



REPUBLIC OF KENYA



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**Maeke v Republic (Criminal Appeal E056 of 2023)
[2025] KEHC 7190 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E056 OF 2023**

MW MUIGAI, J

MAY 19, 2025

BETWEEN

JANET MWIKALI MAEKE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Trial Court Proceedings

The accused was charged with the offence of Attempted Murder contrary to Section 220 of the [Penal Code](#), the particulars of the charge sheet were that :

On the 28/10/2019 at Ithanga village Uthithini sublocation, Masii location in Mwala subcounty the accused attempted to unlawfully caused the death of Stephen Wambua by hitting him with a stone on the head.

1. The accused answered to the charges on when she was arraigned before Machakos Chief Magistrate's Court in Machakos Criminal case no .450 of 2001 where she pleaded not guilty .
2. The accused was placed on her defence , she was convicted on the main charge and was sentenced to life imprisonment as per judgment and sentence of Honourable Principal Magistrate M.A Otindo delivered on 27/2/2023.

The Trial .

The Prosecution's evidence .

3. The prosecution called witnesses in proof of the charges .



4. Pw1 Eunice Ndungwa testified that the accused was her aunty and the complainant her brother , that on 25/10/2018 at about 12:00 noon she was going to market through Ithanga village when she saw Agnes Nzilani , Stephen Wambua and David Nzomo and two clan members called Muli and Nzau arguing .
5. That Nzilani was holding a panga and the accused grabbed it from her but Nzomo grabbed the panga and returned it to Nzilani . That the accused was not satisfied , she picked a brick and hit Stephen Wambua on the shoulder . Nzomo escorted the clan elders. That they followed Stephen to the boma and sat at his home .They were outside with brother Nzomo and her niece Anne Nzomo joined them and they talked about the issue .
6. That the accused came hurling insults , she had a stone in her jacket ,she said someone must die .She came and hit Stephen Wambua on the front side of the head .
7. He was bleeding, pw1 did first aid and the bleeding stopped . That they took him to hospital .He was staying at Kiganjo and said he will go to work and then go to hospital

He called her at 6:30 pm informing her that he was in so much pain and its like his head was swelling. He spoke like a drunkard though he had never taken alcohol. He called at 7:30 pm and said he had not reached but he was in good shape. PW1 told him to persevere , she called at 8:00pm but he did not pick , she called 3 times and a lady picked the last call and informed her that he was bleeding from the mouth and nose and they did not know what was happening
8. She told them to rush him Kiganjo where he would be assisted . They arrived and she was informed that the complainant was picked by an officer. First aid was done and he was admitted at Nyeri Hospital where he was taken to ICU. His colleagues called them and advised them to report the matter, PW1 said that they reported the matter to Masii station at about midnight and left for Nyeri to see him.
9. That they found officers and PW1 was with David when they saw the complainant at the ICU .His head was swollen , he had pipes all over the body and was not eating or moving and stayed in hospital for 3 months. Corona Pandemic came and they were told to discharge him, they brought him home, they did home care and the complainant was with his wife . That he is still unwell and was being fed and wears pampers and cannot talk. They prayed for justice.
10. She stated during cross examination that the complainant did not report the matter and that she did not bribe the police .
11. PW2 Anne Nzomo testified that the accused is her father’s sister and the complainant is her uncle. That on 25/10/2019 at 12:00 noon she was at Masii Ithanga village at home with her dad, the complainant 2 clan men and Agnes That they were at the roadside outside the boma. That Agnes had a panga and they heard a commotion. That Janet, the accused was at home and she came from the house and picked the panga from Agnes and attempted to cut the clans man.
12. That her dad picked the panga, she picked a stone and started hitting her dad and uncle and they came to the boma. That the two aunties went to their homes.
13. That PW1 is also her aunty and she came to the homestead with her dad and uncle. That they were sitting and discussing family issues when the accused came and that she took something, “stone in her pockets” which she threw and hit her uncle on the head. They did first aid, he was given water and spirit .The complainant was working in the police band and said he would go to hospital after he gets out to work. That her mother later told her that the complainant had called and said he was not feeling well. They tried to reach him at night but he did not pick his phone . That a passenger told them he



