



**Abubakar v Republic/Odpp (Criminal Appeal E008 of 2022)
[2023] KEHC 20213 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E008 OF 2022
SM GITHINJI, J
JUNE 19, 2023**

BETWEEN

YAHYA ATHMAN ABUBAKAR APPELLANT

AND

REPUBLIC/ODPP RESPONDENT

(Being an appeal from the Judgment of Hon T.A.Sitati – Principal Magistrate in PM’S Court Criminal case No.31 of 2019 Rep-vs Yahya Athman Abubakar delivered on 29th October, 2021)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Mr Aboubakar for Appellant

Ms Mkongo for the State

- 1 Yahya Athman Abubakar was charged in the lower court with a main count of attempted murder, contrary to section 220 (9) of the [Penal Code](#).
- 2 The particulars of this offence are that on the 17th day of February, 2019 at around 23.00hours in Wiyoni area, Lamu West Sub-County within Lamu County, the appellant herein together with others not before court intentionally and unlawfully attempted to cause the death of Musa Harun Musa by stabbing him with a panga on the stomach causing him severe internal injuries and multiple cuts on the head and shoulders.
- 3 In the alternative, he faced a charge of grievous harm, contrary to section 254 of the [Penal Code](#). The particulars hereof being that on the 12th day of February, 2019 at around 23:00hours in Wiyoni area, Mkomani location, Lamu West Sub-County, within Lamu County, the appellant together with others not before court intentionally and unlawfully did grievous harm to Musa Harun Musa by stabbing causing him severe internal injuries and multiple cuts on the head and shoulders.



- 4 The prosecution called seven (7) witnesses and their case is that the complainant who is Pw-1 in this case was living at Wiyoni in Lamu West Sub-County. He referred to himself as a jack of all trades as he was doing wiring, plumbing, electrical and other casual jobs. The appellant herein was his neighbour for a period of 4 to 5 years. The two had a strained relationship. Before the appellant married a lady known as Wahida who is now his second wife, some youths had gone to complainant's home and informed his wife Yayi, that the complainant was seen with Wahida behind the school wall. Yayi was furious about it and the complainant went to Wahida's mother to clarify on the report. Wahida was called by her mother and denied the allegation. The complainant then left their house. However, before he left Bakari who is the father to Wahida was inclined to attack the complainant with a club but was restrained by his wife who said there was no evidence. Yahya was in love with Wahida and was inclined to marrying her. His first wife told her that Wahida was already carrying the complainant's baby in her womb. She did not manage to discourage the appellant from marrying Wahida as a second wife but the appellant remained suspicious of the complainant. Bakari then became the father-in-law to the appellant. The appellant had also a close friend known as Mohammed.
- 5 On the material day, that is on 12/2/2019 the complainant had gone to the house of Mama Shomo to install for her a DSTV. He finished at about 10.00Pm and headed home leaving his assistant, Mohammed to tighten a few loose ends. While on the way when he got near the appellant's house he noted of three men who were ahead of him. The men were standing on the road. Two of the men had sticks. The appellant had a Samsung phone whose torch light he shone on them. He noted they were the appellant (Yahya), Mohamed and Bakari. Mr Mohamed and Bakari were armed with sticks. Mohamed and Bakari asked him what he was doing there. He told them he had left Mama Shomo's house where he had installed a disc. Before he could say more he was attacked on the head with blows and stick. He tried to identify the one who had hit him and saw the appellant standing armed with a panga. The appellant raised the panga to attack him. The complainant dived at him in an effort to wrestle him and forestall the attack. He held the appellant's hand which was holding the panga. As the two wrestled, the complainant was cut on the left shoulder, and wrist. The other two men were also attacking him.
- 6 The left shoulder suffered more cuts and the right arm a cut. He managed to grab the panga out of the appellant. Before he could escape with it, Mohamed hit him on the head hard with a stick. The complainant felt dizzy and the appellant snatched back the panga from him. His right small and ring fingers were slashed. As he was falling down the appellant slashed him on the belly with the panga which gutted it open. He fell down and the appellant pulled him to the backside of the house. They continued to attack him; the appellant kicked him on the ribs. Bakari then asked the other two what he should do. Mohamed advised that the body should be bound in ropes, placed in a sack and thrown in the ocean. The other agreed to the idea. The appellant went to a corner of the house. He retrieved a huge rope, the kind used to anchor a boat. Mohamed assisted him and placed the rope around the complainant's neck. The appellant used it to bound his feet and legs. They searched for a sack but did not trace one. The appellant went and strangled the complainant using the rope. Bakari stepped outside to look for a sack. There was electric light in the house and the complainant was able to see what was happening. Though weak, he was still conscious and could as well follow on what they were saying. Bakari bumped into Lulu, a neighbour. Lulu entered into the house. When she saw the complainant she screamed. She asked why the complainant had been attacked. The appellant picked a stick and hit her, ordering her to leave. He reminded her that she had previously intervened for Ustadhi Salim. Ustadhi Salim was suspected of having defiled the daughter of Bakari.
- 7 A mzee called Baguro also got to the scene. He is one of the village elders. Bakari invited him to the house allegedly to see a thief. He alleged that the complainant was armed with a panga and was lying



