Njeri v Republic (Criminal Appeal E002 of 2023)
[2025] KEHC 248 (KLR) (22 January 2025) (Judgment)

Neutral citation: [2025] KEHC 248 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E002 OF 2023

HI ONG'UDI, J

JANUARY 22, 2025

BETWEEN

PETER KAMAU NJERI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment and sentence delivered by Hon. Edna Nyaloti on 7th December, 2022 in Chief Magistrate's Court Nakuru in Criminal Case No. 3789 of 2021)

JUDGMENT

1. Peter Kamau Njeri the appellant herein was charged with the offence of attempted murder contrary to section 220 (a) of the Penal Code. The particulars being that on 12th July, 2021 at 2010 hrs at Kaloleni B area in Nakuru East Sub-County within Nakuru County unlawfully attempted to cause the death of Judy Wairimo Wanjiku by stabbing her several times on the chest, above and below the elbow of her left hand.

2. He denied the charge and the case proceeded to full hearing with the prosecution calling seven (7) witnesses. The appellant gave an unsworn statement of defence without calling any witness. After the full hearing the court found him guilty, convicted him and sentenced him to serve thirty (30) years imprisonment. Being aggrieved by the Judgment he filed this appeal on 12th January, 2023 challenging both the conviction and sentence on two (2) grounds. Later he filed the following amended grounds of appeal:

    i. That the imposed sentence is excessively harsh and unjust considering that, the appellant was first offender and ought to have been awarded a less severe sentence in the discretion of the court.

ii. That the imposed sentence is excessive and does not go well with the provisions of the policy sentencing directives 2015 under paragraph 4:1.

iii. That the appellant is remorseful and regrets his actions. He is repentant.

iv. That the appellant before his conviction and sentence was in good relationship with PW1 who was his girlfriend.

v. That the appellant worked tirelessly to support his girlfriend and self and his elderly parents and has potential if given another chance.

vi. That the court considers his mitigation grounds and award a lesser sentence or substitute the remaining sentence with a non- custodial sentence or the court be pleased to order that the appellant serves under the Community Service Order.

vii. That the court considers the provisions of section 333(2) of the Criminal Procedure Code to be factored in his sentence.

3. The Appeal was canvassed by way of written

Submissions

Appellant's submissions

4. The appellant, submitted on the seven grounds of appeal collectively. He submitted that the circumstances that led to the commission of attempted murder were not harsh to warrant a sentence of 30 years imprisonment. Further, that the court ought to have awarded a less severe punishment as stipulated under Article 50[2][p] of *the Constitution* of Kenva 2010 and at the discretion of the court.

5. To buttress this position, he relied on paragraph 4.1 (page 15) of the revised sentencing policy guidelines 2023 and the Court of Appeal decision in Thomas Mwambu Wenyi Vs Republic (2017) eKLR which cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Maharashtra at paragraph 70-71 where the court held the following on sentencing:

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

6. He further submitted that he was fully rehabilitated and ready to be productive in building the nation since he had acquired several certificates while in prison. It was also his submission that the trial court did not apply section 333(2) of the Criminal Procedure code while sentencing him. To further support

his argument, he cited several decisions among them Ahamad Abol A thi Mohammed & another v Republic [2018] eKLR Pages 63 it was held that;

> "...By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced..."Taking into account" the period spent in custody must mean considering that period so that the imposed sentence i reduced proportionately by the period already spent in custody.....It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012"

Respondents submissions

7. These are dated 23rd day of October, 2024 and were filed by M/s Emmah Okok Principal prosecution counsel. She submitted that the prosecution discharged its burden of proof and that the appellant was properly convicted of the offence of attempted murder.

8. Counsel further submitted conceding the appeal based on section 333(2) of the Criminal Procedure Code which was not complied with. That the court in sentencing did not consider the period the appellant had been in custody prior to the date of Judgment. She urged the court to issue a sentence of twenty (20) years imprisonment and the same to run from 2nd September 2021 when the appellant was first arraigned in court.

Analysis and determination

9. This being a first appeal this court has a duty to re- evaluate and re-consider the evidence afresh and arrive at its own decision while bearing in mind that it did not see nor hear the witnesses. In Kiilu & another V Republic [2005] 1 KLR the Court of Appeal held:

    (i) The appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

    (ii) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence so support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

10. I have carefully considered the evidence on record, the amended grounds of appeal, both submissions and the law. The issues I find falling for determination are as follows:

    i. Whether the charge of attempted murder was proved.

    ii. Whether the sentence meted out on the appellant is too harsh

    iii Whether section 333(2) of the Criminal Procedure Code was complied with.

i. Whether the charge of attempted murder was proved.

