Kithinji v Republic (Criminal Appeal E185 of 2022)
[2025] KEHC 1778 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1778 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E185 OF 2022

LW GITARI, J

FEBRUARY 20, 2025

BETWEEN

RODGERS MURIITHI KITHINJI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant Rodgers Muriithi has filed this appeal from the proceedings and Judgment in Meru Chief Magistrate's Court Criminal Case No. E010/2022 where he was charged with two counts of attempted murder contrary to Section 220(a) of the *Penal Code* and assault causing actual bodily harm contrary to Section 251 of the *Penal Code*.

2. In his supplementary grounds of appeal, he relies on one single ground which is as follows:

    1. That the learned Magistrate erred in law and fact by failing to consider that this a family dispute whereby there was need for alternative justice system since the complainants were ready to withdraw the matter but the trial court was silent on the matter.

3. He prays that the matter be remitted back to the trial court for the issue raised by the appellant herein to be addressed.

4. The respondent opposed the appeal and prays that it be dismissed.

The Brief Background

5. The appellant was charged with two counts of attempted murder and one count of assault. Upon being arraigned in court he denied all the charges and a plea of not guilty was entered. The trial proceeded and eight witnesses were called by the prosecution and they testified and were cross-examined by the appellant. The appellant was placed on his defence and he gave his defence on oath.

6. The learned Magistrate in her considered Judgment found the accused person guilty, convicted him and sentenced him to serve twenty (20) years imprisonment on each count 1 & 2 and five (5) years imprisonment on the third count. The sentence was to run concurrently starting from the date that he was remanded in custody.

7. Throughout the proceedings the complainants, the prosecutor and the appellant never gave an indication that they preferred to have the matter referred to alternative dispute resolution.

The Facts Of The Case

8. The complainant on the 1st count – Paul Kithinji was the appellants father while the second complainant Beatrice Karimi is a sister-in-law to the appellant and is the mother of Trevah Dereva the third complainant. It was on 24/11/2021 when the second complainant (PW1) (she is married to appellant's brother, PW5) went to her in-law's house. She met the appellant and they never talked to each other as there existed some bad blood between them. The appellant went to his parents' house. He then went to where PW1 was standing with her sister-in-law and a neighbour. The appellant called PW1 aside. The neighbour (PW3) suspected there was a problem and he went and called the appellant's father (PW2) who went and asked the appellant what the problem was. The appellant told his father (PW2) that his wife was framed by some people and so the wanted the issue resolved.

9. PW2 told him to wait for the family to hold a meeting to talk about the issues. The accused refused. Pw1 decided to leave the compound with her child who is the complainant on the 3rd count. As they were leaving, the accused removed a panga which he had put inside his trouser and he charged towards PW1 who took to her heels. But unfortunately she tripped and fell.

10. The accused reached her and cut her on the left side of the face. The appellant then turned on PW1's child Trevoh and cut him on the forehead. It is then that Pw2 rushed to the scene to help his daughter-in-law. When the appellant saw his father, he turned on him and attacked him with a panga. The appellant cut his father PW2 with a panga on the back of his neck inflicting two long cuts. The appellant left and went to the gate. He realized that the neighbours had left. The appellant returned to where his father was lying down on the ground and he cut him again, this time on the left arm. The appellant went to follow Pw1 and her child. PW2 was assisted by a man who went and lifted him up. He was taken to Gitoro Heath Centre then transferred to Kiirua Hospital.

11. Beatrice Muthoni Geogwa (PW3) testified she witnessed when the appellant found Pw1 and her child. The appellant cut PW1. The PW2 went to rescue PW1 and the appellant turned on him (PW2) and cut her using a panga.

12. PW4 Caroline Karamta is the sister to the appellant, sister-in-law to PW1 and daughter to PW2. Her testimony was that she witnessed when the appellant cut PW1, PW2 and her nephew Trevor as testified by the other witnesses.

13. PW5 Maurice Ndereva Kithinji is the husband of PW1. He was at home when he heard screams. His wife appeared with his son and he saw that they had been cut. He took them to the neighbours house. He met the appellant who was armed with a panga. The appellant reached his wife and cut her on the arms. He wrestled with the appellant and managed to grab the panga from him. He was assisted by some people who were working at a construction site and they arrested the appellant then tied him with ropes. He took his wife and child to Gitoro Hospital. He then went back to the scene and collected the appellant who he took to Meru Police Station. He also handed over to the Police the panga that he snatched from the appellant. He told the court that the appellant had told him he would kill people and even kill children.

