



REPUBLIC OF KENYA



KENYA LAW
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**Kabati v Republic (Criminal Appeal 62 of 2023)
[2025] KEHC 1372 (KLR) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 1372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 62 OF 2023
DR KAVEDZA, J
MARCH 3, 2025**

BETWEEN

SGT JOSEPH MUNYATHIA KABATI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence of
the Court Martial sitting at Embakasi Garrison in Court Martial
Case No. 12 of 2017 Republic vs Sgt Joseph Munyathia Kabati)*

JUDGMENT

1. The appellant was charged with the offence of committing a civil offence contrary to section 133 (1)(b) of the *Kenya Defence Forces Act*, No. 25 of 2012, that is to say, attempted murder contrary to section 220 (a) of the *Penal Code*. The particulars of the offence are that on the 19th day of February 2017 at about 1845 hours while deployed at Dhobley Military Camp, Somalia, with intent to unlawfully cause death, shot 63xxx Mr. Lameck Osano on his right chest and left forearm using AK 47 rifle No. 63/03 Registration Number CT7048, an act he knew or ought to have known constitutes an offence.
2. In the alternative, the appellant was charged with the offence of committing a civil offence contrary to section 133 (1)(b) of the *Kenya Defence Forces Act*, No. 25 of 2012, that is to say causing grievous bodily harm contrary to section 231(a) of the *Penal Code*. After a full trial, he was convicted on the main charge and sentenced to serve ten (10) years imprisonment.
3. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant raised eleven (11) grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He contended that the charge sheet was defective. He complained that his constitutional rights were violated. In addition, the sentence imposed was harsh and excessive under the circumstances.



4. In response, the respondent filed grounds of opposition dated 31st May 2022. The grounds are that the sentence meted was lawful and proper within the law. The trial court factored in all evidence that was tendered before including the defence of insanity.
5. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno vs Republic* [1973] EA 32).
6. The prosecution's evidence is as follows. PW1 67xxx SSgt Chrispine Ajowi testified that on February 21, 2018, he was the guard commander at Dhobley Defence with Sgt. Osano, the complainant, and others. Divided into two shifts, PW1 was on the first shift, relieved by Sgt. Mwanasa and Cpl. Nyongesa at 1300 hours. The appellant did not show up for his shift. PW1 returned at 1700 hours for weapon testing. During the exercise, the appellant arrived, shouted, "Piga hiyo bunduki," and had an altercation with the complainant. The appellant then removed his body armour, cocked his AK-47, and shot the complainant three times. Cpl. Nyongesa (PW3) disarmed him, and the complainant was taken for treatment.
7. PW2 11xxx WO II Cyrus Gichuhi stated that on December 10, 2016, he issued the appellant, 60 rounds of 7.62mm ammunition, producing the ammunition book as evidence.
8. PW3 80xxx Cpl Stephen Nyongesa testified that on February 19, 2017, he was on guard duty at OP4 with WO II Osano, Sgt. Deya, and the appellant. The appellant did not show up for his shift at 1300 hours but arrived after 1800 hours during live firing, shouted, "Piga bunduki," and later shot Osano three times. PW3 disarmed him.
9. PW4 84xxx Cpl Calvin Ochieng Odera confirmed the appellant's absence at 1300 hours and his arrival during the live firing exercise, where he shot the appellant.
10. PW5 52xxx WO2 Ibrahim Gichuiya witnessed the aftermath of the shooting incident and ordered the appellant's arrest. He confirmed issuing the appellant 90 rounds of ammunition on December 22, 2016.
11. PW6 67xxx SSgt Isaiah Musigahe testified that he was the storeman who issued the appellant with an AK-47 rifle with butt number 63/3 and registration number CT 7048, along with five magazines, during pre-deployment training for AMISOM VII duties in Somalia. He produced the arms register to support his testimony.
12. PW7 Captain Dr. Patrick Okoth testified that he is a medical officer. On February 20, 2017, he was deployed at Dhobley Level II Hospital under AMISOM VI. On that date, he examined the appellant, who had allegedly shot WO II Osano. After examining him, he was found to be of sound mental status. He produced his findings as a prosecution exhibit.
13. PW8 Capt (Dr.) Kyalo Mwendwa testified that he is a medical officer deployed under AMISOM VI at the Dhobley military camp. On February 19, 2017, while discharging his duties, he treated WO II Lameck Osano, who had a gunshot wound to his right chest and was bleeding. The injury was allegedly inflicted by a colleague. The patient had been shot 15 minutes earlier. He provided treatment and produced his treatment notes to support his evidence.
14. PW9 59xxx WOI Charles Mbingi stated that he was in Dhobley as the in-charge of the military police detachment. On February 19, 2017, at around 1930 hours, the appellant was escorted and handed over to him with the information that he had shot Sgt Lameck Osano. He placed the appellant in custody,



