Chirchir alias Bonde & another v Republic (Criminal Appeal 10 of 2023) [2024] KEHC 192 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEHC 192 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDAMA RAVINE

CRIMINAL APPEAL 10 OF 2023

RB NGETICH, J

JANUARY 17, 2024

BETWEEN

MITEI CHIRCHIR ALIAS BONDE ..... 1ST APPELLANT

JACOB KANGOGO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence from the Judgment and/or Decree of Honourable J. Tamar (PM) delivered at Eldama Ravine Principal Magistrate's Court Criminal Case No. 168 of 2015 on 5th April, 2020)

JUDGMENT

1. The Appellants were charged with 3 counts of offences. Count 1 and 2 offences of attempted Murder contrary to Section 220(a) of the *Penal Code*. The particulars of the offence were that on the 22nd day of February, 2015 at around 11:00am at Mochongoi Village in Koibatek Sub-County of Baringo County two Appellants with another who was acquitted and others who were not before court, attempted to unlawfully cause the death of Amos Lumet Kimosop and in count two, they were charged that on the same day, they attempted to unlawfully to cause the death of Robert Kiprotich Kiprop.

2. Count 3 is the offence of Robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code.* The particulars of the offence are that on the 22nd day of February,2015 at around 11.00am at Mochongoi Village in Koibatek Sub-County of Baringo County, Mitei Chirchir Alias Arap Bonde, Jacob Kangogo and Sarah Kurui together with others not before court and while armed with dangerous weapons namely metal bars (tarimbo) stole cash Kshs. 11,020 /-, one mobile phone make Nokia 308 Serial No. 356316058595307 valued at Kshs. 7,950/-, one belt valued at Kshs. 2500/= and a pair of shoes valued at Kshs. 3050 /= all valued at Kshs. 24,520/= the property of Amos Lumet Kimosop and before and immediately after stealing wounded the said Amos Lumet Kimosop.

3. The Appellants denied the charges and the matter proceeded for hearing with the prosecution calling a total of 12 witnesses. The Appellants adduced sworn statements. The 3rd accused was acquitted of all the accounts. The Appellants were also acquitted of the offence of Robbery with violence (count 3) but were convicted of substituted offences of causing grievous harm contrary to Section 234 of the *Penal Code* and that of wounding contrary to section 237(a) of the *Penal Code*.

4. The Appellant being aggrieved and dissatisfied with the conviction and sentence, filed the Petition of Appeal dated 21st May, 2020 on the following grounds:

    i. That the learned Magistrate erred in law and fact in convicting the Appellants in the absence of both direct and circumstantial evidence to support the charges.

    ii. That the Learned Magistrate erred in law and fact in disregarding the evidence of the Appellants.

    iii. That the Learned Magistrate erred in law and fact in disregarding the mitigation tendered by the Appellants and thereby imposed manifestly excessive sentences.

    iv. That the Learned trial magistrate erred in law in substituting the offences of attempted murder, a felony, contrary to section 220(a) of the *Penal Code* with the offence of Grievous harm, another felony contrary to section 234 of the *Penal Code* Chapter 63 Laws of Kenya that both carry a maximum sentence of life imprisonment.

Appellant's Submissions

5. The Appeal was canvassed by way of written submissions. The appellants through their advocate filed their written submissions and identy the issues for determination as follows:-

    i. Whether the trial magistrate erred in law in substituting the offences of attempted murder with the offence of grievous harm.

    ii. Whether the evidence looked at as a whole was sufficient to sustain the substituted convictions.

    iii. Whether the evidence of the Appellants was considered.

6. On whether the trial Magistrate erred in law in substituting the offence of attempted murder with the offence of Grievous harm, the appellants submit that the trial Magistrate found that the Appellants were not guilty of the offences as charged but went ahead to convict them on the offences of grievous harm contrary to Section 234 of the *Penal Code* and wounding contrary to section 237(a) of the *Penal Code*, charges which were not preferred against the Appellants herein.

7. That although the court has the jurisdiction under section 179 of the *Criminal Procedure Code* to convict for offences other than those charged, the offence should be minor and the facts are distinguishable in this case from the case of Criminal Appeal No. 134 of 2006 *Alex Kilei kasuki v Republic* which the court relied on as the facts in that case are distinguishable in that the Appellant therein had shot and killed six people and wounded several others.

8. The appellants further cited the case of *David Kariuki Wachira v Republic* [2010] eKLR The Court of Appeal had this to say;

> "With respect, we are of the view that the learned judge erred in her judgment on the sentence and we must interfere with the same. We are also of the view that the trial learned magistrate erred in substituting the charge of attempted murder contrary section 220(a) of the *Penal Code* to grievous harm contrary to section 234 of the *Penal Code*. The evidence

before the trial Magistrate established clearly the offence of attempted murder contrary to section 220(a) of the *Penal Code* and there was indeed no reason to substitute the same with offence of grievous harm contrary to section 234 of the *Penal Code*. While the offence of grievous bodily harm under section 234 of the *Penal Code* may be cognate to that of attempted murder under section 220 of the code, both carry the same sentence, namely life imprisonment and none of the two can be described as minor to the other- see section 179 of the *Criminal Procedure Code* which allows conviction for a minor offence where a more serious one is charged but is not proved".

