REPUBLIC OF KENYA

IBRAHIM KINYUA KING'AU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in

Nyahururu P.M.CR.C.NO.845/2007 by Hon T. M. Matheka
Senior Resident Magistrate, dated 7TH April, 2009)

JUDGMENT

The appellant was sentenced by the Nyahururu Principal Magistrate to serve probation supervision for a period of three years having been found guilty and convicted of the offence of unlawful wounding contrary to section 237(a) of the Penal Code, although he had been charged with attempted murder contrary to Section 220 (b) of the Penal Code.

The learned trial magistrate found that the evidence presented before her did not disclose the offence charged and stated as follows:

> "In my view, though the facts do not prove the charge under section 220(b) of the Penal Code, it is very clear to me that the accused unlawfully caused injury to the complainant. He had no lawful reason to shoot at the complainant at all. Under section 179 of the C.P.C., the court has jurisdiction to convict a person of a lesser offence if the facts so warrant."

The facts of this matter are largely uncontroverted. The appellant, a police corporal went into a bar for a drink. He met the complainant, who was a stranger to him, among other customers. In particular there were two ladies, one of whom, is said to have known the appellant. It is the prosecution case that a disagreement arose between the complainant and the appellant over one lady. The appellant accused the complainant of hiding the lady who he was interested in. An argument ensued and the two engaged in a physical confrontation resulting in the appellant shooting the complainant on the thigh with a gun.

The appellant on the other hand testified that as he left the bar, a certain man accosted him arguing that he (the appellant) had stolen his mobile phone. The man's actions towards him attracted two young men who together with the first man attacked him, knocking him to the ground. In the process, the three attackers stole his wallet with Kshs.3000/=. As the three kicked him, he reached for his firearm and shot to scare them. He later learnt that he had infact shot someone.

While it was the prosecution case that the appellant without any lawful cause shot and wounded the complainant, it was the appellant's defence that he did not aim his firearm at any person. It is also his defence that he acted in self-defence. What fell for determination by the court below were the above two issues. Those are also the only issues in this appeal. The appellant having been aggrieved by the three year probation has filed this appeal on the grounds that:

i) the learned magistrate erred in convicting the appellant of the offence other than that charged

ii) the magistrate failed to find that the appellant was attacked by the complainant

iii) the appellant acted in self defence and was entitled to an acquittal.

Arguing these grounds, learned counsel for the appellant submitted that the offence of attempted murder cannot be substituted with that of unlawful wounding as the two are not cognate; that the ingredients of the offence of unlawful wounding were not set out; that the appellant was entitled to an acquittal as he acted to present harm to himself by the complainant and two others.

Learned counsel for the respondent supported the conviction arguing that the two offences being cognate, the learned magistrate was entitled to substitute the offence of attempted murder with that of unlawful wounding.

I have considered the appeal and the above arguments. I have also taken into account the three authorities cited by learned counsel

for the appellant, namely:

i) Mugambi Vs. Republic (1976-80) 1 KLR 585

ii) Cheruiyot Vs. Republic (1985) KLR 1

iii) Ali Mohammed Hassan Mpanda Vs. Republic (1963) E.A. 294

There is evidence that the complainant sustained gun shot wounds from the gun which was lawfully issued to the appellant in the course of his duty.

Did he shoot in order to repel the attack or did he intent to cause harm to the complainant? The complainant's version of the events leading to the incident was that the appellant was infuriated when he failed to get one of the ladies. He sent the complainant to look for them and when he could not locate where they were, he (the appellant) let it out on the complainant by drawing his gun, aiming it at the complainant and shooting him on the leg. That story in view of the independent evidence of P.W.6, Patrick Mungai (Mungai) is incredible just as is the appellant's story about an attack by strangers.

Mungai saw the appellant and the complainant quarrelling before they engaged in a struggle. He said:

> "They were fighting on the ground. I heard the sound of a gun shot."

Mungai confirmed that he was able to see these events with the aid of electric light. He added in cross-examination that:

> "The 2 persons were quarrelling and fighting. They were talking about money, a wallet and a phone."

It is therefore not true that the complainant just stood there as the appellant shot him. There was a fight. There is evidence from the complainant himself that he left with the appellant to go and look for the ladies.

P.W.2 Mary Muthoni Muchiri, one of the ladies in question, while in her house heard the appellant and the complainant exchange words outside her house but she refused to open. P.W.4 Peter Njuguna Mwangi, the owner of the bar, saw the appellant and the complainant leave together and shortly afterwards heard a gun shot. All the prosecution witnesses were unanimous that the two left together. The appellant's allegation that he was attacked by three people has no support in the totality of the evidence on record. There is no doubt that a disagreement, whether arising from the ladies or theft of personal items erupted. The fact that the appellant shot and caused personal injury to the complainant is equally not in dispute. There is no allegation that the complainant was armed.

A police officer of the rank of a corporal ought to have known the dangers of shooting in the dark. It is apparent that the shooting was not in the air with the barrel of the gun facing the sky. Whatever the reason, the appellant injured the complainant. The next question is whether he was justified. I have stated that the complainant was unarmed, and therefore did not pose any real threat to the appellant to call for the kind of response he unleashed on the complainant.

It has been held in the Privy Council case of Palmer Vs. Regina (1971) All ER 1077 that:

> "Where the evidence is sufficient to raise the issue of self-defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence."

I am persuaded by the evidence that the appellant did not act in self-defence. Even if I was to find that he acted in self-defence, I would have found that he used excessive force to repulse the attack and cannot escape responsibility. From the evidence of Mungai, Muthoni, or the investigating officer, the appellant appeared to have planned to cover up his actions by attempting to frame up charges against the complainant. The appellant admitted having made the O.B. entry of the attack himself. Although he denied it, there is likelihood that he also issued to himself a P.3 form. His evidence that he was assaulted assault by others, including the complainant, is in my view incredible.

Did the trial magistrate err in substituting the offence of attempted murder with that of unlawful wounding? It was held in the case of Cheruiyot Vs. Republic (supra) that in order to constitute the offence of attempted murder contrary to section 220 of the Penal Code (Cap 63), it must be shown that the accused had a positive intention to unlawfully cause death. The trial magistrate found that there was no such intention and substituted the charge with lawful wounding.

Section 179(2) of the Criminal Procedure Code provides that:

> "179.(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

In the case of Mugambi Vs. Republic (supra), the court considered a similar provision in the Tanzanian case of Ali Mohammed Hassan (supra) where it was held that for the sub-section 179(2) to apply, two things must be shown; namely, that the substituted conviction is for an offence which is both minor and cognate to the offence charged.

The offence of attempted murder is a felony and a person found guilty of committing attempted murder is liable to imprisonment

for life. On the other hand, unlawful wounding is misdemeanour punishable by imprisonment for a term of five years. To that extent, the latter is a minor offence to the former. Death can be caused in many ways including inflicting an injury. An injury caused without a lawful justification by the use of a gun is, in my view, cognate to the offence of attempted murder. I come to the conclusion that the learned magistrate was not in error in substituting the charges.

For these reasons, this appeal is accordingly dismissed. The appellant to continue serving sentence.

Dated, Signed and Delivered at Nakuru this 16th day of April, 2010.

W. OUKO
JUDGE