- ambush at the door of Yahya (appellant). He attacked the appellant but they managed to overpower him and killed him. He pointed at where the complainant was. Mzee Baguro asked whether they had taken the necessary steps to report to the authorities. Mzee Baguro went outside to make phone calls.
- 8 Pw-2 was attracted to the scene by the noises emanating therefrom. He thought a man was fighting his wife. He went and peeped inside through a hole in the wall. He saw the complainant lying down. The three assailants were there, appellant, Bakarai and Mohamed. When Bakarai saw him he asked him what he was after. He chased him away. Pw-2 stated since the complainant was dead, his wife should know of it. Pw-2 wailed as he noted how the complainant was. He went and called the complainant's wife, telling her to go and collect her husband's body. Complainant's wife (Yayi) got to the scene in company of her son Ihram. She screamed loudly when she noted how her husband was. She kept on touching him to ascertain that he was alive.
- 9 Pw-3 is the husband to Pw-4 who is a village elder (Mama wa Mtaa). At 11.00pm a woman went to their home calling on Pw-4 to go and help the complainant. Pw-4 was suffering from ulcers. Pw-3 told his wife that Musa was reportedly in trouble. She took time to rise, and Pw-3 went ahead of her. When he got to the scene Bakarai told him that it was good that he had arrived. He alleged there was a thief who was armed but they had managed to corner him and beat him up. Bakarai asked Mohamed to open up the gate for Pw-3 to enter. When Pw-3 entered he found the complainant bound in a rope seriously injured. The appellant was also present. Pw-3 asked them whether they had alerted authorities. He went outside to call the area chief. He had no credit. He went home and informed Pw-4 that the situation was serious. He then bought credit and called Chief Majid who could not be reached. Assistant Chief Ali Jelle did not as well pick her phone.
- 10 Pw-4 when she was told the complainant could be dead, decided to go to the scene despite of the fact that she was unwell. The scene was in the house of Bakarai but occupied by the appellant and his second wife Wahida. On arrival, Bakarai ushered her inside, alleging a thief had been cornered. The complainant was at a corner, seriously injured. He had bled profusely and his wife (Pw -5) was crying saying he had been killed. Pw-4 ordered a boat be secured to rush him to the hospital. That was done and he was rushed to King Tahid Hospital. Bakarai as well went with the team. Emergency procedures were administered and by 3.00am he was stable. Pw-4 alerted Chief Majid and Assistant Chief Ali Jelle. She then went back to her house.
- 11 Bakarai though was in the team that took complainant to the hospital he was not there to help but to ascertain his death. According to the complainant, he was saying he should be taken straight to the mortuary as he was dead. Mzee Kichekoh is the one who retorted by telling him that he was not a doctor to certify death. X-ray was done which revealed right pelvic bones fracture. He was referred to Mombasa Hospital where he was admitted for 14 days.
- 12 Pw-5 had reported the matter at Lamu Police Station. The matter was investigated and P-3 form issued. It was filled at King Tahid Hospital. It revealed that the complainant had suffered multiple cuts on the skull, shoulder, loin area, and right ring finger. The skull had 7 cut wounds. There were cuts on wrist joint and right ring finger. Deep cut wound on loin, 3 cuts deep involving the loin itself. The injuries were clarified as grievous harm. Pw-6 produced the treatment notes and the P3 form.
- 13 The appellant was arrested at the hospital where he had gone to ascertain the condition of the complainant. The rest of assailants went underground and after investigations by Pw-7 he was charged.
- 14 The appellant in his defence stated that he married Wahida Bakarai in the year 2019. They together had 6 years old daughter. They lived in a house owned by Bakarai, his father-in-law. On 12/2/2019 he went to Faza Kizingitini and returned home at 11.00Pm. He was with Bwana Hamadi, Fahmi, Bakarai Athman and Mohamed Hilal. When he got home he found a man who vanished within. The two then fought.



He got unconscious as he was injured. Both were taken to the hospital. His wife Wahida alleged that she had a sexual relationship with the complainant.