14. Desmond Kithinji (PW6) is appellant's brother, is a brother to Pw5, son to Pw2 and brother-in-law to Pw1. He testified that he received a call from a neighbour about the incident. He went to Makutano Police Station and reported. The appellant was then taken to the Police Station by PW5.

15. No. 50926 PC John Mbiluri (PW7) is a Police Officer attached to Meru Police Station and is the one who received the report. The suspect who is the appellant in this case was taken to the Police Station by members of the public. He arrested him. He then visited the casualties who had been in hospital. He found the appellant's father, PW1 and her child who was two years old. The PW2 was cut and injured on left side of the face, Pw2 was cut on the neck and the child on the forehead. The child's face was soaked in blood. He then went and visited he scene. He recorded statements and issued the victims with P3 forms which were filled by the doctor. He also recovered the panga which was used to attack the victims and produced it as exhibit 1 and a jacket which the appellant had worn on the material day to conceal the panga. The motive of the attack was that the appellant felt that his father did not like him and wanted to eliminate his brother's family.

16. Doctor Muthuri Rickson Gitonga (PW8) testified that he works at Meru Teaching and Referral Hospital. He produced the P3 Form on behalf of Doctor Linah who filled the P3 Forms. He had worked with her since 2022 and was conversant with her handwriting and signature.

17. He testified that Trevor Ndereva wore blood stained clothes at time of examination. He had injuries on right trachea and cut wound on forehead which was stitched. The injuries were caused by a panga. The degree of injury was harm. He was two and half (21/2) years old at the time of examination. He produced the P3 form as exhibit 3. He also produced a P3 form for Bearice Mukami who was twenty-five years old and gave a history of having been cut by a person who was well known to her. Her clothes were blood stained at time of examination. She had an injury on the neck and jaw region. she had a fracture on the jaw joint, fracture on the bones around the left eye as a result of deep cut wounds. The degree of injury was grievous harm. He produced the P3 form as exhibit 4.

18. The doctor examined Paul Githinji (PW2) who alleged to have been cut with a panga by someone known to him. He had a cut on the right shoulder neck and left shoulder. The cut on the shoulder was deep extending from the neck to the right shoulder. There was also a cut on the left shoulder. There was also an injury on the left arm resulting in total inability to use the left arm. The degree of injury was grievous harm. He produced the P3 form as exhibit.

Defence Case

19. The appellant was put on his defence after the prosecution closed its case. He gave his defence on oath and did not call any witness. He told the court that there were family misunderstandings. He had wanted to have the family dispute discussed it but they never agreed on anything as a family. On what happened on the material day he told the court that it is his father who hit him with a stick and he ran away but the father followed him. He panicked and picked a panga and cut his father. He admitted that he cut his sister-in-law. He however stated that he never intended to cut the child but was cut by accident.

20. The learned Magistrate in her Judgment ruled that the prosecution proved that the appellant is the one who cut the complainants and he admitted that fact. She further held that there were witnesses who confirmed that it is the appellant who cut the complainants. The learned trial Magistrate found the appellant guilty, convicted him then sentenced him.

21. The appellant filed amended supplementary grounds of appeal with the singular ground that the learned Magistrate failed to refer the matter to Alternative Dispute Resolution (AJS). On the other

hand, the respondent urged the court to find that they proved all the ingredients of the offenses beyond any reasonable doubts.

22. I have considered the evidence which tendered before the learned Magistrate, the defence of the appellant and the submissions. The issues for determination are:

    1. Whether the charges were proved beyond any reasonable doubts.

    2. Whether the learned Magistrate erred by failing to realize that the matter was a family dispute which should have been resolved through alternative Justice System and promote reconciliation.

23. This is a first appeal and this court has a duty to analyze the evidence, evaluate it and come up with its own independent finding. The court has to however, leave room for the fact that it did not have an opportunity to see the witnesses when they testified and leave room for that. See Okeno –vs- Republic (1972) EA 32. The appeal arises from the decision of the Magistrate in Criminal case. The appellant had the right of appeal against the conviction and sentence. Under Section 349 of the *Criminal Procedure Code*, the Appeal should be filed within fourteen days. An appeal to the High Court from the Subordinate Court is on both facts and law. Section 347 of the *Criminal Procedure Code* it provided:

> " (1) Save as in this Part provided,—
>
> (a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and
>
> (2) An appeal to the High Court may be on a matter of fact as well as on a matter of law."

The appellant has not raised any ground challenging the evidence tendered before the trial court nor has he raised any point of law.

24. I have considered the evidence which was tendered before the learned Magistrate. The appellant was charged with attempted murder and assault. Section 220 of the *Penal Code* provides as follows:

> " 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."

