

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL APPEAL NO. E111 OF 2025**

**GEORGE KOSIDA KIMUMA ..... APPELLANT**

**- VERSUS -**

**REPUBLIC ..... RESPONDENT**

(Being an appeal from conviction and sentence of **Hon. M. N. Olonyi RM**  
delivered on the 13/12/2025 and sentencing on 16/12/2025 in **Tamu SPMC in**  
**Criminal Case No. E201 of 2024**)

**J U D G M E N T**

1. **GEORGE KOSIDA KIMUMA** (‘the appellant’) was on **24/7/2024** arraigned before the Tamu Resident Magistrate’s Court for the offence of threatening to kill contrary to ***section 223(1) of the Penal Code***.
2. It was alleged that on the **5/6/2024**, at Katuk village, Muhoroni Sub-County in Kisumu County within the Republic of Kenya, without lawful excuse, the appellant uttered words ‘*wewe lazima uhame hapa ama kichwa yako ipatikane Nyakach*’ threatening to kill **Boniface Ogallo Amolo**. The appellant denied the charge and after trial, he was found guilty, convicted and sentenced to 3 years’ imprisonment.
3. Aggrieved by that decision, the appellant preferred an appeal to this Court vide a Petition of Appeal dated **17/12/2025**. He set out 7 grounds of appeal which can be summarized into as follows: -
  - a) ***That the trial court erred in law and fact in convicting the appellant for the offence of threatening to kill under section 223(1) of the Penal Code against the weight of evidence.***

- b) That the trial court erred in law and fact in disregarding the contradictions and inconsistencies and incredible evidence of the prosecution witnesses.*
- c) That the trial court erred in law and fact in drawing adverse inference against the appellant thereby shifting the burden of proof contrary to the law of evidence.*
4. This being a first appellate court, its jurisdiction is well cut out. It is supposed to re-evaluate the evidence afresh and come to its own independent conclusions and findings but having regard to the fact that it did not see the witnesses testify. See **Okeno vs Republic (1972) EA 32.**
  5. In the Court below, the prosecution paraded 5 witnesses. **Boniface Ogallo Amolo**, the complainant, testified as **Pw1**. He told the Court that on **5/6/2024** while in his farm with a group of cane cutters, the appellant with one **Charles Opani** came to the farm while armed with pangas. The appellant hurled insults at him. The one which caught his attention was that the appellant would cut his head which would be found in Nyakach. That he ran to where the cane cutters were for safety as they were also armed. The appellant and **Charles Opani** left promising to return. They never returned. He reported the incident to Chemilil Police station.
  6. That he had known the appellant for over 20 years and their respective lands bordered each other. That the appellant had once attacked and cut him with a panga.
  7. In cross-examination, he testified that the appellant had threatened him in dholuo that; ‘Obiro ngado nguta ibiroyud nguta Nyakach.’ That the appellant had previously cut his fingers and promised to compensate him but did not. He denied harbouring any hatred against the appellant but admitted that back

home, they had had disagreements. He denied being hurt with the judgment in **Tamu MCELC No. E011 of 2024 George Kosila Kimuma vs Boniface Ogalo Amolo.**

8. **James Otieno Nyakwaka** testified as **Pw2**. He narrated how on 5/6/2024, he was at Katuk village harvesting his cane in the company of **Pw1** and other cane cutters. This was being supervised by Boniface Ogalo, (Pw1) who was his employee and one supervising his farm. That the appellant approached **Pw1** and told him in Swahili '*nitakata kichwa yako na kichwa yako itapatikana Nyakach.*' That he had leased a portion of his land No. 1926 to **Pw1**. In cross-examination, he stated that the appellant was speaking in both Swahili and Dholuo.
9. **Pw3** was **William Awinda Abunga**. He stated that on the material day, they were cutting cane when at about 3pm, the appellant came with another both armed with pangas. That the appellant threatened Pw1 in Swahili that; '*matako ya mamako, kichwa yako itapatikana Nyakach.*' In cross-examination, he maintained that the threats were made in Swahili towards **Pw1**. That the appellant also spoke same words in Dholuo.
10. **Willis Otieno Galo Pw4** testified that on the material day, he had visited his uncles in Sidho East. He went to the farm where there was cane cutting. The land belonged to his grandfather but had been leased to **Pw1**. That he saw the appellant with another person come to the farm armed with pangas. The appellant addresses **Pw1** with hostility that, '*wewe lazima uhame hapa ama kichwa chako itapatikana Nyakach.*' That he and others were terrified and they reported the incident at Chemelil Police Station.

