



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 10 OF 2020

EDWARD WANYONYI MAKOKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Garissa Chief Magistrate's Court Criminal Case No. 1167 of 2015 delivered by Hon. C.M. Maundu (CM) on 4/3/2020)

JUDGEMENT

1. The appellant was convicted and sentenced to 20 years' imprisonment for offence of attempted murder contrary to section 220(a) of the Penal Code.

Particulars being that on 25/9/2014 at 2030 hrs in Benane town within Garissa County attempted to cause death of Ibrahim Hassan Shid. He also faced 2nd count of unlawfully wounding of a person contrary to section 237 of the Penal Code on the same particulars.

2. He pleaded not guilty and matter went into full trial.

3. He was convicted and sentenced as earlier stated.

4. Thus he lodged instant appeal setting out the following grounds:-

(1) That the trial court erred in law and facts by failing to find that the prosecution did not prove its case beyond reasonable doubt by failing to call material witnesses.

(2) That the trial court erred in law and facts by failing to find that the prosecution evidence was self-contradicting and therefore could not be relied upon to arrive at a safe conviction.

(3) That the trial court erred in law by failing to find that the appellant was justified to fire his firearm pursuant to Order 11(2) of the National Police Service Standing Orders and the sixth schedule of the National Police Service Act No. 114 of 2011.

(4) That the trial court misdirected itself in facts by determining only 2 rounds of ammunition were discharged and that they should have hit any other person apart from the complainant.

(5) That the trial court erred in facts and law by failing to give reasons for disbelieving the defence case contrary to section 169(i) of the Criminal Procedure Code Cap. 75 the defence was plausible and it impeached the prosecution case.

(6) That the trial court erred in facts and law by finding that the appellant was guilty of attempted murder despite the lack of intention to commit the offence.

(7) That the trial court erred in law and facts by relying on the evidence of complainant, PW3 and PW4 who jointly had broken school rules by leaving without permission at night and were caught chewing khat and thus had a possible common goal of concealing the true facts.

5. The evidence tendered was as follows:- **PW1 Ibrahim Hassan Shid** was at the material date a form four student at Benane Secondary. He testified that on 25-9-2014 at about 8.00p.m he was at a kiosk belonging to one Rukia taking supper. The hotel is situated at Benane Trading Centre.

