Republic v Ominya (Criminal Appeal E020 of 2020)
[2024] KEHC 12533 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12533 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E020 OF 2020

WM MUSYOKA, J

OCTOBER 18, 2024

BETWEEN

REPUBLIC ..... APPELLANT

AND

PATRICK OMINYA ..... RESPONDENT

(Appeal from conviction and sentence by Hon. L Ambasi, Chief Magistrate, CM, in Busia CMCCRC No. 2865 of 2015, of 30th November 2020)

JUDGMENT

1. The respondent, Patrick Ominya, had been charged before and acquitted by the primary court, of the offence of attempted murder, contrary to section 220(a)(b) of the Penal Code, Cap 63, Laws of Kenya. The complainant had gone to the business premises of the respondent to collect a debt from him. There was a disagreement, and the complainant opted for self-help, by way of taking away a windscreen, a scuffle ensued, the respondent armed himself with a panga, and injured the complainant with it. The trial court found and held that the mens rea for the offence, of positive intention to kill, was lacking, hence the acquittal.

2. The appellant was aggrieved, and brought the instant appeal, revolving around there being overwhelming evidence to support the charge; the respondent having formed a sufficient intention to commit murder; the trial court failing to apply section 179 of the Criminal Procedure Code, Cap 75, Laws of Kenya.

3. Directions were given on 14th May 2024, for canvassing of the appeal by way of written submissions. Only the appellant filed written submissions, which I have read through, and noted the arguments made.

4. There are only 2 issues for resolution, whether there was an intention to kill, and whether section 179 of the Criminal Procedure Code should have been applied.

5. Attempted murder may take 2 possible forms. The first is an attempt to unlawfully cause the death of another; while the other is where there is a duty on the part of the offender, towards the victim, in some way, and the offender, with intent to unlawfully cause death, acts or omits to act, in such circumstances that the act or omission could endanger life. In short, it is about doing or omitting to do something, which act or omission endangers the life of another, with an intention to either kill or cause the death of that other. See Rex vs. Mpande s/o Ndele [1938] 5 EACA 44 (Sir Joseph Sheridan CJ, Sir Charles Law CJ & Lucie-Smith J).

6. As to the actus reus, there is no dispute. There was an act, which endangered the life of the complainant. He was slashed with a panga. The injury was classified as grievous harm, for it left the left small finger detached from the hand, and hanging from the wrist, and there was profuse bleeding. The complainant ended up admitted at Jaramogi Odinga Hospital, at Kisumu. The injury could cause death, by excessive bleeding, if not attended to in good time. The act of slashing the complainant, so badly, endangered his life.

7. The mens rea required for attempted murder is a positive intention to kill. See Rex vs. Gwempazi s/o Mukonzho [1943] 10 EACA 101 (Sir Joseph Sheridan CJ, Gray CJ & Manning J), Hamisi s/o Tambi [1953] 20 EACA 176 (Sir Barclay Nihill P, Sir Newnham Worley VP & Sir Hector Hearne CJ) and Cheruiyot vs. Republic [1976-1985] EA 47 (Madan, Miller & Potter, JJA). That intention can be expressed verbally or in writing, or it can manifest itself in an overt act. The intention to kill is usually inferred from the evidence tendered in support of the charge. It was said, in Ahmed Mohamed Saeed vs. Reginam [1956] 23 EACA 396 (Sir Barclay Nihill P, Sir Newnham Worley VP & Sir Enoch Jenkins JA), it would be the duty of the court to determine whether, on the facts adduced, it could reasonably infer either that the accused intended to kill, or that he at least knew that what he was doing was so eminently dangerous, that it must, in all probability, cause death or such bodily injury as was likely to cause death.

8. There was no evidence that the intention to kill was expressed verbally, and an intent had to be inferred from the overt acts of the respondent, of arming himself with a panga, chasing after the respondent and slashing him with it. Was there a positive intention to kill? It would be difficult to determine whether the respondent had formed an intention to kill, or just to cause an injury to the complainant. It was stated, in Rex vs. Luseru Wandera s/o Wandera (1948) 15 EACA 105 (Sir Barclay Nihill CJ, Edwards CJ & Sir John Gray CJ), that circumstances of extenuation would be taken into account, and the existence of provocation would not operate to bar a conviction for attempted murder, but such circumstances could be considered in mitigation of sentence.

