

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CRIMINAL APPEAL NO. E134 OF 2024

BIDII SAFARI KINDI.....1ST
APPELLANT

THOYA SAFARI KAZUNGU.....2ND
APPELLANT

CHARO SAFARI KAZUNGU.....3RD
APPELLANT

VERSUS

REPUBLIC.....
....RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. E. K.Usui, CM, in Malindi
CM`s Court Criminal Case No.E044 of 2024 delivered on 19/11/2024)*

JUDGMENT

1. The appellants herein were convicted for the offence of threatening to kill contrary to section 223 (1) of the Penal Code. The particulars of the offence were that on the 11th January 2024 at Kijiwetanga area in Malindi sub-county within Kilifi county without lawful excuse while armed with stones uttered words that Joseph Kambi Kazungu (herein referred to as the complainant) was a witch and that they were going to kill him, which words were calculated to eliminate or to kill the said complainant.

2. The 1st Appellant was convicted over another charge in count 2 of assaulting a police officer contrary to section 103(a) of the National Police Service Act. The particulars of the offence were that on the same day, time and place as in count 1 he assaulted No.108517 PC Amani Karisa (herein the police officer) thereby occasioning him actual bodily harm.
3. The Appellants were each sentenced to serve 7 years imprisonment for the offence of threatening to kill while the 1st Appellant, Bidii Safari Kindi was in addition sentenced to serve 3 years imprisonment over the offence of assaulting a police officer. The Appellants were aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:

- 1). The learned trial magistrate erred in law and fact by failing to find that the offences in question were not proved according to the threshold required by the law.

- 2). The learned trial magistrate erred in law and fact by failing to find that there were no exhibits produced in the case.

- 3). The learned trial magistrate erred in law and facts by failing to find that there was no proper identification of the Appellants herein making the prosecution case lack merit.

4. The case for the prosecution was that the Appellants are nephews to the complainant. That on the material day at

around midday the Appellants went to the home of the complainant and found him inside his house. They accused him of being a witch and threatened to kill him. The threats were heard by the complainant's son PW2 and the complainant's wife PW3. The complainant's son rushed to the nearby police station to make a report. The Appellant's started to pelt the complainant's house with stones. The complainant locked himself inside the house. His wife PW3 started to scream. Neighbours who included Thoya Kahindi PW4 went to the place but the Appellants pelted them with stones. They damaged the grill to the complainant's house with stones and logs.

5. Meanwhile PW3's report was received at Kizingo police station by PC Mogaka PW6. He, PC Amani Karisa PW5 and other police officers went to attend to the report. They found the Appellants at the scene and arrested them. They were placed in the police vehicle. The 1st Appellant then wanted to escape. PC Amani held him. He then hit the police officer with a fist on the left eye. When PC Mogaka went to intervene, he head-butted him on the forehead. They took the Appellant to Kizingo police station and then to Malindi police station. PC Amani went to hospital for treatment. He was issued with a P3 form which was completed at Malindi sub county hospital by a clinical officer PW8 who found him with swelling and redness and pain on the left eye. He classified the degree of injury as harm.

6. The case was investigated by PC Makau PW7 of Kizingo police station who recorded statements of witnesses. He charged the Appellants. During the hearing in court the clinical officer PW8 produced the treatment notes and the P3 form for the assaulted police officer as exhibit, P.EXH. 1 and 2 respectively.
7. When placed to their defence the Appellants stated in their respective defences that their uncle the complainant had sold a plot that belonged to their family. That on the material day the 2nd Appellant went to show the other two the plot that had been sold. They went to see the plot. He showed them the plot. That while they were there the chief arrived and they showed him the plot. Three policemen then arrived. They started to beat them and arrested them. They were taken to the police station and locked up. They were charged.

Submissions

8. The Appeal was canvassed by way of written submissions. The Appellants submitted that the case was not proved beyond reasonable doubt. That there were no exhibits produced such as logs and sticks said to have been used during the incident. Neither were photographs of the scene produced. Therefore, that the allegations were mere allegations.
9. It was submitted that the 3rd Appellant was not identified to have been involved with the incident. It was submitted that the evidence for the prosecution witnesses was full of

contradictions which showed that the charges were fabricated.

