



**Muli v Republic (Criminal Appeal 166 of 2023)
[2024] KEHC 14729 (KLR) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 166 OF 2023
DR KAVEDZA, J
NOVEMBER 26, 2024**

BETWEEN

SPTE SYLVESTER MULI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by the court martial at Kahawa Garrison on 31st July 2023 in Court Martial Case No. 15 of 2022)

JUDGMENT

1. The appellant was charged and convicted before the Court Martial on three counts of offences: Count I and II, committing a civil offence contrary to section 133(1)(a) of The [Kenya Defence Forces Act, 2012](#) that is to say attempted murder contrary to Section 220 of the Penal Code. Count III, Deliberate discharge contrary to section 123(a) of the [Kenya Defence Forces Act, 2012](#). He was sentenced to serve twenty (20) years imprisonment in Counts I and II and one (1) year imprisonment in Count III. The sentences were to run concurrently.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He complained that he did not have a fair trial. He argued that the charge sheet was defective and the amendments thereto prejudiced him. He urged the court to quash his conviction and set aside the sentence imposed.
3. Before delving into the specific re-evaluation of the evidence on record, I will deal with the preliminary issue raised by the appellant thus: the charge sheet was defective for being duplex, and an amendment made thereto prejudiced him.



4. A charge is duplex where in one charge there is more than one offence. Section 134 of the Criminal Procedure Code provides: -

Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offences or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

5. In the case of *Sigilani –vs- R (2004) 2 KLR 480* it was held that:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

6. The question is whether the charge and particulars are specific and only refer to one offence in one count. In my view, the charge sheet was not duplex in any way.
7. On whether the amendment to the charge sheet prejudiced the appellant, Section 214 of the Criminal Procedure Code allows the prosecution to amend the charge at any time before it closes its case. In this case, the prosecution made an application to amend the charge sheet on 17th April 2023. The application was allowed despite the defence’s opposition. The charge was read to the appellant who denied the charges. In my view, the trial court complied with section 214 of the Criminal Procedure Code. That ground of appeal therefore fails.
8. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic [1973] EA 32*).
9. The prosecution’s case was as follows: On 2nd July 2022, Cpl Erick Momanyi (PW1), a KDF officer, was stationed at Kangaita Citso Camp in Laikipia County, alongside his colleagues, including Spte Brian Njeru (victim) and Spte John Karanja (PW2). The camp was tasked with security duties, and Spte Sylvester Muli (the appellant) had requested permission for a night out, which was granted by their superior, PW2. However, the appellant did not return by the agreed time, and when PW1 attempted to contact him, he could not be reached. PW1 informed PW2, who suggested waiting until 4:00 pm the next day, after which they would raise an AWOL (Absent Without Leave) report if the appellant did not return.
10. On 3rd July 2022, at around 2:30 pm, the appellant reappeared at the camp and approached Spte Njeru to ask for food. Njeru did not respond, and the appellant proceeded to the kitchen, where he served himself. After eating, the appellant returned to where the others were and suddenly threatened to kill Njeru. He was armed with an AK47 rifle, and in Swahili, the appellant stated, “Njeru today I will finish you,” before shooting at Njeru. The bullet hit Njeru in the chest. When the appellant turned towards Spte PW2 and aimed his weapon at him, PW2 ducked to avoid being shot. PW1 then intervened, grabbing the appellant from behind and pulling him out of the tent. The appellant fired three more shots but eventually dropped his weapon when challenged by PW1. PW1 called for assistance, and nearby construction workers arrived with a rope, which they used to restrain him. They helped to rush Njeru to the hospital.



11. PW2, Senior Private John Karanja, confirmed the events. He explained that when the appellant approached their tent, Njeru did not respond to his request for food, leading the appellant to help himself. PW2 was lying on his bed when he heard the gunshot and saw the appellant point the rifle at him. PW2 ducked and crawled towards the door to escape. He then ran to a nearby bush, about 50 meters away, to seek help. He saw PW1 managing to subdue the appellant and confirmed that Njeru was severely injured. PW2 added that the appellant fired five rounds during the incident.
12. PW3, Senior Private Brian Kivuti Njeru, who was also stationed at the camp, recalled that after lunch, the appellant came to his tent, cocked his AK47, and pointed it at him. The appellant threatened to kill him, and when PW3 attempted to move the rifle away from his forehead, the appellant shot him. The bullet hit his neck, and he was later rushed to IKR MRS and then transferred to Outspan Hospital and Nairobi Regional Hospital for treatment.
13. PW4, Consultant General Surgeon Dr. Ken Muthua, examined PW3 after he arrived at Nairobi Regional Hospital. He confirmed that PW3 had suffered a gunshot wound to the neck, which exited through the back. Fortunately, the bullet had avoided vital structures, and PW3 was stable. Dr. Muthua confirmed that the injury could have been life-threatening had it been positioned differently.
14. PW5, Dr. Gathukia, a medical officer, also testified that PW3's neck injury was serious but not fatal. He confirmed the medical report detailing the gunshot wound.
15. PW6, Cpl Daniel Taura, the investigating officer, was informed of the shooting incident on 3rd July. He arrived at IKR MRS where he found PW3 receiving treatment. Afterwards, he visited the camp, where he found the appellant tied up near the gate. PW6 discovered the AK47 rifle near the tent, as well as spent cartridges and a pool of blood inside the tent where PW3 had been sleeping. The weapon and the spent cartridges were collected and taken for forensic examination.
16. PW7, Senior Superintendent Alex Chirchir, conducted a ballistic examination of the weapon and confirmed that the AK47 rifle found at the scene had been used to fire the five rounds of ammunition. The rifle was capable of firing the cartridges found at the scene.
17. PW8, Cpl Kelvin Wafula Marumbu, accompanied by PW6, took the AK47 rifle and the spent cartridges to the DCI for forensic analysis. He confirmed the weapon's serial number and stated that it was in good working order. The forensic examination later confirmed that the rifle had been used in the shooting incident.
18. In his defence, the appellant opted to remain silent. However, the advocate of record raised the issue of intoxication, suggesting that the appellant may have been under the influence at the time of the shooting. However, this argument was not supported by any evidence, and no proof of intoxication was presented.
19. The appellant was then convicted and sentenced accordingly.
20. Section 220 (a) of the Penal Code provides for the offence of attempted murder as well as the sentence upon conviction:
 - “(a) attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life”



