



REPUBLIC OF KENYA



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**CKM v Republic (Criminal Appeal E005 of 2023)
[2025] KEHC 12270 (KLR) (27 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL E005 OF 2023
RC RUTTO, J
AUGUST 27, 2025**

BETWEEN

CKM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment and conviction delivered on 21st November 2023 by
Learned Magistrate M.W Kurumbu (Mrs)PM in Thika Criminal Case No 212 of 2020)*

JUDGMENT

1. The Appellant was charged with the offence of threatening to kill contrary to section 223 (1) of the Penal Code. The particulars of the offence were that on diverse dates, between 1st July 2020 and 1st October 2020 at Juja township area in Juja sub-county within Kiambu County, without lawful cause, she sent threatening messages to kill PMK as follows:

1st July 2020 at 1915hrs: And get this right, I will get them either peacefully or peacelessly by sweat or by blood, by life or by death. My patience is exhausted.

1st September 2020 at 0337hrs: Next time you hear am at the plot (my plot) Caesar plot and you come like you did on Tuesday you will go back as dead meat. So don't dare. Nimejipanga.

1st September 2020 at 0342hrs: The men who broke that gate are men like you. This time round they will break your head.

1st September 2020 at 1948hrs: Money for Njeri plot, Caesar plot, my car, the rent and food I paid for you, and all the plots we bought together must get back to me before we go to the grave. And even if I die, you will bring it to my grave in tears.



1st October 2020 at 0424hrs: Endelea tuu kusukumana na Mimi. Kinyingo wa Mangú alikufa yule Yuko Sasa ni Wa Githurai so utaona Githurai hapo. Nimejipanga vizuri sana.

2. The Appellant pleaded not guilty and after a full trial, the trial magistrate found her guilty as charged was convicted and sentenced to two years' probation.
3. The Appellant being aggrieved by her conviction and sentence filed a petition of appeal dated 4th December 2023. She raised 14 grounds impugning the findings of the learned trial magistrate. In summary, the Appellant was dissatisfied that: the offence was reported to have occurred between 1st July 2020 and 1st October 2020 when she was arrested on 14th January 2020 and took plea on 16th January 2020; she was improperly detained by the police for 48 hours thereby breaching her rights enshrined in Article 49(1) of *the Constitution*; no evidence was adduced as to determine who was the owner of the cellular number 0704xxxxxx; and no witness from the Safaricom or Airtel companies was summoned in court to testify.
4. Further grounds were that: there was no indication as to where those messages had been shared from; the alleged threats were made on phone calls and not on text messages; the trial court erroneously convicted the Appellant on dates of the previous charge sheet and not the amended charge sheet; the offender was of the kikuyu lineage and a male when the Appellant was a female Taita descendant; the trial court failed to address the contradictions in the occurrence book; and that she was not afforded 14 days right to appeal the sentence.
5. On these grounds, the Appellant urged this Court to allow her appeal, quash the conviction and set aside the sentence meted out on her. She prayed that she be acquitted under section 215 of the Criminal Procedure Code.
6. The appeal was canvassed through the parties' written submissions. In her written submissions dated 3rd October 2024, the Appellant reiterated the contents of her petition of appeal and submitted that the prosecution failed to discharge its burden of proof. She urged the Court to allow her appeal.
7. The Respondent filed its written submissions dated 16th October 2024. It submitted that all the ingredient to the charges leveled against the Appellant were proved beyond reasonable doubt. It prayed that the appeal be dismissed.
8. The duty of this Court sitting as a first appellate court was well enunciated by the Court of Appeal in the case of *Okeno vs. Republic* [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya versus Republic* [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (*Shantilal M. Ruwala versus Republic* [1957] EA 570). 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 finding 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 had the advantage of hearing and seeing the witnesses.”