6. He was with Hassan Abdikadhir and Yussuf Ali (PW3) when the appellant who was a police officer at Benane police station came. The appellant was wearing Jungle uniform and was carrying a gun. He said that he knew the appellant before. He used to see him at Benane Trading Centre.
7. That the appellant asked them what they were doing there and they told him that they were eating.
8. He was using spot light from his mobile phone make Alcatel to see the food which he was taking, without any provocation the appellant took away the mobile phone from his hand and walked out with it.
9. That he followed the appellant outside and asked him to return his phone. Instead of the appellant returning the mobile phone to him, he responded "nitakupiga risasi". The complainant (PW1) thought that the appellant was just joking and he (Pw1) responded to him by saying "hauwezi" suddenly the appellant cocked his gun and fired. He saw blood oozing from his right cheek. The appellant fired again. This time round the bullet hit him on his right leg.
10. Upon being shot twice, he fell down. Many people converged at the scene. When people came the appellant left the scene. He could not tell how many shots the appellant fired but he heard him firing shots as he walked away.
11. From there, he lost consciousness. When he woke up, he found himself at Garissa General hospital. An operation to remove bullets from his body was done. He was later transferred to Kijabe hospital where another operation was done. In court, he identified an AK 47 rifle which the appellant had and bullet head that was removed from his body.
12. During cross-examination, by Mr. Onono for the appellant he said that they got late from Class and found food having been finished and that is why they went to eat outside. He admitted that they did not seek permission from the school authority before going out. He denied that they attacked the appellant with sticks and kicks and that the appellant fired a warning shot.
13. **PW2 Mohamed Muhumed Magan** testified that on the material date he was at Benane Trading Centre when he heard people arguing. He recognized the voices of the two people who were arguing as Corporal Makokha (appellant) and the complainant (PW1) herein. The complainant asked the appellant to return his phone. He heard the appellant threatening to beat the complainant if he continued to ask for the mobile phone.
14. Suddenly he heard a gunshot. He panicked and laid on the ground. After ten minutes he gained courage to go to the scene. He found the complainant lying on the ground bleeding. Rukia was crying.
15. **PW3 Yusuf Ali Mohamed** was on the material date taking supper with the complainant. When the appellant came. The appellant asked them what they were doing there. The appellant allegedly took away the complainant's phone and walked out. The complainant followed him outside and requested to be given back his mobile phone.
16. After a short while they heard gunshots. When he saw the complainant lying down he ran away from the scene. He returned later after ten minutes and took the complainant to hospital.
17. During cross -examination by the defence counsel, he said that food in the school had gotten finished and he asked for permission from the Principal (of the school) to go and eat outside. He denied that the appellant was assaulted by students before he shot. He said that he remained in the hotel.
18. When the complainant walked out following his mobile phone. While inside the hotel he heard the complainant asking the appellant to return back his phone. Shortly thereafter he heard a gunshot. He was in the hotel. When the complainant was shot.
19. **PW4 Hassan Abdikadir Bishar** was with the complainant and PW3 taking supper in a kiosk at Benane Trading Centre when the appellant herein came and asked them what they were doing. He replied and told him that they were eating. He alleged that the appellant forcibly took away the complainants cell phone.
20. The complainant followed him and asked him to return his mobile phone. After a short while he heard gun shots. He ran away and went back to school. After 20 minutes he returned to the scene. He found the complainant having been shot.
21. **PW5 Mohamed Olat Bankalile** recalled that on 26-9-2014 at around 6.00am he was informed by the complainant's mother that the complainant was shot by Police on the previous night. That he rushed to Garissa General hospital where he met the complainant having been admitted. The complainant had injuries on his right leg and on the right chin.
22. That complainant was operated on and a bullet was removed from his body. They were referred to Kijabe hospital where he was admitted until 10-10-2014 when he left the hospital.
23. **PW6 Chief Inspector Micheal Wachira** was the OCS Modogashe Police Station as at the material date. The appellant was the Officer Incharge of Benane Police Patrol Base which is under Modogashe Police Station.
24. On 26-9-2014, at about 9.00p.m he received a telephone call from Inspector Elmi who informed him that there was a shooting incident at Benane Trading Centre. Thereafter he received a phone call from Garissa County Police Commander one Mr. Kinyua who instructed him to proceed to Benane to attend to the incident.

