



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CRIMINAL APPEAL NO. 28 OF 2019**

**JOHN KURIA GICHERU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence dated 8<sup>th</sup> December, 2017 of Hon. E. Kimilu, Principal Magistrate, in Naivasha CMCCR No. 1649 of 2016)*

**JUDGMENT**

1. The appellant was convicted and sentenced in the lower court for the offence of attempted murder contrary to **Section 220(a) of the Penal Code**. The particulars of the charge were that on the 31<sup>st</sup> day of October, 2016 at Mwiciringiri village in Naivasha Sub-County within Nakuru County, he unlawfully attempted to cause the death of Jacinta Gathoni, by setting a house in which she was sleeping on fire.

2. He was sentenced to twenty years' imprisonment on 14<sup>th</sup> December, 2017.

3. Dissatisfied with the trial court's decision the appellant filed an appeal on 19<sup>th</sup> September, 2019. In his amended grounds of appeal filed on 8<sup>th</sup> February 2021, the appellant states:

*1. That, the learned trial magistrate erred in law and in fact by convicting the appellant on evidence of identification by PW1, this evidence lacked ingredients.*

*2. That, the learned trial magistrate erred in law and in fact by convicting and awarding the appellant a harsh sentence. He failed to consider circumstances of the case.*

*3. That, the learned trial magistrate erred in law by upholding that the charge of attempted murder was proved but failed to note that the evidence before her was full of assumption presumptions and theories not supported by the evidence.*

4. The ODPP has opposed the appeal. Both parties filed written submissions as directed by the court.

5. The issues that arise for determination are:

a. Whether there was proper identification.

b. Whether proof of the ingredients for attempted murder was discharged.

c. Whether the sentence was inordinately harsh and unlawful.

6. This court's role on a first appeal is to review and re-evaluate all the evidence availed in the lower court, and to reach its own conclusions being mindful that it did not itself hear the evidence or see the demeanour of witnesses. **Okeno v. Republic (1972) EA 32**

7. I deal with the evidence of the witnesses as hereunder, covering each head of appeal.

8. PW1 Teresa Muchiku Kamau, the appellant's wife, testified that on 31<sup>st</sup> October, 2016 at 12.30am, she was in her mother's house at Mwiciringiri. Her husband, the appellant, had threatened to kill her and her children. That night she heard someone hit the window. She

woke up and smelt petrol. Soon she saw someone disappear and saw a fire in the sitting room. According to her, she saw the appellant by the light of the flames. She threw her baby daughter out of the window and jumped out of the house. As the fire engulfed the house, she shouted for help and neighbours showed up but it was too late.

9. According to her, she saw the accused running away through the kei-apple fence. He was arrested at Ihindu. In cross-examination PW1 reiterated that, using the fire light, she saw the accused running away.

10. PW2 Jacinta Gathoni, PW1's mother, testified that at around midnight on 31<sup>st</sup> October, 2016 she was asleep when she heard noises in the house. Her daughter PW1 and two children were in the house. She saw the window was open. She went outside and then saw the roof was on fire. She testified that on 30<sup>th</sup> October, 2016 the accused had called her about six times but she did not pick the phone. The accused had threatened his daughter's life, and they had a troubled marriage.

11. When she was outside, PW2 saw someone sneak through the kei-apple fence but she could not identify the person. She was outside when PW1 and her two children jumped out of the burning house.

12. PW3 Mary Wairimu Kamau works as a saloonist and is a sister of PW1. On 30<sup>th</sup> October, 2016 the accused called her and told her if her sister (PW1) did not go back to his home, he would do something regrettable. According to her, the accused and her sister had marital problems. Sometime in October 2016, the accused had come to her house armed with a panga, and holding his two year old last born child. He had asked her why she was hiding his wife. He had taken the child several times.

13. Due to these incidents, PW3 had reported to the police at Mwiciringiri Police Post several times. According to PW3, before her mother's house was burnt, the accused had passed by her work place and openly threatened to do something everyone would regret. He frequently carried a panga.

14. PW4 GG aged 14 years and a student at [Particulars withheld] Secondary School, testified. He said that on 30<sup>th</sup> October, 2016, he was at a petrol station visiting a pump attendant who was his friend when the accused came by. He knew the accused as a neighbour. According to him, on 30<sup>th</sup> October, 2016, the accused asked him to fill a white jerry can with petrol. It was worth Kshs 400/=. The jerry can was wrapped in a green plastic bag. It was the second time he had seen accused purchase petrol at the station. Later, he learnt that the accused had used the petrol to burn a house.

15. PW5 PC Arickagelo Mutwiri attached to Mwiciringiri Police Post was the Investigating Officer. On 31<sup>st</sup> October, 2016, Jacinta Gathoni (PW2) accompanied by members of the public came to the station to report that her house had been set on fire while they were asleep. The occupants of the house at the time were Teresia Muchiku the accused and Jane Wanja Kuria. He went to the scene with the irate members of the public following.

16. According to him, the accused had been reported more than five times with threatening to kill, but he had been evasive. At the scene he saw a timber house burnt to the ground. He called Scenes of Crime officers who took photos. There were assorted household, items, beddings and a bicycle inside. The value of the property was over Kshs One million. He produced photographs as Exhibits 1 (a), (b), (c) and (d).

