



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 11 OF 2015

SHEM KYALO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence (Hon. M. A. Ochieng, SRM)

dated 27th day of May 2014 in Criminal Case No. 1594 of 2010

at the Principal Magistrate's Court at Kajiado)

JUDGMENT

1. The appellant was charged with the offence of attempted murder contrary to section 220 (a) of the Penal Code. Particulars were that on the 12th December 2010, at Kitengela Township in Kajiado District within Rift Valley Province, he attempted to unlawfully cause the death of Godfrey Mwendwa Wambua, by attacking him with a knife and a club, threatening to kill him.

2. The appellant denied the offence and after a trial in which the prosecution called 4 witnesses and his defence, he was convicted and sentenced to 10 years' imprisonment. He was aggrieved with both conviction and sentence, and lodged this appeal raising the following grounds, namely:

- 1. That the trial magistrate erred in both law and fact in convicting him on contradictory evidence of the same family members;**
- 2. That the trial court erred in law and fact on the evidence of a single witness (PW1) which was full of fabrications and contradictions;**
- 3. That the trial court erred in law and fact by convicting him on the charge of attempted murder yet the charge preferred against him was assault;**
- 4. That the trial court erred in law and fact by convicting against the weight of evidence;**
- 5. That the trial court erred by convicting him despite the fact that the prosecution did not prove its case beyond reasonable doubt.**

3. During the hearing of this appeal, the appellant abandoned his appeal against conviction and urged the court to reconsider sentence. He argued that although he was sentenced to 10 years imprisonment, the trial court did not consider the period he had spent in custody and or remand.

4. Mr. Njeru, learned Assistant Deputy Prosecution counsel, submitted that the sentence imposed against the appellant was lenient. According to counsel, the attack on the complainant was vicious and the sentence allowed in law is life imprisonment. He submitted that considering the nature and seriousness of the offence of attempted murder, the sentence of 10 years was lenient and appropriate and should, therefore, not be interfered with.

5. I have considered the arguments by both the appellant and those made on behalf of the respondent. I have also perused the trial court's record and the judgment. The appellant was charged with the offence of attempted murder. The facts as stated in the charged sheet, are that

he attacked the complainant with a knife and a club threatening to kill him.

6. After hearing the evidence of witnesses called by the prosecution and that of the defence, the trial court found the appellant guilty and convicted him. The incident took place on 12th December 2010. According to the complainant, the appellant went to his house and attacked him without any reason. He hit him with a knife injuring his hand and also hit him with a club on the head. He had to seek treatment in various health facilities in Kajiado and Nairobi.

7. In his defence, the appellant denied committing the offence. He told the court that he only intervened and separated the appellant from fighting his (appellant's) wife. In mitigation, the appellant prayed for leniency, stating that he had a family and was the sole bread winner. He was sentenced to 10 years imprisonment.

8. The appellant was charged under section 220(a) of the Penal code which provides:

“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.”

9. The section uses the words **“liable”** which means a person convicted of attempted murder does not necessarily have to be sentenced to life imprisonment. The sentence to impose is at the discretion of the trial court.

10. I have considered the appellant's plea on sentence, perused the record and noted the circumstances under which the offence was committed. The appellant was arrested on 19th December 2010. He was initially released on bond on 1st January 2011. A warrant was however issued on 23rd March 2011 when he failed to attend court, but was lifted when the appellant appeared in court and explained that he was in court 2 when his case was called out.

11. The case proceeded before **Kaberia, SRM**, who heard 5 witnesses. The appellant was found to have a case to answer. He was to give his defence on 21st November 2011 but did not attend court and a warrant of arrest was issued against him. However on 22nd May 2013, the appellant was present in court, but the record does not show whether he came on his own or was brought under warrant. His bond was, however, cancelled and therefore he remained in custody.

12. The case began *de novo* before another magistrate with PW1 testifying on 13th August 2013. The trial concluded on 29th May 2014 when the appellant was sentenced. Since the date of his sentencing, the appellant has spent over five years serving the sentence. If the period he was in remand after his bond was cancelled on 22nd May 2013, is taken into account, he has spent over six years in remand and prison.

13. Taking all these into account from when the appellant was first arrested, went through the two trials and the purpose to be achieved by sentencing, I am satisfied that the appellant has learnt his lesson. Consequently, I allow the appeal on sentence. The appellant's sentence is hereby reduced to the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Kajiado this 21st day of February, 2020

E. C. MWITA

JUDGE