Kosi v Republic (Criminal Appeal E017 of 2022)
[2023] KEHC 19871 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19871 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E017 OF 2022

JN NJAGI, J

JULY 6, 2023

BETWEEN

BARAKO KOSI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.C. Wekesa, PM, in Marsabit PM's Court Criminal Case No.E593 of 2021 delivered on 14/12/2022)

JUDGMENT

1. The Appellant was convicted for the offence of attempted murder contrary to section 220(a) of the Penal Code and was sentenced to serve life imprisonment. The particulars of the offence were that on the 27th October 2021 at Goff-Choba area Qilta Korma location in Marsabit Central sub county within Marsabit County he unlawfully attempted to cause death to Galgalo Boru Dulacha (herein referred to as the complainant) by shooting him on both legs and left side of the chest.

2. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The appeal is based on the grounds that the trial magistrate failed to accord the appellant a fair trial and failed to consider his defence and his mitigation.

3. The case for the prosecution was that on the material day the complainant was in the company of Petro Halake PW2, Asuran Lechipane PW3 and Molu Jabano PW6 at Goff-Choba area of Marsabit County where they were scooping sand and loading it into a lorry. PW2 was the driver of the lorry. The area was prone to insecurity and PW 2 sent the complainant to do surveillance of the surrounding area. The complainant went to a nearby hill and checked around. He did not see anything to cause suspicion. As he walked back to the lorry he was shot at on both legs. He fell down. Two people approached him. One of them asked him what tribe he was. He told him that he was a muslim. The person told him that he was lying and shot him with a gun on the chest. The people then said that he had died and left.

4. PW2, PW3 and PW6 heard the gun shots and heard the complaint crying that he had been shot at. They ran away. PW2 called the area Assistant Chief PW4 who went to the area. PW4 stood at a certain hill and saw the lorry at a distance. He called the OCS and informed him of the incident. PC Simiyu PW8 of Marsabit police station and other police officers went to attend to the report. The driver took them to the scene of the shooting. They found the complainant a short distance away from where the lorry was. They escorted him to Marsabit County Referrral Hospital where he was admitted in serious condition.

5. The complainant was attended to at the hospital by Dr. Mwangi PW7 who found him with a gun shot wound with an entry on the right anterior chest and exit on the posterior. He also had an entry gun shot wound on the left lateral side of the thigh and exit on the medial side. The doctors were unable to safe the left leg and it was amputated. The doctor, PW7, filled a P3 form and classified the degree of injury as grievous harm.

6. It was further evidence of the complainant that when the person who shot him was interrogating him as to what tribe he belonged to he noticed that one of his fingers was chopped at below the nail. That on the 20/11/2021 while admitted at the hospital, the said person went to the hospital and he identified him as the person who had shot him. He sent a person called Juma to make a report to the police. Juma went and reported to the OCS, CI Obonyo PW5. CI Obonyo went to the hospital and arrested the suspect, the appellant. He escorted him to the police station. PC Simiyu PW8 recorded the statements of witnesses. The Appellant was charged with the offence. During the hearing the doctor PW7 produced the P3 form as exhibit, PExh.1.

7. The Appellant when placed to his defence stated in a sworn statement that he is a casual labourer. That on the 27/10/2021 he was at Majengo and not at a place called Goff-Choba. That he has never been to that place. That on the 20/10/2021 he was at Marsabit County Referral Hospital where he was nursing a sick uncle. The complainant was in the same ward where his uncle was admitted. He stayed with the complainant in the ward for three days before he was arrested. He denied that he is the one who shot at the complainant.

8. The appellant called one witness an uncle, Kocha Barako, DW2. The witness said that the appellant does casual work. However, that he does not know where the appellant was on 27/10/2021.

9. In convicting the Appellant of the offence, the trial magistrate held that the prosecution had proved the elements of the offence of attempted murder which are the intention to kill (the mens rea) which was manifested by an overt act which was the shooting of the complainant. The court further held that the complainant identified the appellant as the person who shot him as the incident occurred in broad day light; that the complainant engaged the appellant in a conversation wherein he had ample time to observe him to the extent of noting a deformity on one of his fingers; that the identification was by recognition which was more reliable which can be explained when the complainant gave a vivid description of his assailant at the time of recording his statement and that the complainant was able to identify the appellant at the hospital. Further that the appellant`s defence did not cast any doubt on the prosecution`s case.

Submissions

10. The appellant submitted that the complainant did not know him before the date of the incident and did not positively identify him as the person who committed the offence.

11. The state on the other hand submitted that the fact that the complainant was shot on both legs and on the chest established the actus reus and mens rea of the offence of attempted murder that the person

who shot him had the intention to cause his death. That this is further established by the fact that the complainant heard the two attackers say that he had died before they left.

12. It was submitted that the conditions were favourable for positive identification as the complaint held a conversation with his attacker. That the complainant at that time noted that the appellant had finger chopped below the nail. That it is this feature that enabled the complainant to identify the appellant when he found him at the hospital where he, the complainant, was admitted.

13. The state submitted that the evidence was carefully scrutinized by the trial magistrate who observed that the incident happened in broad day light during which time the complainant talked to the appellant and had time to observe and identify him. That the trial court weighed all this evidence against the alibi evidence of the appellant and correctly found that the appellant had been identified as the attacker.