25. That he mobilized his police officers and an ambulance and proceeded to Benane. They met the victim being attended to by a doctor at Benane hospital. There was a group of students and members of the public who were baying for the blood of the appellant but he calmed them down.
26. That he proceeded to Benane Police Patrol Base with the appellant. He recovered an AK47 rifle and three magazines which had been issued to the appellant. He later handed those items to Corporal Kingara.
27. **PW7 Hassan Abdullahi Ahmed** is a nursing officer based at Garissa General hospital. He testified that on 26-9-2014, he was given a bullet by Dr. Bishar which he later handed over to IPOA officers on 01-10-2014.
28. **PW8 Corporal Wilfred Kingara** testified that on 27-0-2014 he was instructed by DCIO Lagdera to accompany OCPD Lagdera and OCS Modogashe to Benane. He was asked to investigate a matter where it was alleged that the appellant shot the complainant herein. At the scene, he saw blood stains. He was given two spent cartridges by the Assistant Chief of Benane.
29. That he recorded statements from two (2) students of Benane Secondary School and a hotel owner. He forwarded the firearm used together with the two spent cartridges and 27 live ammunition to the ballistic expert. They were examined and a report was prepared.
30. **PW9 P.C. Benjamin Buya Shama** testified that on the material date he was sleeping when he received a telephone call from one Hassan who informed him that there was a confrontation at Benane Trading Centre between his in charge (appellant) and a male student and as a result the appellant discharged some ammunition.
31. He asked him whether the boy was shot dead or not. He (Hassan) said that he was not sure. Hassan told him to be cautious since the appellant was coming to the post. He alerted his colleague of what happened.
32. They took their weapons and took cover. When the appellant arrived at the Patrol base, he identified himself. He told them that there was a boy who attacked him. He then went to his room.
33. Later he learned that the boy who was shot did not die. He was taken to hospital. After two (2) days, the OCPD and CID officers came. They took their statements. Later he also recorded a statement with IPOA officers.
34. **PW10 Bishar Abdi Aden** is a medical doctor based at Garissa General hospital. He is the one who examined the complainant and filled his P3 form. The complainant had a wound on tip of the nose (entry) and another wound in the right chin (exit).
35. He also had a wound on the right thigh with fractured femur and a bullet lodged on knee joint. He assessed the degree of injury as grievous harm. He filled the P3 form on 6th October, 2014.
36. **PW11 Emily Ibeere** worked with IPOA before she moved to EACC. She was the one investigating this case before she moved to EACC. She is the one who recovered the bullet head which was removed from the body of the complainant at Garissa General hospital. She later handed the bullet head to the current investigating officer Mr. Otiende Paul on 26-7-2015.
37. **PW12 P.C. Daniel Njogu** is attached to Benane Police Patrol Base. He recalled that on 25-9-2014 he was the one on duty. His colleague (PW9) was off duty. At about 8.30p.m the appellant person who was the In-charge of the Patrol base left for Benane Trading Centre.
38. He was in a jungle trouser, a T-shirt and he carried a gun, a stick and a torch. After sometime he heard gun shots from Benane Trading Centre. He called his colleague (PW9) and informed him. That they took cover since they thought that an AP Camp which was nearby had been attacked.
39. That after seven (7) to ten (10) minutes the appellant came. He alleged that he was attacked by a group of students and that he injured one of them.
40. **PW13 Gerad Adam Noor** testified that on the material date at about 8.00p.m he was in his pharmacy shop at Benane Trading Centre when he heard three (3) gun shots. He closed his shop and went home. On the next day he went to the place where he heard gun shots. He met children holding two spent cartridges and handed them to Chief Ibrahim Noor.
41. **PW14 Ibrahim Noor Hussein** is the Assistant Chief Benane Sub-Location. He testified that on the material date, he heard gun shots from Benane Trading Centre. He was instructed by the Deputy County Commissioner Lagdera to go to Benane Hospital.
42. At the hospital he met the complainant herein with injuries on his head and leg. He called OCS Modogashe who came with an ambulance. He left after the OCS arrived. On the next day Gerald gave him two spent cartridges which he handed to Corporal Kingara.
43. **PW15 Chief Inspector Alex Chirchir** is a firearm examiner. He produced a report dated 7th October, 2014. The report was prepared by his colleague Lawrence Nthiwa. The report confirms that the two expended cartridges which were recovered from the scene were fired from the AK 47 rifle which was issued to the appellant.

44. He also produced his report dated 17th March, 2015. In his report he confirms that the bullet that was recovered from the complainant's body was fired from the AK 47 rifle issued to the appellant person herein.

45. **PW16 Paul Otieno Otiende** is an investigating officer with IPOA. He testified that the file in this case was handed to him on 18-2-2015 by Emily Ibeere PW11 when she was going on transfer to another department. She was the initial investigating officer.

46. Upon taking the file he recorded statements from various witnesses including two police officers from Benane Police Post. Emily Ibeere handed him a bullet head which she had recovered. She took the bullet for ballistic examination.

47. Initially, the appellant was charged with the offence of grievous harm but the family of the complainant was not comfortable that the matter would be handled appropriately by a fellow police officer and that is why they took over the investigations. The charge of grievous harm was subsequently withdrawn under Section 26 of IPOA Act.

48. After investigations he recommended that the appellant be charged with the offence of attempted murder. He said the appellant used excessive force and that appellant had gone to work alone which is contrary to the Police Rules.

DEFENCE CASE

49. When the appellant was put on his defence the appellant elected to give sworn evidence. He called a total of four (4) witnesses.

50. He was the In-charge Benane Police Patrol Base. He testified that on 25-9-2014 at about 9.00p.m he left the police post to Benane Trading Centre alone on what he called "**Security Intelligence mission**" he was armed with a gun, a torch and a walking stick.

51. At Benane Trading Centre he spotted about 3-5 people a head of him smoking cannabis sativa. He ordered them to stop but they ran away. They entered into a nearby structure (*locally known as Dash*) where people chew miraa or operate as hotels.

52. He followed them into the said kiosk but they exited through the back door. He went to the next hotel which belonged to one Rukia. Inside the hotel, he found three old men and seven other men. They were all chewing miraa.

