REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. E010 OF 2021

JOSEPH CHEMUKU WANYONYI......................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

[An appeal from the conviction and sentence by Hon N. N BARASA (P.M) in original Webuye Law Courts Criminal Case No. 714/2017 delivered on 18th February, 2021 **]**

JUDGEMENT

The appellant was charged in the subordinate Court to answer to charges of Attempted Murder contrary to Section 220(a) of the Penal Code. The particulars of the offence are that on the 6th December, 2017 at Makhese Area along Webuye-Kitale Road in Bungoma East Sub County within Bungoma County, unlawfully to cause the death of No. 76290 P.C Simon Onduso Oribu by intentionally causing an accident with motor vehicle registration number KBC 775C, Toyota Premio, an accident which caused serious injuries to the said No. 76290 PC Simon Onduso Oribu after you had threatened that you will kill him.

The evidence before the trial court was that PW-1 Simon Oribo Onduso while performing traffic duties along Webuye-Kitale Road on the 6th December, 2017 at Murram Area together with Madam Karimi, PC Kimani and PC Kirorio, they stopped a Motor Vehicle Registration Number KBC 775C, whose driver had exceeded speed by 18 Kilometres per hour as opposed to the recommended 50 Kilometres per hour. When the driver was asked for cash bail, he did not have and requested to be driven to the Police Station whereupon, the complainant (PW1) accompanied him in the vehicle.

He stated that the appellant instead drove speedily towards Kitale despite pleas to turn the vehicle back. That the appellant was going to pick his father and began talking rude to the witness and later on told him that he would kill him and attempted to hit two oncoming vehicles before driving the Motor Vehicle into a ditch.

The witness stated that he saw his colleagues on the road whom he alerted that he was in danger. He was assured that he was being followed and should not worry. He stated that as a result of the accident, he sustained bruises on the knees.

PW-2, PC Eddah Karimi stated that she was notified of a speeding vehicle whereupon they stopped and asked PW1 to accompany the driver who is the appellant to the police station. That the vehicle speedily drove towards Kitale whereupon they followed it and found the vehicle overturned at Mutengene area and PW1 had sustained injuries. The appellant was escorted to the police station and PW1 to Lugulu Mission Hospital.

PW3, Sergeant Imelda Matiko stated that while performing traffic duties at Makhese Area and while standing on the left side of the road facing Kitale, she saw Motor Vehicle Registration Number KBC 775C moving fast and her colleague PW1 waving his cap asking for help. She testified that they followed it for a short distance and found it involved in an accident. PW1 was holding the appellant. They arrested the appellant.

PW 4, Felix Mwenda was with PW3 who informed him that their colleague PW1 was in the vehicle that had sped off and asked for their help. They followed the vehicle for a short distance and found it overturned and PW1 was trying to arrest the appellant. They were joined by other officers.

PW 5, PC John Kirorio stated that he was operating the Speed Gun along the Webuye-Kitale Road when he spotted Motor Vehicle Registration Number KBC 775C over speeding and relayed the information to PW1. A few moments later, the said PW1 told him he had been hijacked and driven towards Kitale and later involved in an accident. He joined his colleagues at the scene and escorted PW1 to Hospital.

PW6, Dr. Paul Kipkorir Rono from the St. Luke's Hospital and Real Hospital gave a medical history of PW1 who was treated at both hospitals.

PW7, Sgt. Julius Kivuva testified that he was tasked to investigate the case. He stated that he recorded witness statements, had the vehicle inspected at the Webuye Police Yard and photographed. That he forwarded the file to the Director of Public prosecutions Bungoma who advised the appellant to be charged.

PW8, Dr. Edward Vilembwa, a Clinical Doctor from Webuye Hospital produced the P3 indicating that the complainant had scars on right elbow joint, scars on the right knee joint, swollen left knee joint and presence of reduced movement on the knee joint. The injuries were approximately 8 months. The injury was assessed as Grievous Harm.

The appellant was put on his defence where he elected to give sworn evidence. He stated that on the fateful day, his mechanic after repairing his car offered to drive it to Lugulu area to pick another car. That he was stopped by officers and asked for a Driving Licence which he didn't have. He was ordered to alight and placed in a Probox.

The police officers asked PW1 to accompany the appellant to Misikhu area where he was going to pick his father and thereafter come back with cash bail for the mechanic.

That driving past Lugulu Girls High school, PW1 demanded Kshs 3,000/= in bribes and pulled the steering wheel to his side whereupon the vehicle lost control hence the accident. He stated that the accident was caused by the interference from PW1.

The Appellant was convicted and sentenced to serve 18 months in prison hence the appeal which is anchored on the following grounds.

