



**Karobia v Republic (Criminal Appeal E058 of 2024)
[2024] KEHC 15006 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E058 OF 2024
LM NJUGUNA, J
NOVEMBER 27, 2024**

BETWEEN

DAVID NJAGI KAROBIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the decision of Hon. S.K. Ngii in
Siakago MCCR E563 of 2023 delivered on 28th June, 2024)*

JUDGMENT

1. The appellant has filed a petition of appeal dated 23rd July 2024 seeking that the appeal be allowed and the sentence be substituted with a less severe proportionate sentence. The grounds of appeal are as follows:
 - a. That he pleaded guilty at trial;
 - b. That the learned trial magistrate erred in law and fact by imposing a harsh and excessive sentence upon the appellant without complying with section 333(1) & (2) of the Criminal Procedure Code;
 - c. That the learned trial magistrate erred in law and fact by imposing a harsh and excessive sentence upon the appellant without considering the circumstances under which the offence occurred;
 - d. That the learned trial magistrate erred in law and fact in failing to consider that as a first offender, the appellant ought to have benefitted from the least severe punishment; and
 - e. That the learned trial magistrate erred in law and fact by imposing a sentence of 17 years imprisonment without considering that the appellant is a senior citizen hence denying him hope for prospects.



2. The appellant was charged with the offence of attempted murder contrary to section 220(a) of the Penal Code. Particulars are that on 19th June 2023 at Kaithungu village, Kamumu location within Murangari location, Mbeere North sub-county in Embu County, the appellant attempted to unlawfully cause the death of Alban Njoka Karobia by severally cutting him on his head, arms and feet using a sharp 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 Alban Njoka Karobia, the appellant's brother who stated that they had a disagreement about some grass that the appellant was supposed to sell and give him the money. That the appellant sold the grass but lied that he had only sold half of it. That they met and talked about the issue at his grass farm and then the appellant invited him to the shopping center where they had a drink together. That when they were returning home, the appellant started blaming him for not supporting his claim to collect more money from the person who bought the grass. He stated that the appellant invited him to his home where he took a panga and attacked him from behind, cutting him 6 times with it on the head, hands and legs. That he lost consciousness and regained consciousness at Embu Level 5 Hospital where he was admitted for 2 months. On cross-examination, he stated that he did not threaten the appellant with death if he refused to give him his money. That the appellant intended to kill him and he did not confront the appellant at any given point.
4. PW2 was Francis Njeru Karobia, a brother to both the appellant and PW1. He stated that their dispute was brought to his attention and he tried to help them to resolve it, and after the deliberations, he went back to his home. That later that day, he heard that PW1 had been attacked but when he went to the home of the appellant, he was denied access, as was everyone else who had gathered, until the police arrived. That when he entered the compound of the appellant, he saw PW1 lying near the kitchen bleeding profusely with injuries on his head, hands and legs and there was a panga near where PW1 was lying. The appellant was inside his house alone preparing to sleep and that is when the police arrested him and PW1 was taken to hospital. On cross-examination, he stated that he did not know how the incident happened and if PW1 had waited for the appellant by the roadside. He didn't know if the appellant and PW1 had gone to the appellant's home together but their homes are not very far apart.
5. PW3 was Augustino Njeru, the area chief who stated that the appellant's wife called him and told him that she had found the appellant fighting with his brother and he had cut PW1 with a panga on the head. He called a Nyumba Kumi elder who lives near the appellant and the elder confirmed that he had heard the appellant's wife screaming and had gone to confirm what had happened. That the elder called him back saying that he had seen the appellant with something in his hands threatening anyone who wanted to enter his compound.
6. That the elder called the OCS who went to the complainant's home where they found him lying a few meters from the entrance to the appellant's home. That there was a panga and blood at the appellant's compound and they heard him shouting that he was going to kill PW1. That PW1 was unconscious and they took him away in the police vehicle. On cross-examination, he stated that he later learned that the appellant and PW1 had disagreed over napier grass that was supposedly sold but he did not know what caused the appellant to attack the complainant.
7. PW4 was PC. Calvin Abok of Ishiara Police Station who stated that he was informed about the incident and he visited the scene together with his colleagues from Kanyuambora Police Post. That they found PW1 in a maize plantation having injuries on his head, hands and legs and he was unconscious. That the people told the police that it was the appellant who had attacked the deceased. They arrested the appellant and then rushed PW1 to hospital. A bloodstained panga was recovered outside the appellant's house.



