Ntugu v Republic (Criminal Appeal E018 of 2021)
[2023] KEHC 2590 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E018 OF 2021

LW GITARI, J

MARCH 16, 2023

BETWEEN

JEREMIAH NTUGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Before me is an appeal arising from the Judgment in Marimanti Principal Magistrate's Court in Criminal Case No.1207/2019. The appellant vide a charge sheet filed in court on 6/10/2020 was charged with the offence of attempted murder contrary to section 220 (a) of the *Penal Code*. The particulars were that on 2/11/2019 at Nkarini Sub-Location, Chiakariga Location Tharaka South Sub-County within Tharaka Nithi County unlawfully attempted to cause death of Peter Mutegi by shooting him on the stomach with an arrow.

1. The appellant pleaded not guilty and the learned trial magistrate proceeded to conduct a full trial. At the conclusion the learned trial magistrate found the accused person guilty, convicted him and sentenced him to serve nineteen (19) years imprisonment.

2. The appellant was aggrieved and lodge this appeal based on the following grounds:-

    1. That the learned magistrate erred in law and facts by disregarding clear evidence adduced by the appellant and his witnesses.

    2. That the learned honourable trial magistrate erred in law and in facts by disregarding theappellant's defence.

    3. That the learned trial magistrate erred in law and in facts and exhibited clear bias by not recording the evidence adduced by the appellant and his witnesses and more particularly the evidence on DW2 and DW3.

4. That the learned trial magistrate erred in law by upholding that the charge of attempted murder was proved but failed to note that the evidence before him was full of assumptions, presumptions and theories not supported by the evidence.

5. That the learned magistrate erred in fact and in law by failing to consider the alibi defence statement of appellant.

6. That the honourable trial magistrate erred in law and in facts thereby arriving at the wrong conclusion and thereafter erring in a conviction and sentence.

3. The appellant has urged the court to allow the appeal, set aside the conviction and set him at liberty.

4. The appeal was canvassed by way of written submissions.

Brief fact:

The brief facts of the case are that the appellant and the complainant, Peter Mutegi (PW1) are neighbours.

On 2/11/2019 at around 7.30 pm the complainant, Peter Mutegi (PW1) was at his home where he also runs a small business of a shop. While he was at his sitting-room and was eating some food, he was surprised to see one man standing infront of him. He realized that two men who he did not know had gained entry into his house. The two men appeared to be scared and were looking for somewhere to hide. PW1- tried to talk to them but they did not answer. The two men hid inside his house. He then suddenly saw that the appellant had entered his compound. The appellant told PW1 to be ready as he was going to die. All of sudden PW1 was shot with an arrow which went through his left hand and into his stomach through the left side. The appellant told the complainant that he could not operate the shop as he had killed him. The wife of PW1 went to his rescue and extracted the arrow which was lodged in his stomach and protruding on the right side. He was rushed to Orsola Hospital for treatment. While being taken to hospital, the complainant lost consciousness and came to on 4/11/2019 and found himself in St. Orsola Hospital and had already been operated on. He was discharged after fourteen days. The complainant sustained injuries on the right side of the abdomen and the liver was injured. The complainant sustained external and internal injuries which were managed through surgery and he was hospitalized for ten days. The injuries as for the clinical officer were life threatening and were assessed as grievous harm. The P3 form and medical treatment notes were produced by a clinical officer as exhibits 1, 2, 4 and 5. The matter had been reported to the police. The following day the appellant went to seek refuge at Chiakariga Police Station as members of the public wanted to kill him over a shooting incident. The appellant was arrested and charged. Police recovered the arrow which was used to injure the complainant.

5. Upon being put on his defence, the appellant alleged that he was in his house and that the complainant was shot by people who were in his company and went to demolish his (appellant) house. He called his wife and the area Chief as his witnesses. The trial magistrate convicted the appellant and sentenced him to serve nineteen years imprisonment.