53. He introduced himself and requested all the ten people in the said structure to introduce themselves by showing him their identification cards. They were using light from two cell phones to light the structure. He alleged that the complainant herein was one of the people who were holding cellphones.

54. The complainant produced a student identification card from Benane Secondary School. He asked him to hand over the mobile phone which he was using and he complied. The other six (6) young men who were with the complainant did not produce identification documents.

55. That he asked the three elderly men why they were chewing miraa with "*students,*" before they could respond the seven (7) student jumped and took away his walking stick. His torch fell down. He was hit with a stick on the back. The person with the stick wanted to hit him again but he blocked the stick.

56. That he jumped outside. He was still holding the student identification card (I.D) and the mobile phone. He put them in his pocket. He alleged that when he went out he found a crowd of people. He suspected that the students who ran away had come back.

57. They started throwing stones at him. Those people started hitting him with sticks. He was completely surrounded. One of those people hit him on his private parts. He fell down. When he rose up he told the attackers that he was armed and he was going to shoot. He shot one warning shot but the attackers did not disperse.

58. He was hit on the elbow and the attackers went for the hand that was holding his gun. As they were struggling two gunshot were released. All the people except one person ran away. The person who remained was holding his leg and it was bleeding, when the crowd started re-grouping he ran away and went back to the police post.

59. He alleged that when he fired the warning shot he heard other gun shots within Benane Trading Centre. He alleged that he had no intention to shoot the complainant.

60. He alleged that he sustained injuries during the said incident and that he was treated at Modogashe Sub-County hospital. He said that he was issued with a P3 form which was later filled by a Medical practitioner.

61. **DW2 Mutwiri Nyaga** is a Clinical officer based at Modogashe Sub-County Hospital. He produced the appellant's P3 form and an outpatient card as exhibits in this case. The patient's card is dated 26-9-2014 whereas the P3 form was filled on 17-4-2015.

62. **DW3 Kokow Muhumed Hassan** is the Principal of Benane Secondary school. He produced a class register from Benane Secondary school for 2014. It was a photostat copy. He could not trace the original register in the school. According to the said register the complainant was absent from school most of the time.

63. DW4 Inspector Rodgers Wangila Masinde is the OCS Modogashe Police Station since mid-2015. He produced O.B entry number 5 of 25-9-2014 which was made by the appellant after the said incident. He also produced O.B No. 6 of the same date.

64. DW5 Peter Masiga Abas was the Principal Benane Secondary School when the said incident happened. He alleged that the complainant's school attendance record was very poor.

65. The parties agreed to canvass appeal via submissions.

APPELLANT'S SUBMISSIONS

66. The appellant submitted that there were two key witnesses who were not called by the prosecution. A lady called Rukia and a student called Ibrahim Mohamed Hassan. The lady called Rukia was mentioned by PW1, PW3 and Pw4 who were the complainant a student at Benane Secondary School together with his school mates.

67. The prosecution and defence differed on the nature of business that was conducted by Rukia. While the prosecution led evidence to suggested that Rukia was a hotel owner where the students were eating, the evidence of the defence was that she was a miraa vendor.

68. Why this is significant is because, had Rukia testified, she would have clarified the nature of business she was running and therefore impugned or corroborate the students' version of events. If they were corroborated, then they would emerge as honest and believable witnesses. On the converse, if she testified that she was a miraa vendor then she would have corroborated the defence and therein impeach the prosecution witnesses.

69. Failure to call a material witness can only be adversely implied against the prosecution and in this regard, it would mean that the students were chewing miraa outside school hours and therefore they had a common purpose to mislead the court to believe that they were having super.

70. It would then follow that the defence was truthful in that the Appellant was a responsible officer stopping underage students from cheating miraa and when he intervened, they attacked him leading to the shooting.

71. The second crucial witness is Ibrahim Mohamed Ahmed. From the Occurrence book entry entered by the Appellant on his return to the station, he stated that when he confronted the students and asked them to identify themselves, one of them gave him a school identification card bearing his name, Ibrahim Mohamed Ahmed and he also gave him his phone which was an exhibit in court.

72. He entered this information as the first incident report and did not have time to falsify the same as it was recorded immediately after the event. This issue was canvassed in cross examination of PW2.

