



REPUBLIC OF KENYA



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**Tabu & 3 others v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 14577 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E028 OF 2023
DK KEMEL, J
NOVEMBER 22, 2024**

BETWEEN

**ERICK OMONDI TABU 1ST APPELLANT
MOSES WASONGA TABU 2ND APPELLANT
RUEBEN OCHIENG OKADO 3RD APPELLANT
LEONARD ONYANGO MBEDE 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. Eric Malesi (PM)
delivered on 26th May 2023 in Madiany PMCC E048 of 2022)*

JUDGMENT

1. The Appellants herein Erick Omondi Tabu, Moses Wasonga Tabu, Rueben Ochieng Okado and Leonard Onyango Mbede were charged, convicted and sentenced to 20 years' imprisonment by the trial court for the offence of attempted murder contrary to section 220(a) of the Penal Code. The particulars of the offence were that on 25/10/2022 at around 0200hrs at Masala sub-location in Rarieda sub-county within Siaya County jointly with others not before court attempted unlawfully to cause the death of one Kevin Otieno Muga.
2. Dissatisfied with the court's verdict, the appellants have herein appealed to this court against both the conviction and sentence on the following grounds:
 - i. That the trial court erred in law and in fact in awarding sentences that were inordinately excessive and that the appellants were not given a chance to mitigate.



- ii. That the trial court erred in law and fact by basing their conviction on scene identification yet the time of the incident was unfavorable for positive identification.
 - iii. That the trial court erred in law and fact by relying on contradicting prosecution witnesses to arrive at its verdict, and failing to consider the appellants' sworn statements.
 - iv. That the prosecution failed to prove the case against the appellants beyond reasonable doubt as by law required.
3. The jurisdiction of the first Appellate Court is well settled. In the widely quoted case of Okeno –vs. R (1972) EA32, it was held that the duty of the first Appellate Court is to re-assess, re-evaluate and re-analyze the evidence tendered and to come to its own conclusion as to whether to uphold the decision of the trial court and course bearing in mind that the appellate court did not have the benefit of seeing or observing the witnesses as they testified and to make an allowance for that. It is therefore imperative that this court fairly considers the evidence on record and to reach its own conclusion.
 4. The Respondent called a total of seven witnesses in support of its case.
 5. PW1 was Kevin Otieno Muga testified that he was a resident of masala, and a boda boda rider by occupation. That he knew all the four Appellants in court. That accused the 1st Appellant was a minor while the 2nd, 3rd Appellants were boda boda riders and that the 4th Appellant was a member of community policing. That on 25/10/2022 at about 1.30 Am, he was in his house sleeping, together with his wife and children. That he was awoken by dogs barking. He woke up and looked at his phone, it was 1.30 am. That there was security light outside. On one side of the compound there were trees and a banana plantation. That the dog was barking as if it had been hit/beaten. That he saw a flashlight from outside, but within their compound and that he woke his wife to show her the same. That he requested his wife for the phone number of the 3rd appellant who was a member of community policing. That he then saw many people outside his compound some of whom he recognized namely the four appellants. That the people outside were armed with sticks, clubs and whips. That they called him by name and insisted that he opens the door or else they would kill him since they claimed that he was a thief. That his children started crying while he and his wife were screaming for help. That the 1st and 2nd Appellants were at the forefront. That there were other people behind the house. That the door to his house was not very firm and that the 1st Appellant used a metal bar to break in. That he tried to defend himself using a panga that was in his house but they disarmed him and that the 1st Appellant used the panga to cut him on his head. He showed the court a scar on his head. That they asked him to name his fellow thieves and insisted that they would kill him. That he surrendered and left them to do as they pleased. That he asked them why they would not take him to the police but the 3rd and 4th Appellants claimed that what they were doing was known by the authorities. He testified further that the Appellants brought motor vehicle tyres and motorcycle fuel. That he was ordered to sit on the tyre while the other person sat on him and that the appellants poured fuel on them. That a match stick was lit and that they started burning. That the crowd that had gathered departed. That the ropes that were tied on his hands got burnt and that managed to crawl on the grass and further towards his mother's house from where he was then taken to Bondo county hospital where he was hospitalized for three months. He identified the discharge summary which was marked as PMFI-1 while the P3 form was marked as PMFI2. That he suffered burns on the hands, left shoulder, upper back, right hand-palm and wrist which he showed the court. That he also lost the functionality of the right hand as he cannot fold his hand. That he later found out that the other man burnt together with him later succumbed to his injuries. That he had no prior disagreements with the Appellants prior to the incident.