25. The ingredient of the offence of attempted murder is the intention to commit the offence whether or not the same is carried out successfully. This constitutes he "mens rea" of the offence. The actus reus of the offence is the actual execution of any act in furtherance of the intention. The mens rea and actus reus constitutes the criminal liability. So in a charge of attempt, the intent, or the criminal mind and intention becomes the key ingredient of the crime. See Lord Goddard CJ in R –vs- Whybrow (1951) 35 CR Appeal Rep, 144 where he stated:

> " ...But if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime."

Mens rea in Criminal Law Butterworths (1998) 6th Ed page 288 was explained as follows:

> " Nothing less than the intention to kill."

26. Abdi Ali Bare –vs- Republic (2015) eKLR Githinji, Mwilu J and M'Inoti JJA stated thus:-

> " ...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. In the work quoted above by Smith & Hogan (Butterworths), the authors give the following scenario at page 291 to illustrate the distinction.
>
> D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D. takes up his position, loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder...
>
> In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of act. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In Cross & Joines' Introduction To Criminal Law, Butterworths, 8th Edition (1976), P. Asterley Jones and R.I.E Card state as follows at page 354:
>
> '...[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted...'
>
> The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts."

27. In this case the prosecution witnesses adduced evidence which was well corroborated on how the appellant injured them using a sharpened panga inflicting on them severe injuries. The witnesses knew the appellant as they were close relatives and close neighbours. These witnesses were PW1, 2, 3, 4, & 5. The appellant according to PW5 who is his brother had threatened to kill people including children. This threat, the weapon used and the parts of the body attacked and the manner in which he executed the attack show that his intention was to cause grievous harm. The doctor, PW8 confirmed that the complainant had sustained injuries which were grievous harm and the child had sustained bodily harm. The appellant admitted that he caused the injuries on the complainants and attributed it to family disputes.

28. The appellant has not challenged the evidence as his appeal is not based on facts. The appellant has also not challenged the conviction.

29. I find that based on the facts and the law, I come to the conclusion that the charges against the appellant were proved beyond any reasonable. The Judgment by the learned Magistrate was considered on both facts and law. The Judgment is sound and find no reason to interfere with it.

30. Whether the learned Magistrate erred in law and facts by failing to promote Alternative Dispute Resolution

One of the modes of dispute resolution in criminal matter is Section 176 of the *Criminal Procedure Code* and it provides as follows:

> " In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated."

31. For the court to promote reconciliation, it is an exercise of judicial discretion which should always be exercised judiciously. The section applies in proceedings for common assault or for any other offence which is not a felony. None of the parties before the trial court applied to have the matter resolved through reconciliation. The offences the appellant was facing were felonies and therefore reconciliation could not apply. The learned Magistrate could not exercise discretion to order reconciliation when the parties were not wiling and where the nature of offences was not one where reconciliation could be promoted.

32. The appellant faults the court for not applying Section 204 of the *Criminal Procedure Code* which provides as follows:

> " If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused."

33. For the court to exercise discretion the Section, under the complainant must satisfy the court that he has sufficient grounds permitting him to withdraw the complaint and the court exercises its discretion to allow the termination of the complaint. What is clear from this provision is that the court has to be moved with an application by the complainant and to exercise its discretion to allow or deny the application.

34. Article 159 of *the Constitution* gives Judicial Authority to the courts and tribunals established under *the Constitution*. The Article provides as follows:

> " (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
>
> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law."

35. It is clear from the above provisions, that alternative disputes resolution in criminal cases is limited and depend on the exercise of the discretion by the court. There are no policy guidelines on how to incorporate the alternative justice system in handling criminal matters. The statutory provisions cited above limit reconciliation to certain categories of offences and does not extend to capital offences. There is lack of a formalized structure on how informal justice systems can be applied to handle criminal matters and their scope of operation.

36. *The Constitution* and the written laws embraces alternative disputes resolution and traditional disputes resolutions mechanisms. In this matter the learned Magistrate had no discretion to promote reconciliation as the appellant was charged with felonies. It is also clear from the record that none of the parties, nor the state approached the court to have the matter resolved thro' reconciliation. The learned trial Magistrate called for a probation officer's report and noted the victim impact statement. She concluded that a Custodial sentence was called.

37. I find that the learned Magistrate cannot be faulted for not promoting Alternative Dispute Resolution as the offences were felonies and the victims were still suffering from the impact of the injuries on their lives.

Conclusion

38. This appeal lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF FEBRUARY 2025

HON. LADY JUSTICE L. GITARI

JUDGE