9. They submit that the decision in *Alexander Kilei Kasuki v Republic* [2010] eKLR was rendered by the Court of Appeal on the 12th day of February, 2010 whereas the decision in *Kariuki Wachira v Republic* [2010] eKLR was rendered on the 9th day of July, 2010 by the same court which found that substitution of attempted murder with grievous harm was not viable since the two offences carry same sentence and cannot be said to be minor to the other offence.

10. They submit that it is very clear that the Court of Appeal departed from its earlier reasoning in the above matter and the decision in *Alex Kilei Kasuki v Republic* [2010] eKLR can be said to be no longer good law and the learned trial magistrate erred in relying on an authority which is no longer a good law.

11. Further in the case of *William Mwai Macharia v Republic* [2016] eKLR Justice Ngaah Jairus had this to say:

> "My understanding of this provision of the law is that one may only be convicted of a substituted charge under this section if that charge is minor to the offence which the accused person was initially charged, it does not appear to me like a felony can be substituted with another felony. In the trial against the Appellant, he was charged with attempted murder which carries a maximum life sentence upon conviction; the substituted charge for which he was convicted is also a felony which, again, he was liable to imprisonment for life though the learned magistrate sentenced him to only four years imprisonment. Here, I am of the humble view that the learned magistrate misdirected herself on the law when she substituted a felony with another felony much as the facts disclosed the commission of felony other that which the Appellant was charged with.

12. The Appellants quoted section 179 of the *Criminal Procedure Code* Cap 75 Laws of Kenya as follows:-

> "When offence proved is included in offence charged
>
> 1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> 2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

13. They argue that the above section does not allow the trial court to convict an accused person with more than one minor offence as it talks of an offence but not offences. They submit that the trial court misdirected itself in substituting the charged offence with two offences.

14. On whether there was sufficient evidence to convict the appellants on substituted charge, they submit that all the eye witnesses were either the complainants or persons who were working for him; that there was no independent witness who would have adduced independent evidence

15. They submit that the evidence presented before trial court did not prove the case as against the Appellants beyond reasonable doubt. They state that there was no corroboration of the evidence linking injuries suffered with the accused persons.

16. They submit that all the prosecution witnesses said that a scuffle ensued after some people arrived in a motor vehicle and started beating up Amos Lumet Kimosop. These people were not arrested.

17. They submit that there was no evidence showing the accused persons had weapons prior to the incident but evidence was adduced to the effect that evidence that the prosecution witnesses had tools including tarimbos, pangas (Machete) etc which they used in fencing. Further that PW1 and PW4 did not say in their respective testimonies that the 1st Appellant did anything that resulted in any injury but all they say is he was allegedly holding a panga (machete).

18. Further that the evidence adduced was full of contradictions; that PW1 stated that he was taken to the hospital by a motor vehicle while PW9 says he took him on his back.

19. They submit that it is clear that the complainant, Amos Lumet Kimosop was trying to use the criminal justice system to enforce a civil claim that can otherwise be enforced through the civil courts. That his claims to land appears to be at the centre of the dispute. The Appellants invites this Honourable Court to look beyond the evidence in the trial court and conclude that the complainant wanted the appellants convicted so that he can enforce his claims to the land rather than use the usual channels of enforcing a civil claim.

20. That it is no wonder that after the Appellants were convicted and sentenced, he went ahead to take possession of the land and hired goons who have continued to terrorize the Appellants and the family. They prayed that this Appeal be allowed, the convictions quashed and the Appellants set at liberty.

Respondent's Submissions

21. In submitting whether there was direct and circumstantial evidence in support of the charges. She referred to evidence of PW1 and submitted that evidence by PW1 was direct, rather than circumstantial insofar as he clearly saw the appellants and was able to identify them at the scene. PW3 was also called to the scene and on reaching there, he found 5 people digging holes; he said he saw accused 2 beating the complainant with a panga injuring him on the head and they took him to hospital for treatment.

22. On whether Appellant's evidence was Appellants' was considered, the state submit that there was evidence that there was overt act by the accused persons which caused injury to the complainant

23. In respect to sentence the state counsel submits that under section 234 of the *Penal Code* Cap 63 (LOK), any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life and submits that the court called for probation officer's report and social inquiry conducted turned out to be unfavorable and the Appellants were sentenced to 3 months imprisonment for the offence of wounding contrary to section 237 of the *penal code*. For the offence grievous harm contrary to section 234 of the *penal code* the 1st appellant was sentenced to 7 years imprisonment and the 2nd Appellant 10 years imprisonment; the sentences to run concurrently.

24. The state counsel submits that maximum imprisonment term provided for the offence of gravious harm is life imprisonment but the court meted out lenient sentence against the Appellants hence the conviction and sentence were lawful and urge this court to uphold.

