Bokole & 2 others v Republic (Criminal Appeal E026 of 2024)
[2025] KEHC 13067 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13067 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E026 OF 2024

M THANDE, J

SEPTEMBER 19, 2025

BETWEEN

KATSUSA MWENI BOKOLE ..... 1ST APPELLANT

NICKSON HARE KITSAO ..... 2ND APPELLANT

HAARISON KAZUNGU NGOWA ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellants herein were charged in Malindi Criminal Case No. E910 of 2021 with the offence of attempted murder contrary to Section 220(a) of the Penal Code. The particulars of the offence are that on the night of 25.10.21 at Kikwatani village, Marereni sublocation, Magarini sub county within Kilifi County, jointly with others not before court, the Appellants attempted unlawfully to cause the death of William Muchera Julius (the Complainant) by shooting him with a poisoned arrow.

2. Following trial, the Appellants were convicted of the offence and sentenced to 11 years imprisonment.

3. Being aggrieved by the decision of the trial court, the Appellants filed the Appeal before me against conviction and sentence. The Appellants separately filed amended grounds of appeal. The summarized grounds are that the trial Magistrate erred in law and fact by:

    1. relying on evidence on identification that did not meet the legal threshold.

    2. failing to consider that the prosecution did not prove its case to the required standard.

    3. failing to consider the Appellants' defence.

    4. The Respondent opposed the Appeal in submissions dated 21.11.24 in which it was submitted that all the elements of the offence had been established. The Respondent further submitted

that the Appellants were properly identified by recognition as the Appellants were known to all the witnesses who were at the scene. Further, that the trial court was right in finding that the defence of the Appellants was mere denial which could not shake the prosecution's case. Finally, that the sentence, the legality of which has not been challenged was within the law and lenient in the circumstances.

5. As a first appellate Court, I have subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial Court, I neither saw nor heard the witnesses. (See Okeno v. Republic [1972] EA 32 and Gabriel Kamau Njoroge v Republic [1987] eKLR). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.

6. The Complainant testified that as he was driving his tuk tuk with Emmanuel Kenga in the back seat, 2 motorcycles sandwiched them. He was hot with an arrow from the motorcycle that was on the right. The 1st Appellant was on a motorcycle with the 2nd Appellant as the rider. The 3rd Appellant was on the other motorcycle with someone else. He stated that it was the 1st Appellant who shot him with an arrow. He was taken to Malindi subcounty hospital where he remained for 11 days.

7. PW2 Alex Kenga Kanjoro was in the Complainant's tuk tuk. He saw the 1st Appellant who was on the motorcycle on their left draw an arrow and shoot the Complainant on the thigh. The tuk tuk rolled thrice. The 2nd Appellant came and stopped his motorcycle in front of the tuk tuk. He then did a u-turn and left. The 3rd Appellant who had a passenger on his motorcycle did likewise. Good Samaritans came and the 1st Appellant took off.

8. PW3 Denno Charles Rimba stated that he was in Kikwatani waiting for a truck when he heard a bang. On checking, he saw a tuk tuk and 2 motorcycles. He then saw the arrow in the Complainant's thigh and screamed and people came. The 2 motorcycles took off. He saw all the Appellants at the scene. The 1st Appellant was ferried on one motorcycle by the 2nd Appellant while the 3rd Appellant was on another motorcycle with a fourth person. He stated that all the Appellants were known to him.

9. PW4 Yusuf Ali Charero stated that on the material day, he was in Marereni near Banarhama mosque installing a pump in a borehole. 2 motorcycles arrived with passengers, one of whom was the 1st Appellant who was armed with a bow and arrows. He heard the 1st Appellant telling the occupants of the other motorcycle to follow the coming tuk tuk, which they did. The following day he heard that a tuk tuk person had been shot with an arrow.

10. PW5 Maxwell Gowe a government analyst who did tests on the arrow produced his report according to which, the arrow head contained quabin, a toxic substance. PW6, Ibrahim Abdullahi a clinical officer who examined the Complainant found that he had a piercing soft tissue injury at right hip joint extending to right gluteus muscles. Exfoliation was done on the Complainant who was admitted for 11 days. PW6 produced the P3 form and discharge summary.

11. PW7 PC Raymond Odinga the investigating officer recalled that the Complainant reported that he was driving his tuk tuk from Marereni to Gongoni when he was attacked with arrows. He was rushed to Malindi Hospital and the arrow head was dislodged. He obtained the arrowhead which was taken to the Government Chemist in Mombasa and it was established that the same was laced with a toxic substance. The P3 form was completed and the Appellants charged in court.

12. In his defence, the 1st Appellant stated that he was engaged in illegal business of betting which cannot survive without police protection. On 5.11.21, he was ferried to the CID offices by the 2nd Appellant as PW7 had told him to go see his boss. On being asked, he said he knew the Complainant. They said he would face consequences if he did not give them Kshs. 400,000/= which they demanded. He was later charged in court. On his part, the 2nd Appellant stated that on 3.11.21, he dropped the 1st Appellant at the CID offices. He told PW7 that on the night of 25.10.21, he was at home unwell and did not know anything about the Complainant having been shot with an arrow. He was then arrested and charged. He denied having committed the offence. The 3rd Appellant stated that on 3.11.21, he went to pick up police officer Faraso to drop him home on his motorcycle. While there, PW7 told him to wait for Faraso in the cells. He told PW7 he did not know the Complainant or that he had been shot with an arrow. He denied committing the offence.