- was unconscious and he was bleeding. She also went to see him at Nyeri referral where he was taken. He was in a coma. The accused was identified on the dock.
14. She said during cross examination that the accused had the stone in a sweater that was on the waist. The accused said she was a child and could not ask her questions .
 15. Pw3 Dr. William Muriuki from Nyeri County said that the complainant was 39 years old and that he was received from Masii police station on 24/10/2019, he was complaining of being assaulted. He was examined and the doctor reported that he had a swollen brain and that he had several head injuries with bruises on the brain .He required ICU admission and occupational therapy . The injuries were classified as grievous harm.
 16. He further stated that the patient had improved but his motor skills required therapy for full function. He needed close care giver and that he could move with support , he had even started expressing himself .
 17. PW3 produced the p3 form and stated during cross examination that it was filled later when the complainant had requested for it .He was not bribed to do the report .
 18. PW4 No 240539 Pc Dennis Oloo the Investigating Officer said that he took over the case from PC Munyao who was retired. He testified that he took statements from the witnesses .That the complainant was at home and that he was called for a family meeting . That during the meeting his aunt Janet Mwikali had a dispute with the complainant and she hit him with a stone on the head .The complainant started bleeding and those around him did 1st Aid and he became okay at the time.
 19. That he left home to go to work at Kiganjo when on the way the injury worsened .He was rushed to Nyeri General Hospital where he was admitted , his condition deteriorated and he stayed at ICU and was admitted for long. He was transferred for home care in a cabbage state and could not talk walk and was paralyzed on both limbs.
 20. The P3 form had not been filled when Pw4 visited the Hospital.
 21. That the court ordered that a correct medical report be authored , he referred the court to the report which stated that the patient could not talk or express himself and was in rehabilitation phase undergoing speech and occupational therapy .
 22. He had lost function of the upper and lower limbs . He could not walk or talk and was undergoing speech and occupational therapy .He produced the medical report dated 13/10/2022 by Dr. Kiriro from Nyeri Provincial General Hospital .
 23. He explained that he got information of the accused from Pw1 Eunice who showed him the accused he went to Ithanga village . He identified the accused on the dock.
 24. He stated during cross examination that the accused hit the complainant with a stone and the doctor could tell if the stone could cause the injury.
 25. Pw5, the complainant Stephen Wambua David brought intermediary his wife Mary Wambua, testified through his wife and intermediary in the case. He said that
he was at home on 25/10/2019 with the family who he listed in court as his brother Nzomo, sister Eunice and Auntie Nzilani and that they had a land dispute which they tried to sort out .
 26. That he was hit by a stone just below his eye by the Accused Person. He travelled and he collapsed while on the road , he lost his speech and was in a coma . He was in ICU for 4 months at Nyeri Provincial



General Hospital. He pointed out the accused before the court as the person who hit him with a stone just below the eye.

27. He said during cross examination and reexamination that he did not report the incident because he was going to work and didn't know it would be bad. That he had just left for work and expected that he would go to hospital but he collapsed before reaching his destination, that it was the stone that caused all this. The court noted the status of the complainant he cannot move or talk.

The Trial Court delivered a Ruling on case to answer Section 211 of CPC complied with.

The accused defence.

28. The accused gave sworn evidence, she said that she was framed and that the case concerned the land dispute. That their father gave her land and claimed that whoever took the land from her would go to the grave.
29. That when her father died in May 2019, the complainant started saying that he would cultivate the land. That Eunice sent him to farm to come from Kiganjo, he came with David and they said they wanted the land by force. They also told her and her sister to go and get married.
30. That the complainant left, he then claimed that she had hit him with a stone. That their sister later said they would jail her, she would later be arrested and charged in November and was remanded in prison. They also said she would die in prison so that they could take away her land.
31. She testified during cross examination that the case was brought by Eunice and not the accused, she also saw the complainant was incapacitated and that she knew the charges. That there was a land dispute and they did not fight but were discussing about, she denied hitting him with a stone.
32. She called one more witness but the witness was disqualified after the court noted that she was sitting in court when the accused testified.
33. The accused closed her case.

The Judgment.

34. The court rendered its verdict on 23/2/2023 and found that the prosecution had proved its case against the accused. The court found that the complainant sustained serious injuries and was drooling as he spoke in court. That the incident was witnessed by pw1 pw2 and pw5 and that the accused retired to her home after she finished the meeting. She came back to attack the complainant. That the accused did not rebut eye witness evidence and did not cross examine them on the father's decree over the land.
35. That she returned back to the complainant and hit him on the head with the stone hard. The court found that he intended to harm of cause harm. Further that she never bothered to visit him in hospital.