9. From the facts that were presented before the trial court, it could reasonably be inferred that the respondent intended to kill, or that he at least knew that what he was doing was so eminently dangerous that it could, in all probability, cause death or such bodily injury as was likely to cause death. The respondent had armed himself with a dangerous weapon. He cut the complainant so badly with it, that he severed his small finger, and he had to be admitted in hospital for some time. The very act of arming himself with such a weapon, for it was not at hand, and he had to fetch it from within his butchery, and the act of chasing after the complainant and cutting him with the weapon, pointed to an intent to either kill him, or he had knowledge that what he was doing was dangerous enough to cause a bad injury that could result in the death of the complainant. The facts do not paint a case of the respondent acting in self-defence.

10. The facts presented by the prosecution were sufficient, to provide basis for a conviction for the offence charged, or an inchoate or lesser offence, such as causing grievous harm. Of course, the boundary between attempted murder and causing grievous harm, from the facts of the case, was very thin. The

respondent could have been successfully prosecuted for either attempted murder or causing grievous harm. The victim suffered a serious injury, which was caused unlawfully. Some offence must have been committed.

11. The trial court should have reverted to section 179 of the Criminal Procedure Code, upon concluding, whether rightly or wrongly, that the facts did not disclose the offence of attempted murder, for, no doubt, the conduct by the respondent was unlawful, and, to the extent that it caused a grave injury to the victim, it meant that some crime had been committed, and the trial court should have attempted to find that other offence, from the facts presented. See In Rex vs. Roy Hull Home [1944] 11 EACA 107 (Sir Joseph Sheridan CJ, Sir Norman Whitley CJ & McRoberts J) and Mustafa Daga s/o Andu vs. Rex [1950] 17 EACA 140 (Sir Barclay Nihill CJ, Sir Graham Paul CJ & Edwards CJ), the appellate courts formed opinions that the intention to unlawfully cause death had not been established, in the cases they were handling, and substituted the convictions of the appellants, of attempted murder, with that of unlawfully causing grievous harm. Acquitting the respondent, in the instant case, had him walk scot-free, despite having committed a grievous offence, which left the complainant with debilitating permanent injuries. As they say, he literally got away with murder.

12. It could be that the respondent did not visit the victim at his home, and attack him there, and that it was, in fact, the victim who had walked himself to the presence of the respondent. There could be an element of provocation, in the sense that, when it became obvious that the respondent and his partner would not pay the debt, the complainant chose to take away an asset belonging to them as lien. However, all those factors did not excuse the offence. The only effect they would have would be to extenuate or mitigate it. The presence of those factors would not trigger an acquittal; they would only be considered at sentencing.

13. The respondent offered a defence, that it was the complainant who was the author of the scenario, for he had walked into his business premises, and removed a weighing scale, as lien for an alleged unpaid debt, owed to him by the respondent. When the respondent attempted to speak to him, to resolve the matter, the complainant attacked him with the scales. Whereupon, the respondent went into his shop, picked a panga, chased after the complainant and cut him with the panga. It might be the respondent was angry, that the complainant had taken his scales, or because he had hit him with them. He did not provide evidence of any injury from the hit with the scales.

14. The bottom-line is that the respondent rushed back to his shop, to arm himself with the panga, chased after the complainant and slashed him with it. The respondent could have retreated, or restrained himself, and sought alternative ways of resolving the dispute. He could have avoided arming himself with the panga, for there was no evidence that the complainant came after him, after he had allegedly hit him with the scales, to require the respondent arm himself in self-defence. The respondent became the aggressor, the moment he had to go for a panga, and chose to chase after the complainant, and to cut him with it. According to him, members of the public wanted to burn him with petrol, in an effort to administer extra-judicial justice, after he cut the complainant, and he had to be rescued by the police, who held him in their custody, for his own sake. The defence, therefore, conceded the attack on the complainant, by the respondent, band the prosecution and defence cases were complementary, except for a few inconsequential inconsistencies.

15. The facts, as presented by the prosecution, and also by the defence, established the offence charged, of an attempt to commit murder, contrary to section 220 of the Penal Code. The respondent should have been convicted, and sentenced accordingly. I, therefore, find and hold that the appeal herein is merited, and I hereby allow it. The acquittal of the respondent, on November 30, 2020, in Busia CMCCRC No. 2865 of 2015, is hereby quashed, and substituted with an order convicting him of the offence

charged. The respondent shall be arrested, and presented before the Chief Magistrate's Court at Busia, in Busia CMCCRC No. 2865 of 2015, for the purpose of mitigation and sentence. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 18TH DAY OF OCTOBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the appellant.