



REPUBLIC OF KENYA



KENYA LAW
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**Adhan v Republic (Criminal Appeal E037 of 2022)
[2023] KEHC 27126 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E037 OF 2022
SM GITHINJI, J
DECEMBER 21, 2023**

BETWEEN

MOHAMED ADHAN APPELLANT

AND

REPUBLIC RESPONDENT

((Being an appeal from the Judgment and Sentence of the Principal Magistrate's Court at Lamu by Honourable M.Maina Wachira – Principal Magistrate dated 19th October, 2022 in Lamu Criminal Case NO.E079 of 2022 Republic =vs=Mohamed Adhan))

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Mr Soita for the Appellant

Ms Mkongo for the State

1. Mohamed Adhan was charged in the lower court with a main count of attempted murder, contrary to section 220 (A) of the [Penal Code](#).
2. The particulars of this offence are that on the 15th day of March, 2022 at around 2000hours in India area of Langoni Location, Lamu Central Sub-County within Lamu County, the appellant unlawfully attempted to cause the death of Issack Mohamed by cutting his head using a panga.
3. In the alternative, the appellant faced a charge of grievous harm contrary to section 234 of the [Penal Code](#). The particulars hereof being that on the 15th day of March, 2022 at around 2000hours in India area of Langoni Location, Lamu Central Sub-County within Lamu County, the appellant unlawfully did grievous harm to Issack Mohamed.



4. The prosecution case is that on 15/3/2022 the complainant in this case who gave evidence as Pw-3 was living at Kiombe, past India. He was a donkey operator in Lamu. That day at around 4.00Pm he was at Sports ground watching football. After the game was over, he went to the Mosque to pray. Thereafter he visited his brother at his home in India. His brother Omar Mohamed was not in his house. The complainant rested on a log outside the house. The appellant then appeared. It was about 7-8Pm. He appeared to had taken his things from his friend's house which was near Omar Mohamed's house. The appellant hit him with a fimbo on the left cheek. The complainant asked him why he was attacking him. The appellant is said to had appeared drunk. The complainant tried to get hold of the walking stick but he slide and fell down. He drew out a panga from his waist and cut the complainant with it on the left arm near the elbow. He then cut him on the head 4 times.
5. Pw-5, a neighbour, at the said time was told by his wife that she was hearing commotion at the neighbouring house. Pw-5 went outside the house and saw many people. The complainant was walking towards the door. There were some street lights and he was able to see. The complainant was bleeding from hand and head. He appeared weak. Pw-5 held him and took him to his brother's house, which is three houses from the place he was. His brother was not present but his wife was. Pw-5 decided to take complainant to the hospital. They got a motor cycle and went to King Fahd Hospital. Pw-1 who is a cousin to the complainant went to the said hospital to assist. The doctor told him to call the police as it was a police case. He called the police. Pw-2 an officer from Lamu Police Station was assigned the case to investigate. He went to King Fahd Hospital. The appellant had also some injuries and had sought treatment at King Fahd Hospital. Pw-2 was informed that there were people at King Fahd Hospital who had cut each other. Upon arrival at the hospital they were told the complainant was in the theatre. They went there and saw him. He is Isaak Mohamed. He was not able to talk. The officer went outside and was told where the assailant was. He was at the reception getting medicine. He said he is Adhan Mohamed. He said he fought with Isaak Mohamed. He was arrested and taken to the police station.
6. Pw-4 examined the complainant and filled his P-3 form. He noted that he had cut wounds on head top and side, occipital region (back of the head). He had dislocation of left arm elbow joint and fracture radius and ulna. He was operated to restore the fractured bones. The degree of injury was opined as grievous harm.
7. The appellant was then charged with the offences in the charge sheet.
8. The appellant gave a brief defence. He stated that he was living in Bombay in Lamu and was a boat captain. On 15/3/2022 he did his job as a boat captain in Lamu. In the evening he left Mokowe at 5pm and went to Lamu. He parked the boat. He slide at the jetty and got injured. He went to the hospital for treatment. Two officers found him there and was arrested. He was informed he had fought someone and was not aware of it.
9. The trial court evaluated the evidence and found the main count proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 15 years imprisonment.
10. The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that; -
 1. The charge was not proved against him beyond reasonable doubt.



