REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 65 OF 2014

John Ngare Kwema.....……...…….……Appellant

Versus

Republic……...……..…….……Respondent

(Appeal against Judgement, Conviction and Sentence in Criminal Case Number 88 of 2014, R vs. John Ngari Kwema at Nyeri, delivered by W. Kagendo, S. P. M on 21.7.14).

JUDGEMENT

The appellant herein seeks to quash the conviction and sentence imposed upon him by the Learned Senior Principal Magistrate in Criminal case number **88** of **2014, at Mukuruweini,** delivered on 21. 7. 2014 whereby the appellant was charged with the offence of attempted murder contrary to Section **220 (a)** of the Penal Code.[1] The particulars of the offence were that on the 9th day of June 2013 at Muthuthuni Village in Mukuruweini Sub-County within Nyeri County he attempted to cause the death of **Esther Wacera Maina** by cutting her severally with a panga.

In determining this appeal, this court fully understands its duty as laid down in the case of *Okeno v. R*[2] which is to subject the evidence tendered in the lower court to a fresh and exhaustive examination and draw its own conclusions. This duty was authoritatively stated by the Supreme Court of India in the recent decision in the case of *K. Anbazhagan v. State of Karnataka and Others*,[3] where a three-Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal ruled that:-

> *"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind –* ***sans passion and sans prejudice****. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."*

PW1, Esther Wacera Maina testified the appellant who was her husband (but they had been separated for 2 years) had prior to this incidence assaulted her, and on the material day he advanced towards her

and a one **Lucy Wagenchi** her sister brandishing a panga, he hit the ground with it and said he would kill one of them prompting them to run while screaming, but unfortunately she tripped and fell and he caught up with her. She lifted her hands up in the air, and he asked her something to the effect *"you said you will never come back to my home"* to which she responded *"let's go home and discuss."* He sought to know where her phone was and she responded it was with her sister, he asked the same question to her sister who by this time had caught up with them and she said she did not know. He then hit her with the panga on the back using the blunt side then cut her right leg, she attempted to run, but he caught up with her and cut left leg. As she lifted up her hands covering her head, he continued to cut her hands and the head. She lost consciousness. The injuries necessitated hospitalization for three weeks. The injuries damaged her nerves, a problem that she will live up with and also she requires an artificial leg **PW2 Jeniffer Nyawira Kahuthu,** a medical officer at Mukuruweini District Hospital produced the P3 and classified the injuries as grievous harm.

PW3 Lucy Wangechi the sister to the complainant and who was in the company of the complainant at the material corroborated her evidence. She narrated how the appellant attacked the complainant with a panga and inflicted serious injuries on her.

PW4 P. C. Martin Rukaria, of Nyeri Police Station was among the officers who arrested the appellant while **PW5 James Kahinga Thieri**, the area MCA confirmed that he heard screams, went to the scene, found a lady lying down soaked in blood, he confirmed that she was still alive, she was put in his vehicle, they reported at the police station and took her to hospital.

PW6 P.C. John Korir was the investigating officer. He confirmed the complainant was brought to the police station by PW5 in critical condition, he told him the people who brought her to take her to hospital, later h visited her in hospital. She had regained consciousness, he recorded the witness statements.

The trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence. The court complied with the provisions of Section **211** of the Criminal Procedure Code[4] and the accused elected to give unsworn evidence. The appellant narrated how he was arrested and was told he will know the offence further on, and later was shocked when the charges were opened. On the scars the complainant showed the court, he testified that they were the same scars the complainant had when they used to love each other and alleged that she did not show the court one scar she had on her thigh. He claimed that the complainant only wants "compensation." He denied committing the offence.

The learned magistrate concluded that the evidence was credible and that the prosecution had proved its case and convicted the appellant as charged and sentenced him to **life imprisonment**.

Aggrieved by the above verdict, the appellant appealed to this court seeking to overturn the said sentence. In his amended petition of appeal, the appellant raised four grounds, which in my view can be reduced into two summarized as follow;, ***(a)*** *Whether the prosecution proved its case to the required standard,* ***(b)*** *Whether the defence offered by the appellant was considered by the trial court.*

The appellant filed written submissions which I have carefully considered. Learned state counsel also filed submissions and strongly maintained the prosecution proved its case beyond reasonable doubt and urged this court to uphold the conviction and sentence.

I find it necessary to examine in detail what constitutes *'an attempt to commit an offence'.*

When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence.

In a commentary on the *Indian Penal Code (Act XLV of 1860),***[5]** the learned authors have authoritatively defined the essential ingredients of an *attempt to commit an offence* in the following words:-

> *"In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to*

commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded"

Thus, for there to be an attempt to commit an offence by a person, that person must:-

a. *Intend to commit the offence;*
b. *Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;*
c. *Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,**[6]***

But in fact he does not commit the whole offence. For the offence of attempting to commit an offence to be proved, the prosecutor must prove each of the above three elements beyond reasonable doubt.

The act relied upon as constituting the attempt must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case of *Williams, Ex parte The Minister for Justice and A-G*.[7]What is done must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that a person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relief him from criminal responsibility for the attempt which he made before desisting.

Attempted murder requires the existence of an intention to kill or cause grievous bodily harm. This was the holding in *R.vs Grimwood*.[8]The requisite intention to kill can be inferred by the circumstances. This was the holding in *R. vs Walker & Hayles*.[9] In order for a person to be guilty of attempted murder, that person should have deliberately, intentionally or recklessly with extreme disregard for human life, attempted to kill someone. There should be some substantial step towards committing the crime.

For the prosecution to prove the offence of attempted murder, it must establish that the appellant had the intention to kill. It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention to kill the complainant. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute an attempt to kill the complainant.

