



**Director of Public Prosecutions v Kariuki (Criminal Appeal
E065 of 2022) [2024] KEHC 4160 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E065 OF 2022
LM NJUGUNA, J
APRIL 24, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

THOMAS MUGAMBI KARIUKI RESPONDENT

*(Appeal arising from the decision of Hon. D.O. Ogoti, CM in Chief Magistrate's
Court at Embu in Criminal Case No. 704 of 2020 delivered on 26th April 2022)*

JUDGMENT

1. The appellant has filed a petition of appeal dated 09th December 2022, challenging the abovementioned decision acquitting the respondent. It prayed that the appeal be allowed and the acquittal be quashed. The appeal is premised on grounds that:
 - a. The learned trial magistrate erred in law and fact by acquitting the respondent when there was sufficient evidence to convict him;
 - b. The learned trial magistrate misdirected himself in law by failing to properly analyze the evidence before him;
 - c. The learned trial magistrate erred in law in finding that the prosecution's case was doubtful when the same was strong, credible and corroborated in all material particulars;
 - d. The learned trial magistrate erred in law in totally disregarding the entire prosecution's evidence;
 - e. The learned trial magistrate erred in law by failing to find that the prosecution had proved its case beyond reasonable doubt; and
 - f. The acquittal of the respondent was against the weight of the evidence.



2. The respondent was charged with the offence of threatening to kill, contrary to section 223 (1) of the [Penal Code](#). Particulars of the offence are that on 17th September 2020 at around 7pm at Kiriari village in Embu North sub-county within Embu County, the respondent, jointly with others not before the court, without lawful excuse, uttered the words “*nitakuua mchana kwa kukudunga kisu*” meaning “I will kill you in broad daylight by stabbing you with a knife”, threatening to kill Simon Rutere Njagi.
3. The respondent pleaded not guilty to the charge and the plea of not guilty was duly entered. The matter went to full hearing and the prosecution called 4 witnesses.
4. PW1 was the complainant who stated that on the day of the incident, he was on the way to his mother’s house through the shops when he saw the respondent who was in the company of Mutugi and Mwangi. That he had been avoiding them because they call him “*kilemba*” and he does not like it and so he hid in a pit latrine. That he continued to hide but the respondent called him. That he was apprehensive of speaking to the respondent in the absence of the other 2 men and they trailed him to his mother’s house. That the respondent asked him what he was doing at his Sukuma wiki shamba and he responded by asking him what he had seen him doing. The respondent chased PW1 and PW1 ducked. The respondent fell and he thought PW1 wanted to assault him. He removed a knife from his waist.
5. That he screamed and called out for his son, Mutugi, who went to the scene and they reported the matter at Manyatta Police Station. That the accused person told him that he would do to him what he did in Mombasa and in the presence of the complainant’s wife and son, he told him that he would kill him with a knife the following day at 1pm. That the respondent was arrested with a knife. On cross-examination, he stated that he differed with the respondent about the Sukuma wiki shamba which as of 2019 belonged to his father but in 2020, the pending land was finalized and it no longer belonged to his father. That the pit latrine where he hid was in the Sukuma wiki shamba. That the respondent carries a knife and PW1 usually sees him with it.
6. PW2, Alice Marigu, wife of the complainant stated that her daughter went home and told her that her husband was asking for her son but she did not know why. That she accompanied her son towards the scene where the complainant told them that the respondent had threatened to kill him if he did not give up on the land issues. That the things that her husband had bought had been scattered on the ground and while they collected them from the ground, she heard one of the people saying that the complainant, who is a prophet, would bow down to them and they mocked him. That when she arrived at the scene, she heard the respondent threatening to kill someone but she did not know whom he was referring to. On cross-examination, she stated that they preferred to report the matter at Manyatta Police Station and not Kiriari.
7. PW3 Paul Mutugi, son of the complainant stated that on the day of the incident, his mother informed him that his father was calling him. That the complainant informed him that he had been attacked by his (PW3’s) cousins. That at the scene, the items that the complainant had bought had been strewn on the ground and they collected whatever little that remained before heading to Manyatta Police Station to report the matter. That as they were on the way home, the respondent told the complainant that he would kill him the following day with a knife in broad daylight.
8. PW4, PC Naima Omar of Manyatta Police Station stated that the incident was reported at the station at around 10pm and an OB number was issued to the complainant. That the complainant reported that he was on his way to greet his mother when he was accosted and attacked by his nephew, the respondent, who was in the company of others. That the respondent had a knife and he was shouting saying that he was going to kill him and that the complainant’s wife and son went to his rescue. That the differences between the respondent and the complainant arose from a land dispute. That they arrested the respondent at Kiriari Shopping Center and a kitchen knife with a wooden handle was



