



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 67 OF 2020

SHADRACK LEWA KACHOCHO.....1ST PETITIONER

PRISCA MWAKA.....2ND PETITIONER

DAVISON MTANA.....3RD PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioners herein were jointly charged before the Senior Principal Magistrates Court in Shanzu Criminal Case No. 485 of 2014 with the offence of attempted murder contrary to Section 220[A] of the Penal Code and in count 2 the offence of causing a person grievous harm contrary to Section 234 of the Penal Code.

2. Consequently, the Petitioners were sentenced to serve 30 years imprisonment and being dissatisfied with the conviction and sentencing, they filed an appeal vide Mombasa High Court Criminal Appeal No. 213 of 2017 in which the sentence to serve 30 years imprisonment for count 1 was upheld by the court and count 2 was dismissed. They are now before this court seeking for the following prayers:

a. That an order be made and declare that section 220 of the PC contradicts section 389 of the PC as to the sentence of the offence of attempted murder and goes not only against the letter and spirit of section 389 of the PC that provides the general penalty for attempted felonies but also against the provisions of the constitution.

b. That an order be made and declared that section 220 of the penal code has no primacy over section 389 of the PC.

c. That an order be made and declared that the petitioners were entitled to benefit as right from the general sentence provided under section 389 of the PC.

d. Subject to order[c] and under section 389 of the CPC, an order be issued substituting the 30 years sentence in excess to that provided.

3. The Petitioners in their submissions filed before this court on 11/12/2020 stated that they had no complaints against the convictions but that of sentencing as they were not given the least sentence available as provided by the law. That this court had the jurisdiction to hear and determine this petition as it involves the violation of the Petitioners rights. The court was urged to allow the petition and substitute the 30-year sentence with that of 7 years.

4. The Respondent filed submissions on 6/5/2021 and stated that the injuries inflicted upon the complainant by the Petitioners were severe. That the complainant had become disabled as a result of the crime and the aggravating circumstances of the offence committed outweighed the mitigating circumstances.

5. Section 220 (b) of the Penal Code defines the offence of attempted murder as follows: -

“Any person who 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 nature as to be likely to endanger human life is guilty of a felony and is liable to imprisonment for life;”

The operative word as per the above excerpt herein is 'attempt', this word is defined in Section 388 of the Penal Code which states as follows: -

388. Attempt defined

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil 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 fulfilment 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.

6. A look at the proceedings from the lower court and the judgement of the court of appeal in which the p3 was produced in evidence outlines the injuries sustained by the complainant. He was found to have sustained;

a. Fractures of the right zygoma and mandible

b. Multiple cut wounds extending from the occipital region to the root of the neck and between the shoulder blades ranging in size and depth of 6cm-15cm

c. Multiple wounds on the face of which the largest extended from the right ear to the left infra-orbital region

d. Fracture of the olecranon process of the left elbow joint

e. Multiple cuts on the left upper limb extending from the elbow to the wrist

f. Cut wound on the left deltoid region about 6cm

g. Multiple cut wounds on the upper limb on the medical aspect with significant impairment of blood supply

h. Multiple cuts on both wrist, lower limb fracture of the tibia about 10cm below the knee joint with an associated 16 cm oblique incision wound with sharp margins

i. Lacerations medial to the popliteal region left

j. Amputation of the right upper limb from the elbow, surgical toileting of wounds

k. External fixation of the fractures and blood transfusion.

7. From the injuries sustained by the complainant, it is clear that the intention of the Petitioners herein was to take his life. The same are grievous in nature and it beats logic from this Court's point of view on how he survived. However the bone of contention in the petition before this Court is a conflict of law between Sections 220 of the Penal Code and 389 which states that any person who attempts to commit a felony or misdemeanour is guilty of an offence and liable to, if no other punishment is provided, one half of such punishment as may be provided for the offence attempted but so that if the offence committed is punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

8. Indeed, there is a clear conflict between the provisions of Sections 220 and 389 of the Penal Code. This Court is guided and heavily relies upon the sentiments echoed by the Court of Appeal in **Evanson Muiruri Gichane v Republic [2010] eKLR** where the court stated; **the appellant was convicted of an offence [attempted robbery with violence] punishable by death. In terms of Section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences.**

9. Section 389 of the Penal code states as follows:

“Attempts to commit offences. Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”

10. From the above it is clear that the attempted murder offence is a felony which under Section 389 of the Penal Code is punishable by 7 years.

11. Article 50 (2) p states that:

“Fair hearing

(2) Every accused person has the right to a fair trial, which includes the right –

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and”

12. Section 220 of the Penal Code states:

“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.”

13. It is clear therefore that there is a conflict between Sections 220 and 389 of the Penal Code in as far as the sentence of the Petitioners are concerned. How then is this conflict to be resolved? In my view, the resolution of this matter must take into account the need to involve the complainant in any possible variation of the sentence. The Petitioners cut the victim into pieces. The victim’s leg was amputated. The victim is now an invalid depending on others for the smallest of favours. In fact from the record the Petitioners intended to kill the victim, who survived only by the grace and mercy of God. Both the Petitioners and the victim are villagers. It would be the height of injustice to release the Petitioners after 7 years to go back to enjoy their lives while their victim suffers lifelong disability. However, in the event that such should happen, the victim must be fully aware and if possible participate in any proceedings which may lead to early release of the Petitioners. This is so because the concept of fair hearing applies to all parties including the victims. Therefore, without participation of the victim, without the victim’s knowledge of these proceedings, this Court cannot proceed to make any orders varying the sentence meted upon the Petitioners.

15. For these reasons the petition herein is dismissed.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER , 2021.

E. K. OGOLA

JUDGE

PETITIONERS IN PERSON

MS. ANYUMBA FOR DPP

MS. PERIS COURT ASSISTANT