13. The Appellants were convicted of the offence of attempted murder contrary to Section 220 (a) of the Penal Code which provides:

    Any person who—

    a. attempts unlawfully to cause the death of another; or

    b. ...

    is guilty of a felony and is liable to imprisonment for life.

14. In this appeal, the central issue for determination is whether the prosecution proved the charge against the Appellants, to the required standard. The elements that are to be established in the offence of attempted murder were set out in Cheruiyot v Republic [1976- 1985] EA 47 as follows:

> [A]n 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. Attempt is defined in Section 388 of the Penal Code 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.

16. It can be seen from the above provision that beyond the intention, there must also be demonstration of actus reus. In other words, it must be shown that the accused person committed some overt act in execution of his intention to commit the offence.

17. In the instant case, the testimony of the Complainant was credible and straightforward. He explained how the his tuk tuk was sandwiched between 2 motorcycles and one of the occupants shot him with an arrow. PW2 and PW3 corroborated this evidence and added that after shooting the Complainant, the Appellants fled in their motorcycles. PW4 also saw the Appellants and heard the 1st Appellant who was armed with a bow and arrow tell the others to follow the tuk tuk in question. The following day, he heard that the Complainant had been shot with an arrow. The medical evidence confirmed that the Complainant had a piercing soft tissue injury while the testimony of PW6 was that it was established that the arrowhead was laced with a toxic substance.

18. The Court is aware that the evidence shows that it is the 1st Appellant who shot the Complainant with the arrow. Does that mean that the other Appellants were not involved? Section 21 of the Penal Code provides guidance as it makes provision for joint offenders in prosecution of common purpose as follows:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

19. The evidence on record shows that before the attack, PW4 saw the 3 Appellants near the Banarhama mosque and heard them as they hatched the plan to attack the Complainant. The evidence also shows how the Appellants followed and sandwiched the Complainant's tuk tuk with their motorcycles whereupon he was shot and they then fled. The action of one was the action of all of them as they shared a common purpose in prosecuting the intended murder of the Complainant. It is immaterial that the 2nd and 3rd Appellants were not actually armed with a bow and arrow and were not seen shooting the Complainant. Their conduct shows they had a common intention with the 1st Appellant who inflicted the injury on the Complainant.

20. In my finding, I am fortified by the decision in Osoro & 2 others v Republic [2025] KECA 544 (KLR), where the Court of Appeal addressed its mind to the doctrine of common intention as embodied in section 21 of Penal Code and stated:

> 40. In Njoroge -v- Republic [1983] KLR 197 at page 204, this Court, (Madan, Potter & Chesoni, JJA), addressing the issue of common intention expressed themselves as follows: "If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly."
>
> 41. The evidence showed that the 1st appellant was part of the mob that chased the deceased and dragged him out of the kitchen in the home of James. It is also evident that although the 1st appellant was not armed, he stood by and did not disassociate himself from what was going on. We find that the 1st appellant had a common intention with the 2nd and 3rd appellants who inflicted the fatal blow. Clearly, the 1st appellant was on the same mission as the 2nd and 3rd appellants who assaulted the deceased, and since death was a logical consequence of the attack on the deceased, the 1st appellant must also be taken to have had malice aforethought and is therefore guilty of the offence of murder.

21. The evidence on record clearly shows that the Appellants put their intention to murder the Complainant into execution, notwithstanding that they did not fulfil that intention. The act of shooting the Complainant and the use of a poisoned arrow is sufficient and clear demonstration that

their intention was to kill the Complainant, even if they did not succeed. In this regard, I am guided by the holding in Abdi Ali Bare v Republic [2015] KECA 794 (KLR), where the Court of Appeal stated:

> 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.

The Court went on to state:

> 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 fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder.

22. I have carefully considered the evidence adduced by the prosecution and have satisfied myself that it was proved beyond reasonable doubt that the Appellants had by their acts indeed committed the offence of attempted murder.

23. I now turn to the issue of identification. The Court notes that the Complainant had initially stated he did not know the assailants but later stated it was the Appellants. Had his been the only testimony on identification, the Court would have rejected it. However, PW2 and PW3 witnessed what transpired and they saw the Appellants who were known to them prior to the incident. Similarly, PW4 saw all the Appellants on the material day. He heard 1st Appellant who was armed with a bow and arrow tell the other Appellants to follow the tuktuk in question. He too knew the Appellants prior to the incident.

24. This is a case of recognition. It is trite that recognition is more reliable than identification of a stranger. In the case of Peter Musau Mwanzia v Republic [2008] eKLR, the Court of Appeal had this to say about recognition:

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

25. The evidence on record is that the Appellants were known to the Complainant, PW2, PW3 and PW4 prior to the incident. In light of the foregoing, the ground challenging identification fails.

26. On the ground that the trial court did not consider the Appellants' defence, I have looked at the record and note that the trial court did in fact consider the defence but found that the defence raised by each accused does not shake the prosecution case and comprised of mere denials. After considering the Appellants' defence and in light of the evidence tendered by the prosecution, I too find no reason, to come to a different conclusion.

27. In the end and in view of the foregoing, this Court finds that the Appeal has no merit and the same is hereby dismissed with the result that both conviction and sentence are hereby upheld.

DATED SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF SEPTEMBER 2025

M. THANDE

JUDGE