On cross examination, he stated that the three security lights in his compound outside, are what enabled him to see the Appellants at the scene of the incident. That his witnesses were his wife and mother and that all the Appellants are his village mates. He further stated that he has never been accused of theft, that he was born in the area where the incident took place. That there were also security lights at a nearby gate and that all the lights remained on all through the incident.

On re-exam, he testified that he has never been arrested nor have a pending case of theft in court.

6. PW2 was Christine Ajwang a resident of Masala. She testified that she is mother to the complainant and that she knows all the Appellants. She testified further that on the 25/10/2022 at about 0200hrs, she was asleep when her sister in-law (Evelyn) came and woke her up informed her that their children were being killed. That she ran out with a torch. That she ran towards her son's compound. On reaching there, she met her daughter in-law Jane and her children, who informed them that Pw1 had been taken away. That she left following the commotion where she met accused 3rd and 4th Appellants who ordered her to go to her house. That she saw one Isaac carry what she believed to be fuel and other people who were carrying a big tyre. That she told them to take the issue to the police but the 3rd Appellant claimed that all the authorities were aware of what was going on. That she was forced to go back to her house crying. That later she heard a knock at the door and it turned out to be the complainant whom she gave a mattress on which to lie down. That she then informed Evelyn and later called her brother who sent her money with which to take the complainant to the hospital where he was admitted for about two months.

On cross examination, she stated that she knew all the accused persons now appellants by their names and voices. That she saw them at the scene. That the 1st Appellant was beating the complainant while the 3rd Appellant is the one who persuaded the boda boda guys not to help in taking the complainant to hospital. That she was with Evelyn when she reported the incident to the police but that she was accompanied by Jane when she returned to record their statements. That the 4th Appellant held her and threatened to throw her into the fire that burnt the complainant and one Joseph. That Joseph is her nephew and who was burnt together with the complainant.

On re-examination, she stated that the 3rd Appellant's home is about 50 metres away from her home.

7. PW3 was Jane Achieng Ochola, a resident of masala. She testified that she's a business woman and that PW1 is her husband. That on the 25/10/2022 at about 0200hrs she was asleep with her husband when she heard noises from outside and that the door was being knocked. That they use solar lamps inside and outside their house. That there are three solar lamps outside their house. That her husband held a panga as the 1st and 2nd Appellants went into the house and disarmed him then and that the 1st Appellant cut him on the head. That they dragged PW1 outside while beating her. That the 1st Appellant demanded that she gives them her husband's phone or else they would burn their house and that she complied. That she followed them behind their house where they were beating her husband and one Joseph. That there were about ten people. That a crowd gathered. That one Isaac and John went to get fuel and a tyre that they used to burn her husband and Joseph. That at about 5.00 AM, Pw2 went and briefed her that PW1 was in her house. That she followed PW2 to her house where she found PW1 lying down with burns on his body. That later on they took PW1 to hospital and then reported the matter to the police. That PW1 was admitted and that he is not fully healed.

On cross examination, stated inter alia; that she saw everything with her own eyes and that she saw all the appellants herein at the scene of crime and who assaulted and eventually burnt PW1.