73. It will suffice to state that there was not less than four persons when the assault on the Appellant took place including the said Ibrahim Mohamed Ahmed who voluntarily gave his identification card and phone contrary to the allegation by the complainant. This ground will be shortly developed to show how the trial court misdirected itself in facts as to the number of the students who confronted the appellant.

JUSTIFIABLE USE OF FIREARM

74. It is not contested that the Appellant was an officer of the National Police Service. A police Officer can justify firing his weapon when his life or property is in danger. Any injuries sustained can therefore be legally permissible in the premises. Order 11 (2) of the National Police Service Standing Orders and the Sixth Schedule of the National Police Service Act No. 114 of 2011 read together bear the basis for this argument.

75. From the evidence of PW12 at page 45, it is evident that the safety of the Appellant was threatened. He stated as follows:

“The appellant came and sat besides me. He had his AK 47. He had dust on his clothes and shirt, on the head and an injury on the face, as is he had been beaten. He told me he had been attacked by students...he went to his house and started patching his tongs”

76. The P3 form for the Appellant which was produced as exhibit 4 is consistent with the testimony of PW12. It reads as follows:

“History and physical examination: 26/09/17. Bruises on the skull, generalized body pain, inguinal pain. H.P.I. Allegedly attacked by mob while he was on the line of duty. Presented with the above complain. Bruises on forehead labial aspect and swollen abit. Bruises on left inner limb above the ankle join no deformity, penile pain. Impression soft tissue injuries.”

77. The Appellant testified under oath and described how he was attacked by the students after he took a phone that was in the possession of Ibrahim Mohamed Ahmed.

78. The logical conclusion is that the Appellant discharged his weapon as the result of the assault by the many students who had crude weapons such as sticks. PW12 even described the dust on the Appellant which was an indication of a physical confrontation with the students.

79. Trial court misdirection on facts that there were only two rounds discharged and that they should have hit any other person other than the

complainant.

80. The Appellant from the onset of the case set out to show that the owner of the phone was Ibrahim Mohamed Ahmed. This comes out from the cross examination of PW2. The said Ibrahim Mohamed Ahmed was recorded in the OB entered by the appellant. From the defence, it is the said Ibrahim that is the owner of the phone and not the complainant.

81. If the Appellant intended to injure any of the students deliberately then it would have been the said Ibrahim and not the complainant. The trial court misdirected itself in facts by believing that the complainant was the owner of the phone and failing to consider that Ibrahim was the real owner of the phone. The complainant was therefore shot inadvertently as the scuffle was ensuing and had they not attacked the officer, then he would not have been injured.

82. Lack of intention to commit the offence of attempted murder.

83. It behooves a court of law to place a high burden of proof on the prosecution to demonstrate that a Police Officer went beyond his mandate in firing his weapon and occasioning an injury. This is premised on the fact that the law allows an officer to use his weapon when in danger and in such a case he cannot be culpable in any injury suffered.

84. The appellant's safety was in danger and during the physical confrontation his weapon discharged accidentally. The prosecution did not take liberty to show any criminal intent, on the converse, its prosecution case reveals an officer who was cornered, injured and therefore had no choice but to fire. This cannot amount to criminal intent.

RESPONDENT'S SUBMISSIONS

85. Mr. Mulati for the respondent opposed the appeal on conviction and sentence.

86. He submitted that, on failure to call witnesses e.g. Rukia, she was said to be owner of the joint/hotel. The respondent submitted that witnesses called left no gap or doubt in prove of prosecution's case. The case was cogent.

87. He contended that, PW2 Mohamed Ahmed (PW1) confirmed that, his phone was taken by appellant. PW2 was not at hotel but 20m where he found 2 people arguing (PW1 and appellant) over phone.

88. He argued that, Ibrahim Mohamed was not a witness nor owner of the phone. Thus, not essential to call him. See page 19 of line 16-20 of the proceedings.

89. He submitted that, PW2: He only saw 2 people. Appellant and PW1 arguing on intention. PW1 page 11 line 6 of the proceedings. When arguing and complaining appellant said "*nitakupiga risasi*" then he shot. Thus the shooting was intentional.

90. The prosecution further submitted that, the issue of injuries of appellant Came in defence. In Defence the appellant alleged that the injuries were occasioned by members of public.