- and shortly thereafter, the appellant's weapon, CT7048, and five magazines containing 147 rounds were brought to him. PW9 testified about his investigations into the incident.
15. PW10 23xxx Assistant Superintendent of Police Alex Muindi Mwandawiro testified that he works in the National Police Service as a Firearms Examiner in the Forensic Ballistics Laboratory at the DCI Headquarters. He testified about his examination of the ballistics involved in the case.
 16. PW11 63xxx WO2 Lameck Odhiambo Osano, the victim of the shooting, testified that Sgt. Kabati threatened to shoot him for no apparent reason and subsequently did so without provocation.
 17. PW12 was the investigating officer.
 18. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He gave sworn evidence and called three (3) witnesses. The appellant admitted being deployed by the Kenya Defence Forces for AMISOM duties at Dhobley during the material time. He also acknowledged being issued an AK-47 rifle with butt number 63/3 and registration number CT7048. He testified that he did not shoot the complainant and claimed that the firearm in question was not issued to him. He provided evidence regarding the firearm he was issued before leaving Kenya for deployment in Somalia. Additionally, he stated that he has a history of mental disorder and was undergoing treatment even prior to the incident.
 19. His witnesses, DW2, DW3, and DW4, however, gave evidence that they saw the appellant aim and shoot the complainant.
 20. The appeal was canvassed by way of written submissions which have been duly considered. Before I delve into the analysis of the evidence on record, I would like to address my mind to the issue raised by the appellant with respect to whether the charge sheet was defective.
 21. The appellant contended that the appellant was charged with two different sections of the law. From the record, I note that the appellant was charged in the main charge with the offence of committing a civil offence contrary to section 133 (1) (b) of the *Kenya Defence Forces Act* of 2012, that is to say, attempted murder contrary to section 220 (a) of the *Penal Code*. The particulars of the offence are that on the 19th day of February 2017 at about 1845 hours while deployed at Dhobley Military Camp, Somalia, with intent to unlawfully cause death, shot 63xxx Mr. Lameck Osano on his right chest and left forearm using AK 47 rifle No. 63/03 Registration Number CT7048, an act he knew or ought to have known constitutes an offence. A perusal of the charge sheet does not indicate any defect. That ground of appeal fails.
 22. Section 220 (a) of the *Penal Code* provides for the offence of attempted murder as well as the sentence upon conviction:
 - a. attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life”
 23. To sustain a charge of attempted murder, the evidence must show that there was a specific intent to unlawfully cause the death of another. In *Cheruiyot Vs Republic (1976 - 1985) EA 47* it was emphasized 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”.



24. It was the prosecution's case that the appellant, a Kenya Defence Forces member deployed at Dhobley, Somalia under AMISOM, was at Observation Point Four (OP4) on February 19, 2017. The complainant sent him for fruit supplies, and upon his return, after a brief conversation, the appellant removed his body armour and helmet, cocked his AK-47 rifle, and fired three rounds at the complainant, hitting him twice. The complainant fell and was rushed to Dhobley Level 2 hospital, then airlifted to Nairobi for further treatment.
25. The appellant was subdued and disarmed by fellow servicemen, notably PW3 Corporal Stephen Nyongesa, arrested, and examined at Dhobley Level 2 hospital. The Military Police, led by PW5 WO II Charles Mbingi, investigated the matter, placing the accused in custody and seizing his rifle (CT 7048) and five magazines with 147 rounds. PW10 Alex Muindi Mwandawiro, a firearms examiner, confirmed that the three expended cartridges and a fired bullet recovered from the scene were fired from the appellant's rifle. These items, along with the examiner's report, were produced as evidence in the trial.
26. While the appellant denied shooting the complainant, the chain of events, eyewitness testimonies, and forensic evidence collectively establish a prima facie case linking him to the offence of attempted murder. The evidence establishes that the appellant physically carried out the shooting with clear intent to kill, fulfilling both actus reus and mens rea, supporting the charge of attempted murder. Therefore, the conviction on the main charge of attempted murder is affirmed and upheld.
27. The appellant was sentenced to serve ten (10) years imprisonment. During sentencing, the court martial considered the seriousness of the offence, the appellant's mitigation, the fact that he was a first offender, the appellant's health and the time spent in remand custody. In my view, the sentences imposed were legal and justified under the circumstances.
28. The upshot of the above is that the appeal is found to be lacking in merit and is dismissed in its entirety.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 3RD DAY OF MARCH 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Ms. Awandu for the Appellant

Mutuma for the Respondent

Achode Court Assistant

