



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 26 OF 2017

MBAI MWANZIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mutomo Senior Principal Magistrate's Court

Criminal Case No. 485 of 2015 by Hon. Z. J. Nyakundi S P M on 22/05/17)

J U D G M E N T

1. **Mbai Mwanzia** was arraigned in Court to answer a charge of **Attempted Murder** contrary to **Section 220(a)** of the **Penal Code**. Particulars being that he unlawfully attempted to cause the death of **David Munyao** by cutting him with an axe on the head on the **25th day of August, 2015**.
2. He also faced a charge of unlawfully assaulting **Kyalo Mutindi** thereby occasioning him actual bodily harm contrary to **Section 251** of the **Penal Code**.
3. Having denied the charges the Appellant was subjected to full trial, acquitted on Count 2, but found guilty on Count 1 and sentenced to **ten (10) years imprisonment**.
4. Aggrieved, through the firm of **J. K. Mwalimu and Company Advocates** he appealed on grounds that the learned Magistrate relied on inconsistent and contradictory evidence of the Prosecution; he applied selective bits of evidence in convicting the Appellant while disregarding exonerating evidence; ingredients of the offence were not established as required by law, doubts that were established were not resolved in favour of the Appellant and the sentence imposed was excessive.
5. Facts of the case were that PW2 **David Munyao**, the Complainant in the first Count, bought land from the Appellant. On the **25th August, 2015**, having notified the Appellant, PW2 and PW1, **Kyalo Matindi** and Complainant in the 2nd Count went to the home of the Appellant carrying pangas with the intention of cutting trees that stood at the boundary that he had planted at the point of buying the land. On knocking to announce their presence, the Appellant came out of the house eating succotash and when PW2 greeted him, he went back into the house and came out with an axe. As they walked towards the boundary, the Appellant returned to the house and came out after ten (10) minutes with some substance wrapped in a newspaper cutting that he rolled and started smoking as he led them to where the trees that served as boundary marks were. On finishing, they started walking back. The Appellant walked ahead of him as PW1 followed. The Accused's wife and children were at their home. As they walked on PW2 heard the Appellant say that he could kill him so as to take the whole land. In a split of a second the Appellant cut him on the head with the axe and he fell down at the spur of the moment. PW1 in an attempt to deter him jumped and held the Appellant and both of them fell down. As a result PW1 sustained a cut on the left hand. PW2 struggled and stood and managed to snatch the Appellant the axe. He called out for help. PW3 **Janet Ngayau** who heard screams went to assist. They used the lessa that he carried to tie the wound. His family members got means of transport and took him to hospital.
6. In the meantime, the matter was reported to the police. PW2 rang PW5 **No. 75433 P C Japheth Kiadiavoi** and made a report. While on his way to the scene of the incident he encountered the Appellant who surrendered to them. He effected arrest.
7. The Complainant on being seen at **Mutomo Hospital** by PW6 **Gilbert Muya**, a Clinical Officer, he found that the cut on the left side of the head was deep. He advised him to have a CT Scan done.
8. PW2 was taken to **Machakos Hospital** for treatment. Subsequently a P3 Form was filled. The degree of injury sustained was assessed as grievous harm.

9. When put on his defence the Appellant stated that on the material date he was called out by PW2 at **6.00 a.m.** When he went out he was on phone and he noticed PW2 carried a panga which protruded from his jacket. He finished communicating on phone and demanded to be shown the boundary of his land to enable elders find a path at the time of going to the land. He urged that PW2's workman had a panga and an axe and denied having carried anything. He said that PW2 threatened him and ordered him to do what he wanted. As they walked on, PW1 was in front while PW2 was behind him. PW2 hit him on the lower back with a panga. He turned to ask him why he did so, his workman turned, held him and started screaming. As they struggled they hit PW2 (**David**) who fell down. His (Appellant's) wife and children who heard scream went to the scene. PW2 took the panga and axe and ran into the bush. He denied knowing how the Deceased sustained the injury. Thereafter he decided to go and report to the police. While on the way he encountered the police. He called his wife **Ndanu Mbai** as a witness who stated that she went to the scene after hearing screams where she saw PW2 leaving with 2 pangas while the Appellant and PW1 were on the ground.

10. The learned trial Magistrate considered evidence adduced analyzed it, applied the relevant law and reached a finding that the ingredients of the offence of attempted murder had been proved beyond reasonable doubt.

11. The Appeal was canvassed by way of written submissions. It was urged by the Appellant that the case was not proved beyond any reasonable doubt. The Respondent/State through learned Counsel, **Mr. Mamba** urged that evidence of PW2 was corroborated by that of PW1. That evidence adduced by the Prosecution witnesses left no doubt that the offence was committed. That the act of the Appellant taking the axe was evidence of his intention to kill the Deceased, which was buttressed by his utterance.