21. To sustain a charge of attempted murder, the evidence must show that there was a specific intent to unlawfully cause the death of another. In *Cheruiyot Vs Republic (1976 - 1985) EA 47* it was emphasized that;

“an essential ingredient of an attempt to commit an offence is a specific intention to commit that offence. If the charge is one of attempted murder, the principal ingredient and the essence of the crime is the deliberate intent to murder. It must be shown that the accused person had a positive intention to unlawfully cause death and that intention must be manifested by an overt act”.
22. It was the prosecution’s case that the appellant fired his AK47 rifle at Spte Brian Njeru, hitting him in the chest, which constitutes the actus reus (physical act) of the crime. PW2 testified that the appellant also aimed and fired the rifle at him after shooting at PW3. The act of firing the weapon at Spte John Karanja further corroborates the prosecution’s evidence of the appellant’s actions. PW3 confirmed that the appellant shot him in the neck, sustaining a gunshot wound, which is a key piece of evidence supporting the charge of attempted murder.
23. The medical testimony from PW4 (Consultant Surgeon Ken Muthua) and PW5 (Captain Dr Gathukia) further substantiated the severity of the gunshot wound sustained by Spte Njeru, particularly the neck injury, linking the physical harm to the appellant’s actions. The AK47 rifle, along with five spent cartridges, were recovered at the scene by PW6, and ballistic expert PW7 confirmed that the spent cartridges matched the rifle, proving that the weapon used was indeed the one fired by the appellant.
24. On the issue of mens rea (mental state), the prosecution demonstrated that the appellant had the intent to kill. Prior to the shooting, the appellant explicitly threatened to kill his victims. PW1 testified that the appellant stated, “Njeru, today I will finish you,” which exhibited his intention to kill. PW2 and PW3 corroborated similar threats made by the appellant before he fired at them.
25. The appellant deliberately aimed the rifle at vital areas, such as the chest and neck, further supporting the inference of intent to cause fatal harm. The use of a military-grade AK47 rifle, designed for lethal force, also highlights the appellant’s intent to kill. Additionally, the appellant did not stop after injuring one victim, continuing to fire at the others, as confirmed by PW1. The witnesses did not report any provocation or self-defense on the part of the appellant. His actions seemed to be premeditated, and he did not act in response to an immediate threat. The lack of any mitigating circumstances (such as self-defense or provocation) further strengthens the case for deliberate intent to kill.
26. In conclusion, the evidence establishes that the appellant physically carried out the shooting with clear intent to kill, fulfilling both actus reus and mens rea and supporting the charge of attempted murder. The conviction on two counts of attempted murder is therefore affirmed.
27. In count III, the appellant was charged with Deliberate discharge contrary to section 123(a) of the [*Kenya Defence Forces Act*, 2012](#). The act provides as follows:

A person subject to this Act who negligently or deliberately fires or discharges ammunition from a weapon in the person’s charge or entrusted to the person’s care, or which forms part of property within the person’s charge or issued to the person for use for service purposes, commits an offence and shall be liable, on conviction by a court-martial, be liable to imprisonment—



- (a) for a term not exceeding two years or any lesser punishment provided for by this Act in the case of negligent firing or discharge of ammunition; or
- (b) for a term not exceeding seven years or any lesser punishment provided for by this Act in the case of deliberate firing or discharge of ammunition.

28. The evidence of deliberate discharge of a firearm is provided by PW6, who recovered the appellant's AK47 rifle at the scene, alongside five spent cartridges. PW7, a ballistic expert, confirmed that the rifle was capable of firing the rounds and that the cartridges matched the weapon. PW2 and PW3 testified that the appellant fired the rifle deliberately at them, with PW3 sustaining a gunshot wound to the neck. Furthermore, PW1 described how the appellant fired multiple shots, including after being restrained, demonstrating the intentional use of the firearm. The conviction on this charge is therefore affirmed.
29. On sentence, the appellant was sentenced to serve a concurrent sentence of twenty (20) years in counts I and II and one (1) year in count III. During sentencing, the court martial considered the seriousness of the offence, the appellant's mitigation, and the time spent in remand custody. The court directed that the sentences shall run from the date of the appellant's arrest. In my view, the sentences imposed were legal and justified under the circumstances.
30. The upshot of the above is that the appeal is found to be lacking in merit and is dismissed in its entirety.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF NOVEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Achola h/b for Orimba for the Appellant

Mburugu for the Respondent

Achode Court Assistant