14. It was submitted that the appellant was convicted on the evidence of a single identifying witness. That the court can convict on such evidence though the evidence has to be tested with the greatest of care as stated in the case of Ogeto v Republic (2004) KLR19. Therefore, that conviction of the appellant though pegged on the evidence of a single identifying witness was proper and should be upheld.

15. On sentence the state submitted that the sentence of life imprisonment is the maximum sentence and therefore the sentence was manifestly harsh in the circumstances of the case.

Analysis and Determination

16. This being a first appeal, the court is under obligation to reconsider the evidence adduced before the lower court and come to its own independent conclusions. Hence, in Okeno vs. Republic [1972] EA 32 the Court of Appeal for East Africa held that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole 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 conclusion; 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..."

17. The circumstances under which the complainant herein was shot are clear. The trial court accepted his evidence that he was first shot on the legs and that when he fell down he was approached by two men one of whom asked him what tribe he belonged two. That he told the person that he was a muslim. The person then told him that he was lying and shot him on the chest. The people then said that the person had died and they walked away. There is no reason for me to differ with the finding of the trial court on this evidence. The complaint was examined at Marsabit County Referral Hospital and was found with gun shot wounds on the chest and on the left thigh. I therefore accept the findings of the trial court the circumstances under which the appellant was shot at.

18. The offence of attempted murder is created by section 220 of the Penal Code which provides as follows:

> 220. Attempt to murder
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> 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.

19. "Attempt" is defined by section 388 of the Penal Code as follows:

388.

(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.

20. The Court of Appeal in Abdi Ali Barre v Republic (2015) eKLR held as follows on the ingredients of the offence of attempted murder:

> 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.
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> .....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.

21. The fact that the complainant in this appeal was shot with a gun on the chest was a clear manifestation of the intention to kill him. The elements of attempted murder were therefore proved. The question was whether the appellant was positively identified as the person who shot at the complainant.

22. The complainant`s evidence was that he talked with the person who shot at him. That he observed that the person had one of his fingers chopped at below the nail. That later on after about three weeks the person found him at the male ward of the County Referral Hospital where he was admitted and he recognized him as the person who had shot him. He sent a person called Juma to report to the police.

24. The appellant was convicted on the basis of an identification of a single witness. It is trite that evidence of a single identifying witness should be scrutinized with the greatest of care so as to ensure that it is safe to convict on such evidence. In the case of Roria v Republic (1967) EA 573 it was held that:

> " .....A conviction resting entirely on identity invariably causes a degree of uneasiness.....That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification".

25. Similarly, in Ogeto v Republic (supra) it was held that:

> It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with greatest care the identification evidence of such a witness especially when it is shown that conditions favouring a correct identification were difficult – see Marube & Another v Republic [1986] KLR 356. Further, the Court, has to bear in mind that it is possible for a witness to be honest, but to be mistaken –Kiarie v Republic.

26. In Wamunga –vs- R [1989] KLR 424 the Court of Appeal held thus in regard to the evidence of identification:

> " Where the only evidence against a defendant is the evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.""

27. The trial magistrate in this case found that the incident happened in broad day light and that circumstances were favourable for positive identification. The question is whether the magistrate tested the evidence of a single identifying witness with the greatest of care so as to ensure that it was free from the possibility of error.

28. I have keenly gone through the evidence of the complainant. The shooting incident took place during the day. That however does not lessen the requirement of testing the complainant`s evidence as it is a well-known fact that a witness may be mistaken on identity of a person whom he saw during the day. Nowhere in his evidence did the complainant in this case state what enabled him to identify the appellant when he saw him at the hospital. He never made mention of the appellant`s chopped finger when he saw him at the hospital. Neither did he point out to the court the chopped finger of the appellant when he testified in court. Whereas the witness said that the appellant`s finger was chopped, the investigating officer only said that the finger was deformed. He did not explain the nature of deformity.

29. The trial court said that the complainant gave a vivid description of the appellant in his statement to the police. However, the complainant never mentioned that he gave the description of the appellant to the police before the appellant was arrested. From the record, the witness was not asked about all the above matters when he testified in court. It is obvious that the prosecution failed to bring out clear evidence on identification of the appellant. There was therefore no basis for trial court in arriving at a conclusion that the complainant identified the appellant by his chopped finger or by recognition when he never stated what enabled him identify the appellant when he saw him at the hospital. Besides that, the witness never knew the appellant before the date of the incident so he cannot have identified him by recognition.

30. In view of the foregoing, it is my finding that the trial court did not interrogate the evidence keenly to see whether there was sufficient evidence on identification. In the case of Maitanyi vs Republic [1986] KLR 198 the Court of Appeal held that a trial court must warm itself of the danger of relying on the evidence of a single identifying witness. In this case the magistrate did not warn herself of that danger which was an error of law. The conviction was not safe.

31. The upshot is that the case against the appellant was not proved beyond reasonable doubt and he was thus wrongly convicted of the offence. In the premises the conviction is quashed and the sentence set aside. I order that the appellant be set at liberty forthwith unless lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 6TH JULY 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Respondent.

Appellant -present in person

Court Assistant – Jarso

14 days R/A.