91. Finally, the prosecution contended that prosecution the evidence of the witnesses PW1 – PW4 was cogent and supports the case. Thus prosecution prayed for appeal to be dismissed.

ISSUES, ANALYSIS AND DETERMINATION

92. After going through the evidence on record and the parties submissions, I find the issues were; **whether the prosecution proved its case beyond reasonable doubt?**

93. This is the first appellate court whose duty is to reevaluate the evidence on record and come up with an independent finding. The court must however bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See OKENO V REPUBLIC (1972) EA, 32.

94. Section 220 of the Penal code Provides as follows;

"Attempt to murder"

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."*

95. The Prosecution is required to prove beyond reasonable doubt that the appellant had an intent to unlawfully cause the death of the complainant herein.

96. From the evidence in record, the appellant met the complainant in a hotel with his colleagues. According to the complainant, they were eating and since the light in the hotel was not sufficient he was using light from his cell phone to see the food which they were taking.

97. The complainant and his two colleagues alleged that the appellant forcibly took away his mobile phone and went out with it. The complainant followed him outside and requested the appellant to return the cellphone. Instead of the appellant returning the mobile phone he threatened to shoot the complainant. The complainant thought the appellant was joking.

98. However, all over a sudden the appellant cocked his gun and shot him twice. According to the complainant there was nobody else outside apart from him and the appellant person. His evidence was corroborated by that of his two colleagues namely Yusuf Ali Mohamed (Pw3) and Hassan Abdikadir Bishar (PW4).

99. They both told court that they did not follow the complainant outside and that when the shots were fired they were still inside the hotel. The appellant on the other hand alleges that he was confronted by a group of people outside who started beating him prompting him to shoot a warning shot in the air.

100. He alleged that he further discharged two other bullets accidentally. However, the trial court did not believe his story. Reason being the two witnesses who were with the complainant said there was nobody else outside. From the hotel they were hearing the conversation between the appellant and the complainant. PW2 Mohamed Muhumed Magan also overheard the conversation between the appellant and the complainant. He did not hear voice from a third party.

101. PW9 P.C. Benjamin Buya Shama who was a colleague of the appellant told court trial court that the information he received after the said incident was that there was a confrontation between the appellant and a male student and as a result the appellant discharged some ammunitions.

102. When the appellant returned to the police post he told him that he was attacked by a boy. The appellant did not say that he was attacked by a mob.

103. From the two ballistic reports, it is clear that the two bullets that injured the complainant were discharged from the appellant's weapon. Therefore, there was no dispute that it was the appellant who injured the complainant. The degree of injuries was clarified as grievous harm.

104. In counsel's submission, that there were two key witnesses who were not called by the prosecution. A lady called Rukia and a student called Ibrahim Mohamed Hassan. Failure to call the said witnesses was fatal to the prosecution case.

105. Counsel for the respondent urged the court to uphold the conviction and sentence arguing that the evidence adduced was sufficient and cogent.

106. Section 143 of the Evidence Act cap 80 LOK provides as follows:-

“No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”

107. In **Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005** the Court of Appeal held as follows:-

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

108. The Court of Appeal reiterated the above position in the case **Alex Lichodo vs Republic Criminal Appeal No. 11 of 2015** which held that,

i) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

ii) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

iii) Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

109. The court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

110. The appellant submitted that, it is not contested that the Appellant was an officer of the National Police Service. A police Officer can justify firing his weapon when his life or property is in danger. Any injuries sustained can therefore be legally permissible in the premises. He cites Order 11 (2) of the National Police Service Standing Orders and the Sixth Schedule of the National Police Service Act No. 114 of 2011 read together bear the basis for this argument.

111. In my view both the Constitution and the National Police Service Act, No. 11A of 2011 are relevant laws in this regard. Article 239 (1) (c) of the Constitution recognizes the National Police Service, in which the appellant was serving at the material time, as one of the national security organs in Kenya.

112. By dint of Article 238 (2) (b) of the Constitution national security is to be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. In *Attorney General & Another v. Randu Nzai Ruwa & Others*, C.A. No. 275 of 2012, the Court emphasized that even where national security is implicated, it has to be pursued while strictly observing and respecting the rule of law, democracy human rights and fundamental freedoms.

113. One of the objectives of the National Police Service Act is to give effect to, among others, Article 238 of the Constitution and Article 244, which sets out the objects and functions of the National Police Service, and demands compliance by the police with constitutional standards of human rights and fundamental freedoms.

