REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.24 OF 2018

(Appeal Originating from Nyahururu CM's Court Cr.No.315 of 2016 by Hon. A. Wanjala (C.M.)

JOSEPH LOSIKE LONGILAI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

Joseph Losike Longilai, the appellant, was convicted for the offence of attempted murder contrary to Section 220(A) of the Penal Code by Hon. Wanjala C.M. in CRC.315 of 2016 on 29/4/2016.

The particulars of the charge are that on 17/2/2013, at City Cotton Village Rumuti within Laikipia County, attempted to unlawfully cause the death of Ilimoo Nakuru by shooting him with a firearm namely AK47 injuring him on the shoulder and arm. Upon conviction, he was sentenced to serve life imprisonment.

Being aggrieved by the judgment of the trial court, he preferred this appeal. He filed grounds of appeal on 9/3/2018 and others filed with submissions on 15/5/2020.

The grounds of appeal can be summarized as follows:

(1) That the court erred by failing to find that no forensic evidence was adduced to connect him to the offence;

(2) That there was no explanation for charging the appellant two years after the alleged offence;

(3) That the court erred by failing to find that no proper identification parade was conducted;

(4) That the court failed to find that the prosecution evidence was riddled with contradictions;

(5) That the court erred by not finding that the conviction went against the weight of the evidence;

(6) The sentence is too harsh;

(7) That the court erred in failing to find that evidence of voice identification was not proved.

The appellant therefore prays that the conviction be quashed and the sentence be set aside. The appellant also filed written submissions on 15/5/2020 in support of the appeal. The appeal was opposed and the State counsel, Mr. Mwangangi also filed written submissions.

This is a first appeal and it is required of this court to exhaustively examine all the evidence tendered in the trial court afresh, analyze and evaluate it and arrive at its own conclusions and determinations.

This court must however bear in mind that it neither saw nor heard the witnesses testifying, though the trial court had the opportunity to. This court guided by the decision of *Okeno v Republic (1972) EA 32 at pg 36*, the EA Court of Appeal said:

"*An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination*

(Pandya v Republic (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Ruwalla v Republic (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter v Sunday Post (1958) EA 424."

The prosecution called a total of seven witnesses in support of their case. The complainant, Ilimoo Nakuru (PW1) a resident of City Cotton Village in Rumuruti was in his house about 7.00 p.m. on 17/2/2013. PW1 was with his wife Regina Elfa and children. He heard gun shots in his home. He opened the door to get out when he met somebody at the door and he asked if he was the village elder that reported them. PW1 asked what was wrong and the intruder said he would show him. He had an AK47 which he fired at PW1 and PW1 fell down. He was shot on the upper chest and the scalp on right side. In the shoulder, the bullet exited at the back. The assailant showed the court his healed scar. He left him bleeding and PW1 became unconscious. He said it is Lusika Malati Longilai a neighbor whom he knew well who shot him; that he spoke in Turkana that they would know that Malati Losike is a man.

PW1 said he was a village elder and he had only reported to the chief that the village was spoilt but there was no specific report about the appellant but he knew the appellant to have stolen sheep at one time and he followed and recovered them. PW1 knew the appellant as a criminal; that he was able to identify the appellant because he spoke and mentioned his names. PW1 said that it was 7.00 p.m. but it was not very dark and that the applicant came close to him as he spoke. He knew the gun that the appellant had because when he fired, it emitted a flash like an AK47. After he was shot, his wife called police who came and took him to hospital where he was admitted for 14 days. He identified the P3 form that was filed upon being examined and he could no longer use the right hand after the shooting. He recorded his statement at Rumuruti; but that the appellant disappeared for about one year but was arrested by the chief when he resurfaced in the area.

