



IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 66 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

ALEX THAIRU..... APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, PM dated 25th March 2019 at the Magistrate's Court at Tigania in Criminal Case No. 271 of 2018)

JUDGMENT

1. The appellant, **ALEX THAIRU**, was charged, convicted and sentenced to 30 years' imprisonment for the offence of attempted murder contrary to **section 220(1)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars were that on 6th December 2017 at Kariene Village, Kiguchwa Location in Tigania East Sub-County within Meru County, he attempted to unlawfully cause the death of **REGINA MUKOMUGA** by severally cutting her on the right ear and left thorax using a panga.
2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic [1972] EA 32***). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.
3. The complainant, PW 1, testified that the appellant was her neighbour and on 6th December 2017 at about 10.00am, while she was bent over doing her laundry, the appellant came from behind and cut her with a panga on the left rib. When she rose to find out who had assaulted her, the appellant cut her left elbow. She raised her right hand to prevent another blow and he cut her 4 times on the forearm. She fell down and the appellant aimed another blow on her neck but he missed and cut her across the right ear. She raised alarm causing people to come and rescue her. They took her to the hospital.
4. Joseph Mithika, PW 2, was one of the people who heard PW 1 raise alarm. He rushed to the scene and found PW 1 lying on the ground bleeding profusely from cuts on the back, both hands and left ear. He also met the appellant, whom he had known since childhood, leaving PW 1's compound armed with a panga. He assisted to take PW 1 to hospital.
5. PW 1 was taken to Mikinduri Hospital and then transferred to Meru Teaching and Referral Hospital for treatment on 6th December 2017. She remained in hospital for 17 days. Dr Kenneth Muthuri produced the P3 medical form prepared by Dr Ibrahim who examined her on 14th January 2018. According to the medical report, PW 1 sustained a cut on the right ear, a big cut wound on the left thoracic area and several cut wounds on the right forearm. The doctor opined the injuries were inflicted by a sharp object and assessed the injuries as grievous harm.
6. The investigating officer, PC Edward Kimata, PW 4, recalled that PW 1 reported that she had been assaulted by the appellant earlier on the same day. She was thereafter taken for treatment to the hospital. PW 1 returned to the police station after being discharged from hospital whereupon she was issued with a P3 medical form. He later charged the appellant.
7. When put on his defence, the appellant gave sworn testimony in which he denied the offence and stated that he was being framed. He told the court that on the material day, he had taken his wife to the hospital at Meru and returned home later only to be informed that he was being mentioned in connection with a crime.
8. The issue raised in this appeal is whether the prosecution proved the case against the appellant beyond reasonable doubt. The testimony of PW 1 was credible and straightforward. She explained how the appellant assaulted her. He was not a stranger to her and the incident took place at daytime. His presence at the scene of the incident was confirmed by PW 2 who responded to the alarm and found the appellant leaving with a panga. PW 1's injuries were seen by PW 2 and confirmed by the medical evidence produced by PW 3.

9. The appellant's defence was two-fold; that he was framed and that he was not at the scene on the material day. The appellant's alibi was exploded as his presence at the scene was affirmed by the testimony of PW 2, an independent witness, who arrived at the scene following alarm, and who saw him leaving with a panga. Likewise, the defence that he was framed lacks merit. PW 1 admitted that she had a land dispute with the appellant but the evidence is clear that he is the one who decided to take the law into his own hands by assaulting PW 1.

10. The offence of attempted murder under **section 220 (b)** of the **Penal Code** is defined 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.

11. The prosecution herein needed to prove beyond reasonable doubt that the appellant did act in a manner that was likely to endanger human life. In **Cheruiyot v Republic [1976- 1985] EA 47** the Court held that;

[A]n 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.

12. In this case the appellant did inflict grievous injuries on PW 1 by cutting her with a panga several times. This is the *actus reus* of the offence. As regards the *mens rea* of the offence, the prosecution was required to prove the intention to kill. The prosecution proved the intention to cause death by the fact that the appellant assaulted PW 1 several times even when she tried to resist, he continued cutting her. It leaves no doubt that the appellant intended to kill her. Having analyzed the evidence, I am satisfied that the prosecution proved all the elements of the case against the appellant.

13. The maximum sentence for attempted murder is life imprisonment. The appellant was sentenced to serve 30 years' imprisonment and challenged this sentence as harsh and excessive. The trial court is entitled to exercise discretion when sentencing hence this court's jurisdiction to review the sentence is circumscribed as stated in **Macharia v Republic [2003] KLR 115** that:

*The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence.....The court will also not ordinarily interfere with the discretion exercised by a trial judge unless as was held in **James vs Republic [1950] EA 147**. It is evident that the Judge has acted upon some wrong principles or overlooked some material facts.*

14. In the sentencing notes, the trial magistrate took into account the mitigation, victim impact statement and concluded that, "*the accused impresses the court as callous, cold blooded individual with an unmitigated predisposition to extreme violence. Despite his moving mitigation this court is not persuaded to extend the facility of mercy to such a blood thirsty individual the like of the accused.*"

15. Although the words used by the trial magistrate were harsh, they reflect the record which shows that the assault was wholly unprovoked and deliberate and was inflicted with the intention to kill the complainant. While the offence and resulting injuries are serious and the court was entitled to impose a heavy custodial sentence, I find the sentence of 30 years' imprisonment on the higher side considering the sentence imposed is for murder and robbery with violence which invariably involve an element of grievous harm. The duty of the court is also to maintain consistency in sentences imposed for similar offences.

16. Having regard to the facts stated by the trial magistrate, I am constrained to quash the sentence of 30 years' imprisonment and substitute it with a sentence of 15 years' imprisonment.

17. I affirm the conviction but allow the appeal to the extent that the sentence of 30 years' imprisonment is quashed and substituted with a sentence of **fifteen (15) years imprisonment**.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this ___8th___ day of JUNE 2020.

A. MABEYA

JUDGE

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.