



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CRIMINAL CASE NO E551 OF 2023

REPUBLIC.....PROSECUTION

VERSUS

ALEX

MUTHOKA

KILUNGU.....ACCUSED

JUDGMENT

THE CHARGE

Alex Muthoka Kilungu (hereinafter referred to as the accused person) is charged with the offence of threatening to kill contrary to section 223(1) of the Penal code. The particulars of the offence are that on 8/6/2023 at Bondeni village in Makindu, within Makueni County, the accused person without lawful excuse and while armed with a machete, uttered words in Kiswahili, "Nitakukata" (I will cut you), threatening to kill Boniface Mwathi. When the plea was taken, the accused person pleaded not guilty. The matter was then set down for hearing.

THE EVIDENCE

The Prosecution case

The prosecution case was partly heard by another Magistrate who was subsequently transferred. When the matter was placed before me, directions were taken to the effect

that the matter proceeds from where it had reached. The prosecution called a total of three (3) witnesses in a bid to prove their case against the accused person. From the record, PW 1 Boniface Mwathi (hereinafter referred to as the complainant) testified twice. It is not clear how and why the witness was called to testify twice. His testimony was that the accused person was his neighbour and that he used to trespass on his land to steal grass. That on 8/6/2023 the complainant was watering his trees when he saw the accused person's livestock grazing on the complainant's land.

The complainant stated that he asked the accused person why he had allowed his livestock to graze on his land and in response, the accused person pointed a machete at the complainant and stated that he would cut and kill him. The complainant grabbed the accused person and snatched the machete from him. The complainant later reported the matter to the police where after the accused person was arrested and charged. PW 2 Dennis Ngumbi Mwathi testified that on the material day he was at home feeding children. That the complainant who is his father was at the farm. PW 2 saw cattle grazing on their land. The witness stated that the complainant drove the cattle out of the land. That the accused person appeared and spoke to the complainant. Later, the complainant returned home and stated that the accused person had threatened him. PW 1 returned home with a machete.

PW 3 Police Senior Sergeant Mohammed Garongo testified that he was the investigating officer in the matter. That the matter was reported at Makindu Police station on 8/6/2023. The investigating officer visited the accused person's home on 17/6/2023 and upon identification by the complainant, the accused person was arrested. It was the evidence of the investigating officer that the complainant took a machete to the police station. The machete was produced in evidence.

The Defence Case

When the accused person was placed on his defence, he gave a sworn testimony without calling any other witnesses. The accused person stated that on the material day, he was with his livestock and took them to the well to drink water. That he had buckets, ropes and a machete. The accused person stated that the complainant went to where the accused person had placed the items then took the machete. That the complainant then proceeded

to where the accused person was. The accused person asked him why he had taken his machete but the complainant responded by stating that the accused person had no brains. The accused person took his buckets and ropes then went home. After two weeks, the accused person was arrested and later charged.

FACTS NOT IN DISPUTE

Having considered the evidence on record, I find that the following facts are not in dispute:

- a) The accused person and the complainant are neighbours well known to each other;
- b) There was a long-standing dispute or bad blood between the accused person and the complainant herein;
- c) On 8/6/2023, there was an encounter between the accused person and the complainant.

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 persons 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 uttered the following word:

"Nitakukata."

Loosely translated, the statement would be:

"I will cut you."

I have already indicated that the complainant testified twice for an unknown reason. The first time he testified, he stated that the accused person stated that he would cut and kill him. When the complainant testified a second time, he said that the accused person stated that he could finish him. In my considered view, for the prosecution to allege that

words uttered constituted a threat to kill, the said words must be clear and unambiguous. The words must leave no doubt that there was a threat to kill.

The words contained in the particulars of the offence, although constituting a threat, are ambiguous. It is difficult to know what the alleged utterer meant, assuming that they uttered the word. It is not even clear what words were allegedly uttered by the accused person given the discrepancy between what is indicated in the particulars of the offence and what was stated by the complainant. Merely saying that one will cut another does not necessarily mean that they will kill them. It is not for the court to choose which words were uttered by the accused person nor for the accused person to confirm which words he allegedly uttered and what he meant. That would be tantamount to shifting the burden of proof to the accused person. Any ambiguity must be resolved in favour of the accused person.

I have already indicated that there appears to have been bad blood between the complainant and the accused person. Where there is an existing grudge or bad blood between parties, the court ought to consider the evidence and in particular the prosecution evidence with great caution as parties are known to resort to criminal sanctions in a bid to settle old scores. It is also to be remembered that existing grudges or disputes between parties are a recipe for chaos. In the authority of *Ayub Muchele v Republic [1980] KLR 44*, Trevelyan and Sachdeva, JJ held that:

“Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask “What reason had the witness to lie” ...The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful...There are spiteful people about.”

I have pointed out that the words complained of are ambiguous. At best, it can be inferred as a threat to cause harm. For a conviction to be sustained, it must be proven, *inter alia*, that the words uttered constituted a threat to kill and not any other meaning. If anything, I find the words to be vague and open to various interpretations. I do not think it is the duty

of the court to give meaning to the words allegedly uttered in circumstances where there is no direct threat to kill.

I have considered the accused persons' defence. I find it difficult to disregard the defence evidence on what transpired on the material day. The defence is probable. The prosecution evidence on record is not capable of dislodging the accused persons' defence. 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 cannot state with conviction that the accused person threatened to kill the complainant on the material day. The entire evidence on record has placed a doubt on my mind that is not unreasonable. My opinion is that reasonable doubt has been cast in the prosecution case. As a matter of law, the doubt must be resolved in favour of the accused

person. It is not the duty of the accused person or the court to fill in the gaps or tie up the loose ends in the prosecution case. The evidence does not irresistibly point to the accused person's guilt. Parties should avoid resorting to criminal sanctions in a bid to settle old scores.

In as much as the duty of the court is to resolve disputes, the court may not always offer or provide the best solution to the parties' feuds. Parties should embrace alternative dispute resolution which in most cases maintains the social fabric. It is the duty of the prosecution to prove the charges against the accused person-.

DISPOSITION

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

- a) The accused person is found **NOT GUILTY** of the offence of Threatening to kill contrary to section 223(1) of the Penal code;
- b) The accused person is hereby **ACQUITTED** in respect of the charge.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT SHANZU THIS 5TH DAY OF FEBRUARY,
2026.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.