The High Court of Tanganyika grappled with the difficulties courts face in resolving cases of this nature in the case of *Mussa s/o Saidi vs Republic*.**[10]** In the said case, **Spry J** (as he then was) stated:-

"The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence. The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence"

Criminal law seeks to restore order, decency and social equilibrium in society. It is aimed at curtailing or reducing to the minimum grave incidents of anti-social conduct. Punishment of an offender lies at the root of criminal law. Where an offence is committed, the offender or wrong-doers is punished, however, the

criminal law also seeks to punish those who intend to commit offences but could not successfully do so.That is, they merely attempted to commit an offence. The fact remains that they intended to commit an act which they know is unlawful and prohibited, but the completed offence was never accomplished. The offence remains inchoate because the accused could not accomplish his desires, or that the end result of his acts or omission is not what he envisaged. He has all the same, attempted to commit an offence. It is a criminal attempt and therefore an offence. Will an accused person be allowed to go scot-free because he could not finish his plans? No. He would be made to face some form of punishment even though he never completed the offence. In my view, any legal system would be defective if criminal liability only arose when substantive offences have actually been committed.

In *Hamisi S/O Tambi*[11]it was stated that *"it is an essential ingredient of the offence of attempted murder to prove an intention to murder no lesser intent suffices."* This position was ably reinforced in the case of *Cheruiot vs Republic*[12](which decision was also relied upon by the learned magistrate) where it was stated:-

> *"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 essence o the crime is the deliberate intent to murder. It must be shown that the accused person had positive intention to unlawfully cause death and that intention must be manifested by an overt act."*

Turning to the grounds of appeal, I take the view that the appellant argues that there was insufficient evidence to sustain the conviction. In other words, did the prosecution prove the case of attempted murder beyond reasonable doubt as required under the law?

Upon re-evaluating the evidence I am persuaded that the ingredients of the offence as discussed above were satisfied. The complainant and PW2 narrated in a clear and consistent manner all what transpired. The appellant said he was going to kill someone. He brandished a panga. Chased the complainant. Hit her on the back with the blunt side. He then cut her right leg. She ran. He pursued her. Caught up with her after she fell down. He cut her left leg. She raised hands in submission or desperation. He cut her hands and head. Then he left her in critical condition, soaked in blood and unconscious. To me, the ingredients of the offence are clearly established in the aforesaid circumstances.

The account given by the accused in his unsworn defence does not rebut the above evidence nor does it give a reasonable explanation of his intention as to why he behaved the way he did. His unsworn defence is extremely brief, evasive and does not rebut the allegations.

The appellants conduct in totality amounts to an attempt to commit a crime. Such conduct can only be presumed reasonably to show that he had bad intentions. It’s a conduct which a reasonable person properly exercising his mind to the facts and the law can safely construe as an attempt to commit a crime, hence the offence of attempted murder was proved and the appellant was rightly convicted. I am persuaded that the acts attributed to the appellant in the circumstances was an overt act of such a character as to be incompatible with any other reasonable explanation.

To my mind, in criminal law, an attempt to commit a crime is an offence when an accused person makes a substantial but unsuccessful effort to commit a crime. The elements of attempt vary, although generally, there must be intent to commit the crime, an overt act beyond preparation, and an apparent ability to complete the crime. The attempt becomes a crime in itself, and usually means one really tried to commit the crime, but failed through no fault of himself or herself. In criminal law, an attempt to commit a crime, is an endeavour to accomplish it, carry it beyond preparation, but failing short of execution of the ultimate design, either in whole or in any part of it. I find that these two elements were proved, namely; ***(i)*** *an overt act* ***(ii)*** *an intention to kill by committing the overt act.*

The appellant alleges that his defence was never considered. A close look at the judgement suggests otherwise. The magistrate examined his defence in detail and weighed it against the prosecution case as required.

The South African case of *Ricky Ganda vs The State*[13]provides useful guidance. In the said case it was held:-

> *"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true……the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses….it is acceptable in totality in evaluating the evidence to consider the inherent probabilities….*
>
> *The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt"*

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am persuaded that the conviction was justifiable. The explanation offered by the accused is in my view improbable and does not cast reasonable doubt on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[14]

After weighing the explanation offered by the accused and the prosecution evidence, I find that the prosecution evidence is truthful, credible and probable as opposed to the incredible and highly improbable defence offered by the appellant. The appellants defence did not raise any reasonable doubts on the prosecution case. Accordingly I find that the appellant was rightly convicted and I uphold the conviction.

On the sentence, Section **220 (a)** of the Penal Code[15] provides that a person guilty of an offence under this section is liable upon conviction to life imprisonment. The learned magistrate meted a sentence of **life imprisonment**.

In *Shadrack Kipchoge Kogovs Republic*,[16] the court of appeal stated:-

> *"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"*

The Supreme Court of India in *State of M.P. vs Bablu Natt*[17]stated that *'the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.'* Moreover, in *Alister Anthony Pareira vs State of Maharashtra*,**[18]**the court held that:-

> *"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"*

I have carefully considered the facts of this case, the nature of the offence and the above principles and the mitigating factors and I have also considered the purpose of sentencing and the principles of sentencing under the common law[19] and the sentencing policy guidelines. The learned magistrate noted that the appellant was not remorseful and deserved the full sentence prescribed by the law. I agree the

offence is serious and left permanent injuries on the complainant which she will have to live with. The offence was committed two years after the parties separated as husband and wife, and with no justifiable reason or provocation suggesting a clear intention to execute the intent of committing the offence.

I find no reason to interfere with the sentence imposed by the learned magistrate. The upshot is that this appeal against both conviction and sentence fails and the same is hereby dismissed.

Right of appeal 14 days

Dated at **Nyeri** this **22nd** day of **March** 2016

John M. Mativo

Judge