9. In the trial court, the prosecution called five witnesses to prove its case. PW1, PMM/ the complainant, stated that he was previously married to the Appellant in 2001. That however, owing to a domestic dispute, the marriage irretrievably broke down leading to their separation in 2008 and a divorce in



2015. That following those divorce proceedings, a matrimonial cause was filed, namely Matrimonial Cause No. 65 of 2015. (The judgment in that Matrimonial Cause was produced in evidence before the trial court). That all the properties that PW1 had acquired remained in his name. Following that judgment, it was PW1's evidence that the Appellant started sending threatening messages to him.
10. PW1 testified that in 2005, the Appellant, together with her sister, hatched a plan to kill him through mungiki members. That it was his sister that disclosed this information to their father. He was informed that they were paid Kshs. 40,000.00 to perform the act. However, the same was resolved with the intervention of parents. That PW1 also elected not to report this incident then.
 11. PW1 stated that come 7th January 2020, the Appellant entered upon PW1's plot forcibly and broke the gate. She then ordered all the tenants to vacate the premises or deposit the rent dues to her account. That PW1 was threatened and reported the matter at Juja Police Station. Later that evening, the Appellant threatened to kill PW1 through officer PC David Musili, PW2, who confirmed that he received a complaint from both the Appellant and PW1. PW2 recalled that the Appellant asked him to tell PW1 that he should leave her alone because if he did not, she would kill him. PW1 reported this incident. He also recalled that he talked to the Appellant's brother asking him to intervene and calm to the Appellant down.
 12. Following that report, PW1 stated that the Appellant's mobile phone was confiscated and preserved by the cybercrimes office where they managed to retrieve the messages. He also recalled that the Appellant had on another occasion tried to poison him. He was admitted at the ICU. He stated that he was apprehensive that the Appellant intended to kill him and feared for his life.
 13. PW3, Susan Wanja, a caretaker at PW1's apartments, testified that she was informed by a tenant that the Appellant had entered the building premises asking all tenants to send rent to her account number following a change of management. In January 2019, PW3 once more received information from the said tenant that the Appellant was evicting tenants because of rent arrears. PW3 was not there when the Appellant was in the premises. She then recalled that the Appellant on certain occasions warned her against stepping foot in those premises.
 14. PW4, IP Boniface Wambua testified that on 9th February 2020, PW1 made a report on malicious damage and was assigned to investigate. After investigations he arrested the appellant and confiscated her mobile phone make infinix smart 2 prepared an exhibit memo (Prosecution Exhibit 1) and forwarded the same to the cyber crime forensic unit and a report was received on 14th January 2020.
 15. PW5, Inspector Charles Kila testified that on 13th January 2020, he received a mobile phone and an exhibit memo Prosecution exhibit 1. He was tasked to analyze it and retrieve the information required. He testified that he retrieved messages from that device on diverse dates between 31st December 2019 and 10th January 2020 using a forensic tool licenced by the Government. The conclusions revealed the text messages in that specified period sent by the Appellant to the complainant as follows:
 1. 10th January 2020 at 0425hrs: Ignorance of the Law is no Defence.
 2. 10th January 2020 at 0424hrs: Endelea tuu kusukumana na Mimi. Kinyingo wa Mangú alikufa yule Yuko Sasa ni Wa Githurai so utaona Githurai hapo. Nimejipanga vizuri sana.
 3. 9th January 2020 at 1948hrs: Money for Njeri plot, Caesar plot, my car, the rent and food I paid for you, and all the plots we bought together must get back to me before we go to the grave. and even if I die, you will bring it to my grave in tears.
 4. 9th January 2020 at 0342hrs: The men who broke that gate are men like you. This time round they will break your head.