PW2 Julius Ekai, a son to PW1 testified that on 17/2/2013, he was at home in his house about 7.00 p.m. when Josphat, the appellant came home. He was in his house while the father (complainant) was in his; then he heard somebody identifying himself as Josphat Losike and addressed PW1 that he had been disturbing him. He heard two gunshots after the appellant spoke and on going out, he met the appellant running away. He went to assist his father who had been shot. He was assisted by the chief to take PW1 to hospital. PW2 said the appellant is a neighbor and had known him for about 5 years.

PW3 Joseph Loree Longurio the Senior Assistant Chief of Rumuruti Township recalled 17/2/2013 about 7.30 p.m. when he was informed on phone that Samson Nakuru an elder, had been shot dead by Josphat Ekai. PW3 immediately informed the OCS. About 10.00 p.m., PW1's wife called to say that PW1 was still alive and he again called OCS Rumuruti together with police, they proceeded to the scene, took PW1 to Nyahururu Hospital. He noted that PW1 was shot on the upper chest near the shoulder. Efforts to trace the appellant were fruitless. Later, the appellant resurfaced in the area and was arrested at a drinking den. PW3 said the appellant has many names and kept changing them wherever he went. He also knew him as Esekon Malati. PW3 said that the cartridges were recovered but not the gun.

PW4 Dr. Arthur Mumelo of Rumuruti Sub-County Hospital examined PW1 and found an old scar on the left side of the neck; scar on the thorax and abdomen – one entry and exit gunshot wounds, a 2cm scar on the right side of the chest and a bigger scar 8cm in diameter on the back side next to the scapular; had a surgical scar. The right upper limb was partially paralyzed and had reduced muscle movement due to nonuse for long. The injury was about one year old and likely weapon used was sharp – most likely a gun and he assessed the degree of injury to be grievous harm.

He produced the P3 form and discharge summary for Nyahururu Hospital where the complainant had been admitted for about 3 weeks.

PW5 Jane Nangolol Ilimoo wife to PW1 recalled that she was in the house when she heard gunshots. She heard a person say he was Malati and heard the complainant reported him that he is a thief; that PW1 pretends to be a village elder. PW5 said that at the time, she was in a different house from PW1. On hearing the shot, she ran where PW1 fell and that Malati ran off but she and Julius Ekai (PW2) chased him as he held a gun in his hand but he managed to escape. PW5 said she had known Malati from childhood. She said that though it was 7.00 p.m., she was able to see very well.

PW6 Agnes Irungu, a clinical officer specialized in orthopedics in Nyahururu County Hospital produced a discharge summary for Samson Ilimoo who was admitted at the hospital from 18/2/2013 to 7/3/2013.

PW7 CID Charles Kazungu of Rumuruti Police recalled that on 23/1/2015 he was in the office with Joseph Lonce, Assistant Chief who informed him that a suspect they had been looking for since 17/2/2013 had been seen. He was led to a house in Kamau where the Assistant Chief identified the suspect and he was arrested. He recorded witness statements and was given the spent cartridge. He sent the two cartridges to ballistic expert in Nairobi on 29/2/2016 and received a report.

When called upon to enter his defence, the appellant gave unsworn evidence.

He denied knowing the complainant whom he only met at the police station and only heard of the charge in court; that he worked in a farm watering tomatoes and on 20/1/2015 when walking home, he met police officers who asked where alcohol is sold which he denied knowing and they told him to go and show where alcohol was sold.

In his submissions, the appellant contended that the incident took place at 7.00 p.m. when it was dark and it happened very fast and hence PW1 could not have identified the assailant; it was also submitted that the words allegedly spoken by the appellant before shooting vary from PW1, 2 and 5 and he relied on the decision of *Ndung'u Kimani v Republic (1980) eKLR* where the court said that a witness whose evidence is to be relied on must create an impression to the court that he is a credible witness.

The appellant also stated that the names given by PW1 to police is different from that in the charge sheet and the defence; that the appellant was framed because he was alleged to be a conman thief and wanted person.

As regards PW2, it was submitted that he gave contradictory evidence whether he saw the appellant with the gun or not and there is evidence of fabrication and that PW2 did not see the assailant.