2. Trial court failed to consider that the complainant never told the police that he was attacked by the appellant.
3. There was no other eye witness save for the complainant and it was his word against that of the appellant.
4. Motor cycle operator who directed the police to the appellant was not called as a witness.
5. There are serious doubts in the prosecution case.
6. Pw-1 stated the appellant was arrested as he had less injuries than the complainant.
7. None of the witness placed the appellant at the scene of crime.
8. There is no corroboration of complainant's evidence that "ABA" is the appellant.
9. Complainant brother's wife who was in the house outside which the complainant was allegedly attacked was not called as a witness.
10. Offence of attempted murder was not proved against the appellant as the evidence suggested an offence of affray.
11. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.
12. I have as the first appellate court considered the charges, evidence adduced, judgment of the lower court and sentence meted, grounds of appeal and submissions by both parties.
13. Having considered the entire record of appeal, I find that there are two issues for determination in this appeal.
 1. Whether the appellant was properly identified or recognized as the real culprit.
 2. Whether the facts disclose an offence of attempted murder.
14. On the first issue, the only eye witness is the complainant in this case. According to his evidence the incident happened between 7-8Pm. That is at night. He alleged to have seen the appellant attack him. He did not disclose the source of light that enabled him to see. He claimed to have known the appellant before as Aba, a name not given by anyone else and that is not carried in the charge sheet. He also alleged that he used to see the appellant and greet each other. He however did not disclose where they used to meet and probably how many times such happened. He gave no description of the assailant at all, of his physical features or even the way he was dressed on the material night. He never claimed to have known his voice and recognized him by it. There is no evidence that he told anyone immediately after the incident that it's the appellant who attacked him. Pw-5 the man who assisted the complainant to the hospital does not disclose that the complainant told him of the assailant. Pw-5 while referring to the accused said he did not see Adhan at the place. He did not refer to him as Aba as the complainant did.
15. Pw-2 who alleged the appellant told him he fought with Issak Mohamed never had a confession taken from the suspect. The allegation is not corroborated by any other witness or evidence. It's doubtful whether he said so.



16. In the case of *Wamunga-vs-Republic* [1989] KLR 426, the Court of Appeal stated;-
- “It’s trite law that where the only evidence against a defendant is evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.....”
17. The trial court considering the foregoing erred in holding that;-
- “In this case, the evidence by complainant and the fact that accused went to hospital at the time complainant was taken to hospital shows that accused could have gone to hospital to show that he had also been injured. Accused did not dispute the investigations evidence that he told the investigation officer that he had fought with complainant though complainant did not say he was fighting the accused. Looking at all evidence I find it was accused who assaulted the complainant.”
18. When the court says the accused “could” have gone to hospital to show that he had also been injured, the Court expresses doubts in use of the word “could”, and also settled on the issue not based on any available evidence as it implies that the accused himself had no injuries worthy medical attention. The court also shifted the burden of prove to the accused when it observed that the accused did not cross-examine Pw-2 on allegation that he told him that he had fought with the complainant, while the court at the same time acknowledged that the complainant never said he informed the police his attacker. The trial court erred in not finding that an accused person ought to be convicted on the weight of the prosecution case and not the weakness of his defence.
19. Investigations should have been conducted to place the appellant at the scene of the offence. The alleged weapons used were not recovered and blood stains on them matched to that of the complainant. The appellant clothes should also have been examined for blood stains matching the blood group or DNA of the complainant. That lacking, there is no reliable evidence to corroborate the complainant’s allegation that the appellant is the one who attacked him and caused him grievous harm. No cause or motive is shown for the alleged attack. The appellant given the available evidence was entitled to the benefit of doubt on this.
20. On the second issue, the court need consider whether if at all the appellant is the one who attacked the victim, had intention of killing him.
21. Attempted murder under section 220 of the *Penal Code* is defined as;-
- “ 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 such a nature as to be likely to endanger human life.....”
22. The appellant herein apart from being alleged to had attacked the complainant and causing him grievous bodily harm, of which the doctor indicated delayed treatment could lead to death,



there is no any other evidence showing he had intent to cause his death. There is no evidence that anything prevented him from causing the death of the complainant if at all that was the intention. Causing grievous harm by itself is not evidence enough to show that the assailant intended to cause death of the victim. If this was the case, the offence of “grievous harm” under section 234 of the *Penal Code* would deserve no space in our laws. Evidence of intent (mens rea) on the part of the assailant to cause death of the victim must be demonstrated by the prosecution beyond reasonable doubt. In the case at hand the evidence is lacking. The facts do not therefore disclose a case of attempted murder of which the appellant was convicted of.

23. Given the foregoing observations, the appeal is merited. The conviction and sentence are quashed, and the appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF DECEMBER, 2023

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. Mr Soita for the Appellant
2. Ms Mkongo for the State
3. Appellant (Virtually)