8. PW4 Evelyn Achieng Okello stated that she's a resident of Masala. That on 25/10/2022 at about 0200hrs a group of people came to her house demanding for Joseph who was her son. That they



forced their way into her house and took her son and headed towards PW1's house. That she rushed to Pw2's house and informed her on what was happening. That she heard shouts from PW1's house and that people were beating PW1 and Joseph. That the beating continued for about one hour. That she could not intervene because the 1st and 2nd Appellants were throwing stones, and that the 3rd Appellant pointed out that the authorities were aware of what was happening. That later the people dispersed. That hours later they took PW1 and Joseph to Aram police station where they were directed to take them to hospital. That on reaching the hospital, Joseph fell. That they were later transferred to Jaramogi Oginga Odinga hospital. That three days later her son Joseph asked her to go back home. That on 03/11/2022 her son succumbed to the injuries.

On cross examination, she stated that she knew all the appellants and that on that fateful night they were all beating PW1 who was her nephew and Joseph who was her son. That the solar lights outside and the big security lights from Isaiah's shop enabled her to see clearly everything that transpired. That she recorded her statement on 06/11/2022 at the intervening time but before then she was in hospital with her son. That at the time of recoding her statement, she had just lost her son so she may not have captured everything. That she has never had any dispute with any of the Appellants. That she had known all the Appellants as they hail from the same area.

9. PW5 was Susan Otieno a resident of Ruma. She testified that she is the assistant chief of Masala sub-location. That she knew the 3rd Appellant who is a member of local community policing. That on the night of 24/10/2022, at about 10.00 pm she received a call from the 3rd Appellant that he and his colleagues were on patrol to look for thieves. That she advised that upon making any arrests, the suspects should be taken to the police. That at around 5.00am the following morning, the 3rd Appellant called her again informing her that two suspects had been arrested but that they had escaped. That on 04/11/2022 she received a call from the Assistant County Commissioner that she and the area chief should rush to Masala where they found police officers from Aram police station. That the police officers informed them that the residents were about to hold protests to the police station following the arrest of some residents. That from the date she spoke to the 3rd Appellant, she never heard of the incident.

On cross examination, she testified that she did not know the 1st and 2nd Appellants. That she did not know the colleagues the 3rd Appellant was with. That she knew the 3rd Appellant as they had spoken. That there had been no barazas prior to the incident and that she had no information on rampant thefts in the area. That she had been told that the trial was about attempted murder which had happened in her area and that she did not know anything about it.

10. PW6 was John Bunde, a clinical officer at Bondo Sub- County hospital. That he had a p3 form for a patient whose injuries were two weeks old and a discharge summary (PMFI 1)-produced as PEXH 1 while the P3 form as PEXH 2.

On cross examination, he stated that the patient's name was Kevin Otieno Muga from Masala, and who had informed him that he knew the people who assaulted him at Masala. That the patient had suffered 8% degree burns on his upper limbs. That he was the first to attend to the patient at the casualty section of the hospital, and that he had a cut wound on his head from a sharp object, and that he was admitted for two weeks.

11. PW7 was PC Isaiah Barasa, the investigation officer in the case from Aram police station. He stated that on 31/10/2022 upon arriving at the police station from Bondo law courts, he was instructed by the OCS to investigate on a case of mob lynching that had happened at Masala. That he went through the OB and established that the incident involved two victims one of whom was deceased and PW1 which had occurred on 25/10/2022. That he proceeded to Bondo Sub- County hospital where he



found PW1 admitted therein and on treatment. That PW1 had deep cut wounds on the head and severe injuries on the hands, legs and back. That the patient could communicate and so he recorded his statement on that date. He established that the other victim had been rushed to Jaramogi Oginga Odinga referral hospital. That he later went to the scene where he collected fire debris and took it to the government chemist for analysis. That he later proceeded to Jaramogi referral hospital to check on the other victim who unfortunately had succumbed to the injuries suffered. That he established that PW1 and the deceased were attacked from their homes by people known to them being the four appellants herein. That on 03/11/2022 he together with his other colleagues went to the attackers' homes and arrested them and later charged them with the charge before the court. That he issued a P3 form which was duly filled. That the debris were collected and documented in an exhibit memo-(PEXH 3), Debris-(PEXH 4), Report from government chemist-(PEXH 5).