Summary of the Submissions:

For the appellant submissions were filed by Kijaru Njeru. He submits that for the offence of attempted murder to be proved, the prosecution needed to prove that the appellant had the intent to unlawfully cause the death of the complainant herein. He submits that since the appellant did not meet the complainant on the said date, he had no reason to go to his home and shoot him. That the testimony of the complainant was not corroborated by any independent witness as all the

witnesses were members of his family. That it was the prosecution's case that the appellant had shot one Mary Karimi who was not called as a witness. He cites the case of *Bukenya v Uganda* (1972) EA 549 where it was held that failure to call a crucial witness by the prosecution entitles the court to make an adverse conclusion against the prosecution's case and acquit the accused person. The appellant submits that the prosecution failed to prove that he is the one who occasioned the injuries on the complainant. The appellant has also urged the court to find that the prosecution did not prove the motive of the attack as the complaint admitted that there existed no grudge between him and the appellant. The appellant further submits that he gave a defence of alibi and called witnesses but that did not lessen the prosecutions burden to proof the case against him beyond any reasonable doubts as he did not assume the burden to proof his innocence.

6. For the respondent, they have isolated four issues for determination arising from the six grounds of appeal. The first issue is whether the learned trial magistrate considered the appellant's defence. The respondent submits that the defence was considered at page 8-9 of the Judgment and the trial magistrate held that the prosecution evidence tendered before him left no doubt that the appellant was sufficiently identified as the perpetrator of the crime with which he was charged.

7. The second issue the prosecution has identified is whether the trial magistrate exhibited bias by failing to record the evidence tendered by DW2 and DW3. The respondent submits that the appellant did not demonstrate that there was evidence that the trial magistrate failed to record and submits that the allegation is baseless.

8. The respondent submits that on the issue that the trial magistrate did not consider the defence of alibi raised by the appellant it is submitted that the same was considered in details by the trial magistrate who found that no doubts were cast on the prosecution's case.

9. Finally on the issue as to whether the evidence tendered supported the charge, the respondent submits that based on the testimony of PW2 & PW3 as well as that of the complainant, the prosecution adduced sufficient evidence to base the conviction.

10. Analysis and determination:

I have considered the proceedings before the learned trial magistrate and the submissions by the appellant and the respondent. This is the first appellate court and its role has been settled by various authorities of the Court of Appeal and this court. The duty of this court is to re-evaluate, re-assess, re-consider and re-analyze the evidence and come up with its own independent finding. The only caution being that the court should leave room for the fact that unlike the trial court it had no opportunity to see the witnesses to assess their demeanor and therefore leave room for that. That leading authority is the Court of Appeal decision in *Okeno v Republic* (1972) EA 32. Where the court held:

> "An appellant on a first appeal is entitled to expect to the evidence as a whole to be submitted to a fresh and exhaustive examination.... And to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions..... It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses....."

11. The appellant is charged with attempted murder contrary tosection 220 of the *Penal Code.* The section provides:

> " 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."

The key ingredient of the offence of attempted murder include the intent and the unlawful act. Intent, forms the malice of the offence of attempted murder and the unlawful act alleged forms the 'actus reus' of the offence. The prosecution as submitted by the respondent had the burden to prove that the appellant had the intent to unlawfully cause the death of the complainant.

Malice aforethought is the intention to commit an unlawful act. The prosecution had therefore the burden to prove that the appellant had a positive intention to unlawfully cause death. The submissions by the respondent is therefore sound. This is also conceded by the appellant that the ingredient of the offence is the intent to unlawfully cause death. What constitutes attempt is defined undersection 388 of the Penal code. It provides:

> " (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.
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> (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

In the case of *Republic v Liseru Wandera s/o Wandera* 1948 EACA, the court stated that for the offence of attempt, the prosecution had the burden to prove a positive intention to unlawfully cause death.

The appellant has argued that the prosecution did not prove any reason or motive as to why the appellant would visit the complinant at his home and shoot him with an arrow. The issue is therefore whether the appellant had the

intent and committed an unlawfully act. Malice aforethought of an offence is defined under section 206 of the *Penal Code* which provides:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances - (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually 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 not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitatetheflightorescape from custody of any person who has committed orattempted to commit a felony."

