



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CRIMINAL CASE NO E048 OF 2022

REPUBLIC.....PROSECUTION

VERSUS

ANTHONY NYAMAI.....ACCUSED

JUDGMENT

THE CHARGE

Anthony Nyamai (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 10/1/2022 at Kangeso village in Kibwezi Sub-county, within Makueni County, the accused person without lawful excuse and while armed with a hoe, uttered words in Kikamba language, whose English rendition is, “*Your father died because of this land, your sister also died and now you will be the next to die*”, threatening to kill Alexandra Norah Muindi. 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 entire prosecution case was 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 accused person had already been placed on his defence by my predecessor. The prosecution called a total of four (4) witnesses in a bid to prove their case against the accused person. PW 1 Alexandra Norah Muindi (hereinafter referred to as the complainant) testified that on 10/1/2022 at about 3:00 pm she was called by the area Assistant Chief. According to the complainant, the reason why she was called was that she had dug a trench on their land so as to block the public from using a path that passed through the land and members of public had complained.

The complainant stated that she went to the scene and found a group of people. That the accused person was standing by the trench and was holding a hoe. The complainant stated that the accused person stated in Kikamba language that the land had killed the complainant's father and sister and that the complainant would be next. That earlier on, the accused person had threatened to stab the complainant using a knife. PW 2 Kioko James testified that on the material day, the Assistant chief had called for a meeting as a path had been blocked by a trench. That he went to the scene and found a crowd. PW 2 stated that the accused person was at the trench holding a hoe. That the accused person told the complainant that the land had killed her father and sister and that she would be next. PW 2 stated that after one week, the surveyor visited the land and after he left, the accused person told the complainant that she would not live until end year as he would stab her using a knife.

PW 3 Khamisi Abdi Mutungi testified that he was a member of community policing. That the Assistant chief informed him that some people had blocked a road. He went to the scene and found about 200 people and a trench on the land. That people were saying that the land was cursed as it had caused the death of their father and sister. PW 4 Police Corporal Moshi (1st name is not clear to me) testified that he was the investigating officer herein. He stated that the report concerning the complaint was made on 17/1/2022. The investigating officer narrated what the complainant reported to him, where after he arrested the accused person.

The Defence Case

When the accused person was placed on his defence, he gave an unsworn testimony without calling any other witnesses. The accused person stated that on 9/1/2022 a trench was dug out on the road. The accused person and others notified the area Assistant chief who called for a meeting on 10/1/2022. On that day, the villagers met at the scene and complained to the Assistant chief. That it was the complainant who had dug out the trench. The accused person stated that he had a hoe which was to be used to return the soil in the trench so as to restore the road. That the Assistant chief directed that the road be restored and the following day, surveyors visited the land and confirmed that the area where the trench had been dug out was a public road and not anybody's land.

FACTS NOT IN DISPUTE

Having considered the evidence on record as well as the accused person's statement, I find that the following facts are not in dispute:

- a) The accused person and the complainant are from the same village and well known to each other;
- b) The complainant had dug out a trench on the land in issue and blocked the path used by members of public;
- c) On 10/1/2022, there was a meeting convened by the area Assistant chief to resolve the dispute;
- d) The accused person and the complainant attended the meeting;
- e) The accused person had a hoe on the material day.

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 words:

"Your father died because of this land, your sister also died and now you will be next to die"

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.

Although the words contained in the particulars of the charge may constitute a threat, the same are ambiguous. It is difficult to know what the alleged utterer meant, assuming that they uttered the words. The complainant stated that it was the accused person who uttered the words and did so while addressing the complainant. The complainant further stated that earlier on in the same month of January, while the complainant was walking home, the accused person had threatened to stab her using a knife. When the complainant was cross-examined by the accused person, she stated that the threat of being stabbed was made later after the incident herein. On the other hand, PW 2 stated the threat to stab the complainant was made after the surveyors had visited the land, one week after the incident complained of.

Quite interestingly, PW 3 testified that he was at the scene on the material day and that it was the group of villagers who were stating that the land had been cursed as it had killed their father and sister. It is not clear from the testimony of PW 3, whose father and sister was being referred to. However, what is clear from the testimony of PW 3 is that there is no indication that the accused person threatened the complainant. The investigating officer testified that the complainant informed him that the accused person had uttered the words complained of and further threatened to stab the complainant. There are inconsistencies in the prosecution evidence as already pointed out hereinabove.

What is to be determined is whether the contradictions are so fundamental so as to vitiate the charge against the accused person. In all cases, discrepancies in witness testimonies are bound to occur. Where the discrepancies are minor and do not go to the root of the case, the same can be overlooked. My view is buttressed by the authority of ***Peter Ngure Mwangi v Republic [2014] eKLR*** wherein the Court of Appeal held that where the evidence adduced by the prosecution consists of minor discrepancies and

inconsistencies, the same are not material and cannot weaken the probative value of the evidence tendered by the prosecution in support of their case

In the case of *Philip Nzaka Watu v Republic [2016] eKLR*, the Court of Appeal had this to say:

"It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

Similarly, in *Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. App. No. 92 of 2007*, the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

In my view, any evidence that tends to suggest that the accused person may not have committed the offence cannot be termed as a minor discrepancy. I find that the

discrepancies in the prosecution evidence were fundamental and went to the root of the case. They cannot be overlooked.

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. 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. He gave an unsworn statement. In the case of *May v Republic [1981] KLR 129*, it was held as follows:

"An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."

It was further held:

“With reference to Section 1(h) of the Criminal Evidence Act, 1898, which preserved the right of an accused person in England to make a statement without being sworn, Shaw LJ said:

'The section makes a clear distinction between the position where an accused person elects to assume the role of a witness in his defence and the situation where he makes an unsworn statement. In the latter case, he is not a witness, and he does not give evidence what is said in such a statement is not to be altogether brushed aside; but its potential value is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences from them in a different light. In as much as it may thus influence the jury's decision, they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence.”

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. It is also clear to me that no proper investigations were conducted in this matter. The investigating officer simply recorded witness statements then moved to arrest the accused person. He did not even say that he interrogated the accused person and got his side of the story.

The evidence on record indicates that the accused was not the only one with a hoe and that the hoes were for purposes of filling the trench with soil so as to restore the path. The investigating officer attempted to portray the picture that the accused person was deliberately armed for purposes of committing the offence. His investigations appear to have been partial. 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. My opinion is that the prosecution has failed in this endeavour.

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 MAKINDU THIS 26TH DAY OF MARCH,
2026.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.