17. During investigations, PW5 learnt that the accused had threatened to kill PW1. He had gone to the accused's house more than five times. When he went to interrogate the accused, he was told the accused had left. PW5 obtained an arrest warrant from Naivasha Police Station, got reinforcements from Naivasha Police Station and a motor vehicle. They went to the accused's house at Ihindu where they arrested him. His house was about 3.2 kilometres away from the scene and about 3 kilometres away from the Police Post.

18. At the burnt compound he found a five litre jerry can that was half burned and smelt of petrol. He produced a photograph of it as Exhibit 1 d. He later met the petrol station attendant at Ihindu and learnt that the accused had bought petrol for Shs 400/= on the eve of the offences.

19. In cross-examination, PW5 said he had received several reports of the accused's threats; that he called the accused who refused to come to the station; and that he had called the petrol attendant to give evidence together with other relevant witnesses.

20. The accused in his unsworn statement of defence stated that on 31<sup>st</sup> October, 2016 he got up as usual and went to his garden. At about 4.00pm two men came to his house and arrested him. He was brought to court on 3<sup>rd</sup> November, 2016 and charges read to him which he denied. He then learnt the complainant was his daughter.

21. According to him, the case was a frame-up since he separated from his wife and she went back to her parents. She had gone to FIDA and he was ordered to take the children to the chief, where his wife would pick them. He denied setting the house on fire, and insisted that he lived 50 kilometres away from the scene of crime.

### **Analysis and determination**

22. The ingredients for attempted murder are: An attempt to unlawfully cause the death of a person. This *actus reus* is the critical element of the proof, that is that the appellant did the act that endangered the life of the complainant. Similarly the mens rea, or intention to kill must be proved. See *Gwempazi s/o Mukonzho [1943] 10 EACA 101* where the court held that:

***“It must be shown that the accused had a positive intention to kill or cause death.”***

23. What is then is an “*attempt*” to commit an offence? In **Cheruiyot v Republic [1976-85] EA 47**, it was held 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 the death and that intention must be manifested by an overt act.”** (Emphasis added)

24. Did the accused have a specific intention to commit the act? Before that question can be answered it is necessary to see if the accused was the person who started or caused the fire at the scene. Thus, the question of identification arises.

25. The accused argues that he was not at the scene, but 50 kilometres away. The state urges that the appellant was identified and recognized by PW1, his wife, as the person she saw at the scene. In her words she said:

**“I opened the bedroom window and saw someone go away. There was fire in the sitting room. Using that flame I saw and identified the person who set the fire. It was John Kuria.”**

Later she testified:

**“I saw John Kuria running away through the Kayaba fence. He is in court.”**

26. PW1 had been asleep and it was just past midnight. When she woke up in her bedroom and opened the window, she said she saw someone go away. The fire was in the sitting room. It was there she saw the accused who set the fire. After she had thrown her children out of the window and jumped out, she said she saw the accused run away through the kei-apple fence.

27. The trial court was alert to the dangers of identification and the possible miscarriage of justice. The trial court assessed the evidence of recognition and referred to the case of **Turnbull & Another [1976] ALL ER 549**. Here, Lord Widgrey pointed out that the court should warn itself on convicting an accused person in reliance on the correctness of the identification and should take into account the circumstances surrounding identification so as to be free of error. He held recognition to be more reliable than identification.

28. In **Nzaro v Republic [1991] KAR 212**, the Court of Appeal held that identification by recognition at night must be absolutely watertight to justify conviction. In **Oluoch v Republic [1985] KLR 549**, it was emphasized that identification by a single witness must be treated with the greatest care. That is to say that, in respect of a single identifier, the test must be rigorous to ascertain whether the surrounding circumstances were favourable for proper identification.

29. In the present case, PW1 appears to have first seen the accused from the light of the flames in the sitting room. Apparently she was still in the house at that point, because she testified that she then threw the baby and daughter through the bedroom window and jumped out. It was the same window past which she saw someone go away. It is not clear whether that “*someone*” was the accused, for she also said:

**“using the flames I saw and identified the person who set the fire....”**

This presumes that either she saw him start the fire or that she assumed that since there was a fire and was in the premises, the intruder, must have started it.

30. In any event, PW1 seems to have seen the accused on two occasions. The first time in the light of the fire burning in the sitting room; and the second time, when he was running away through the kei apple fence.

31. I think that although the trial court did not thoroughly assess the circumstances under which the accused was recognized by PW1, she came to the correct conclusion that he was present at the scene. I am persuaded that the accused was seen twice at the scene by PW1; and that he being her estranged husband, she was able to recognize him. I so find and hold.

32. The evidence of intent on the part of the accused has been more readily proved. He repeatedly threatened PW1 and members of her family; they had reported the threats to the police on several occasions; the police had tried to get him for interrogation but he had evaded them; PW4 GG had seen the accused purchase petrol in a white jerry can on 30<sup>th</sup> October, 2016, a day before the incident; and a half burned white jerry can was found at the scene as seen in photograph produced as P. Exhibit 1d.

33. Ultimately, I am satisfied that the accused was at the scene of the crime; that there is evidence of a premeditated act of arson by him; that he used petrol to effect his desire to fulfil his numerous threats against the complainant; and that in so doing he was intending grievous harm to the complainant.

34. Accordingly, the appeal fails and the conviction and sentence are hereby upheld.

#### **Administrative directions**

35. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

36. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

37. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 26<sup>th</sup> Day of April, 2021.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. John Kuria Gicheru - Appellant in person in Naivasha Maximum Prison
3. Court Assistant – Quinter Ogutu