On cross examination, he stated that he came to know the Appellants at the time of arrest. That the incident occurred on 25/10/2022 at about 0200hrs at Masala. That he collected the debris for analysis to confirm whether petrol was used. That all the four Appellants were mentioned by witnesses to have directly participated in the lynching. That the 3rd Appellant took advantage of being a village elder and mobilized other people to attack the victims.

12. At that juncture, the prosecution closed its case. The court later established that a prima facie case had been made out by the Respondent and that the appellants were placed on their defence.
13. The 1st Appellant herein Eric Omondi Tabu (DW1) tendered an unsworn statement. He stated that he is a gold miner from Masala. That on 03/11/2022 at 10 PM he heard a knock at his door and that upon opening it, it turned out to be police officers who harassed him then took him to Aram police station and that the following day he was taken to Bondo. That he was never informed of the reason for his arrest.
14. The 2nd Appellant Moses Wasonga Tabu testified that he was a resident of Masala. That on the night on 03/11/2022, he was in bed when he heard a knock and upon opening it, it turned out to be police officers from Aram police station who arrested him and took him to Aram station. That the following day he was taken to Bondo law courts. That on 18/11/2022, the charge was read in court for him. That he did not know anything about the charge.

On cross examination, he stated that he knew all the appellants herein in that the 1st Appellant was his elder brother while the 3rd Appellant is his neighbor and that the 4th Appellant is his uncle. That he knew PW1 as his cousin since their mothers are siblings. That on 25/10/2022 he worked overnight, that he has no documentation or witness from his place of work and that he has a debt of Kshs 5000/= owed to PW2.

15. The 3rd Appellant Reuben Ochieng Okado (DW3), a resident of Masala tendered an unsworn statement. He stated that on 03/11/2022 while in bed, he heard noises followed by a knock at the door by people who claimed to be police officers. That he opened the door and they arrested him and took him to Aram police station. That the following morning, he was taken to Bondo law courts and that he knows nothing about the charges read to him.
16. The 4th Appellant Leonard Ouyango Mbede (DW4) a resident of Masala sub location, tendered a sworn testimony. He testified that on 03/11/2022 at 9.00pm he heard a knock at his door. He peeped and saw it was the police. That they ordered him to open the door and he obliged. He was then arrested and taken to Aram police station. That the following day he was taken to Bondo law courts wherein the investigating officer sought for more time to investigate the matter. That on 18/11/2022 the charges were read to him. That PW2 mentioned him in her statement but that he has never met PW2.



On cross-examination, he stated inter alia; that he knows the 2nd, 3rd Appellants; that the 3rd Appellant is not a member of the community policing; that the complainant (PW1) is a boda boda rider; that PW4 mentioned his name while recording her statement with the police; that he knew PW1 From childhood and that he has no bad blood against him; that he knows what happened to PW1.

