



No. 90/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 83 OF 2012

JOHN WAMBUA MAKEWAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Tawa Senior Resident Magistrate's Court, Criminal Case No. 61/2012 by Hon. J.W. Gichimu SRM on 18/6/2012)

JUDGMENT

1. **John Wambua Makewa**, hereinafter "*the appellant*" was charged with the offence of attempted murder contrary to section 220(a) of the Penal Code. It was stated that on the 21st March, 2010 at Makueni Catholic Mission House, the appellant attempted to unlawfully cause the death of **Fidelis Nzuki Mutuota** by shooting him with a BRNO double Barreled Special Poldi Elektro Shot Gun, serial number 1-005501 -75 and wounded him in the abdomen, left upper arm and both thighs.
2. The appellant pleaded not guilty to the charge. He was tried, convicted and sentenced to serve 7 years imprisonment. He has appealed against conviction and sentence.
3. In the amended Memorandum of Appeal the appellant relied on the grounds that: -
 - The learned trial magistrate failed to appreciate the elements of the charge.
 - He misdirected himself on several material facts;
 - The decision was wholly based on speculation and total disregard of the facts that were presented to him;
 - He gave undue weight to some facts while ignoring other important facts;
 - He convicted the appellant on the evidence of single witness;
 - The trial magistrate gave credence to the prosecution's evidence and not that of the defence;
 - The trial magistrate erred by reaching a finding that the required elements of proving the crime namely '*mens rea*' and '*actus reus*' existed;
 - And that the proof was not beyond reasonable doubt.

In the circumstances the sentence was harsh, vindictive and excessive.

4. The appeal was opposed by the State, **Mrs C.N. Gakobo**, Senior Principal Prosecution Counsel put in a notice of enhancement of sentence meted out on the appellant to be commensurate with the circumstances of the case and nature of injuries sustained by the complainant
5. Facts of the case were that the appellant was the priest incharge of the Makueni Catholic Parish. The complainant **Father Fidelis Nzuki Mutuota** also a priest at the same Parish arrived at

- 8.00pm. He had supper with **Father Boniface Kioko, Boniface Mutua**, an ex-seminarian, **Michael Mutuku** and the appellant. The appellant assigned them duties of conducting mass at various stations the following day. The complainant went to bed at 9.30pm. He shared a room with **Bonface Mutua**. He was joined by **Boniface Mutua** and the appellant at about 10.00 pm. They had causal conversation. In the process the complainant made them aware of his results of the MBA Course he was undertaking at the Catholic University that he had just received and was to take to the Bishop at about 11.30pm. It was raining at the time and a power blackout followed, prompting the appellant to retire to his bedroom.
6. Later in the night, he was woken up by a loud sound he believed to be a gunshot at about 4.15am. He called out **Father Boniface Kioko** who confirmed having heard the sound. They listened keenly. At about 4.25 am the appellant entered their room carrying a shotgun. He informed them that there were thieves outside and they accompanied him to his bedroom. He handed the complainant three bullets which he was to give him on demand. He further handed him a pistol to carry for him. They went to a private sitting room. The appellant went to the window and fired twice towards the sisters' convent. The appellant opened the doors to the corridor. They looked through the window but did not see any thieves. The appellant however, argued that the thieves were in the sitting room and told the complainant to crawl on the floor and open the door. He complied. However, when he attempted to open the door the appellant shot him on the arm and chest. He shouted in Kikamba language that he had shot him. The appellant responded that it was the thieves who shot him. He asked him how he could shoot his best friend. The appellant then shot him on the thigh. He did not see **Father Boniface**. He crawled to the door. Twenty minutes later **Father Michael Mutuku** went to assist him. He was taken to hospital.
 7. PW2, **No. 75602, PC Joseph Mutie** a Scenes of Crime Officer, took photographs of the scene of crime. He printed a report thereof and produced them in evidence.
 8. PW3, **Sister Salome Kamene Peter** was woken up by a bang on the door at about 5.00am. On opening she encountered **Sisters Jane Francis and Agatha** who told her that the rear door had been hit. She telephoned the appellant to find out whether there thugs around there, he told her that there were thugs but everything was under control. Immediately she hang up she heard a gunshot behind their house. Thereafter they heard two (2) more gunshots. She telephoned **Father Makewa** but he did not respond. They moved to the Chapel to pray. **Father Boniface** telephoned to tell them about what had befallen the complainant. They found the complainant lying on the corridor having been injured.
 9. PW4, **Father Boniface Kioko** heard gunshots at around 5.00am. He received a telephone call from PW3 and he advised her to stay where they were. When he heard the fourth shot, he hid. Later on, he heard a voice outside. He went out to find **Father Mutuku** who told him that the complainant had been shot.
 10. PW5, **Father Michael Mutuku** heard three (3) gunshots. A person shouted that he had been shot. He then heard **Father Makewa** calling out saying **Father Nzuki** had been shot by thieves. He took a confession from the complainant. He thereafter assisted in taking him to hospital.
 11. PW6, **Boniface Mutua Nzioka** stated that he slept in the same room with the complainant. Before they slept the appellant joined them. According to him the complainant and appellant had a friendly conversation. The appellant told them about his trip abroad while the complainant showed them his testimonials from the University of Nairobi where he obtained a masters degree.
 12. They stayed up until 1.00am, lights went off and it started raining. The appellant left the room. Prior to sleeping he heard noise outside that sounded like a car had hit a tin. At about 5.00am he heard some commotion outside. He then heard the appellant knocking their door. He entered and said that thieves were knocking on their window. The appellant and the complainant went to the window and he heard the appellant ask the complainant to hold something. They shot from the window. The appellant communicated on the telephone and told them that the sisters had said that thieves had gone to their side and were firing from there. As the two (2) proceeded to the corridor, he hid under the bed. He heard a gunshot. He ran to the sitting room and saw the appellant running saying that the thieves were shooting at them and they had shot the complainant. The complainant asked for help and the appellant asked him to wait for them to look for the car. They took the complainant to hospital.
 13. PW7, **Sister Nthiwa Nzerete** and PW9, **Sister Jane Francis Kamanthe Maluka** were woken up by sounds they referred to as bangs that they thought were either gunshots or an electric fault.