5. 9th January 2020 at 0337hrs: Next time you hear am at the plot (my plot) Caesar plot and you come like you did on Tuesday you will go back as dead meat. so don't dare. Nimejipanga
6. 9th January 2020 at 0335hrs: keep this in mind
7. 9th January 2020 at 0335hrs: Pesa yangu ya gari KAN 549T, ya Loan ya kununua na kujenga Caesar, plot, ya kukufulia na kukupikia for 15, years, ya Njeri, plot, ya, Mangú rent and food you I bought and you ate must come back to me before either of us goes to the grave.
8. 8th January 2020 at 1049hrs: no wonder you haven't made it far in life despite the money you make. You are too thick yet think that you are bright.. ignorant fellow. Even standard 4 students can do better.
9. 8th January 2020 at 1047hrs: Hahaha. I pity you and your ignorance and thickness. Check in that judgment if my plot appears anywhere in the matrimonial property now.
10. 8th January 2020 at 0729hrs: To family of Josphat Kibabu. Tafadhali katazeni Mwaura kukuja kuleta fujo kwa plot yangu ya Juja. Akija Tena Kama Jana isipokuwa ni polisi waliingilia asinilaumu kwamba sijamwambia. Hiyo plot ni yangu na pia zingine zote na magari ni yetu.. Hakuna vile atajitajirisha na pesa zangu halafu azunguke akijigamba yeye ni Tajiri huku nikistruggle. Otherwise Jana kwa police alisomewa Sheria na natumaini alielewa.
11. 8th January 2020 at 0618hrs: And if you want peace. keep off that plot. if not I will ensure that no tenant or person stays in all those plots until we get further orders from the court. Ngoigwa Kisii ukicheza nitavuruga zote. zibaki tuu mjengo isiyoleta hata ndururu.
12. 8th January 2020 at 0532hrs: And please I have given all those tenants notices to quit..30 days from yesterday.please prepare the refund.
13. 8th January 2020 at 0332hrs: Mimi si yule Wamusee ulimtumia for 18 years then ukamptupa bila hata kitambaa ya makamasi.
14. 7th January 2020 at 1915hrs: And get this right, I will get them either peacefully or peacelessly by sweat or by blood, by life or by death. My patience is exhausted.
15. 7th January 2020 at 1914hrs: Now you have seen how far Iam willing to go to get back each coin you stole from me. Prepare for the others until I get my 50 percent.
16. 4th January 2020 at 0251hrs: And it's so that you save your money and move around boasting and telling everybody how rich you are and how God has blessed you.. hahaha... blessed you indeed.and you can't take care of your Children's needs. You only only shoulder 1 percent percent then leave for me 99 percent to take care of then move around saying you do everything I thank God the stories are always brought back to me.
17. 4th January 2020 at 0242hrs: if you can refuse to buy Christmas clothes for children who you have no bought for any clothes for a whole year yet they are supposed to walk around in clothes then there's something seriously wrong with ...
18. 4th January 2020 at 0238hrs: You are simply heartless.if you could simply refuse to replace my children's phones.two at only 30k, because they were stolen, as if yours had and have never been stolen, yet you are collecting thousands from businesses we started together, then you are selfish. If you could refuse to buy a laptop until it's bought by my brother, then you are very very self centered.



19. 3rd January 2020 at 1603hrs: when you used my money to buy Njeri plot and Caesar plot or even to change my car into yours you thought I was not a human being with feelings. I must get those ones plus the cars before I go to the grave.
20. 3rd January 2020 at 1601hrs: How and with money from where? DOREP was started with money from Syokimau plot and you used it's proceeds to build.and your arrogance and contempt made you to continue building when the case was in court. I must get my share
21. 3rd January 2020 at 1559hrs: And please tell Lydia to begin preparing to leave Ngoigwa and Terry to prepare to leave Magogoni. As I told you, Juja, Ngoigwa and Mgogoni are my mine. Wacha vile unaenda round ukisema you developed them..
22. 3rd January 2020 at 1104hrs: if she doesn't comply with any tenant who wouldn't have sent their rent to me.watafutie nafasi kwako
23. 3rd January 2020 at 1103hrs: Please tell you cousin Susan to come remove her things and vacate from my premises. I now have a court order and I gonna effect it on whoever defies me, you included
24. 3rd January 2020 at 0529hrs: Never look down on others unless you are admiring their shoes
25. 3rd January 2020 at 0527hrs: Ati you gave me my bidco plot willingly?? Continue creating lies to yourself, feeding on them, believing them, then spreading them to create a new history of yourself. The truth always comes out and when it finally does, it's usually so bitter. The ways of a liar are short-lived. They earn him or her a temporary audience. But when the truth finally comes out and it always does come out, one is left crying and gnashing their teeth ... so continue creating more lies. The higher the rise the bigger the fall
26. 2nd January 2020 at 0211hrs: And get this right,your wives and their children, must leave. Go start with them elsewhere mununue mjenge but what we acquired together, hawatakaa. Hapo.
27. 1st January 2020 at 2230hrs: And prepare to account for everything that I listed in that case starting from 1997. Even the one you sold. I must get my share
28. 31st December 2019 at 0526hrs: The law is very clear that the first parental role is provision of
 - Food
 - Shelter
 - Accommodation
 - Education