In regard to PW5's evidence, it was submitted that she did not say where she was when the complainant was shot and that she did not see the appellant because he ran off once he fired the shot.

The appellant also submitted that the name Malati is foreign to him and there was no evidence to prove that he disappeared from the area and that his defence was not considered.

As regards sentence, the appellant argued that the court should have taken into account the sentencing policy as held in *Dismas Wafula Kilwake v Republic* which considered noncustodial sentence; that the court did not consider his mitigation and that in light of the case of *Mwatetu & another v Republic Pet.15/2015*, the court should not be bound by minimum sentences and exercise its own discretion in sentencing the appellant.

Ms. Rugut, counsel for the State filed written submissions on 17/6/2020. On identification, counsel argued that PW1 said that he saw the person who shot him, named the person as Losike Longiki a person he knew well; that he identified the appellant by recognition because he talked and mentioned his names; that the conditions were favourable for identification and that the said evidence was corroborated by the evidence of PW2 and 5.

As to whether the charge was defective, counsel urged that PW5 referred to the appellant as Malati, PW3 also referred to him as Malati Ekison and that that should have prompted the amendment of the charge sheet but it was not done but that omission is curable under Section 382 of the Criminal Procedure Code. Counsel also submitted that PW3 recalled that the appellant keeps changing his names whenever he goes and he knew him as Malati.

Counsel urged that the offence of attempted murder had been proved in that the appellant demonstrated his intent to commit the offence by the choice of the weapon he carried, that is, a gun, AK47 and the place he inflicted the injuries, that is, the chest; that the *actus reus* was committed when he aimed the gun at PW1 and shot. Counsel relied on the decision of *Douglas Nyambane v Republic (2018) eKLR.*

As regards the sentence, counsel argued that though the appellant was a first offender, the court exercised its discretion to arrive at the sentence of 20 years imprisonment.

I have duly considered all the evidence on record, the grounds of appeal and the rival submissions. The appellant faced a charge of attempted murder contrary to Section 220(A) of the Penal Code. The Section reads as follows:

> *"220; 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."*

I must point out here that Section 220(A) of the Penal Code does not exist. Though the trial court did not state so explicitly, I notice that the conviction was under Section 220(a) of the Penal Code. The court therefore, corrected the error made by the State or the police who prepared the charge sheet.

An attempt is defined under Section 388 of the Penal Code:

> *"(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill 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 fulfillment 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."*

The Section brings out two main ingredients of an attempted offence, that is, the *mens rea* which constitutes the intention and the *actus reus* which constitutes the overt act or the execution of the intention.

Madan, Miller and Potter JJA held in the case of *Cheruiyot v Republic (1976 – 1985) EA 47* as follows:

> *"An essential ingredient of an attempt to commit an offence is specific intention to commit that offence, if a charge is one of attempted murder, the principle ingredient and the essence of the crime is the deliberate intent to murder as it is prescribed by the prosecution and therefore, it must be shown that the accused person had a positive intention unlawfully to cause death; in a presentation under Section 220 of the Penal Code, it is not sufficient that it would have been a case of murder if death had ensued or that the accused was indifferent as to what was likely to be the fate of the victim or that he acted in a manner so harsh as to endanger the life of another person or as to be likely to cause harm to him and an intent merely to cause grievous harm is not sufficient to support a conviction under Section 220 for attempting unlawfully to cause death. In addition to the requisite intent;*

there must be a manifestation of the positive intention by an overt act."

There is no doubt that the complainant sustained very serious gunshot injuries. His evidence was corroborated by PW3, the chief who came to the scene soon thereafter and PW4 the Doctor who examined PW1 and confirmed that PW1 had sustained gunshot wounds.

The appellant challenged his identification for not being watertight.

