



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU  
(CORAM: *CHERERE-J*)  
CRIMINAL APPEAL NO. 31 OF 2020

BETWEEN

JANET MWARE.....1<sup>ST</sup> APPELLANT

MERCY KANINI.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence in Criminal Case 824 of 2018

in the Principal Magistrate's Court at Tigania by Hon. G.Sogomo (PM)

on 22<sup>nd</sup> November, 2019)

JUDGEMENT

The Trial

1. JANET MWARE and MERCY KANINI (1<sup>st</sup> and 2<sup>nd</sup> Appellant respectively) were charged with the offence of attempted murder contrary to section 220(a) of the Penal Code Cap 63 Laws of Kenya (*the Act*). It was alleged that on the 21<sup>st</sup> November, 2018, Appellant attempted to cause death of AM by cutting her severally with a panga.

The prosecution's case

2. The prosecution case as narrated by the complainant was on 02<sup>nd</sup> January, 2019, he went to drink changaa at the home of the 1<sup>st</sup> Appellant which was being served by the 2<sup>nd</sup> Appellant. He could not recall what happened to him but he later found himself in hospital with injuries. PW2 Erick Mururu who was drinking changaa with the complainant stated that the Appellants set upon the complainant with pieces of firewood after he refused to pay for the changaa he had consumed. It was his evidence that they beat him until he lost consciousness. The complainant suffered depressed skull fracture on the right parietal region and his right hand was swollen and tender. The injuries were assessed as maim as evidenced by the P3 form tendered as PEXH. 1. A discharge summary tendered as PEXH. 2 shows that Complainant was treated at Meru Teaching and Referral Hospital as an outpatient for 8 days. Both Appellants were arrested by PW4 PC Lawrence Mugambi and were subsequently charged.

Defence case

3. Appellants who are mother and daughter stated that the complainant and his witness got drunk and started hurling insults at them but that they later left. They denied assaulting the complainant.

4. The trial court after considering the case rejected the defence found the Appellants guilty, fined them Kshs. 200,000/- each in default of which they would serve 3 years' imprisonment.

The Appeal

5. Appellant challenges the conviction and sentence on the grounds among others that:

**1. There was no proper identification**

**2. The prosecution witnesses were intoxicated**

**3. Prosecution case was contradictory**

**4. Treatment notes had different dates when the offence was committed**

6. When the appeal came up for hearing on 03.08.2020, the court directed that the appeal be argued by way of written submissions which both parties dutifully filed.

#### **Analysis and Determination**

7. On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit. (See the Court of Appeal decision in **Kariuki Karanja Vs Republic [1986] KLR 190**).

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the Appellant and for the State and I will consider the grounds of appeal as hereunder.

#### **1. There was no proper identification**

9. I have considered the cases of In **Kimotho Kiarie v Republic [1984] eKLR** and **Cleophas Otieno Wamunga v Republic [1989] Eklr** where the Court of Appeal reaffirmed the need for a trial Court to examine evidence carefully and to be satisfied that the circumstances of identification are favourable and free from possibility of error before it can safely make it the basis of a conviction.

10. Both Appellants conceded that the complainant and his witness were drinking changaa at their home on the material night. They were known to each other and the issue of identification did not arise that required the trial court to consider with caution.

#### **2. The prosecution witnesses were intoxicated**

11. Whereas there is evidence that both the complainant and his witness had been drinking changaa before the incident, there is no evidence that they were so intoxicated as not to know what was happening around them.

#### **3. Prosecution case was contradictory**

12. Whereas the complainant could not recall much of what happened after he was attacked by the Appellants, **PW2 Erick Mururu** who was with him narrated how the Appellants set upon the complainant with pieces of firewood after he refused to pay for the changaa he had consumed and that they did not stop until he lost consciousness.

13. The complainant's case that it was the Appellants that assaulted him was well corroborated and the Appellants' contention that it was contradictory is therefore without merit.

#### **4. Treatment notes had different dates when the offence was committed**

14. **PEXH. 2** which is a discharge summary from Meru Teaching and Referral Hospital demonstrates that complainant was treated as an inpatient between 16<sup>th</sup> April, 2019 and 24<sup>th</sup> April, 2019. Annexed to it is a discharge summary from St. Theresa Mission Hospital which demonstrates that complainant had previously been treated as an outpatient between 11<sup>th</sup> January, 2019 and 29<sup>th</sup> January, 2019.

15. The dates on both discharge summaries confirm that they happened after the complainant was allegedly assaulted and the discrepancies alleged by the Appellants are not tenable.

16.. That complainant suffered depressed skull fracture on the right parietal region and underwent craniotomy which is surgical removal of a portion of the skull has been confirmed by the two discharge summaries and the P3 form which in the degree of injury was assessed as main.

17. The final question for determination is whether the Appellants properly convicted under section 220 (a) of **the Act** solely because they injured the complainant.

18. Section 220 of **the Act** provides as follows: -

**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.

19. Section 388 of *the Act* defines 'attempt' as follows: -

1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil 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 fulfilment 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.

20. In order to sustain a conviction for attempted murder, it is not sufficient to demonstrate or to prove that the complainant/victim was injured but it must be proved that the Appellant had a positive intention unlawfully to cause death.

21. The Court of Appeal for Eastern Africa had occasion to deal with this question in **Republic versus Luseru Wandera s/o Wandera (1948) EACA 105**. The court in setting aside a 10-year sentence for attempted murder stated that an intent merely to cause grievous harm, whilst sufficient to support a conviction for murder, is not sufficient to support a conviction for attempting unlawfully to cause death. The court reiterated the view that a conviction for attempted murder can only be supported by proof of a positive intention unlawfully to cause death.

22. In the present case, there was sufficient evidence to support the fact that there was some overt act on the part of the Appellants that resulted in the injury of the complainant. It was however not proved that the injury to the head was inflicted in execution of the Appellants' intention to murder the complainant.

23. From the foregoing, I am persuaded that the learned magistrate misdirected himself on the law, when he disregarded the need for proof of the very necessary ingredient of intent in an offence of attempted murder.

24. From the evidence on record, I am persuaded that the prosecution proved a case of grievous harm contrary to section 234 of *the Act* and their conviction under section 220(a) of *the Act* cannot therefore be said to be safe.

25. Concerning sentence, Section 234 of *the Act* provides that:

**Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.**

26. The trial court in its discretion imposed a fine in default of which the Appellants are to serve a lesser sentence of 3 years. Considering the extent of the injuries inflicted on the complainant, no law, fact or facts exist that would warrant this court to interfere with the sentence imposed by the trial court.

27. For the foregoing reasons I allow the appeal to the extent that the conviction under section 220 (a) of Penal Code is quashed and substituted with a conviction for grievous harm contrary to section 234 of Penal Code. The sentence as imposed by the trial court is upheld.

**DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF APRIL, 2021**

**T. W. CHERERE**

**JUDGE**