Sentence.

36. The accused was heard on mitigation, she told court that she had children and that she took care of them. That she was also an orphan.
37. The court noted that she was not remorseful and that she attempted to murder her nephew. The complainant also appeared before court and was incapacitated and depends on 3rd persons and he had permanent disability. The court considered the aggravating factors and found that she did not deserve leniency and had to be detained with others like her, she also needed rehabilitation.
38. She was sentenced to life imprisonment under Section 220 (a) of the *Penal Code*.



The Appeal .

39. Aggrieved, the appellant filed petition of appeal on and submissions dated
1. That the honorable trial magistrate erred in matters law and facts by failing to appreciate that the prosecution did not prove its case beyond reasonable doubt
 2. That the court erred in law and fact by failing to appreciate that the prosecution relied on circumstantial evidence that did not meet the required threshold.
 3. That the prosecution evidence was inconsistent and uncorroborated
 4. That the court failed to appreciate the defence.

The Prosecution's Submissions.

40. The prosecution framed issues as whether the prosecution proved its case beyond reasonable doubt and whether the evidence was consistent and corroborated.
41. The prosecution submits that direct evidence from pw1, pw2 and pw5 and medical documents proved beyond reasonable doubt that the appellant threw a stone at pw5 with intention of killing him .
42. That no forensic evidence was collected from the scene and none could be produced.
43. The evidence of pw1 and pw2 corroborated pw5 evidence. The court also considered the appellants defence .The land dispute did not displace the prosecution evidence adduced by pw1, pw2 and pw5.
44. Lastly that the sentence was sufficient and should be upheld.

The Accused Submissions.

45. The accused submits that the prosecution's case was not proved beyond reasonable doubt and that the witness evidence was not corroborated. That an accused person shall not be convicted on uncorroborated evidence as provided under Section 124 of the Evidence Act. That the case was framed against her.
46. The accused points out contradictions in the evidence between Pw1 ,pw2 and pw4 and that Pw1 alleged that she hit the complainant twice , that she hit him with a brick on the shoulder and the she came back with a stone and hit him on the head .Pw3 claimed that the complainant was hit several times and that the complainant was talking and was complaining if being assaulted while pw2 and pw4 claimed that he was hit once on the head.
47. Pw1 alleged that the complainant on the front side of the head , pw5 said he was hit below the eye and the rest did not specify the place .They also contradicted their accounts on the complainant's attendance to hospital That pw1 was taken to hospital immediately after first aid , pw2 & pw4 said he was only given first aid while the complainant did not refer to first aid in his evidence or being escorted by his relative to hospital .
48. Further that pw2 claimed that the accused took a panga from Agnes and attempted to cut one of the clan elders , this was not corroborated by others who were also present.Pw1 said that the complainant called at 6:30 pm and said he was in pain, pw2 said that she tried to call the complainant in vain.Pw1 claimed that the complainant spent 90 days in hospital ,pw4 said he spent 42 days while the complainant said he spent 120 days.
49. The accused submits that the evidence was not credible and reliable.



50. Further that the case was pegged in circumstantial evidence which did not meet the threshold considering the above inconsistencies. That the complainant could have been attacked by unknown people that night on his way home in Nyeri. That the complainant did not have blood after being hit, the doctor testified that he had a swollen head and that he had a lot of head injuries creating doubt on the case.
51. That key witnesses were not called and this weakened the case. Agnes was not called, the clan elder who was threatened by the accused was not called. That the witnesses had to be called to fill the gaps in the prosecution's case. See the case of *Bukenya v Republic*.
52. The investigations were not properly done and that the investigating officer relied on hearsay evidence, he did not investigate whether the complainant was hit on the head or below the eye or forehead whether he was taken to hospital at first instance and before travelling to Nyeri. That no investigation was done in Nyeri to confirm if he was attacked at night in the said county. That the complainant chose to use his threat against the accused to ensure she is eliminated from succession of the land.
53. The accused addressed his defence and submits that her sworn evidence confirmed that the case concerned a family land dispute and that the complainant and his allies were getting rid of her. That he was okay when the accused left the crime scene. The complainant ought to have reported the matter to the nearest police station, the clan elder who she allegedly threatened to cut with a panga did not take any legal action or did not lodge a complaint on behalf of the complainant.
54. Lastly that the trial court dismissed her alibi brought by her sister who had been given land by their late father.