8. PW5 was PC James Gitari of Kanyuambora Police Post who stated that he accompanied PW4 to the scene where they found PW1 lying next to the appellant's maize farm which is near his farm. That PW1 had injuries on his head, hands and legs and there was a bloodstained panga nearby. That the appellant was found in his house being drunk and he was drinking more beer. They arrested him and took the panga as an exhibit. On cross-examination, he stated that the appellant had been identified to the police by an eye witness who heard the appellant saying that he wanted to kill PW1 so that the case can end. That the appellant and PW1 had differed over napier grass.
9. PW6 was IP Leonard Munga of DCI Mbeere North who stated that the incident was reported at the police station and the issue arose from a conflict between the appellant and PW1 because of Napier grass. That the appellant had attempted to murder PW1 by cutting him severally with a panga, which was recovered outside his house. That the panga was taken for analysis at the government chemist but results were not yet ready at the time of his testimony. On cross-examination, he stated that the person who bought the grass had cut it from the shamba where it had been planted. That when the appellant and PW1 differed about the grass, the matter was arbitrated in the presence of several people.
10. PW7 was Dr. Dennis mwenda of Embu Level 5 Hospital who produced a P3 form authored by the late Dr. Njiru. He stated that PW1 was referred to the hospital where he presented with cut wounds on the head, hands and left leg. That his tendons had been cut and the hand could not open. The examining doctor opined that the injuries were inflicted by a sharp object and he classified the injuries as grievous harm.
11. At the end of the prosecution's case, the court found that a prima facie case had been established. The appellant was placed on his defense.
12. DW1, the appellant, stated that his brother, PW1 wanted to buy grass but one James had bought grass for Kshs.500/= but had cut grass that was worth more than that. He stated that the issue was arbitrated by village elders and PW1 agreed to forgive the appellant for the deficit in the purchase price. That later on, he took his brother for a drink at the shopping center and they had said that they wanted to sell the land, an idea which he opposed since not all the siblings were onboard.
13. That when they parted ways, he went to his errands and while walking home, he found PW1 waiting for him by the roadside seeming to concentrate on his phone. That PW1 assaulted him with a stick and when he fell down, PW1 began choking him before a good Samaritan separated them. That he went home and while sitting outside his house, PW1 followed him shouting and demanding for his money.
14. That soon afterwards, he charged towards him with sticks and he fell inside his kitchen on a panga that injured him. That he stood up and went to the house and shortly afterwards, he was arrested by police. On cross-examination, he stated that when PW1 attacked him by the roadside, he slapped him and then followed him to his house with sticks. That it is true that he armed himself with a panga to defend himself by randomly cutting PW1 but he did not intend to kill him. That he did not report the incident because he was in much pain and he needed to rest in his house.
15. The trial court analysed the evidence and found the appellant guilty of the offence of attempted murder. He was sentenced to 17 years imprisonment.
16. The appeal was canvassed by way of written submissions.
17. The appellant submitted that the prosecution did not provide photographs of the scene or the murder weapon. That the testimonies of PW1 and PW5 contradicted each other, and on that basis the conviction ought to be set aside.



18. 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 were 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.
19. 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.
20. 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 v. 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.”
21. 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.”
22. 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 offense 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.
23. PW1, PW2 and DW1 testified that PW1 and the appellant had differed over grass that the appellant had sold to one James. The dispute was settled by some village elders and they all thought that the matter was in the past. Pw1 testified that after the meeting with the elders, he went to drink alcohol with the appellant and on the way back home, the appellant restarted the issue again, the matter escalated when the appellant invited him to his house where he cut him with a panga, causing the near-death injuries. On his part, DW1 stated that when they went drinking, they were in the company of their other brother and they had discussed about selling land, which idea the appellant did not agree with.



He stated that it was PW1 who revisited the issue and started beating him. On cross-examination, he stated that he used the panga to defend himself from PW1's assault and he cut him randomly without the intention of killing him.

24. 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...”

25. 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.”

26. PW7 testified of the injuries sustained by PW1 and classified them as grievous harm and the author of the medical report noted that the injuries were life threatening due to the amount of bleeding that was observed. The complainant was hospitalized for 2 months. For this offence to be proven, the prosecution had to prove that the appellant, if he had succeeded in his attempt, his unlawful acts would have caused the death of the complainant.

27. Mens rea can be inferred through the nature of injuries and the manner in which they were inflicted. In as much as the murder weapon was not produced as evidence, there is enough proof that the appellant cut the complainant with a sharp panga on his head, hands and legs, injuries that would have resulted in death. Furthermore, PW3 testified that the appellant was heard swearing that he would kill the complainant in a bid to end the feud between them. From the evidence adduced, the appellant was clearly identified as the person who inflicted life-threatening injuries upon the complainant with the intention to do so.

28. The appellant claimed that the testimonies of PW1 and PW5 contradicted each other. This is with regards to circumstances of his arrest. PW1 stated that when the appellant was arrested, he was alone in the house while PW5 stated that the appellant's wife was present. This contradiction does not affect



the prosecution’s evidence regarding the perpetrator of the offence. Contradictions in evidence were addressed in the case of Richard Munene v Republic (2018) eKLR where the court stated:

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

29. 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 17 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, the trial court exercised leniency and departed from the prescribed sentence. I see no basis to revise this finding by the trial court.
30. In the end, I find that the appeal lacks merit and the same is hereby dismissed.
31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