> **1. The trial magistrate erred in law and facts when he failed to establish the ingredients to warrant a conviction in the charge of attempted murder.**
>
> **2. The trial magistrate erred in law when he failed to consider that PW-1, the complainant voluntarily jumped out of the vehicle from his evidence he was the maker of his own misery.**
>
> **3. That the trial court erred in law when he failed to consider the appellant's defence and submissions.**
>
> **4. That the trial court erred in law when she failed to consider the appellant's serious mitigation and contents of the probation report.**

The appeal was disposed of by way of written submissions.

The appellant relying on the decision in ***Gerald Wathiu Kiragu vs R Criminal Appeal No. 110 of 2011 (Nyeri)*** submits that the ingredients of attempted murder were not proved.

That the fact that the appellant drove the vehicle onto the way of oncoming vehicles and that the appellant had threatened to kill PW1 twice imputes attempted suicide on the part of the appellant, a fact ignored by the trial magistrate. He should have been charged for attempted suicide. That the threats were not corroborated.

The trial magistrate has also been faulted for not considering the appellant's defence especially that PW1 pulled the steering wheel towards himself thus he was the maker of his own misfortune.

The appellant faults the respondent for not availing the drivers of the Canter Truck and the Tractor to prove the fact that the appellant drove the Motor Vehicle into the way of oncoming cars.

The respondent submits that the offence was proved to the required standards. Counsel submits that the elements enumerated under section 206 of the penal Code were sufficiently proved.

It is submitted the PW1's evidence was corroborated by that of PW2 and PW3 and that PW5 corroborated the evidence of PW1 and PW3.

In a charge of attempted murder, the 2 essential ingredients; intention to commit the offence and preparation to commit it must be proved.

This is a first appeal and the duty of this court is;

> **….. to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."**

See ***David Njuguna Wairimu Vs. Republic (2010) eKLR***.

The offence of attempted murder is created by Section 220 of the penal code. It states;

> ***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.

Attempt is defined by Section 388 of the Penal Code which states 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.

From the above section, firstly, the prosecution needed to prove beyond reasonable doubt that the appellant attempted to unlawfully cause the death of the complainant. The prosecution needed to prove the ***Actus Reus element*** . That is, the prosecution needed to prove that the appellant did an act that endangered the life of the complainant.

Secondly, the prosecution also needed to prove the ***Mens Rea element***; that is; the intention to kill. This position was stated in the case of ***Cheruiyot Vs Republic (1976- 1985) EA 47*** where 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.

It is not in doubt that the complainant sustained serious injuries when the Vehicle he was travelling in with the appellant overturned in a ditch. The prosecution attributes the occurrence of the accident to an alleged murderous intention exhibited by the appellant when he intentionally drove the vehicle into a ditch in order to kill the complainant who was seated right beside him. The prosecution alleges that the complainant instead of driving to Webuye Police Station drove in a high speed towards Kitale. The prosecution states that the appellant told the complainant that he was going to kill him and attempted to ram the vehicle into 2 oncoming vehicles.

The appellant on the other hand states that the complainant was the maker of his misfortune by pulling the steering of the car while in motion towards himself. That as a result thereof, the appellant lost control and the vehicle veered off the road ending in a ditch.

During his examination in chief, the complainant stated thus;

"The driver said I am now taking you to the ditch. He swerved directly from the left directly to the right side of the road while facing Kitale direction. The door was not firmly locked. I hit the door as a result of the impact. I fell outside. Before falling, I saw our colleagues Sgt. Matiko and P.C Mwenda ahead on duty. I removed my 'kofia' and half of my body out and signaled them to follow me. On falling upon hitting the door, I fell on the side and fell down."

The court of appeal (Githinji, Mwilu and M'Inoti, JJA) in ***Abdi Ali Bare Vs Republic (2015) eKLR,*** **held;**

".... The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence

In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder.

The fact that the appellant had been ordered to drive to the police station and instead drove in a different direction points to a possibility that the appellant intended to do harm. The appellant was past the preparatory stage in the execution of his intention.

In this case, the appellant had the intention to harm or cause death of the complainant and he expressed the same to the complainant. He put this intention into action by driving in Kitale direction instead of Webuye Police Station as he had been instructed, driving dangerously and causing the accident. I am satisfied that the conviction was proper and based on evidence.

On sentence, I note that the offence of attempted murder Contrary to Section 220 of the Penal Code is a felony and attracts a maximum sentence of life imprisonment. The appellant was sentenced to serve 18 months imprisonment. That cannot be said to be excessive. I find no

reason to disturb the sentence.

In the result, I find this appeal without merit and is hereby dismissed.

DATED AND DELIVERED AT BUNGOMA ON THIS 23RD DAY OF JUNE, 2021.

S.N. RIECHI

JUDGE