Analysis & Determination.

55. The duty of the first appeal court was addressed in the case of *Okeno v Republic* EA 32 [1972] EA 32, where the court held that the court is required to reassess and reanalyze the entire evidence adduced at trial and to come up with its independent conclusions.
56. The court must also consider that it did not see or hear the witnesses and allowance should be given for this. Further that the court is not entitled to interfere with the trial court's findings unless they were not supported by evidence or found to have been perverse and unreasonable to have been unreasonable.
57. Section 220 (a) of the *Penal Code* provides as follows,

“Section 220 -Attempt to murder

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.”
58. The elements of the offence are also found in the definition of the word ‘attempt’ provided under section 388 of the *Penal Code* which states 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.
59. The main ingredient of an attempted offence is the the intention to commit the said offence,
60. There the prosecution proved that the appellant's actions or omissions were intended to cause death or grievous harm to the complainant. See the case of Emmanuel Kipkorir Langat v Republic [2022] eKLR where the court cited the following English law version of attempted murder :- Criminal Law, Butterworths [1998] 6th Edition at page 288 that, "Nothing less than an intention to kill will do."
61. R. v Whybrow [1951] 35 [1951] 35 CR APP REP, 141, where Lord Goddard C.J held as follows on mens rea in respect of the offence of attempted murder:-
- “ But if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime.”
62. I have considered the evidence, the grounds of appeal and the submission filed by parties.
63. The following issues are framed for determination: -
1. Whether the actus reus was proved beyond reasonable doubt.
 2. Whether the accused had motive.
 3. Whether the sentence was lawful.

Whether the actus rues was proved beyond reasonable doubt .

64. The actus reus must be proved to be complete criminal action as opposed to preparation to commit the offence. See the case of Abdi Ali Bare v Republic [2015] eKLR where the Court of appeal cited Cross & Jones Introduction to Criminal Law 'Butterworth's, 8th Edition [1976], page 354 where the authors state as follows:-'. '[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...'
65. Pw1 testified on 25/10/2019 that she was on her way to Ithanga Village when she saw the complainant and the family members , Agnes Nzilani , Stephen Wambua and David Nzomo and two clan members called Muli and Nzau arguing. The Accused picked a brick and hit Stephen Wambua complainant on the shoulder.
66. They went away, the accused came back at a later hour hurling insults and said that someone must die that day. That the accused removed a stone from her jacket which she used to hit the deceased on the front part of the head. That the accused was bleeding and gave him 1st Aid the bleeding stopped.
67. Pw2 also witnessed the offence, her account was that her family was at the road side and that they were also arguing. That Agnes had a panga. The accused was in the house and went to pick the panga from Agnes Nzilani and wanted to cut the clansman, her father took the panga from her .



68. She also said that the accused took a stone and hit her uncle and her father started hitting her father David and the complainant . That Pw1 had also arrived and joined them at the house while her other aunties, pw1 and Agnes Nzilani went back to the homestead.
69. She also confirmed pW1's evidence that the accused came back as they were discussing the issue and that the accused took stones from her pockets which she threw and hit her uncle on the head .They did first aid , was given water and spirit .
70. Pw5 the complainant Stephen Wambua was able to remember the events of that day and that they were resolving the land dispute. That he was hit by a just below his eye. He travelled and intended to go to work but he collapsed on his way. He was in ICU where he was in a coma for 4 months he lost his speech. His evidence was given by his wife.
71. Pw1 and pw2 evidence was corroborated and was an eye witness account of how the accused assaulted the complainant and that he was bleeding, pw1 did first aid on him.
72. According to pw1 , the complainant was taken to hospital and then he travelled.
73. Pw2 also confirmed that first aid was done but the complainant said he would go to hospital after he had reported to work at Kiganjo.Both witnesses testified that the he did not reach his destination. Pw1 communicated with the complainant between 6:30 pm and 7:30 pm when he called her and informed her he was feeling as if his head was swollen, as if he was a drunkard and how he was in much pain. He said he was in good shape and had not reached his destination. Pw1 called at 8:00pm but the complainant could not be reached, she tried to reach him and the 3rd call was picked by a stranger.
74. The evidence turned out that the complainant was admitted at Nyeri County Referral hospital at ICU and that he had head and brain injuries which left him incapacitated and affected his limbs speech and general well being.
75. The P3 form was filled while he was at the hospital and as he recovered. Pw4 testified said that the P3 was based on the victims' history that the complainant suffered severe head injury with pontine edema, cerebellas contusions requiring ICU care and occupational therapy to regain functions.
76. The medical report was produced by pw4 who was not a medical doctor and he did not author or have any relation with the Doctor who had authored the report.
77. I find that the accused was placed on the scene by eye witness evidence, Pw, Pw2 and evidence of injury/ grievous harm by Pw4. The appellant's actions caused grievous harm on the complainant and these actions posed danger to his life and have caused incapacitation .