17. The appeal was canvassed by way of written submissions. All the parties herein filed and exchanged submissions. The 1st Appellant submitted that the prosecution's aim was out to criminalize him. That PW1's evidence stated that 'they attempted to burn us but they did not succeed.' According to the 1st appellant, that statement by PW1 meant that they were never burnt. He submitted further that he was a first offender and that the 20 years' imprisonment was too harsh and thus prayed for a substitution of the sentence to a less severe one such as community service.
18. It was the submission of the 2nd appellant that the burns, cuts and every harm could not be managed in two weeks as explained by the clinical officer as the same sounds like admitting to having participated in inflicting the same. He relied on the case of *Manyeso vs Republic CR. APPEAL NO. 12/2021* where it was held that 'Sentence should not only be used for retribution but also for rehabilitation of prisoners'
19. 2nd appellant likewise relied on article 159(2) of the constitution and submitted that the conviction be quashed, sentence set aside and replaced by a non- custodial sentence.
20. The 3rd Appellant submitted that the Appellants being granted bail pending trial was proving that there was no such activity as lynching. That the trial court's failure in failing to call for a probation report before sentencing was an injustice and prejudicial to their rights. And just like the other appellants, he prayed for the conviction to be quashed, sentence set aside and replaced by a non-custodial one.
21. The 4th Appellant submitted that he believed that if the probation report would have been allowed prior to sentencing, it would have made a difference. He relied on *Bennard Aganda Wayungi vs Rep Cr. Appeal no. 6 of 2020* where the court stated that "this court has powers to interfere with the sentence imposed by the trial court where the court acted on wrong principles, overlooked some material factors, or the sentence is illegal or manifestly excessive or as to amount to a discouragement of justice."
22. On the flip side the Respondent submitted that it has proved its case beyond reasonable doubt as by law required as provided under section 220(a) of the Penal Code. The Respondent equally relied on the definition of attempt as defined by section 388 of the Penal Code.
23. The Respondent relied on several authorities including the Court of Appeal in *Abdi Ali Bare vs. Rep (2015) eKLR*. Based on the Respondent's submissions, they prayed that the appeal be dismissed.
24. I have considered the evidence before the trial court, the submissions on appeal, together with all the authorities relied upon by both parties herein. I find the only issue for determination is whether the prosecution discharged its duty of proving the charge beyond reasonable doubt as by law required.
25. Section 220(a) of the Penal Code stipulates thus:
 220. Attempt to murder
Any person who—
 - (a) attempts unlawfully to cause the death of another; or
 - (b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.



26. Section 388 of the Penal Code defines attempt as thus:

388. Attempt defined

- (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.

27. From the above, it behooves upon the prosecution to prove beyond reasonable doubt the following ingredients:

- a. Actus reus –that indeed the appellants did an act that endangered the life of the complainant
- b. Mens Rea –that indeed it can be inferred that the appellants intended to kill the complainant

28. On the aspect of Actus Reus, PW1 testified that “they (appellants) attempted to burn us but they did not succeed. They went to bring tyre and fuel and poured it on us, a match stick was lit and we started burning.” (See page 12 line 12-14 of the record of appeal). Again, PW3 who is wife of the complainant testified and gave a vivid account of how the Appellants stormed their house in the dead of the night in company of other villagers and flushed out her husband. She stated that there were security lights and was able to see the assailants who happened to be her neighbours and more specifically the 3rd Appellant who is in charge of community policing in the area. Further, the evidence of PW4 whose son was also attacked alongside the complainant stated that the 3rd Appellant was the one leading the group and who seized her son and led him to Masala Centre where they were doused in petrol and set ablaze. Pw2 who is the mother of the complainant also stated that she tried to intervene but was threatened by the Appellants and ordered to go back to her house or else she will be dealt with as well. All the four witnesses (PW1, PW2, PW3 and PW4) gave direct evidence of the involvement of the four Appellants led by the 3rd Appellant who was in charge of the community policing in the area and that the Appellants had claimed that the two victims were thieves in the area and who required to be dealt with severely. All the said witnesses’ testimonies clearly placed the Appellants at the scene of crime. Again, the area Assistant chief (PW5) confirmed that the 3rd Appellant called her and informed her that they had seized thieves in the area but that they had escaped. She did advise the said 3rd Appellant to ensure that the alleged thieves if apprehended be handed over to the police. The defence evidence presented by the Appellants did not, in my view, shake or cast doubt upon that of the prosecution which was quite overwhelming on the involvement of all the Appellants. Further, the evidence of the clinical officer (PW6) did confirm that the complainant herein sustained serious burns and injuries and who produced the discharge summary and P3 Form as exhibits. PW7 the I.O. testified that “I then rushed to Jaramogi Oginga Odinga Referral hospital to check on the other victim, unfortunately he had succumbed to the injuries suffered.”