- They confirmed in material particular what was stated by PW3. They did not see who shot the complainant.
14. PW8, **No 86420 P.C Samuel Odhiambo Oumu** on receipt of instructions from the officer commanding Makueni Police Station moved to the scene of the incident. He found window panes of the house smashed. They searched for cartridges in vain. **PW10, Onesmus Katua**, Clinical Officer at Makueni Hospital relied on a report made by **Professor Mbindyo** of Mater Hospital. He completed the P3 form (*medical examination report*). As per the report the complainant had a history of being shot on the left arm and leg. The left arm was in a plaster of Paris, the upper 1/3 of the thigh had scars. On the thorax and abdomen he had scars on the lower right. The distal radius and left ulna were shattered and the tissue was severely damaged. He also had a tear on the right femoral vein; injury to the right sciatic nerve and bullet injuries to both thighs.
 15. PW11, **Superintendent Joseph Munira**, the investigating officer visited the scene of crime. He found some window panes broken. Their search for spent cartridges was in vain. There were no foot prints. The appellant handed over to them some spent cartridges. He recovered a pistol and shotgun that were sent to the ballistic expert for examination. His investigations made him conclude that there were no robbers as alleged by the appellant. He therefore charged him with attempted murder.
 16. PW12, **No. 230245, SP Lawrence Nthiwa** a Firearm Examiner examined the firearms a shotgun, S-10055-0175 and a pistol S. No. A656788 four (4) expended shotgun shells and 12 rounds of ammunition, 12 fragments and made a report thereof.
 17. PW15, **Stephen Mbindyo**, an Orthopaedic Surgeon a consultant at Mater Hospital confirmed having attended to the complainant and having prepared a discharge summary thereof.
 18. In his sworn evidence the appellant stated that the complainant was his friend and he had assisted a couple of his relatives. On the material date, they conversed jovially until 1.00am when they dispersed. It was raining and there was no electric power. At 3.45am he saw some light. He did not pay much attention to it. At around 4.45am, he saw some light outside his room which looked like a torch. He woke up wondering whether thugs had struck. The thugs asked him for money and a gun. He went to the safe, took his shotgun and loaded it with two (2) bullets. He went to the sitting room and fired twice in the air to scare them. He saw them running towards the Sisters Convent. He shot again twice and woke up the complainant and PW6. He notified them of the presence of thieves. They followed him. He asked the complainant to hold for him the two (2) bullets as he bent to load the gun. He shot once and heard a shot. It was at this juncture that **Sister Kamene** rang him. He responded. Then he again shot once and the thugs also shot. He fired another shot and heard the complainant say he had been shot. The complainant asked for water and anointing oil. He assisted in taking the complainant to hospital and made a report to the police.
 19. This being the first appellate court, I do remind myself of the duty to re-evaluate evidence adduced in the lower court, then come up with my own conclusions and inference (*vide Okeno vs Republic [1972] E.A. also Njoroge versus Republic [1987] KLR 19*).
 20. I have re-evaluated the evidence as tendered by various witnesses and the respective submissions by counsels.
 21. A legal point was raised by counsel for the appellant **Mr. Namisi**. Alleging that there was a third hand in this matter that caused the trial magistrate to disqualify himself from hearing the matter at a ruling stage having given frightening reasons, the matter was referred to the High Court whereby it was transferred to another court. He submitted that the magistrate who took over the matter failed to adhere to the provision of section 200 (3) of the Criminal Procedure Code.
 22. He argued that the appellant ought to have been called upon to make an election on how to proceed. He was however, not given that opportunity.
 23. **Mrs Gakobo** counsel for the State, however, argued that the court complied with the provisions of section 200(3) of the Criminal Procedure Code. Parties chose to proceed with the matter from where it had reached. In the premises, she urged the court to re-evaluate the evidence and make a finding thereof.
 24. This case was heard by the **Hon. J. Karanja, Principal Magistrate**. After the prosecution closed its case he recused himself following reasons elaborated in his order. The matter was placed before the High Court for directions. The case was transferred to Senior Resident Magistrate's Court Tawa.

