



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 33 OF 2019

VINCENT ONYANGO NYANG.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case No.51 of 2019 of the Senior Principal Magistrate's Court at Oyugis by Hon. J.P Nandi-Principal Magistrate)

JUDGMENT

1. Vincent Onyango Nyang, the appellant herein, was convicted for the offence of attempted murder contrary to section 220 (b) of the Penal Code.
2. The particulars of the offence were that on the 16th day of February, 2019 at Pala Market, Rachuonyo North Sub-County within Homa Bay County unlawfully attempted to cause the death of Nicodemus Ejikon by stabbing him on the neck and ribs with a knife.
3. The appellant was sentenced to serve 30 years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised seven grounds of appeal which can be summarised as follows:
 - a) That the learned trial magistrate erred in law and in fact by convicting him on a defective charge.
 - b) That the learned trial magistrate erred in law and in fact by relying on insufficient evidence.
 - c) That the learned trial magistrate erred in law and in fact by rejecting his alibi defence.
 - d) That the learned trial magistrate erred in law and in fact by meting out a harsh and cruel sentence.
5. The appeal was opposed by the state through Mr. Oluoch, learned counsel on the following grounds:
 - a) That the offence was proved to the required standards.
 - b) That the alibi defence of the appellant was an afterthought.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. Section 220 (b) of the Penal Code provides:

Any person who—

(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 of a felony and is liable to imprisonment for life.
8. Though the appellant contended that the charge was defective, there was no truth in that allegation.

9. What evidence did the learned trial magistrate have at his disposal? On the material day police officers were out to arrest a suspect in an assault case. When they failed to get him at home, they moved to Pala Market in search for him. When they entered one of the bars, one patron whom the prosecution contends is the appellant caused a commotion after an argument with Police officer Ejikon. He insisted that he had to go with his sister and cousin. When he was allowed to fetch them, he instead returned from inside and questioned the authority of PC Nicodemus Ejikon and punched him on the mouth. Other police officers intervened. When police officers attempted to arrest him, he resisted and got the support of the other patrons. It was at this juncture the appellant pulled a knife from his waist and stabbed him on the ribs. He ran out but the appellant pursued him and declared in Kiswahili, “*Lazima nikue Leo.*” This is when he stabbed him on the left side of the neck.

10. In his defence, the appellant contended that he was in Mfangano where he had gone for a funeral on 14th February, 2019 and returned on 17th February, 2019. The appellant therefore raised an alibi defence. In the case of **Kiarie vs. Republic [1984] KLR** the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

This burden does not leave the prosecution even when it is raised for the first time during defence. In the case of **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal rendered itself as follows on the issue of alibi:

It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

11. The complainant interacted with his assailant for a good length of time and in the circumstances the issue of mistaken identity does not arise.

12. During trial in the course of cross examination the appellant suggested he was at the scene only that he denied involvement in the offence. This therefore justified the learned trial magistrate to reject his alibi defence which amounted to an afterthought.

13. Malice afterthought was proved; the declaration by the appellant the he was going to kill the complainant established the same.

14. The appellant was a first offender. Though the offence was unprovoked, I am persuaded to interfere with the sentence. I therefore set aside the sentence meted out by the learned trial magistrate and substitute with a sentence of fifteen (15) years imprisonment to run from when he was sentenced by the trial court.

DELIVERED and SIGNED at Homa Bay this 23rd Day of June, 2021

KIARIE WAWERU KIARIE

JUDGE