10. It was submitted that the prosecution witnesses were not truthful.
11. The Respondent on the other hand submitted that the charge was proved beyond reasonable doubt. That it was proved that the threats were not just verbal but were accompanied by covert acts by the Appellants in pelting stones at the complainant`s house and at neighbours who had gone to his rescue.
12. It was submitted that the evidence of the prosecution witnesses was consistent and was corroborative. That there was sufficient evidence to prove the charge of threatening the complainant and also the charge of assaulting police officers. That the case could not have been framed by police officers and neighbours as they were not privy to the land dispute.
13. It was submitted that the trial court considered the defence for the Appellants and dismissed it on the ground that it was not corroborated by any witness. More so that the evidence adduced by the prosecution outweighed the evidence of the Appellants. The Respondent urged the court to dismiss the appeal.

Analysis and determination

14 This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusions

while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa had the following to say in this connection:

"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 whole 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; 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..."

15The Appellants were charged with the offence of threatening to kill contrary to section 233 (1) of the Penal code. The evidence against them was that they uttered words that the complainant was a witch and that they were going to kill him. They were heard uttering the said words by complainant himself (PW1), his son PW2, and his wife PW3. The appellant

in putting their words into action started to pelt the door and windows to the complainant's house with stones and logs. PW3 said that the Appellants destroyed her kitchen and water tap by hitting them with stones.

16A neighbour to the complainant PW4 told the trial court that his house is next to that of the complainant. That on the material day he was at his house when he heard the banging of a door. He came out of his house and found the complainant's wife crying that her husband was being killed. He went to their house and found the Appellants breaking the metal grill windows to the complainant's house with stones. They are his cousins. Bidii the 1st Appellant had stones while Charo the 3rd Appellant had a log. Charo asked him why he had come there yet it was not his business. He ordered him to leave or they kill him. He left but other people went to the place and the Appellants were pelting them with stones. The Appellants broke the complainant's water tap and kiosk. Policemen went to the place and arrested them.

17Section 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.”

18In 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.”

19The trial court found the offence of threatening to kill to have been proved beyond reasonable doubt. I have on my part reviewed the prosecution evidence together with the appellants' defence. I find the prosecution evidence to have been overwhelming and credible. The Appellants uttered words that the complainant was a witch and that they were going to kill him. The words threatening to kill the complainant were heard by the complainant, his wife PW3 and son PW2. A neighbour to the complainant PW 4 witnessed the Appellants pelting the complainant's house with stones and logs and also witnessed the Appellants pelting members of the public who went to the scene with stones.

20The defence by the Appellants that they were arrested while checking a plot that had issues between them and the complainant had no element of truth in it. There was no reason for the prosecution witnesses to lie against the Appellants. PW4 was an independent witness. The trial court rightly dismissed Applicants` defence. The charge of threatening to kill was proved beyond reasonable doubt.

21That the 1st Appellant assaulted PC Amni with a head butt on the left eye and injured him was corroborated by the evidence of his colleague PC Mogaka PW6 who witnessed the assault. The injuries were corroborated by the evidence of the clinical officer PW 8 who examined him and assessed the degree of injury as harm. The offence of assault on a police officer in the course of his duty was proved against the 1st Appellant beyond reasonable doubt.

In view of the foregoing, the appeal on conviction has no merit and is dismissed.

Sentence

22The sentence for the offence of threatening to kill is imprisonment for a period of up to 10 years imprisonment. The sentence for the offence of assaulting a police officer in execution of his duty is a fine of not exceeding one million

shillings or to imprisonment for a term not exceeding 10 years or both.

23The trial court in sentencing the Appellants stated that it had taken judicial notice that cases of threatening to kill are rampant in the region and that there are many cases of killing of old people in Kilifi county on accusations of practicing witchcraft. I have also taken judicial notice on that. The fact that the Appellants pelted the complainant`s house with stones and did the same to members of the public who went to the rescue of the complainant shows that they meant business.

24Even though, I find the sentence of 7 years imprisonment was excessive. The Appellants were first offenders. They can benefit from a reduced sentence. I consider a sentence of 5 years to be appropriate for the offence of threatening to kill.

25Consequently, the conviction on the Appellants is upheld but the sentence of 7 years imprisonment imposed on them for the offence of threatening to kill is reduced to 5 years imprisonment, while the sentence on the 1st Appellant, Bidii Kindi, of assaulting a police officer in due execution of his duty is reduced to two years imprisonment.

Delivered, dated and signed at GARSEN this 16th day of February 2026.

J. N. NJAGI

JUDGE

In the presence of:

Mr.Oluoch HB Miss Ochola for Respondent

Appellant: present virtually at G.K. Prison Malindi

Court Assistant: Rahma

Original