25. When the matter came up before **Hon. Gichimu**, Counsel for the appellant, **Mr. Mwagambo** urged the court to proceed from where the matter had reached. He stated that they did not wish to have the case heard *de novo*.

26. Following the application made the court stated thus:-

“The court gives direction under section 200(3) of the Criminal Procedure Code that the matter to proceed from where it had reached. The prosecution having closed case, the court now reserved the matter for ruling on the 11/4/2012”.

27. Section 200 (3) of the Criminal Procedure Code provides as follows ;-

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right”.

28. According to the provision of the law afroestated, it is mandatory for the succeeding magistrate to inform the accused of the right to have witnesses re-summoned and be re-heard.

29. The record clearly shows that the succeeding magistrate did not comply with the law. He did not inform the accused of that right. The advocate representing the accused then stated that they did not wish to have the case heard *de novo*. This assertion did not mandate the learned magistrate to abdicate his duty of complying with the law. As correctly pointed out by counsel for the appellant, failure to comply with the provisions of the law was fatal to the prosecution’s case. (see ***Mudoola versus Republic [1996] KLR 616, Ndegwa versus Republic [1985] KLR 534***).

30. This was indeed a mis-trial. I therefore allow the appeal, quash the conviction and set aside the sentence.

31. Section 200(4) of the Criminal Procedure Code Provides thus:-

“when accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate the High Court may, if it is of the opinion the accused person was materially prejudiced thereby, set aside the conviction and m ay order a new trial,”

32. The question arising is whether the appellant was prejudiced and if a retrial should be ordered.

33. In the case of ***Sumar versus Republic [1964] E.A.*** the Court of Appeal stated that whether or not a retrial should be ordered depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to the accused person . In the case of ***Mwangi versus Republic [1983] KLR 520*** the Kenya Court of Appeal following the case of ***Braganza versus Republic [1957] E.A. 152 (C.A.)*** and ***Pyaralal Bassan versus Republic [1960] E.A. 854*** stated at page 538 that;-

“...a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible, or potentially admissible, evidence a conviction might result”.

34. A perusal of the evidence as summarized by this court, clearly show that the case may result into a conviction.

35. On the issue of prejudice, the appellant was convicted and sentenced to serve **seven (7) years** imprisonment on **18th June, 2012**. On the same day, following the application made he was released on bail and his sentence stayed. This means he has not served the sentence. He will therefore suffer no prejudice if a retrial is ordered. In the premises, I do order that the appellant be retried by another court of competent jurisdiction. In that regard he will present himself to **Makueni Principal Magistrate’s Court** on the **30th September 2013** for purpose of a retrial. The case shall be heard on priority basis.

DATED, SIGNED and DELIVERED at MACHAKOS this 24TH day of SEPTEMBER 2013.

L.N. MUTENDE

JUDGE