This is a clear indication that the acts of the appellants indeed endangered the life of the complainant and in fact brought fatal injuries to another victim burned together with the complainant. I am therefore satisfied that the prosecution proved this aspect to the required standard.

29. On the issue of mens rea, it is trite law that malice aforethought can be inferred from the circumstances in which the offence was committed. In the case of *Tubere s/o Ochen v Republic (1945) EACA 63* the court outlined the circumstances as constituting the following:
- a. The nature of weapon used against the victim to inflict injury
 - b. The part of the body targeted by the attacker whether vulnerable or not
 - c. The manner in which the weapon was used whether repeatedly
 - d. The conduct of the accused, before during and after the attack of the victim

Again, in the case of *Emmanuel Kipkorir Langat V.R [2022]EKLR* it was held that the main ingredient for attempted murder would be the intention to cause the death of another and the actus reus would be the actual act that would likely lead to the death, but which subsequently fails.

30. In my view, the act of getting tyres, pouring the fuel on the victims which included the complainant and lighting a matchstick and letting them burn was out rightly malicious. And on application of the above principles to the facts of the case, it goes without saying that the appellants had the malice aforethought to commit the crime of attempted murder. Indeed, from the testimonies of the witnesses, the Appellants were out to rid the village of alleged thieves. The Appellants were working together as a team and in concert in their said mission. No wonder, they tied up the victims then doused petrol on them, set them ablaze and left them to burn. The complainant herein managed to crawl to his mother's house from where he was rushed to hospital where he was admitted for about three months while the other victim was not lucky as he succumbed to his injuries. It is thus clear that the Appellants really wanted the victims to die but fortunately the complainant managed to survive while the second victim was not lucky as he succumbed to his injuries and hence the charges against the Appellants. The Appellants had the option of handing over the victims to the police but not to take the law into their hands
31. In light of the above, all the grounds of appeal submitted by the appellants fail. It is my finding that the Respondent did prove its case against the Appellants beyond any reasonable doubt. I find that the conviction arrived at by the learned trial magistrate was quite sound and must be upheld.
32. On the issue of sentence, the law stipulates a sentence of life imprisonment upon a person found guilty of the offence of attempted murder pursuant to section 220 (a) of the Penal Code. It is noted that the trial court however did not give Appellants life imprisonment but rather a jail term of 20 years' imprisonment for each Appellant. It is noted that the injuries sustained by the complainant herein are life threatening and that the complainant has been disfigured for the rest of his life. He survived by the skin of his teeth. Indeed, the complainant's hand has been deformed as he has lost the functionality of the right hand. The complainant did not deserve to be in this situation yet the Appellants had the option of taking him to the police so that legal action would be taken against him if indeed he was a thief. It is also unfortunate that one of the alleged thieves later succumbed to his injuries thanks to the Appellants zeal to rid the village of thieves. The conduct of the Appellants must be deprecated as they have unwittingly placed the villagers at crossroads regarding the use of the law of the jungle where villagers can take the law into their hands as opposed to the rule of law where everyone's rights are taken care of by law. This is unacceptable. I find the sentence imposed is neither harsh nor severe in view of the circumstances of the case. It is also noted that the Appellants were out on bond pending trial in



the lower court and hence the provisions of section 333(2) of the Criminal Procedure Code. I see no need to interfere with the same.

33. In the result, it is my finding that the Appellants appeal lacks merit. The same is dismissed.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 22ND DAY OF NOVEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Erick Omondi Tabu.....1st Appellant

Moses Wasonga Tabu.....2nd Appellant

Renben Ochieng Mbede.....3rd Appellant

Leonard Onyango Mbede.....4th Appellant

M/s Kerubo.....for Respondent

Ogendo.....Court Assistant

