



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 36 OF 2016

(From original conviction and sentence in Criminal Case No. 10 of 2016 of the Senior Resident Magistrate's court at Wajir – E. C. Cherono - SPM).

MOHAMEDEK WARMOGE SALAT APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the Magistrate's court at Wajir with attempted murder contrary to Section 220 (a) of the Penal code. The particulars of offence were that on 6th January 2016 at Khorof Harar Trading Centre within Wajir County attempted unlawfully to cause the death of Fatuma Ibrahim Ahmed by stabbing her on the cheek with a knife. He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve 20 years imprisonment without option of a fine.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. His grounds of appeal are as follows:-

1. That on being brought before the court he was in a state of confusion and could not understand the proceedings of the court.
2. The accused (should be complainant) who was his wife had been psychiatric for quite a long time and that she used a knife to stab herself in his presence.
3. The accused (should be complainant) father had a grudge with him over property and so they want to fix him with fabricated charges to rob him of his hard earned property while in custody.
4. The investigating Officer had an illicit affair with his wife and the appellant accosted them while together in his house several times.
5. The verdict of 20 years imprisonment was too harsh and excessive considering the situation the appellant was in.

At the hearing of the appeal, the appellant made oral submissions. He stated that he was innocent and wrongly implicated for an offence against his wife who he had married for four years. He said that he had children and that his wife was in great pain and did not have an identity card and that he was the sole bread winner. He asked that the sentence atleast the sentence be reduced.

Learned prosecuting counsel Mr. Okemwa opposed the appeal. Counsel submitted that it was not true

that the appellant did not understand the proceedings or the language used in court as an interpreter was always present.

On his wife being mentally unstable, counsel submitted that such was lies as the incident was broadcast on television and it was known widely that the knife was embedded in the cheek of the complainant. As a result, complainant was taken to Kenyatta National Hospital from Wajir unconscious and in great pain and doctors struggled to save her life. Counsel emphasized that the complainant PW1 testified in court and revealed what she underwent, and brother of the appellant PW3 also corroborated the evidence of PW1 the complainant. Counsel also stated that the said brother of the appellant testified that he witnessed the appellant stabbing the complainant on the hands, legs and cheek. The doctor also confirmed the injuries suffered, and according to counsel, the cheek injury was meant to cause death. Counsel disagreed with the appellant's proposition that his wife attempted to kill herself.

Counsel submitted lastly, that in his view, the sentence of 20 years imprisonment was lenient as the maximum sentence for the offence was life imprisonment.

In responses to the prosecuting counsel's submissions, the appellant said that he was sleeping at 1.00 am when he heard a commotion outside and went and found that his wife had been stabbed. He stated also that the policemen who seduced his wife were from Borana community of the Garre clan. He said that his brother lied against him.

This is a first appeal. As a first appellate court, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences see the case of ***Okeno -vs- Republic (1972) EA 32***.

I have re-evaluated the evidence on record. The prosecution called 5 witnesses. The appellant gave his testimony in defence and did not call any witness.

PW1 Fatuma Ibrahim Ahmed was the complainant. She is the wife of the appellant, and gave a graphic story of the way the appellant on 6th January 2016 in the late afternoon, without any provocation stabbed her with a knife on the wrist hand and legs and also on her cheek. The knife was embedded in the cheek and she became unconscious. She later became conscious at Kenyatta National Hospital.

PW3 Mohamed Warmoge Salat a brother of the appellant, heard wailings from his brother's house at around 5.30 Pm on 6th January 2016. On arrival he found the door locked from inside and the appellant opened the door, and charged at him with the knife then he entered the house again and locked the door, and again PW1 the complainant screamed.

PW3 then called the police who came and broke the door and arrested the appellant. PW2 Inspector Mohamed Nuno testified that he received a call at the Administration Police Camp. Together with two other officers he proceeded to the scene in a station vehicle. The two other police officers were PW4 Inspector Bashir Omar Dadicha and another.

They went arrested the appellant and took the complainant to hospital. The complainant was in great pain. She was treated by Dr. Jamal Mohamed PW5 at Wajir hospital but had to be referred for expert surgery Kenyatta National Hospital. Medical reports on the treatment of the complainant were produced in court.

When put on his defence, the appellant tendered unsworn testimony. He said that after taking miraa on that day he went to his house where he found that his wife had been stabbed with a knife. He found his brother there and asked him to call an ambulance. Instead, his brother called Administration Police Officers who beat him. He complained that the police officer who arrested him had been telling his wife to leave him so that he could marry her.

Having re-evaluated all the evidence on record both for the prosecution and the defence, I find that the prosecution version of what happened was truthful and consistent. The incident occurred during the day. The appellant, his wife and his brother knew each other well. All of them agreed that they were together

that late afternoon. There was no issue of mistaken identity.

The version of PW1 and PW3 is quite clear. It was a horrible incident. It is clear that the appellant himself was on drugs. When he claimed that his wife was mad had stabbed herself, that was a way of diverting attention from the truth. When he said that he asked his brother to call an ambulance and take the complainant to hospital, that was also a way of diverting attention from the truth. When he said that the police officer who arrested him wanted to take his wife from him, that was also a way of diverting attention from the truth. In my view the prosecution proved beyond any reasonable doubt that the appellant senselessly and viciously attacked and stabbed his wife with a knife.

The question is did that assault amount to attempted murder? The learned trial Magistrate relied on the case of *Zakari Murerwa Mwendwa -vs- Republic (2016) eKLR* in which the court observed that an attempt to commit a crime, must go beyond merely the preparatory stage to the intended commission of the crime.

In the present case, in my view the complainant would have died had it not been for prompt action in taking her to Wajir Hospital, and then on the same day flying her to Nairobi for specialized treatment at Kenyatta National Hospital. The assault by the appellant on the complainant was certainly meant and intended to cause her death. It was by sheer good luck that death did not occur. It was clearly a case of attempted murder. It cannot be explained in any other way.

I agree with the finding of the trial court that the prosecution proved the offence of attempted murder charged beyond reasonable doubt.

With regard to the sentence, the trial court sentenced the appellant to serve 20 years imprisonment. Learned prosecuting counsel stated that the sentence was lenient, but did not ask for enhancement of the sentence.

I appreciate that sentencing is the exercise of discretion of the trial court. Indeed under Section 220 of the Penal Code the sentence for the offence is a maximum of life imprisonment. In my view the learned Magistrate considered the circumstances of the case in handing down the sentence of imprisonment of 20 years. The 20 years imprisonment is a substantial sentence, and I find no reason to disturb it, even though the maximum sentence is life imprisonment.

For the above reasons, I find no merit in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Garissa this 9th day of December 2016

GEORGE DULU

JUDGE