25. In supporting substitution of the offence of attempted murder with gravious harm, the state counsel submit that the trial court relied on the provisions of section 179 of the *criminal procedure code* which provides as follows: -

> " When a person is charged with an offence constituting of several particulars, a combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.
>
> When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he was not charged with it."

26. That in view of the above provision of law, the trial court did not err in substituting the charge of attempted murder the offence of grievous.

Analysis and Determination

27. This being the first Appellate Court I am obligated to re-evaluate the evidence adduced before the trial court and arrive at an independent determination. This I do while aware of the fact that unlike the trial court, I never got an opportunity to take evidence first hand and observe the demeanor of witnesses. For this I give due allowance. The duty of the 1st Appellate Court was explained by the Court of Appeal in the case of *Kariuki Karanja v Republic* [1986] KLR 190 which stated as follows:

> " "On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

28. In view of the above, I have perused and considered the evidence adduced before the trial court, grounds of appeal together with submissions by the parties and consider the following as issues for determination:-

    i. Whether the learned trial magistrate erred in law and in substituting the offence of attempted murder with the offence of grievous harm and wounding.

    ii. Whether the sentence imposed was harsh and exessive.

Whether the learned trial magistrate erred in law and in substituting the offence of attempted murder with the offence of grievous harm and wounding

29. The Appellants were charged with two counts of attempted Murder contrary to Section 220(a) of the *Penal Code* with particulars as captured in paragraph 1 above. The Appellants were acquitted for the count of robbery with violence. They were found guilty and convicted of the offence of gravious harm under section 234 and offence of wounding under section 237 of the *penal code*. The Appellant's contention is that the substitution of the charge of attempted murder with the charges of grievous harm and wounding by the trial court was erroneous.

30. Evidence adduced confirm that there was overt act on the part of the Appellants that resulted in the injury of the complainant. There was however no proof that the Appellants had intentions of murdering the complainants.

31. Section 179 of the *penal code* of the *criminal procedure Code* Cap 175 Lawas of Kenya (LOK) provide as follows:

> " When offence proved is included in offence charged
>
> (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

32. From the evidence adduced, there was altercation resulting from a land squabble which led to the Appellants injuring the complainants. There was however no prove that there was intention to murder but evidence adduced proved offence of grievous harm contrary to Section 234 of the *Penal Code* and that of wounding contrary to section 237(a) and convicted them accordingly.

33. Both the offence of attempted murder and gravious harm are felonies which attract maximum sentence of life imprisonment. The above provision of the law talks of minor offence. In my view, the charge substituted is not minor offence compared to the initial charge as they are both felonies and attract similar sentence of life imprisonment. Any of the two offences would have fitted well as main charge in my view. I see valid reason for appellant's challenge of the substitution of offence of attempted murder with offence of gravious harm. I agree with the reasoning in the case of *David Kariuki Wachira v Republic* [2010] eKLR, where the Court of Appeal had this to say;

> " With respect, we are of the view that the learned judge erred in her judgment on the sentence and we must interfere with the same. We are also of the view that the trial learned magistrate erred in substituting the charge of attempted murder contrary section 220(a) of the *Penal Code* to grievous harm contrary to section 234 of the *Penal Code*. The evidence before the trial Magistrate established clearly the offence of attempted murder contrary to section 220(a) of the *Penal Code* and there was indeed no reason to substitute the same with offence of grievous harm contrary to section 234 of the *Penal Code*. While the offence of grievous bodily harm under section 234 of the *Penal Code* may be cognate to that of attempted murder under section 220 of the *code*, both carry the same sentence, namely life imprisonment and none of the two can be described as minor to the other- see section 179 of the *Criminal Procedure Code* which allows conviction for a minor offence where a more serious one is charged but is not proved".

34. From evidence on record, it is clear the appellant unlawfully wounded the complainants and cannot therefore be left Scot free. The offence of unlawful wounding is no doubt a minor offence. In my view, the trial Magistrate did not err in substituting the charge with offence of wound.

35. In respect to sentence for substituted offence of wounding contrary to Section 237 of the *penal code*, the Act provide that any person found guilty of offence of wounding is guilty of a misdemeanor and is liable to imprisonment for five years. The appellants were sentenced to 3 months' imprisonment

which in my view was very lenient. I will not therefore interfere with the sentence in respect to the above minor offence.

36. From the foregoing this appeal partly succeeds. I hereby set aside conviction of the offence of gravious harm and uphold the charge of unlawful wounding contrary to section 237 of the *Penal Code*.

Final Orders

37. Final Orders:-

    1. Appeal partly succeeds.

    2. Appeal against conviction for the offence of gravious harm is hereby quashed and sentence set aside.

    3. Appeal against conviction for offence of unlawful wounding contrary to section 237 of the *penal code* is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 17TH DAY OF JANUARY 2024.

RACHEL NGETICH

JUDGE

In the presence of:

Both Appellants present.

Mr. Sambu for Appellants.

Ms Ratemo for State.