Whether the accused had motive .

78. Pw1 and Pw2 testified that the accused came hurling insults and said that someone must die that day. The accused had also grabbed a panga from Agnes Nzilani and she attempted to cut a clans man during the altercation. Pw2 said that the accused also picked stones and began to him the complainant and her father David Nzomo. This shows that she attempted assault to other people during the offence
79. Section 206 of the Penal code describes malice aforethought in the following terms:
 - (a). An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
 - (b). Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is



accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.

- (c). An intent to commit a felony.
 - (d). An intention to facilitate the escape from custody of a person who has committed a felony.
80. The prosecution proved motive; the Accused informed the Trial Court of land dispute/inheritance that land given to her by her father was taken by family. Secondly there was a family meeting on the matter. The accused made intentional steps to kill the complainant. From the above circumstances explained by the Prosecution witnesses and medical report, the Appellant had motive especially expressed in her own words about the land allocated to her by her late father.
81. In Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990) where the Court held:
- “the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”
82. The statement “someone has to die” was part of PW1’s testimony as what the appellant said as she approached the family meeting. There is proof that it was directed to the complainant. The prosecution witnesses did not give the court reason to believe that the statement was directed at the complainant.
83. The choice of weapon and the nature of injuries also determine existence of motive.
- In Rex v Tubere s/o Ochen [1945] 1Z EACA 63, Eastern Court of Appeal observed that :
- “In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”
84. Further the weapon of offence was stones which the accused hurled at the family members who were seated outside.
85. The evidence proved Causing Grievous harm as provided under section 234 of [Penal Code](#)
86. In the circumstances, the appeal on conviction is dismissed and conviction is upheld.

Whether the sentence was lawful

87. On sentence, Section 220 of the [Penal Code](#) provides that the person who commits attempted murder is guilty of a felony and is liable to imprisonment for life.”
88. The court has discretion to mete any punishment which includes life imprisonment as a maximum sentence.
89. Section 389 of the [Penal Code](#) also gives the trial court further options :-
- “Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”



90. In the case *Evanson Muiruri Gichane v Republic* [2010] eKLR , the appellant was convicted for attempted robbery with violence and was sentenced to death. The court of appeal found that :-
- “The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of Section 389 of the *Penal Code* the appellant shall not be liable to imprisonment of a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences...”
91. The Case of *Joseph Gichuki v Republic* Supreme Court is instructive on sentencing, the Trial Court considered the aggravating circumstances of the case as spelt out in the Sentencing Guidelines 2015 & 2023. The Trial Court also found the Accused person not remorseful
92. This Court considers the following issues; the Accused unprovoked threatened the Complainant, who walked away from the scene, the accused followed him home and threatened him someone must die and hurled a stone she carried and hit the Complainant.
93. The Complainant suffered injury on the head was admitted in hospital in ICU for 4 months as per the P3 Form. The family has incurred huge financial emotional expense, medical bills to pay, buying medical items to help Complainant adjust a photograph in the file shows the Complainant on wheelchair, the report states his limbs he cannot walk work or help himself, he is assisted by wife and family members, he cannot work and generate revenue and fend for his family. This is a huge loss and toll on the family of Complainant. He is incapacitated for life.
94. The Accused admittedly, her defense alluded to a dispute over land inheritance she felt deprived of. There was motive and the act was pre meditated. The totality of these factors are that although the accused is a 1st offender her act was /is direct cause of Complainant disability for life.
95. From life imprisonment to 15 years jail term would be reasonable in the circumstances of this case.
96. However, in light of the totality of the circumstance the life imprisonment sentence is reduced to 15 years imprisonment from the time of arrest and Presentence period. To serve a total of 15 years imprisonment.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT AT MACHAKOS HIGH COURT VIRTUALLY/PHYSICALLY ON 19/5/2025

M.W. MUIGAI

JUDGE