And the rest that amount to about 20 roles so when you go round shouting I do nothing.watu tuu hukuchekelea.you seem not to be reading or knowing much about *the constitution*.so take time to read so that you open your mouth from a point of knowledge and consequence
29. 31st December 2019 at 0020hrs: Childrens act has listed all the responsibilities of a parent to a child
30. 31st December 2019 at 0019hrs: Read. Part 3 of the childrens at...about Parental responsibilities. You see how much you are doing or not doing to your children. Before you



go round shouting that I don't do much. You will be very surprised by how out of the many responsibilities how much yours amount to

16. He identified the mobile phone as an Infinix make IMEL Number 357546093072321 and had both a Safaricom and an Airtel sim card. The subscriber number was 0704xxxxxx; the number that sent the text messages. The report and the mobile phone were both produced in evidence.
17. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the Appellant. She was placed on her defence. Her sworn statement was that she is a female individual from the Taita community and not a male kikuyu as indicated in the charge sheet. She relied on her ID card for this submission.
18. She went on to state that as per the charge sheet, she was arrested on 14th January 2020 and arraigned on 16th January 2020 when the offence was stated to have occurred between 1st July 2020 and 1st October 2020. She complained that when she was arrested on 13th January 2020, she was placed under house arrest and only escorted to the police station at midnight. The police then impounded her mobile phone. As such, she could only contact her relatives at the police station when she borrowed a cell mate's number.
19. She stated that she was informed of the charges leveled against her and released to go home. She was asked to report to the police station every day. She recalled that she did so for the next three days and later on, she was arraigned in court. She complained that she was kept in police custody for two days pending investigations yet the law only allows that she is placed in police custody for 24 hours.
20. She denied that she was the author of the text messages. She remembered that on 7th January 2020, PW1 complained that she broke a padlock. The court ordered PW1 to surrender a property for the benefit of herself and their children. She produced the following witness statement filed at the police station: the complainant's, Inspector Ngove's dated 15th January 2020 and officer David Osili's statement. Finally, she stated that she notified the tenants that she was in charge of the premises but PW1 came with people to accost her. She confirmed that she and PW1 divorced albeit in 2023. That she did not complain that she was arrested for more than 24hours.
21. Having reviewed the Record and submissions before me, I having delimited a preliminary issue for consideration, whose determination will impact the fate of this appeal. The Appellant raised an issue that: the offence with which she convicted with was reported to have occurred between 1st July 2020 and 1st October 2020, yet she was arrested on 14th January 2020 and took plea on 16th January 2020. This assertion raises the question: was she arrested before she committed the offence?
22. Upon perusal of the record, I note that the Appellant was indeed first arraigned in court on 16th January 2020 having been arrested on 14th January 2020 and called to plead on the charges of "creating a disturbance in a manner likely to cause a breach of peace contrary to section 95(1)(b) of the Penal Code. The particulars of the offence were that on diverse dates between 31st December 2019 and 10th January 2020 at Juja township area in Juja sub-county within Kiambu County, created a disturbance in a manner likely to cause a breach of peace to PMK by telling him through text messages that she would break his head and kill him."
23. Notably, from the particulars above, the initial charges were for matters that had happened between 31st December 2019 and 10th January 2020. As the record further shows, the prosecution sought and was granted leave to amend the chargesheet on 16th February 2021. The effect of the amendment was the charges with which the Appellant was finally convicted with, to wit, threatening to kill contrary to section 223 (1) of the Penal Code. The particulars being that on diverse dates, between 1st July 2020



and 1st October 2020 at Juja township area in Juja sub-county within Kiambu County, without lawful cause, she sent threatening messages to kill PMK.