In the case of *Wamunga v Republic (1989) KLR 424*; the court held as follows:

> *"Where the only evidence against the defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.*
>
> *(2) Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."*

In *Anjononi & others v Republic (1976 – 1980) KLR 1506,* the Court of Appeal held that when it comes to identification, the recognition of an assailant is more satisfying, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or another.

The incident occurred at 7.00 p.m. as stated by PW1, 2 and 5. In my view, PW2 and 5 did not come into contact with PW1's assailant. They both came out of their houses after hearing the gunshots and they did not explicitly explain how they managed to see the assailant. However, PW1 was very clear in his testimony that on hearing the first two gunshots, he went to open the door when he came face to face with his assailant at the doorstep. According to PW1, it was not yet dark and that the appellant is a person who knew very well as a neighbor. Apart from that, PW1 said that the appellant identified himself as Malati Losike and that they would know that he was a man. PW1 said that the attacker also said he wanted the village elder who was reporting them. PW2 and 5 also stated that they heard the appellant threatening the complainant. PW2 and 5 also claimed to have known the appellant there before. I am satisfied that the appellant was known to PW1 as a neighbor and he came into close proximity with PW1 at his door step. The appellant also uttered several words that enabled PW1 to recognize his voice. Apart from identifying him, I am satisfied that PW1 recognized the appellant.

PW1, 2, 3 & 5 knew the appellant very well. PW5 said he knew him since childhood. His defence that he did not know PW1 is not true. PW1 had even arrested the appellant another offence before in connection with some other offence. I find that the identification of the appellant was watertight.

In this case, the appellant armed himself with an AK47 rifle and went to the complainant's home uttering threats. That was clear intention or *mens rea* that the applicant had the intention of killing or causing grievous harm to PW1.

A gun is not a toy but a very deadly weapon. The appellant then shot PW1 on the chest with the bullet exiting from the back. PW1 was also injured on the hand which caused paralysis of the right upper limb. Upon being shot, PW1 fell and fell unconscious and the appellant escaped not to be seen till after one year.

The overt act that manifests the appellant's intention was the shooting of the PW1 in the chest, a place he knew was likely to cause death and left PW1 for dead. I am satisfied that the prosecution proved beyond reasonable doubt that the appellant attempted to kill the complainant.

The appellant complained that he is not the same person referred to by the witnesses because the names in the charge sheet differ from what the witnesses called him in their evidence. He denied being known as Losike Malati Longilai as PW1 referred to him. PW2 referred to the appellant as Josphat Losike. PW5 referred to the appellant as Malati Eskon. PW3 knew the appellant as Joseph Ekai or Eskon Malati. PW3 further went on to state that the appellant had many names which he kept changing from place to place because of his criminal character. The witnesses are people who knew the appellant very well. The error that the State made was not to include all the alias names in the charge sheet. This court is satisfied that the witnesses positively identified the appellant and the error is a minor omission curable under Section 382 of the Criminal Procedure Code.

The appellant's defence was a bare denial, that he was not known to the complainant. However, he was positively identified by PW1, 2, 3 and 5, as a person known to all of them. His defence was a bare denial. I find that the conviction to be sound and there is no good reason to interfere. I affirm it.

On sentence, the appellant was sentenced to serve life imprisonment. Under Section 220(a), upon conviction, one is liable to life imprisonment. Sentence is an exercise of the court's discretion. The court took into account the seriousness of the offence and gave a deterrent sentence. I however note that the court did not take into account the appellant's mitigation that he was treated as a first offender, has a young family. Having considered all these mitigating factors, and in exercise of my discretion, I hereby set aside the sentence of life imprisonment. Instead, I sentence the appellant to 30 years imprisonment. The sentence to run from the date the appellant was sentenced on 3/5/2016. The appeal partially succeeds to that extent.

Dated, Signed and Delivered at *NYAHURURU* this *30th* day of *July,* 2020.

R.P.V. Wendoh

JUDGE

PRESENT:

Eric – Court Assistant

Appellant – present