11. Section 220 (b) of the Penal Code, pursuant to which the charge was laid, stipulates that:

12. Any person who—

a) attempts unlawfully to cause the death of another;

or

b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.

13. Further, Section 388 of the Penal Code defines

"attempt" as follows;

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

14. In Cheruiyot vs. Republic (1976-1985) EA 47 the position taken was that:

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

15. Moreover, in the case of Abdi Ali Bare vs. Republic (supra), the Court of Appeal made it clear that, in cases of attempted murder, care must be taken to distinguish what otherwise would be acts of preparation to commit an offence and actual attempt to commit the offence. The said court stated as follows:

....The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence..."

16. In light of the foregoing decision, the key elements that needed to be proved by the prosecution before the lower court are:

i. That the offender had a positive intention (the mens rea) to kill the complainant;

ii. That the offender took steps to execute his intention to kill by carrying out some overt act (actus reus) that was proximate to the commission of the offence; and,

iii. That the offender was positively identified to be the appellant herein.

17. The doctor who testified as PW6 stated that the complainant had scars on her abdomen, upper limb and a stab wound on the arms. He further stated that the complainant had been admitted from the 12th to 14th July and the wounds were stitched. He added that the degree of injuries was grievous harm. He produced as exhibits the P3 form and discharge summary.

18. The prosecution evidence in this regard was entirely uncontroverted. The appellant during the defence hearing gave an unsworn testimony stating that he was drunk and was not aware of his actions. The evidence of PW6 and the P3 form attest to the fact that the complainant sustained life threatening injuries on the night in question. PW1 told the court that the appellant tried to stub her on the chest but she covered it with her left arm. From the foregoing, it is my humble view that the act of stabbing the complainant was sufficiently proximate in terms of what was necessary for purposes of the offence of murder.

19. As to whether positive intention to kill was proved, it is trite that, in cases of attempted murder, the attempt itself is the main ingredient of the offence. Further, the intention to kill can be discerned from the nature and intensity of the attack. In *Daniel Muthee vs. Republic Criminal Appeal No. 218 of 2005* (UR) the Court of Appeal took the view, in a case where the victims succumbed to their injuries, that:

> "When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice afore thought was established in terms of Section 206(b) of the Penal Code."

20. As earlier noted, the evidence adduced by PW6 and the contents of the P3 form attest to the injuries sustained by the complainant. It is my finding that the appellant had the positive intention of unlawfully causing the death of the complainant.

21. As to whether positive identification of the appellant as the offender, PW1 stated that the appellant was her boyfriend and they had dated for three (3) months. The appellant during the defence hearing confirmed the same saying the complainant's family knew of their relationship. Further, there was no dispute before the lower court that the complainant knew the appellant well prior to the incident and that they were still engaged in a relationship even at the time of the incident.

22. Consequently, having carefully re-evaluated the evidence adduced before the lower court, it is my finding that the elements of the charge of attempted murder were proved beyond reasonable doubt against the appellant. Further more the appeal from the amended grounds does not challenge the conviction.

ii Whether the sentence meted out on the appellant is too harsh

23. I have considered the circumstances of this case. The appellant had no questions for the complainant (PW1) in cross examination. The issue of him having been acting under the influence of alcohol was never raised until he gave his unsworn defence.

24. The record reveals that the learned trial court only called for the victim impact statement without a pre-sentencing report, which was a serious omission. The two reports would have assisted the trial Magistrate to give a balanced sentence. In this case I find the sentence to be too harsh.

iii Whether section 333(2) of the Criminal Procedure Code was complied with:

25. The said section provides

> (2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day, the date on which it was pronounced, except when otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

26. I have perused the lower court record and as admitted by the respondent the period the appellant was in prison custody from 2nd September, 2021 to 7th December, 2022 was not taken into account at the time he was sentenced. This was an omission which can be corrected by this court.

27. The upshot is that the appeal succeeds only on the issue of sentence. The following orders shall follow:

i. Conviction is upheld

ii. The sentence of thirty (30) years imprisonment is set aside and substituted with a sentence of fifteen (15) years imprisonment

iii. Sentence to run from 2nd September, 2021

Orders accordingly

DELIVERED, DATED AND SIGNED THIS 22ND DAY OF JANUARY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE