



**Cuvi v Republic (Criminal Appeal E068 of 2024)  
[2024] KEHC 15005 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15005 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E068 OF 2024  
LM NJUGUNA, J  
NOVEMBER 27, 2024**

**BETWEEN**

**BERNARD NJUKI CUVI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. Njoki Kahara (SRM)  
in Siakago MCCR E601 of 2022 delivered on 05th March 2024)*

**JUDGMENT**

1. The appellant has filed a petition of appeal dated 18<sup>th</sup> March 2024 seeking that the appeal be allowed, conviction be quashed, sentence be set aside and the appellant be set at liberty. The grounds of appeal are that the learned trial magistrate erred in law and facts:
  - a. By imposing a harsh sentence upon the appellant;
  - b. By failing to note that the prosecution's evidence was contradictory, uncorroborated and inconsistent;
  - c. By failing to consider the irregularities and illegalities occasioned;
  - d. By rejecting the appellant's defense without giving cogent reasons which would have watered down the prosecution's case thus violating section 169(1) of the *Criminal Procedure Code*;
  - e. By violating the appellant's rights under Article 27(1)(2)&(4) of *the Constitution*;
  - f. By failing to note that the burden of proof can never shift to the appellant; and
  - g. By not considering that the appellant was a first offender.



2. The appellant was charged with the offence of attempted murder contrary to section 220(a) of the Penal Code. Particulars are that on 17<sup>th</sup> July 2022 at Gitua village, Mbeere North sub-county within Embu County, the appellant attempted unlawfully to cause the death of Jeremiah Nyaga Ileri by cutting him several times with a panga. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.
3. PW1 was Jeremiah Nyaga Ileri who stated that the appellant is his brother. That the appellant told him that he had seen a gazelle and he wanted to show him. That he followed the appellant and when they reached a certain point he began cutting him with a panga on his neck, waist and knees and he fell down. He stated that he was taken to hospital where he was admitted for treatment. He stated that he had not disagreed with the appellant but there was a pending land case at Siakago ELC no. 28/2022. On cross-examination, he stated that he was not carrying anything that day and he did not know whether the animal that the appellant had seen was dead or alive.
4. PW2 was Patrick Munyi Mbaka, a neighbor who stated that PW1 went to his land to see him. That he had cut injuries on his head, neck and throat and he was covered in blood. That when they saw him, his wife screamed raising alarm and PW1 told him that he had been attacked by the appellant. That they looked for a vehicle to take him to hospital and while on the way, they met the appellant and they took him to Siakago Police Station. PW1 was taken to Tenri Hospital where he was referred to Embu Level 5 Hospital and he was admitted for a whole month. On cross-examination, he stated that the appellant was carried in the same vehicle that was taking PW1 to hospital and he was taken to Siakago police station. He did not know the reason why the appellant injured PW1.
5. PW3 was John Njiru Mugo, a village elder who stated that he was informed about the injuries sustained by PW1. That he went to the home of PW2 where he found PW1 bleeding profusely from the ears, head and neck and he was lying on the ground. That they called for a motor vehicle and took him to hospital and PW1 said that it is the appellant who had assaulted him. That there is a land dispute between the appellant and PW1 and he suspected that it was the motivation for the assault. On cross-examination, he stated that PW1 went to the home of PW2 which was the nearest place he could have gone for help. That though appellant's wife told the police that the appellant was away in Nairobi for work and gave out the appellant's phone number, the appellant was arrested on the same day of the incident.
6. PW4 was Edwin Macharia Nyaga, PW1's son, who stated that on the day of the incident, his father had gone to the farm at 6.00a.m as he did every day. After sometime, he heard PW2 calling for help and when he ran to his home, he found PW1 lying on the ground, bleeding profusely and he had injuries on both sides of his face, the ears, on the head and throat. That he called PW3 who got a vehicle and they took PW1 to hospital and while they were enroute, they met the appellant, they put him in the same vehicle and took him to the police station.
7. That PW1 was taken to Embu Level 5 Hospital where he was admitted. He stated that there is a land dispute between the appellant and PW1. On cross-examination, he stated that the vehicle that was used to take PW1 to hospital had 5 people. That they did not ask PW1 why he was attacked because he was bleeding profusely. That the appellant had severally told PW1 to vacate the land where they live but he did not, since the land belongs to both of them and each brother has his portion.
8. PW5 was Sgt. Hamson Muthusi of Siakago Police Station who stated that the incident was reported as assault and the appellant by then, was being held in a cell when he took over investigations. He stated that the appellant had been brought at the police station when PW1 was being escorted to hospital. That he visited the appellant's home and his wife told him that the appellant had travelled to Nairobi a week prior. The complainant told the police that the appellant struck him with a panga while he was



walking ahead of him to go and see a gazelle that was allegedly on a part of their land. That PW1 was helped by PW2 and PW3 to get to hospital. On cross-examination, he stated that the blood found at the scene was not examined and that nobody saw the appellant attacking PW1. That the panga used to cut the deceased was not recovered but the appellant was apprehended by those people who were taking PW1 to hospital.

