

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
APPELLATE DIVISION
CRIMINAL APPEAL NO. E027 OF 2025

ROBA KATELO.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(BEING AN APPEAL FROM THE CONVICTION AND SENTENCE BY HON S.K AROME (PM) DELIVERED IN MARSABIT SPMCR NO E132 OF 2024 ON 15th July 2025

ARISING BETWEEN

REPUBLIC.....
PROSECUTOR

VERSUS

ROBA KATELO.....
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 10th day of September 2024 at Mataaribi location in Marsabit Central sub county within Marsabit county without lawful excuse using Borana language uttered threatening words to wit, “ *Sijjesa*” meaning “ I will kill you” threatening to kill HABIBA KATELO.
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 10th day of September 2024 at Mataaribi location in Marsabit central sub-county within Marsabit County, willfully and unlawfully damaged assorted cloths and three birth certificates the property of HABIBA KATELO.
3. The Appellant pleaded not guilty to the offence of threatening to kill but admitted to the charge on Count II of malicious damage to property. After confirming the facts and mitigation the Appellant was sentenced to serve 18 months imprisonment.
4. During trial, the prosecution called four witnesses who testified in support of their case. PW1 the

Appellant's 12 year old son testified and stated that on the material night they were asleep at about 11.00pm, when the Appellant came, woke them up and told them that he did not want to see them in his house. He proceeded to take a knife and threatened to stab his mother (the complainant) and he and his other siblings had to intervene and begged him not to do so. When appellant relaxed and put the knife down, he took that opportunity and hid the said knife under the sofa. After a while the Appellant started to look for the said knife and when he did not get it, went and got hold of a panga, which he used to rip/tear apart their cloths and books into small pieces.

5. At this point his mother (PW2) managed to escape from the house and locked the door from outside. The appellant was not deterred, and he continued to rip apart the said cloths and their birth certificates, and when done he opened the window and jumped outside, whereupon he opened the latched door and ordered them to follow their mother outside.
6. PW2 confirmed PW1 version of events that the Appellant lifted a knife intending to stab her and it took the intervention of her children, to dissuade him from doing so. The Appellant proceeded to pick up all

her clothes, the children's school uniforms, book and birth certificates and proceeded to destroy the same. After he was done, he proceeded to rip open her dress and left her naked and when he went into the reading room, she got an opportunity and took off. She spent the rest of the night at a neighbour's house and reported the matter to the police on the following day. PW3, the Appellant mother did not see, nor did she hear of any commotion at night and PW4 confirmed that PW2 sought shelter at her house and assisted her with clothes to put on and a place to spend the night.

7. PW5 arrested the Appellant after recording all witness statements and had him arraigned before the court. In defence the Appellant stated that he was sick and that the issue had arisen due to minor disagreement between him and his wife, but he had not assaulted her.
8. The trial court considered the evidence adduced and found the Appellant guilty of the offence of threatening to kill and after mitigation sentenced the Appellant to serve a sentence of four (4)-year imprisonment.
9. The Appellant, being dissatisfied with the conviction and sentence passed, filed his Petition of Appeal

dated 22.07.2025, and raised the following grounds of Appeal.

- a. ***That the learned trial Magistrate erred in law and facts when he relied on contradicting and paradoxical testimonies tendered by prosecution witnesses to reach his verdict.***
 - b. ***That the trial court was influenced by the complainant without considering the independence of the court which also amounts to infringement of the appellants right under Article 27 of our constitution (2010).***
 - c. ***That, the learned trial magistrate erred in law and facts when she appreciated the shallow evidence adduced by prosecution witnesses to convict the appellant without analyzing and scrutinizing the same.***
 - d. ***That the lower court failed to consider truthful and merited defence which had discredited the prosecution evidence and raised credible doubt on its veracity.***
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.**

17. The Court of Appeal in **Kiilu & Another V Republic, [2005] 1 KLR 174,** while discussing the courts duty on appeal did state that;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

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; 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."

18. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel and find that the issues which arise for determination is whether the prosecution satisfactorily proved their case beyond reasonable doubt and whether the sentence passed was lawful and Appropriate.
19. The offence of threatening to kill is set out under **Section 223(1) of the Penal Code**, which states as follows.

223. Threats to Kill

(1) 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.”

20. In **Okutto Vr Republic (2024) KEHC 10044**

(KLR) the court held that;

“ 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 she is under threat of losing her 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.”

21. PW1, PW2 and PW4 gave cogent evidence of what transpired on the material night and the following morning. Not only did the Appellant threaten to kill PW2 but took active steps in threatening her life using a knife and panga and was saved from his wrath by their children pleas. The following morning the Appellant once again followed PW2 to the neighbour’s compound and continued to threaten her life using a metal bar. For good measure he

added that he wanted to “kill her and drink her blood.”

22. The evidence adduced was cogent and directly implicated the Appellant in threatening to take away the complainant's life and thus his appeal against his conviction fails.

23. 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 sentenced to serve a four (4) year jail term and that is less than what is prescribed under Section 223(1) of the Penal code, which provides for a sentence of ten (10) years. Under the circumstances, the said sentence cannot be said to be excessive and/or illegal.

21. Be that as it may I do note that the trial court did not call for a pre-sentence report based on provisions of **Paragraph 22.13 of the**

sentencing policy Guidelines, and holds that the same would have influenced the sentence duration handed down. I do therefore order that a pre-sentence report be filed by the probation department within the next 21 days for the courts consideration.

(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 Appeal against conviction fails and is dismissed.

b) The final determination on sentence 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 16th day of FEBRUARY 2026.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 16th day of FEBRUARY 2026.

In the presence of;

.....Appellant

..... For O.D.P.P

..... Court Assistant

ORIGINAL