



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 97 OF 2015**

**RICHARD MUTUA MUTHUSI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Mwingi SRM Criminal Case No. 545 of 2013 – H. M. Nyaberi  
Ag. SPM)**

**JUDGMENT**

The appellant was initially charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on 3<sup>rd</sup> October 2013 at Ukasi Market Mwingi East District within Kitui county assaulted Musyoka Kivonga thereby him actual bodily harm. The charge was later amended to attempted murder contrary to section 220 (a) of the Penal Code.

After the trial, he was convicted as charged under section 215 of the Criminal Procedure Code. He was sentenced to serve life imprisonment.

Dissatisfied with the decision of the trial court, he filed his appeal on 13<sup>th</sup> July 2013. Before the hearing of the appeal however, he filed an amended petition of appeal and written submissions which he relied upon.

His grounds of appeal are as follows:-

1. That the trial magistrate erred in law and fact to convict him without considering that the offence committed was of assault and not attempted murder as alleged by the prosecution.
2. That the life prison sentence is too harsh and excessive.
3. The magistrate failed to consider that weapon at the time he was alleged to have visited the home of the complainant.
4. That there was no independent evidence that he inflicted the alleged injury on the complainant.
5. The doctor's report did not support the charge.
6. No identification parade was conducted to ascertain the truth.
7. The magistrate did not consider that there was an existing grudge.

8. The prosecution did not prove the alleged offence beyond reasonable doubt.

During the hearing of the appeal, the appellant relied on his written submissions and elected not to make oral submissions. I have perused and considered the written submissions.

Learned Prosecuting Counsel Mr. Okemwa opposed the appeal and stated that as a first appellate court I should reconsider the evidence on record.

Counsel submitted that the appellant was initially charged with assault causing actual bodily harm, but later the charge was amended to attempted murder, and the evidence on record proved the offence charged. Counsel emphasized that there was no evidence of provocation. The complainant was vulnerable as he was neither armed, nor did he know that he was going to be attacked.

Counsel added that the defence of the appellant in naming an unknown person as the culprit was an afterthought.

In response to the prosecution counsel's submissions, the appellant said that the counsel merely said what was in the trial court's record, while he had denied the offence of attempted murder. He stated that he knew KASIKE KARALE who committed the offence, was charged and bonded and the case later withdrawn.

He maintained that the injuries indicated in the P3 form were not severe to justify his imprisonment for life.

The brief facts of the prosecution case were that on 3<sup>rd</sup> October 2013, the complainant Pw1 Musyoka Kivonya a boda boda operator was at his house at 7.30pm with Ngandi Ibrahim Pw5, and Joseph Mutisya Pw3 – when the appellant arrived and said that the complainant's uncle Gregory Nzau alias Kakai had come from Nairobi and wanted to see him.

Both then proceeded on foot towards the house of Gregory Nzau. About 20 meters from the house of the uncle, the appellant suddenly produced a machete from his jacket and told the complainant that he had been sent by Ndaka and Muthangi to kill him. (These two people had married the complainant's two wives when he was in custody on a charge of murder).

The complainant then started running away and the appellant cut him one in the back. The complainant however managed to run away past his uncles home back to his home. Pw3 Lilian Wanjiku the wife of the uncle's, witnessed the two chasing each other in the moonlight.

The complainant was taken to Ukasi Police Station, Ukasi Dispensary and then Mwingi District Hospital for treatment.

The appellant was then arrested and charged.

In his defence, the appellant admitted being with the complainant that night.

He stated that near the house of Kakai, the complainant disagreed with Kasike who struck him with a machete. That when people from Kakai's home came out, he jumped over the fence and lost his slippers.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions – see the case of *Okeno Vs. Republic [1972] EA 32*.

I have re-evaluated the evidence on record.

There is no doubt that the appellant and the complainant were together that night. The appellant admits so. There is no dispute that the appellant was cut with a machete near the house of Kakai. The appellant admits that, and the medical evidence is clear on that. He also said another person was responsible for the

attack on the complainant.

That appellant claims that the offence alleged and proved was assault causing actual bodily harm.

Indeed, the appellant he was initially so charged. However, the charge was properly amended before trial commenced. He pleaded to the same and was also tried of the same.

The injury suffered was described in the P3 form as deep cut wound of 6cm to the back. The degree of injury was classified as harm. In the said P3 form harm is defined as – any bodily hurt, disease or disorder whether permanent or temporary.

In the treatment notes however, the injury is described as “deep cut on left scapular 6 inch extending to vertebral bleeding profusely seen 2 degrees cut with sharp object”. The wound was stitched.

I observe that the person who filled the P3 form Pw6 KAREN NAITOLE described herself as a Clinical Officer. She also said that she used the treatment notes to fill in the P3 form. She testified in evidence that the 6cm, was the depth of the wound, not its size.

On the basis of the evidence tendered in court, I am of the view that the injury was inflicted by a matchete. The degree of injury was such more severe than described by the Clinical Officer (Pw6).

In addition, the intention of the appellant was quite clear that the appellant wanted to kill, as the complainant stated that the appellant told him he was sent to kill him. I do not believe that a third party caused the injuries on the complainant.

With regard to the complainant regarding possession of a weapon, the evidence is clear that the matchete was hidden in the appellant’s jacket and only produced at the appropriate time. The appellant himself said he jumped over a fence from the scene leaving his sandals behind. This is consonant with the fact that no weapon was found at the scene. He must have taken the weapon.

With regard to existence of a grudge, there is no suggestion in the record that the appellant raised the issue of a grudge at the trial.

In my view, with the evidence of the complainant, the two people whom he and the appellant left in his house when they left to his uncle’s house, the wife of his uncle who saw the appellant chasing the complainant, and the medical evidence, the prosecution proved its case against the appellant beyond reasonable doubt. I will uphold conviction.

With regard to sentence, life imprisonment is the maximum sentence for attempted murder. The appellant was treated as a first offender. The probation report was that he was not remorseful and was suspected to be a highway robber.

However, with injury suffered by the complainant and the fact that the appellant said in court that he had children and his wife was dead, in my view the maximum sentence was not called for.

I will thus set aside the sentence and substitute the same with a sentence of 12 years imprisonment.

Consequently, I dismiss the appeal on conviction. I however set aside the life sentence and order that the appellant will serve twelve (12) years imprisonment from the date on which he was sentenced by the trial court.

**Dated and delivered at Garissa this 30th day of August 2016**

**GEORGE DULU**

**JUDGE**