- 15 The said wife gave evidence as Pw-2. She alleged the complainant was her neighbour. She had no love relationship with him. The complainant on the material night visited her for a chat. The appellant appeared and the two fought using firewoods. There was no use of a sharp weapon or object. Out of it the appellant divorced her and she got married to another man called Jaffar Elis.
- 16 The trial court evaluated the entire evidence and found the appellant guilty of the offence in the main count. He was consequently convicted and sentenced to serve 20 years imprisonment.
- 17 The appellant, dissatisfied with the said conviction and sentence appealed to this court on the following grounds; -
1. The learned trial magistrate erred both in fact and in law in the analysis and evaluation of the evidence on record thereby making wrong conclusions of facts and the law consequently causing a miscarriage of justice by wrongly convicting the Appellant with attempted murder.
 2. The learned trial magistrate misconstrued, misapplied and ignored the provisions of the Evidence Act in his admissions, analysis and evaluation of the evidence on record as a result he wrongly convicted the Appellant with the offence of attempted murder.
 3. The learned trial magistrate failed to reach correct findings of facts and law in his consideration of the evidence before him and in particular failed to:
 - a. Find out that none of the witnesses who testified in favour of the complainant Pw1 saw him being attacked outside the Appellant's house as was alleged by Pw1.
 - b. Find that no trace of blood was found out at the alleged scene of the assault as alleged by Pw1 but blood was found at the house of the Appellant.
 - c. Find that Dw2 confirmed to the court that she had a relationship with the Complainant Pw1 before being married to the Appellant.
 - d. Find that Dw1 confirmed to the court that Pw1 the complainant indeed visited her in the Appellant's house and that the Appellant, her father Bakari and a third person indeed found Pw1 in the house at 10Pm at night.
 - e. Find that Dw 2 was struck with fear and fled the Appellant's house and left the Appellant, her father and Pw1 in the house.
 - f. Find out that no proper investigations were conducted by the police to establish the offense of attempted murder which failure led to the learned trial magistrate to wrongly convict the Appellant.
 - g. Find that there was no forensic evidence to corroborate the allegations of the complainant Pw1.
 4. The learned trial magistrate misapprehended the legal meaning of the murder thereby wrongly convicting the Appellant.
 5. The learned trial magistrate erred both in fact and in law in shifting the burden of proof from the prosecution to the Appellant.



6. The learned trial magistrate erred both in fact and in law in misapprehending and or misapplying the standard of proof which is beyond any reasonable doubt thereby occasioning miscarriage of justice.
 7. The learned trial magistrate erred both in fact and in law in removing the evidence of the Appellant.
 8. The learned trial magistrate erred both in fact and in law in falling to exercise his discretion under the law to ensure crucial witnesses such as the father of Dw 1 Bakari was called as a witness or arrested and arraigned in court alongside the Appellant.
 9. The learned trial magistrate wrongly sentenced the Appellant to twenty (20) years imprisonment.
- 18 The appeal was canvassed by way of written submissions. The respondent filed their submissions but the appellant did not.
- 19 I have considered the charge, the evidence adduced, judgment of the lower court, sentence, grounds of the appeal and submissions by the respondent.
- 20 Having done so, I find this as an open and shut case. The appellant does not dispute all along having injured the complainant. During the cross-examination the defence is that he was found in a compromising position by the appellant in his house with his second wife and a fight between the two ensued. However, the evidence by the witnesses who got to the scene is clear that the assailants, including the appellant herein, alleged that the victim was a thief whom they had cornered in a house owned by Bakari but occupied by the appellant and his wife. Such defence is therefore inconsistent and just a cooked story which is unbelievable.
- 21 The complainant indicated firmly and boldly that the appellant had a grudge with him as he suspected prior to his marriage to Dw-2, the victim had a relationship with her. His first wife had even indicated to him that she was carrying a womb having been impregnated by the victim. The father to Dw-2 was also not happy with the victim on the very same ground; he had even attempted to attack him, save for restraint by his wife.
- 22 On the material night the complainant was attacked and injured by the three men while on his way home. He was not armed. The two inflicted on him very serious injuries classified as grievous harm. Their deliberations during the incident shows without doubt that they were out to kill him. They even tied him with a rope with intentions of placing him in a sack and throw him into the ocean. One of the assailants Bakari thought he was dead and went to the hospital to ascertain it. The appellant later also went to the hospital to ascertain that he was not dead as his survival was almost a miracle given the inflicted injuries.
- 23 The victim was attacked by 3 armed men; where one, the appellant herein, was armed with a panga. He himself was not armed. Even if he had a love affair with the appellant's wife, of which is not established in the case as a fact, he was not found in the act and the defence of attack at the "heat of the moment" is not available to the appellant.
- 24 Mens-rea for the offence of which is the intention to kill and the overt act are well established in the case by the prosecution beyond reasonable doubt. The inflicted injuries were intended to cause his death and in my view it was just not the day meant for his death that he survived the ordeal. The facts



are in line with the finding in the case of *Cheruiyot -vs-Republic* [1976-1985] EA 47 where the court held that;-

“.....an 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.”

25 Having weighed the foregoing, I am convinced that the conviction of the appellant by the lower court is right. The court at length went through the sentencing motions and did a lengthy finding on the same. Having gone through it, and considering the circumstances under which the offence was committed, the 20 years imprisonment is well deserved. I find no ground on which I can interfere with the same downward.

26 The bottom line is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JUNE, 2023

.....

S.M.GITHINJI

JUDGE

In The Presence Of; -

1. Mr Aboubakar For The Appellant
2. Ms Mkongo For The State(ms Ochola Holding Her Brief)