114. In addition, the Act makes express provisions regarding self defence by police officers and the use of force, in particular the use of firearms. Sections 49(5) and 61 of the Act as read with the Sixth Schedule sets out the circumstances under which a police officer may resort to the use of force and firearms. Part A of the Sixth Schedule provides for use of force by the police in the following terms:

“1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are in effective or without any promise of achieving the intended result.

2. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.

3. When the use of force results in injuries—

(a) the police officers present shall provide medical assistance immediately and unless there are good reasons, failing to do so shall be a criminal offence; and

(b) shall notify relatives or close friends of the injured or affected persons. (Emphasis added).

115. Part B of the same schedule makes provisions on the use of firearms by the police as follows:

“1. Firearms may only be used when less extreme means are inadequate and for the following purposes—

(a) saving or protecting the life of the officer or other person; and

(b) in self-defence or in defence of other person against imminent threat of life or serious injury.

2. An officer intending to use firearms shall identify themselves and give clear warning of their intention to use firearms, with sufficient time for the warning to be observed, except—

(a) where doing so would place the officer or other person at risk of death or serious harm; or

(b) if it would be clearly inappropriate or pointless in the circumstances.

3. A police officer shall make every effort to avoid the use of firearms, especially against children.”

116. In my view in light of the above express provisions of the National Police Service Act regarding use of force and firearms by the police in self defence, there is no room for invoking section 17 of the Penal Code and applying the principles of the Common Law on self defence. The provisions of the Act are a complete and exhaustive code and demand that a police officer must resort to non-violent means as the first option and to use force only when non-violent means are ineffective.

117. In addition, even where the use of force is justified, the officer does not have a carte blanche in the use of force. The Act demands that the force used must be proportional to the objective to be achieved, the seriousness of the offence and the level of resistance, and still, only to the extent necessary. When it comes to use of firearms, the Act makes that a last resort option.

118. To determine whether a police officer has used force or a firearm as required by the Act therefore cannot be a subjective issue. The court must evaluate all the circumstances surrounding the use of force or firearm so as to determine, for example, whether force was used as a last option; whether it was proportionate to the threat that confronted the police officer; or in a case involving a child, whether the officer had made all effort to avoid the use of firearms. See **CRIMINAL APPEAL NO. 23 OF 2016 - I.P. VERONICA GITAHU and P.C. ISSA MZEE Vs REPUBLIC**

119. From the foregoing, the trial court justified and this court is satisfied that there was nobody else present when the appellant grievously injured the complainant. His allegation that he was attacked and injured by mob was therefore made up story. The evidence indicating that the appellant sustained injuries was therefore cooked up story in a bid to cover the truth.

120. In the case of **Cheruiyot vs Republic (1976 -1985) EA 47** the court held as follows:

“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 appellant person had a positive intention to unlawfully cause death and that intention must be manifested by an overt act.”

121. The appellant alleged that he discharged three bullets one of them being a warning shot. However, only two spent cartridges were recovered from the scene. The complainant suffered two gun shots. One on the cheek which apparently appeared to have been aimed on the pw1 head and another on the leg.

122. If what the appellant was alleging that he was attacked by a mob was true then most probably the shots would have hit another or other person (s) but not only the complainants whom they had an altercation with, as the complainant wanted his mobile phone from the appellant.

123. Instead of returning the phone the appellant intentionally shot the complainant twice. There was evidence that, before discharging the bullets he had warned the appellant that he would shoot him. A gun is a lethal weapon.

124. For appellant to aim his gun at the complainant and shoot him twice is clear manifest that he had a positive intention to unlawfully cause his death. This court therefore agrees with trial court finding that, the prosecution proved beyond reasonable doubt the essential elements of ***mens rea*** or intention ***to kill***.

125. Thus, court finds that there is no merit in appeal against conviction.

126. On sentence, the offence of attempted murder attracts a penalty of life sentence. The appellant was awarded 20 years imprisonment. That was not excessive in the circumstances of the instant case thus court also finds no merit on challenge of the sentence imposed.

127. Thus, the court makes the following orders;

i) The appeal is dismissed in its entirety and both conviction and sentence upheld.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JULY, 2020.

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C. KARIUKI

JUDGE