



REPUBLIC OF KENYA



**Jamal v Republic (Criminal Appeal E015 of 2023)
[2024] KEHC 3226 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E015 OF 2023
RN NYAKUNDI, J
APRIL 4, 2024**

BETWEEN

MOHAMED JAMAL APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the judgment of Hon. C.
Mayamba in Kakuma law court cr. No. 277 of 2022)*

JUDGMENT

1. The appellant was charged with the offence of attempted murder
Contrary to section 220(a) of the penal code. The particulars were that on the 10th day of November, 2022 at Kakuma Refugee Camp in Turkana West Sub County within Turkana County, attempted to unlawfully cause the death of IFRA ISMAEL by using a metallic rod.
2. He was also charged with other three counts namely; Assault causing
actual bodily harm contrary to section 251 of the Penal code. Particulars of the offence were that on 10th November, 2022 at Kakuma Refugee Camp in Turkana West Sub County within Turkana County, unlawfully assaulted Waraitu Abdugarim thereby occasioning her actual bodily harm.
3. The third count was that of Assault causing actual bodily harm contrary
to section 251 of the Penal code. Particulars of the offence were that on 10th November, 2022 at Kakuma Refugee Camp in Turkana West Sub County within Turkana County, unlawfully assaulted Nanahi Abdugarim thereby occasioning her actual bodily harm.
4. The third count was that of Assault causing actual bodily harm contrary



to section 251 of the Penal code. Particulars of the offence were that on 10th November, 2022 at Kakuma Refugee Camp in Turkana West Sub County within Turkana County, unlawfully assaulted Faiza Mahamud thereby occasioning her actual bodily harm.

5. The appellant was convicted on all the counts and imprisoned to a cumulative sentence of 41 years imprisonment.
6. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
 - i. That the learned magistrate erred in law and facts by convicting the accused person by not considering the great loss incurred by the appellant (The victim injecting the accused person with terminal disease and the victim further on selling the house and all the shop of the accused person while in prison).
 - ii. That the court should have noted and considered that the appellant was left destitute all the children were relocated to uncertain place somewhere in Nairobi.
 - iii. That the learned magistrate erred in law and facts by convicting the accused person harshly knowingly that this was a family matter.
7. Both parties filed their submissions, which submissions have been considered in arriving at a determination.

Appellant's Submissions

8. The appellant submitted that his rights guaranteed in Article 50 (2) (g) were violated by the trial court as the record of the trial court does not indicate whether it informed him of his right to choose to be represented by an advocate. Secondly the trial magistrate failed to observe that appellant was a lay person and not well conversant with legal matters and ought to have been represented by an advocate or be informed of the right. He cited the case of Republic Versus Karissa Chengo & 2 other (2017).
9. It was the appellant's submission that the trial magistrate erred in law by convicting the appellant on the offence of attempted murder contrary to section 220(a) of the penal code, which was not proven by the prosecution as the main charge. He further submitted that he was not supplied with witness statements and exhibits throughout the trial. It was submitted that the only logical finding consistent with circumstances of the case and the prevailing legal position is to declare the trial proceedings a nullity.
10. The appellant submitted that there was no investigation carried out by the investigation officer in the instant case because he only interrogated family members and no community members were interrogated concerning the incident.
11. The appellant further argued that the defence of Alibi ought to be disproved by the Prosecution. That he was a mere businessman in Kakuma who did not understand neither Kiswahili nor English and as such he could not understand what was written in the witness statements for him to ask questions during trial. In essence it was his submission that he was not accorded a fair trial.



12. He finally submitted that there was no justification whatsoever for the trial to have been conducted in hurry and in the process infringing on his right to a fair trial.

Respondent's submissions

13. The Respondent in its submissions stated the sentence imposed was sufficient and should be maintained.

Analysis and determination

14. Having reviewed the trial Record, the grounds of appeal and the parties' submissions, the two main issues for determination are as follows: -
- a. Whether the conviction was proper and safe.
 - b. Whether the sentence was appropriate.

Whether the conviction was proper and safe.

15. The offence of attempted murder under section 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."
16. I also make reference to 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.
17. From the above legal provisions, the main ingredient of an attempted offence is the intention to commit the said offence, whether or not the same is actually carried out to fruition or not. This intention is what constitutes the criminal intent or mens rea of the offence while the actual execution of any act in an attempt to commit the crime is the actus reus. Thus, in the present case, the main ingredients for attempted murder would be the intention to cause the death of



another and the actus reus would be the actual act that would likely to lead to the death, but which subsequently fails.

