



REPUBLIC OF KENYA



KENYA LAW
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**Lomwate v State (Criminal Appeal E003 of 2024)
[2025] KEHC 3998 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E003 OF 2024
RPV WENDO, J
MARCH 28, 2025**

BETWEEN

MNANGAT LOMWATE APPELLANT

AND

STATE RESPONDENT

JUDGMENT

1. Mnangat Lomwate, the appellant herein, has filed this appeal against the judgment of CM. CR. E 1237/2021 Republic -v- Mnangat Lomwate where the appellant was charged with the offence of threatening to kill contrary to section 223(1) of the *Penal Code*. The particulars of the charge are that on the month of November, 2021 at Konyao Location, West Pokot County, without lawful excuse, uttered words threatening to kill Longiro Tiyaluk “kama uwezi kuninunulia pikipiki nitakuua na hii mshale alafu ni chome nyumba yako”
2. The appellant was arraigned before the Chief Magistrates court on 22/12/2021. He pleaded guilty to the charge and was convicted on his own plea. On 17/1/2022, he was placed on probation for a period of one year. However, on 15/2/2024, the Prosecution
3. Counsel applied for cancellation of the probation order because the appellant had been arrested and charged for Arson in Criminal case no. E103/2022. The Magistrate cancelled the probation order and sentenced the Appellant to eight (8) years imprisonment.
4. The appellant is aggrieved by both conviction and sentence. He filed this appeal based on the following amended grounds;
 1. That the trial magistrate violated his rights to fair trial under article 50(2) (j) of *the Constitution*;
 2. That the Magistrate did not allow him to mitigate;
 3. That Magistrate erred by not considering the fact that the investigations were poor;



4. The court failed to consider that the appellant was serving sentence for the same offence.
5. That the sentence is harsh.
5. He therefore prays that the conviction be quashed and sentence set aside.
6. The appellant also filed submissions which are all jumbled up and are not very clear. The court will do its best in considering the grounds of appeal and the record of appeal.
7. The Respondent did not file their submissions even though they were allowed time to do so.
8. The appellant was arraigned in court on 22/12/2021 and the charge was read to him in Kipokot language which he understood and he admitted the offence. Facts were read to him by the prosecutor and the appellant admitted the facts to be true and was convicted of the offence. He was treated as a first offender. The court called for a presentence report and one was availed. On 17/1/2022, the appellant was placed on probation for one year. However, on 15/2/2024 the prosecutor moved the court and applied to have the accused sentenced for this offence because he had violated the probation order and been sentenced to three (3) years imprisonment in Criminal Case 103/2022 by court three (3) for the offence of Arson. The court went ahead and sentenced accused to eight (8) years imprisonment on 15/2/2024.
9. This court has looked at Kapenguria CMCC 104/2024 in which the accused is alleged to have committed another offence but found it not to relate to accused. The court has however found that accused was charged in Kapenguria Criminal Case No. E103/2022 for an offence of Arson contrary to section 332(a) of the [Penal Code](#).
10. He is alleged to have willfully and unlawfully set on fire houses belonging to Longilo Tiyaluk. He pleaded guilty to the charge of Arson and was sentenced to three (3) years imprisonment on 13/5/2022. He sought review of his sentence in that matter in E010/2023 and E013/2023 which were declined by the High Court.
11. Coming back to this case, appellant pleaded guilty and was convicted on his own plea. Section 348 of CPC bars appeals arising from a conviction on plea of guilty except on the extent and legality of the sentence. It provides as follows “No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.
12. The court in *Olel -V- Republic* 1989 KLR 44 emphasized the above position when it said, “when a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the CPC (Cap 75) does not merely limit the right of appeal in such cases but bars it completely”
13. The above decision means that if the plea is equivocal, the court may interfere.
14. Guided by section 348 [Criminal Procedure Code](#), this court will consider the plea that was recorded by the lower court to determine whether it was equivocal, which would therefore render the conviction unlawful.
15. Section 207 (1) of the [Criminal Procedure Code](#) provides for the manner in which a plea will be taken. The same was considered in the celebrated case of *Adan -V- Republic* 1973 EA 443 where the court gave guidelines on how a plea should be taken. The court said as follows;
 - (i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;



- (ii) The accused's own words should be recorded and if they are on admission, a plea of guilty should be recorded;
 - (iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts;
 - (iv) If the accused does not agree with the facts or raises any questions of his guilt, his reply must be recorded and change of plea entered;
 - (v) If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.”
16. I have considered the court record and find that the appellant understood the charge because after accepting that it was true, he went on to explain how he was angry with the father because he had refused to assist him. Even in his submissions, the appellant still maintains that he admits the offence and blamed it on peer pressure, see his submissions at ground 3, I find that the plea was unequivocal and therefore proper.
17. The appellant complained that his right to fair hearing under Article 50 (2) (j) was violated. Article 50 (2) (j) provides as follows; -
- 50 (2) Every accused person has the right to a fair trial, which includes the right- (a) – (i)
50 (2) to be informed in advance of the evidence the prosecution intends to rely on, and to have (j) reasonable access to that evidence;
18. The appellant pleaded guilty to the charge and so it was not necessary to be given witness statements to prepare for his case. Had he denied the offence, then the prosecution Counsel would have given him witness statements and any other necessary evidence in their possession for preparation of his defence. That ground lacks merit.
19. The appellant alleges that he was not given a chance to mitigate. I have looked at the court record and indeed it is true that before he was sentenced to eight (8) years imprisonment, for violating the probation order, the court did not allow him to mitigate which was a lapse on the part of the court.

Whether the sentence is harsh;

20. The appellant was placed on probation for one year on 17/1/2022 for threatening to kill his father. Once he was released on 8/2/2022, he burnt down his father's house and that is when he was charged in Criminal case no. 103 /2022. It means that he did not serve the probation sentence and that is why the magistrate substituted the probation order with the eight (8) year jail term.
21. When he was placed on probation, the appellant was said to be a first offender. Under section 223 (1) of the Penal code, upon conviction for threatening to kill, one is liable to ten (10) years imprisonment. At the time of the conviction for threatening to kill, the appellant was found to be favourable for probation. For the above reasons, it is my view that the eight (8) years imprisonment was excessive and the court will intervene.
22. In conclusion, I find the conviction to be sound and I hereby affirm it. As for the sentence, it is excessive and I hereby substitute eight (8) years with three (3) years imprisonment. The sentence will be effective from 15/2/2024. The appeal succeeds to that extent.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 28TH DAY OF MARCH, 2025



R. WENDOHO.

JUDGE.

Judgment delivered virtually in the presence of; -

Mr. Majale for the State

Appellant – present virtually

Juma/Hellen - Court Assistants