12. Further, that the injuries sustained by the Complainant established malice aforethought on the part of the Appellant. He alluded to the definition of an attempt as provided by **Section 388 of the Penal Code**. He cited the case of **Republic vs. Luseru Wandera s/o Wandera (1948) EA CA 105** where the Court stated that though the attempt to murder was not proved against the Appellant, the Court was entitled to presume that the Appellant knew and intended the natural and probable consequences of an assault committed by him with the knife and that those consequences were likely to cause grievous harm. That the case was proved to the required standard and the sentence was imposed following the discretion the Court had.

13. It is the duty of this Court being the first Appellate Court to re-evaluate the evidence on record and come to an independent conclusion bearing in mind the fact of having not seen or heard witnesses testify. (**See Okeno vs. Republic (1972) EA 32**).

14. The Appellant faced a charge of **Attempted Murder** contrary to **Section 220(a)** of the **Penal Code** that provides thus:

“Any person who—

(a) attempts unlawfully to cause the death of another;”

Therefore the Prosecution had the duty of proving beyond any reasonable doubt that the Accused had the intent to unlawfully cause the death of the Complainant. The learned trial Magistrate in addressing the issue cited authorities that made him reach the decision to convict the Appellant. He also took into account what amounts to an attempt as clearly defined in **Section 388** of the **Penal Code** which provides thus:

“(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.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”

15. In the case of **Republic vs. Whybrow (1951) 35 CR APP. REP 141** it was stated that:

“... if the charge is one of attempted murder the intent becomes the principal ingredient of the crime.”

16. In the case of **Abdi Ali Bare vs. Republic (2015) eKLR** The Court of Appeal stated that:

“... it has long been accepted that 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. ... 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. ...”

17. It was urged by the Appellant that there was no clear evidence to support the necessary standard of proof for existence of *mens rea*.

18. Evidence adduced by PW2, the Complainant, was that the Appellant hit him with the axe that he was carrying and he sustained a deep cut wound. His evidence was corroborated by that of PW1 who witnessed when he committed the act that caused the deep cut on the Complainant's head. In his defence the Appellant stated that PW1 hit him with a panga and he turned. PW1 held him and both of them screamed. As they struggled they hit the Complainant (PW2) who fell down. Looking at the nature of injury sustained it was a deep cut that

could not be consistent with the explanation given of accidental hitting by two (2) people who were struggling. The deep cut wound was consistent with the explanation given by the Complainant and confirmed by this witness (PW1). This was evidence that confirmed the overt act that was committed by the Appellant that resulted into injuries that the Complainant suffered.

19. When the Complainant and PW1 arrived at the homestead of the Appellant at **6.20 a.m.** or thereabout he stated that his aim was to show his workman the markings at the boundary. According to him, he had notified the Appellant but the Appellant denied having had any notice for he stated that the Complainant on finishing to speak on the phone told him that he wanted him to show them the boundary.

20. It was proved that the Appellant carried with him an axe. It was stated that prior to acting the Appellant uttered some words regarding his intention to kill the Complainant. He wondered aloud if he could kill **David** what he was capable of doing regarding the land in question that he still considered his. As correctly stated by the learned trial Magistrate, no sooner had he uttered the words than he moved swiftly and cut the Complainant. He demonstrated his intention of causing death of the Complainant. An axe has many specialized uses other than as an implement for splitting wood. It is not stated that they had gone to the boundary to cut some wood such that the Appellant needed to carry an axe. Considering the fact that the act was perpetrated after he had identified the markings on the boundary and having aimed at the Complainant's head, he had the intent to either kill the Complainant or at least cause him grievous harm that he accomplished. **(See Section 206 of the Penal Code).**

21. This is not a case where he struggled with the Complainant's workman prior to hitting the Deceased. He did not strike out wildly as was in the case of **Lusero Wandera (Supra)** he had the positive intent to cause death. In the premises the trial Magistrate did not misdirect himself, therefore I affirm the conviction.

22. Regarding the sentence, it is contended that it was excessive. In the case of **Bernard Kimani Gacheru vs. Republic Criminal Appeal No. 188 of 2000** the Court stated as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

I do take into consideration the fact that circumstances of each case must be considered differently. I do note the injury that was sustained and the fact that at the point of filling the P3 the wound had healed and the Complainant will have the opportunity of filing a Civil Suit against the Appellant. In the premises, I set aside the sentence imposed by the Lower Court and substitute it with a sentence of **seven (7) years imprisonment** to be effective from the date of conviction.

23. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of January, 2019.

L. N. MUTENDE

JUDGE