11. In cross-examination, he maintained that the threats were made in Swahili. That however, there were some words the appellant spoke in dholuo but he did not hear them well.
12. **PC Stanley Wuala, Pw5** was the investigations officer. He testified that Pw1 made a report on **5/6/2024** at about noon. That the appellant had threatened him with the words complained of. He summoned the appellant who presented himself on **15/7/2024** and he arrested him. He recorded statements from witnesses some of who were cane cutters. In cross-examination, he admitted knowing the existence of land disputes between **Pw1** and the appellant.
13. When placed on his defence, the appellant gave sworn statement. He stated that he occupied land Reference **Ksm/Sidho East/1926**. That **Pw1** lives far from his land. That on **5/6/2024** he was at his work place at **No. 34 Kunde Road Nairobi off Argwings Kodhek Road**. in Nairobi. He denied threatening to kill **Pw1**.
14. He stated that on **3/6/2024**, he received a call from his cousin **Charles Ouma Opani**, his farm manager that **Pw1** had trespassed to into his farm and started harvesting mature cane and delivering the same to Chemelil Sugar Company. He asked Charles to go and report the incident at Chemelil Police Post. Charles later gave him the OB report Nos. **07/04/06/2024** and **09/08/06/2024**, respectively. That he also reported the incident to the area village elder Marikus Golo Odoro. He later went to record a statement with the police on **15/6/2024** but the police declined to record it.
15. That he later obtained an order from court in **Tamu MCELC No. E011 of 2024** to stop payment of the cane proceeds to **Pw1**. That one Maurice had

sued him but the Court found that he had obtained title to **Ksm/Sidho/1926** by way of adverse possession. He was stood down at that point.

16. When he returned on **24/11/2025**, he produced documents to show his interaction with Inspector Kiapa on **16/6/2024**. He stated that he had since lodged a complaint with IPOA against police officers. He was never cross-examined.
17. **Dw2** was **Charles Ouma Opani**. He stated that the appellant was his uncle. That he did not hear the appellant threaten **Pw1**. He and the appellant were at the farm on **15/6/2024** and not on **5/6/2024**. That **Pw1** started harvesting the cane on **3/6/2024**. He went there but **Pw1** answered him that he knew what he was doing. Again the harvesting continued on **6/6/2024** when he reported to the village elder. Reports to the police did not yield any response. That **Pw1** harvested the cane for 2 weeks from **3/6/2024** to **18/6/2024**.
18. On cross-examination, he stated that he reported the harvesting of the appellant's cane on **3/6/2024** and **4/6/2024** but he had no OB Numbers for both. That the incident happened on **5/6/2024** but he was not in the farm with the appellant.
19. **Marikus Golo Odoro Dw3** the village elder was visited by **Dw2** on **6/6/2024** at his home. **Dw2** informed him that someone was harvesting the appellant's sugarcane. He went to the scene and called the assistant Chief who told the disputants to call a surveyor to come and demarcate the land. In cross-examination, he stated that he did not know what had happened on **5/6/2024**.
20. It is on this evidence that the trial court convicted the appellant and sentenced him to 3 years' imprisonment.