9. PW6 was Dennis Mwenda of Embu Level 5 Hospital who stated that PW1 was referred from Siakago Police Station for treatment. PW1 went in with clothes soaked entirely in blood stains and clots. He observed that there were cut wounds on the right side of the head, a severed left earlobe that had been stitched back and pus was oozing from it, a cut on the right cheek, several cuts and lacerations on the neck that were stitched and a fracture on the right mandible that caused difficulty in closing and opening the mouth. He had a healing laceration on the right arm which appeared to have been a defense wound. This examination was conducted 10 days after the incident and PW1 was referred to Kenyatta National hospital for repair of the broken mandible jaw. He classified the injuries as grievous harm and he produced the P3 form as evidence.
10. At the end of the prosecution's case, the court ruled that a prima facie case had been established. The appellant was placed on his defense.
11. DW1, the appellant, denied any involvement in the offence and he stated that he was not at home on the day of the incident. He stated that he was on a motor cycle when his cousin went and asked him to enter the motor vehicle. Once he entered, they took him to the police station on the allegation of attempted murder. That when he was taken by his cousin, he had just returned from Nairobi and after he was taken to the police station, his cousin disappeared. He said that he was hijacked by 5 people in a motor vehicle. That he learned about PW1's injuries when he was arraigned in Court. That the police recorded a statement on his behalf and he refused to have his fingerprints taken but he was beaten and he had to agree.
12. The trial court analysed the evidence and found the appellant guilty of the offence of attempted murder. He was sentenced to 40 years imprisonment.
13. The parties on appeal were directed to file their written submissions but only the respondent complied.
14. In its submissions, the respondent relied on sections 220 and 388 of the Penal Code and the cases of *Emmanuel Korir Langat v. Republic* (2022) eKLR and *Abdi Ali Bare v. Republic* (2015) eKLR. It argued that the evidence adduced proves that the appellant did an act that endangered the life of the complainant. It relied on the cases of *Philip Nzaka Watu v. Republic* (2016) eKLR and *Njuki v. Republic* (2002) 1 KLR 77 and urged that there are no significant inconsistencies that go to the core of the evidence. It stated that the sentence imposed by the trial court should remain undisturbed and it cited the cases of *Shadrack Kipkoech Kogo v. R. Eldoret Criminal Appeal No.253 of 2003* and *Bernard Kimani Gacheru v. Republic* (2002) eKLR.
15. From a perusal of the petition of appeal and submissions, it is my view that the issues for determination are as follows:
  - a. Whether the prosecution has proved the case beyond reasonable doubt; and
  - b. Whether the sentence imposed was harsh and excessive.



16. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of *Okeno vs. Republic* [1972] EA 32 I agree with the court when it 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. The offence of attempted murder is provided for under section 220(a) of the *Penal Code*, thus:

“Any person who -

(a) attempts unlawfully to cause the death of another; or

(b) .....,

is guilty of a felony and is liable to imprisonment for life.”

18. An attempted offence is one which is a precursor to the actual offence, such that if the actions of a person accused of an attempted offence were to progress, they would end up with the actual offence. It means that in this case, if the actions put in motion had progressed, it would have resulted in murder. In proving an attempted offence, the court has to establish that the aggressor was identified and he possessed mens rea to do the unlawful act, which he did.

19. PW1 stated that the appellant called him intending to show him a gazelle that he had seen somewhere on their land. PW1 walked ahead of the appellant and after sometime, the appellant began cutting him with a panga on his head, waist and knee and he fell down. PW2 testified that PW1 went to his home seeking help and he was bleeding profusely. That PW2’s wife raised alarm and that is when PW4 went towards the noise and he found his father bleeding. PW4 called PW3 who arranged for a motor vehicle to take PW1 to hospital. PW4 stated that while they were in the vehicle taking his father to hospital, they met the appellant and they put him in the said vehicle and took him to the police station before proceeding to hospital. PW2 said that PW1 told him that it was the appellant who had attacked him.

20. In his defense, the appellant denied involvement in the incident and stated that he had travelled and at the time he was arrested, he had just returned from Nairobi. He stated that he was lured into a motor vehicle by his cousin and he was taken to the police station where they abandoned him and he was later charged with the offence. That the police assaulted him, took his fingerprints and recorded a false statement for him.

21. In the case of *Moses Kabue Karuoya v. Republic* (2016) eKLR the learned Judge stated:

“In the case of *Bernard Kariuki Chege v Republic* [2016] KEHC 3200 (KLR) this court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another



crime. An inchoate offense requires that the accused have the specific intent to commit the underlying crime. An inchoate crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place. Strictly inchoate crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves...”

22. An inchoate or attempted offence is defined under Section 388 of the *Penal Code* as follows:

- “(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
- (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
- (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”

23. The testimony of PW1 as to the identity of his attacker remains uncontroverted through the appellant’s defense. PW6 testified about the injuries sustained by PW1 and in his assessment, the injuries are classified as grievous harm. PW1 stated that the appellant lured him further afield and then started hacking him with a panga starting with strikes on either side of his neck. The medical examination revealed that PW1 had wounds all over his head and neck and his throat was cut. From the full testimony of PW6, the injuries sustained by PW1 fell slightly short of fatality. In fact, from the provision of section 388 of the Penal Code, it is my view that the manner in which the injuries were inflicted shows that the appellant’s intention was to kill PW1 but his effort did not succeed. In the eyes of this court, the appellant possessed the mens rea and he unsuccessfully attempted to murder the deceased.

24. As to whether the sentence imposed by the court was harsh, I do note that the trial court considered the mitigation provided by the appellant before sentencing. The offence of attempted murder carries a sentence of life imprisonment. However, the trial magistrate sentenced the appellant to 40 years imprisonment. On appeal, the sentence imposed by the trial court can only be reviewed if the trial court proceeded on wrong principles of law (see the case of Bernard Kimani Gacheru v. Republic (2002) eKLR). In the present case, though the trial court exercised leniency and departed from the prescribed sentence, I find that the sentence is harsh and excessive. I hereby reduce the same to 25 years.

25. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

