clearly saw the Respondent on the material day as the incident took place during the day. Her evidence on identification was corroborated by her employee PW2 who lived in the farm and knew the Respondent. Besides that, the Respondent admitted that she on that day arrived home from school at 5.15 pm. She said that she saw the complainant going away from her home. The offence was said to have been committed at 5.30 pm. There was sufficient evidence that the Respondent was within the vicinity when the offence was committed. This coupled with the evidence of the complainant and PW2 removed any doubt on the identification of the Respondent. The Respondent was thereby properly identified. The question was whether she threatened the complainant as claimed by the complainant and PW2.

32. PC Baraza said that they went to the home of the complainant at 5.30pm to attend to her report after receiving a phone call from her that she had been chased with a knife by a certain lady. That on getting there the complainant upraised them of what had happened and she pointed out to them the home of the Respondent. That they went to the home of the Respondent and found the Respondent. They arrested her.
33. The complainant however did not say that the police went to her home on that day after she called them over phone. She stated in cross-examination that she did not know the time the police went to arrest the Respondent. Her husband PW3 similarly did not say that the police went to their home shortly after they called them. He never stated the time nor the day the police went to arrest the Respondent. The Respondent and her witnesses said that she was arrested on the material day at 10 pm.
34. In view of the fact that the complainant and her husband did not corroborate the evidence of PC Baraza that he went to their home shortly after 5.30 pm, I do not think that PC Baraza was telling the truth that they went to the home of the complainant shortly after 5.30pm. In addition, the complainant and her husband could not have failed to know if policemen went to the home of the Respondent after visiting their home as the home of the Respondent is next to their home. There was thus no sufficient evidence that the

Respondent was arrested on that day at 5.30 pm. If the Respondent was arrested on that day and the stated time, the complainant and her husband would have known of it. In view of this discrepancy, the most likely time of arrest of the Respondent was as stated by the Respondent at 10 pm.

35. This brings me to the reason for the arrest of the complainant. The complainant, her husband and their employee testified that the Respondent was arrested for threatening the complainant with a knife. The Respondent stated in her evidence that the person the policemen wanted to arrest was her mother whom they accused of threatening the complainant but they changed their mind and arrested her instead.

36. The particulars of the charge against the Respondent was that she threatened the complainant while holding a knife and uttered the words that: *umeponea leo ilikuwa siku yako umbwa wewe.*". Nowhere did the charge state that the Respondent chased the complainant while holding a knife as testified by the complainant and her employee PW2. What was more serious, holding the knife to the complainant and uttering the said words or chasing the complaint with the knife? Definitely it is the latter. The fact that the investigating officer did not charge the Respondent with chasing the complainant with a knife may as well mean that the incident did not happen as narrated by the complainant and her witness, PW2.

37. Whereas the complainant said that the Respondent chased her with a knife and that she later went back to her home and pointed the knife at her husband, her husband never mentioned that the Respondent went to his home and pointed a knife at him. He instead said that he was going round the farm when he found the Respondent cutting mangoes with a knife about 20 meters from his house.

38. It is clear that the complainant was not telling the truth that the Respondent went to her home for a second time and pointed a knife at her husband. If the complainant was not truthful on this, was she truthful in her evidence that the Respondent chased her with a knife? Was she a credible witness?

39. The Court of appeal in the case of **Ndungu Kimanyi v Republic [1979] KLR 283**, held the following on credibility of witnesses:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

40. In **Richard Munene v Republic [2018] eKLR**, the same court stated that;

“It is a well settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of prosecution witness that will be fatal to the case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial that an accused person will be entitled to benefit from it.”

41. The discrepancy between the evidence of the complainant and that of her husband on whether the Respondent pointed a knife at the complainant`s husband was not a minor issue that called for it being ignored. It was a serious issue that went to the credibility of complainant on whether she was a witness worthy of belief. Because if she could lie that the Respondent pointed a knife at her husband, she could as well have been lying that the Respondent chased her with a knife. I am therefore in agreement with the trial court that the evidence of the complainant on the issue rendered the complainant`s evidence doubtful. Her employee PW2 may have been coached to lie against the Respondent. He did not tell the court how far he was from the complainant when the Respondent uttered the words stated above. It was thus not safe to rely on the evidence of

the complainant and her employee PW2 to convict the Respondent of the offence.

42. The upshot is that the case against the Respondent was not proved beyond reasonable doubt and therefore the trial court was right in dismissing the case. Consequently, I do not find any merit in the appeal and the same is dismissed.

Delivered, dated and signed at GARSEN this 11th day of February 2026.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluch for Appellant

Respondent - Present in person in open court

Court Assistant: Jumaa