24. The effect of the amendment, was that the Appellant was now being charged for acts allegedly committed between 1st July 2020 and 1st October 2020. The timelines in the two chargesheets are key given the elaborate evidence on record from the prosecution. I have examined the record and while the prosecution moved to amend the chargesheet and charge the Appellant for charges committed between 1st July 2020 and 1st October, 2020, it NEVER gave any evidence to prove these acts. The prosecution evidence on record sought to prove matters allegedly committed between 31st December 2019 and 10th January 2020.
25. First the complainant himself, PW1, in his evidence did not refer to any matters falling within the period stated in the amended chargesheet. He spoke to their marriage with the Appellant in 2001, their separation in 2008 and ultimate divorce in 2015. He alluded to an incident in 2005 where he chose to let go, and finally referred to an incident on 7th January 2020 when the Appellant allegedly evicted tenants. PW2 does not even mention the period when the alleged matters that were reported to him happened. PW3 also spoke to events of January 2019. The most unfortunate even is the testimony of PW4 and PW5, the police officers involved in this matter. PW4 states that it was reported to him an incident on 9th January 2020 and he took the phone and prepared an exhibit memo dated 13th January 2020 to the Cyber Crimes unit for forensic analysis.
26. PW5 is the officer who forensically examined the phone. He stated that he extracted the messages between 31st December, 2019 to 10th January 2020. (I have elaborately set out the messages as retrieved by PW5).
27. This summary of the evidence before the trial court, leads to the question, on what evidence was the Appellant convicted for the offence of threatening to kill contrary to section 223 (1) of the Penal Code for having allegedly send threatening messages to PMK, between 1st July 2020 and 1st October 2020 at Juja township area in Juja sub-county within Kiambu County? There is no single thread of evidence that was tendered to demonstrate and act committed between 1st July 2020 and 1st October 2020.
28. From the record, it is apparent that there may be some bad blood between the complainant and the Appellant, their marriage having broken down culminating into a divorce. However, the criminal justice system is sacrosanct that for a conviction, the prosecution must prove its case beyond reasonable doubt. It is also trite that the offence and the particulars must be in harmony and must be proved by the evidence on record. Anything short of that, the conviction is fatal.
29. In *Akolon v Republic* (Criminal Appeal E010 of 2024) [2024] KEHC 7987 (KLR) (21 June 2024) (Judgment), it was held as follows:

“16. The Court of Appeal in *Yongo v Republic* [1983] KLR, 319 held that a charge is defective when it gives a misdescription of the alleged offence in its particulars. Said the court:

“In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

- a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to



charge an offence which the evidence in the committal proceedings discloses; or

- b. It does not, for such reasons, accord with the evidence given at the trial; or
- c. It gives a misdescription of the alleged offence in its particulars.”

30. The upshot is that having evaluated the trial court record, I find that the chargesheet the Appellant was ultimately confronted with was fatally defective. While the Appellant was confronted with charges for acts allegedly committed between 1st July 2020 and 1st October, 2020 the evidence adduced spoke to events that happened between 31st December, 2019 to 10th January 2020. Clearly, while the prosecution amended the chargesheet, it unfortunately failed to re-evaluate the evidence it presented before Court.

31. The upshot is that I find that the chargesheet was fatally defective and set aside the Appellant’s conviction for being not safe. Accordingly, the appeal is allowed. The Appellant’s conviction is set aside and her sentence vacated.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF AUGUST 2025.

RHODA RUTTO

JUDGE

In the presence of;

Mr. Moha for Appellant

Ms Torosi for Respondent

Wabwire Court Assistant