21. The Court has considered the submissions on record and the entire record. All the grounds were argued as one. The Court will likewise determine all the grounds together.
22. The grounds were that the trial court erred in convicting the appellant on insufficient evidence that was contradictory and inconsistent and that the appellant's defence was not considered.
23. The charge facing the appellant was one of threatening to kill. It was under **section 223(1) of the Penal Code** which provides: -

***“Any 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.”***

24. In **Martin Ng'ang'a Kamanu vs Republic (2020) eKLR**, the Court held: -

***“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 complaint. The uttering of these words must be made in the context that the complainant perceives that he is under a 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.”***

25. In **Philip Nzaka Watu vs Republic (2016) eKLR**, the Court of Appeal held: -

*“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, it has been recognized in many decisions of this Court, some inconsistency in evidence may signify the veracity and honesty, just as unusual uniformity may signify fabrication and coaching of witnesses.”*

26. In Dickson EliaNsamba Shapwata & Anor vs Republic CRA No. 92 of 2007, the Tanzanian Court of Appeal held: -

*“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 statement. The Court has to consider whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”*

27. It was the appellant’s submission that the evidence by the prosecution was insufficient and contradictory. That Pw1 alleged that the threatening words were spoken in dholuo while Pw2, Pw3 and Pw4 insisted that they were spoken in Swahili. To the appellant this was fatal.
28. The prosecution evidence was that Pw1 was in the farm on the material day, 5/6/2024 cutting cane. He was with cane cutters totalling 9. He then saw the appellant approach him in the company of Dw2. They were armed with a panga each. That the appellant hurled insults at Pw1. That the words that

caught his attention were that he would cut his head which would be found in Nyakach. **Pw1** felt threatened and retreated to where the cutters because they were likewise armed. After those threats and the ones repeated on **15/6/2024**, **Pw1** withdrew from that village to Nyakach for sometime.

29. In his defence, the appellant denied the charges. He stated that on the alleged day, he was at his place of work in Nairobi. That he received a report from **Dw2** that **Pw1** had entered his farm on **3/6/2024** and had started cutting the mature cane. He asked **Dw2** to go and report to the police which the latter did. That **Dw2** testified that **Pw1** continued to cut the cane from **3/6/2024** until **17/8/2024**. The appellant's testimony and that of **Dw2** was that the appellant only visited the farm on **15/6/2024**.
30. From the forgoing, it is clear that there was an incident in the sugar farm on the **5/6/2024**. The testimony of **Pw1** was not only firm as to what happened but it was also corroborated by **Pw2**, **Pw3** and **Pw4**. While it is true that the language used in the uttering of the alleged words was said by **Pw1** to have been in dholuo while his witnesses stated them to have been in Swahili, there was evidence that, while threatening and insulting **Pw1**, the appellant was speaking in Dholuo, Swahili and English.
31. In the words of the Court of Appeal in the case of **Philip Nzaka Watu vs Republic** (Supra) no two witnesses recall exactly the same thing to the minutest and no two people perceive the same phenomena exactly the same. The contradiction in the threatening words being in dholuo or Swahili was not so material as to affect the evidence of the prosecution.
32. The appellant was placed at the scene of the incident. His defence of alibi was being raised to late in the day. It was never raised during the cross-examination of the 5 witnesses of the prosecution. The cross-examination

mainly majored in showing that there was a dispute of land between **Pw1** and the appellant. There was no challenge whatsoever as to the appellant's presence on the farm on the 5/6/2024.

33. In **Karanja vs Republic (1983) KECA 35 (KLR)**, the Court of Appeal held: -

*“Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in R vs Ahmed Bin Abdul Hafid (1934) EACA 76, ...that in a proper case the Court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought.”*

34. In the present case, as already observed, there was no suggestion whatsoever during the testimonies of the five (5) prosecution witnesses that an alibi would be raised as a defence. Accordingly, the trial court properly considered and rejected the appellant's defence.
35. In this regard, it was clear that the incident occurred on 5/6/2024. The threats were made to **Pw1**. The appellant was in the company of another and they were both armed. That not only did **Pw1** feel threatened by running away from the appellant to the safety of his 9 sugarcane cutters who were armed, but he later on withdrew from the village to Nyakach out of fear. The long

land dispute between the two could have provoked the appellant to utter the alleged words.

36. In the premises, this Court does not fault the findings of the trial court. The conviction was safe and the sentence lawful. The appeal is without merit and is hereby dismissed.

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 24<sup>th</sup> day of **April, 2026**.

**A. MABEYA, FCI Arb**

**JUDGE**