It is therefore upon this court to evaluate the evidence to determine whether the prosecution proved the offence of attempted murder. The prosectuion proved the offence of attempted murder. The prosecution called five (5) witnesses. The first witness was the complainant. There were three witnesses who gave direct evidence, The complainant, PW1 testified that on 2/11/2019 at 7.30 pm he was at home. He suddenly saw the appellant had come into his compound. The appellant then told him to be ready as he was going to die. The complainant realized that the appellant was armed with a bow and arrows. The appellant aimed a bow and arrow and shot him on the left side of the stomach below the ribs cage and exited on the right side of his body. According to the complainant, the appellant was at close range. The complainant heard her sister asking the appellant why he wanted to kill him. The appellant left while telling the complainant that he would not operate the shop as he had killed him. According to the complainant the intention of the appellant was to kill him as he had told him to prepare to die before shooting him.

12. PW2 Susan Njeri on her part told the court that he lives with the complainant (PW1) as his employee and is also his sister. She told the court that on 2/11/2019 at about 8.00pm while at home with the complainant he saw the appellant had come into the compound. She testified that the appellant was armed with a bow and arrows. The appellant shot the complainant with an arrow which pierced his stomach. She told the court that she knew the appellant saw him and even talked to him.

13. On her part, PW3 testified that she is Mary Kaumbari Kanake and she is the complainant's wife. On the material day, she saw the appellant had come to the compound and she realized he was armed with a bow and arrows. The appellant then shot the complainant in the stomach with an arrow. The appellant wanted to shoot another arrow but PW2 restrained him. PW3 went to hide her children in the toilet. When she returned she heard the appellant saying that he had killed the complainant and he would not operate the shop again. PW3 assisted the complainant and removed the arrow. She retained the arrow and she identified it in court as exhibit 3.

14. PW4 was Lilian Wahu a clinical officer at Marimanti Level 4 hospital who produced a P3 form on behalf of her colleague David Nyaga who she had worked with for eight (8) years. She testified that the complainant had internal as well as external injuries. Internally the liver was injured and there was

internal bleeding. The complainant underwent surgery and was admitted in hospital for ten days. The injuries were life threatening and were ssessed as grievous harm. She produced the P3 form, treatment notes and discharge summary as exhibit 1, 2, 4 and 5.

15. On his part, PW5 testified that he received the report from the Chief Nkarini Location reporting that the appelalnt had gone to the complainant's home while armed with a bow and arrows. The appellant shot the complainant and badly injured him. Later the next day at 11.00 am the appellant presented himself at Chiakariga Police Station seeking refuge there as the members of the public were baying for his blood over the shooting incident. PW5 arrested the appellant and arraigned him in court for the offence of grievous harm which was later substituted with attempted murder.

16. These evidence show beyond any reasonable that it is the appellant who shot the complianant with an arrow. From the testimony of PW 1, 2 & 3 the appellant had wanted to kill the complainant but he survived by the grace of God. This is deduced from the utterance of the appellant that the intention was to cause the death of the complianant. It is clear from the evidence that the appellant told the complainant 'to be prepared to die' and 'say that I would not operate the shop again as he had killed me." The intention was therefore to cause the death of the complainant through an unlawful act. There is no dispute that the complainant sustained life threatening injury as a result of the shooting. I find malice aforethought as provided under section 206 of the *Penal Code* was proved.

17. The appellant present himself to the police over the shooting incident. The evidene adduced demonstrate that the appellnt committed positive overt acts, namely telling the complainant to get ready to die and actually shooting him on the stomach with an arrow.

18. The motive was established from the utterances of the appellant, that is, the complainant would not operate the shop again. The learned trial magistrate found that the appellant was positively identified or recognized as the person who shot the complaint. Based on the evidence tendered the trial magistrate cannot be faulted for arriving at that decision. He was properly guided by the case of *Gwempazi s/o Mukonzho* (1943) EACA and *Hamisi s/o Tambi* 20 EACA on the ingridients of attempted murder. I find that the prosecution proved the offence of attempted murder against the appellant. This answers ground 4 of the appeal which I find has no merits. The evidence was direct, well corroborated and credible and is not full of assumptions, presumptions and theories.

19. The appellant has submitted that no independent witness was called as witnesses were members of the same family. No ground of appeal addresses this submission. I will however proceed and deal with the ground.

20. From the record of the learned trial magistrate, there were three key witnesses, that is the complainant, his wife and sister who is also his employee of the complainant. There are three issue which this court has to consider. These are:

    i. Competence and compellability witness

    ii. Whether the evidence was sufficient.

    iii. Whether the court can make an adverse conclusion against the prosecution's case.