18. Lord Goddard C.J. in *R. vs. Whybrow* (1951) 35 (1951) 35 CR APP REP, 141, stated 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.”

Mens rea in attempted murder was also explained in *Criminal Law, Butterworths* (1998) 6th Edition at page 288 that, “Nothing less than an intention to kill will do.”

19. It follows then that the acts of an accused person must be considered

and determined as to whether they were intended for the death of a victim and a determination must be made on whether there was an intention to commit the act, which will all be a question of fact. The Court of Appeal explained this principle adequately in *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, reconnoitres 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 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. 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.”

20. In the present appeal, as noted at the trial court the intention to kill the



victim was manifested in the injuries subjected on the Complainant together with the pattern of assault. That such acts were indicative of someone whose mind was made up to cause serious harm culminating into the death of the victim.

21. The trial court noted that from the appellant's defence, he felt betrayed, and ac the act of using a huge metal bar subjecting the complainant into numerous hits on the head amounted to intent within the meaning of Section 202 of the Penal Code. I have equally noted from the Appellant's grounds of appeal that he still feels betrayed. He argues that the learned magistrate erred in law and fact by not considering the great loss he incurred. Particularly, the victim injecting him with a terminal disease. I concur with the trial court that the element of 'intent' was established. I shall not delve into the other counts because they were proved beyond reasonable doubt. The appeal on conviction therefore fails.

On Sentencing

22. In the case of Francis Karioko Muruatetu & Another Vs Republic, Criminal Petition No. 15 Of 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

"It is for this Court to ensure that all persons enjoy the rights to dignity.

Failing to allow a Judge discretion to take into consideration the convict's mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity."

In the "Muruatetu Case", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

- a. age of the offender;
- b. being a first offender;
- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;
- f. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;
- h. any other factor that the Court considers relevant."

23. In the present case, the Appellant was convicted and sentenced to Thirty-five years imprisonment in count 1, 2 years in each of count 2,3 and 4. In considering the circumstances of the case and the objectives of sentencing in totality, I am inclined to interfere with the imposed sentence on the 1st Count only.
24. The court in Mokela – vs – The state (135/11) [2011] ZASCA 166 the supreme court of South Africa held that:

"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte



blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or where the sentence is to be served”

25. The current Kenyan sentencing regime is not perfect and has inherent deficiencies as indicative of the various jurisprudential decisions from the superior courts. Different courts adjudicating different cases on somewhat similar facts and scrupulously applying their minds to the correct principles or objectives applicable to sentencing seem to come to different conclusions as to what the appropriate sentence may be. There is empirical evidence which one can take judicial notice and acknowledge the imperfection of the sentencing system in Kenya. It can be categorized depending on the legal philosophy of judges and magistrates who sometimes are referred to as conservative, severe, lenient or compassionate to their fellow citizens charged of various offences. I think that is the reason the safeguards in the law are laid down that the courts of review and appeal would not lightly interfere with the sentences imposed by the trial court. The exercise of sentencing discretion makes it difficult to develop clear principles or policy for the sentencing judge or magistrate to ensure consistency to avoid unfair discrimination. Critically analyzing the sentencing process and considering of traditional factors and other related legal principles one can discern an equal treatment of offenders convicted of different cases of similar nature under similar circumstances. Having considered all the factors and relevant case law I tend to give due regard to the holistic approach of all the parameters as embedded in the Kenya sentencing regime. I have no doubt deterrence is not the only desert for justice to be served for those found culpable of a crime. The objectives of re-habilitation, transformation, reparation and victim offender mediation are not to take a back seat. Therefore fundamentally for me as far as possible the session judge or magistrate has the duty to complete the picture and give concise reasons on the electives penalty. In this case the 35 year imprisonment is on the higher margin without any evidence of compelling and exceptional circumstances.
26. The sentence is hereby substituted with 25 years’ imprisonment and the period shall include the time spent in custody pursuant to the provisions of section 333(2) of the Criminal Procedure Code. The sentence on the other counts remains undisturbed. The sentences shall run concurrently.
27. It is so ordered.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 4TH DAY OF APRIL, 2024.

In presence of;

Mr. Onkoba for the state

Appellant present in person

.....

R. NYAKUNDI

JUDGE