- recovered from his jacket which he had borrowed from his friend as soon as he was arrested. On cross-examination, she stated that the land dispute between the complainant and the respondent was in court but she does not know if it was resolved.
9. Upon close of the prosecution's case, the court found that the respondent had a case to answer and he was placed on his defense.
 10. DW1, the respondent, stated that there is no land dispute between him and the complainant and that if any dispute existed, it was between his step-grandmother and another member of the family. That the only witnesses who can corroborate the complainant's version of the facts are his wife and son but they stated that they did not see him at the scene but they allegedly heard him threatening the complainant. That he was not arrested with the knife but it was found in a jacket that he had borrowed after the arrest. That the complainant and his mother do not see eye to eye and that he habitually frames people for crimes to remove focus from his own misdeeds. On cross-examination, he stated that he was at the scene because it was his portion of land given to him by his grandmother for farming and he had been called there. That there were about 6-7 people at the scene but only 3 were members of his family.
 11. The trial magistrate considered the evidence adduced and he found that the offence was not proved beyond reasonable doubt. That none of the prosecution witnesses placed the respondent at the scene and that the evidence was marred with contradictions. On this basis, he acquitted the respondent under section 215 of the *Criminal Procedure Code*.
 12. This appeal was canvassed by way of written submissions.
 13. The appellant, in its submissions, relied on the provisions of Section 223(1) of the *Penal Code* and the case of *Republic v. David Kipsang Rono* (2010) eKLR, for the argument that the trial magistrate failed to consider the actual utterances of the respondent threatening the complainant. That PW1 stated that he was accosted by the respondent who attacked him with a knife and as a result, the items he had bought from the shop were strewn on the ground and destroyed. That PW1 screamed and his wife and son went to his rescue and they all heard the respondent threatening to kill PW1 even if he hid. That PW3 also heard the threatening words uttered by the respondent to the complainant. It argued that the respondent was properly placed at the scene and that it was irrelevant that there was a land dispute; the point is that the respondent threatened to kill the complainant. That the respondent had the intention to cause harm to the complainant and so he should be convicted of the offense.
 14. On his part, the respondent submitted that the offence was not proved beyond reasonable doubt and the trial court was not persuaded that the evidence was enough to sustain a conviction. He relied on the cases of *Richard Munene v. Republic* (2018) eKLR, *Abel Maina Mburu v. Republic* (2021) eKLR and *Josphat Nyamai Muli v. Republic* (2019) eKLR. He urged the court to allow litigation of this matter to rest and that the findings of the trial court should not be unsettled since the standard of proof was not met.
 15. The issue for determination herein is whether the trial court's decision to acquit the respondent should be overturned.
 16. In order to determine the issue, I shall re-examine the evidence adduced at trial, as is expected of a first appellate court. In the case of *Okeno v. Republic* [1972] EA 32 it was held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower



court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

17. Section 223(1) of the *Penal Code* provides;

"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."

The offence with which the respondent is charged stems from this provision of the *Penal Code*. According to the provision, a threat to kill becomes a felony when any person;

- a. Unlawfully utters a threat to kill another; or
- b. Causes any person to receive a threat to kill, whether written or not

18. PW1 stated that he was on his way to his mother's house through the shops when some 2 people who were in the habit of mocking him, noticed him and were waiting for him. That he hid in a pit latrine to let them pass but they did not and instead, they were joined by the respondent who threatened to kill him the following day at 1pm with a knife. PW2 stated that when she heard the respondent saying that he was going to kill someone, she did not know whom he was referring to. PW3, who was in the company of PW1 at the time of the threat, said that the respondent told PW1 that he would kill him in broad daylight with a knife.

19. PW4 stated that the threat to kill was reported at the police station within a few hours and the respondent was arrested in connection with the same. She also stated that a knife was found in a jacket that the respondent borrowed from his friend immediately after he was arrested and was being loaded into the police vehicle. In his defense, DW1 stated that the allegations were not true and that the complainant was a habitual liar who was used to implicating people so that he could hide his misdeeds. That there is bad blood between them owing to a land dispute, which according to PW1, led to his father losing a piece of land to the respondent.

20. From the evidence, it is clear to me that indeed the respondent threatened to kill the complainant and the testimony of PW3 places him at the scene. However, it is important to deduce whether the respondent had the intent to commit the offence. This can be inferred from the alleged behavior of the respondent at the time of the threat. PW1 stated that the respondent asked him what he was doing at his Sukuma wiki shamba and he in turn asked him to tell him what it is that he is doing. That soon after, the respondent attacked him with a knife, which, PW1 stated on cross-examination, was taken and hidden by the respondent's friends. PW1 stated that the respondent usually carries a knife and that he sees him with it. PW4 stated that at the point of arrest, a knife was recovered in a jacket that the respondent was wearing and that the jacket was given to the respondent immediately after his arrest. In my view, the respondent threatened the complainant.

21. In the circumstances, and given the evidence adduced, it is my finding that the prosecution proved the case against the respondent beyond any reasonable doubt. The defense of the respondent did not offset the evidence of the prosecution and the alleged bad blood between the respondent and the complainant is not sufficient defense.

22. Therefore, I find that the appeal has merit and the same is hereby allowed with the following orders:

- a. The order by the trial magistrate acquitting the respondent is hereby set aside; and



- b. The respondent is hereby found guilty of the offence of threat to kill contrary to section 223(1) of the [Penal Code](#) and is hereby convicted for the same.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

..... for the State

..... for the Respondent