    1. Competence and compellability of witnesses section 27 & 28 of the *Evidence Act* (cap 80 Laws of Kenya) provides that-

        " Confession made after removal of impression caused by inducement, threat or promise If such a confession as is referred to in section 26 is made after the

impression caused by any such inducement,threat or promise has,in the opinion of the court, been fully removed, it is admissible."

The witnesses who were called by the prosecution were competent and compellable. The Act provides that a witness adduces evidence of what he sees, hears, perceives, touches and so on. This is called direct evidence. In its ordinary meaning direct evidence would be that which based on an eye witness account; on personal knowledge or observation. The evidence which was tendered by the three witnesses was the appellant went into the complainant compound and after telling him he was going to die, shot him with an arrow in his stomach. The complainant testified that he saw the appellant well and even spoke to him. The complainant testifed that her sister was nearby. The sister who is PW2 testified that the appellant went to their home armed with a bow and arrows and shot the complainant. She told the court that she knew the appellant and even talked to him. Similar evidence was adduced by PW3 the complainant's wife. The defence of the appellant was that he is not the one who shot the complainant and that he was framed. I find that the evidence adduced by PW1, 2 and 3 was cogent and credible. It is reliable and sufficiently proves that it is the appellant who shot the deceased with an arrow.

21. The appellant submits that one Mary Karimi was not called as a witness who was allegedly shot by the appellant on the material day. In criminal cases, the prosecution bears the burden of proof and has the sole discretion to determine the witness to call. It is also trite that no particular number of witnesses is requied to proof a charge.

Section 143 of the *Evidence Act* provides:

" Number of witnesses:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

According to PW5- the investigating officer the appellant had shot Mary before he shot the complainant. The two shooting incidents don't seem to have taken place at the same place. The relevancy of that shooting of Mary Karimi is not clear. I find that failure to call that witness does not entitle this court to draw adverse conclusions against the prosecution's case. I note that this was not one of the grounds of appeal.

Finally I will consider grounds 1, 2 and 5 together. The appellants in the three grounds is alleging the trial magistrate failed to consider his defence and in particular his defence of alibi. The appellant submits that he raised a defence of alibi on oath and called his wife as a witness. It is submitted that no further cross-examination was done by the prosecution. The defence of the appellant is at page 40 of the record. His defence was not given on oath and so the submissions his defence was given on oath and he was not cross-examined is misleading. An accused person who opts to give unsworn defence is not subjected to cross-examination. The defence is a statutory statement. Though the statement may be relied on depending on the circumstances of the case when not tested in cross-examination, it is low probative value. It is trite that whee an accused raises a defence of alibi, he assumes no burden of proving his innocence, the burden remains on the prosecution. See *Wangombe v Republic* (1980) KLR 119

The trial magistrate at page 8-9 of the Judgment considered the appellant's evidence and found that the evidence before the court left no doubt that the appellant was sufficiently identified as the perpetrator of the crime of which he was charged. The trial magistrate made a finding of fact which this court cannot refute as he had the opportunity to see the witensses and assess their demeanor. This ground is not supported by the record. The defence was considered and a finding was made. The ground is

without merits. The appellant had averred that the trial magistrate was baised by failing to record the testimony of DW2 & DW3. No submission was advanced in support of this ground. It is not sufficient for the appellant to make an allegation, he must demonstrate the same with evidence. He did not state the evidence which the trial magistrate failed to record. This is a court of record and therefore the record of the lower court is considered to be a true reflection of what transpired in court unless the contrary is shown. The record shows that the evidence of the appellant and that of his witnesses was recorded by the learned trial magistrate. I find that the allegation of bias in hollow and is without basis. The ground is without merits.

22. The defence of alibi was considered and the learned trial magistrate found that the circumstances sorrounding the identification of the appellant were favourable and free from possibility of error.

Finally, the court has to consider whether the charge was provedsection 220 of the *Penal Code* provides:

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

I find that from the evidence tendered by the prosecution the ingridients of the charge were proved beyond any reasonable doubts. In the circumstances the conviction of the appellant by the learned trial magistrate was safe.

Conclusion:

I find that the appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH MARCH 2023.

L.W. GITARI

JUDGE