



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 114 OF 2019

JACKSON MUTISYA DAUDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction passed by Hon

A. Lorot, Senior Principal Magistrate while sitting at

Machakos Law Courts in Criminal Case 1705 of 2014 vide judgement

delivered on 9.5.2019 and sentence passed on 17.5.2019 by Hon C.A. Ocharo)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MUTISYA DAUDI.....ACCUSED

JUDGEMENT

1. This is an appeal that was lodged herein by the Appellant, **JACKSON MUTISYA DAUDI**, against the conviction passed by the Senior Principal Magistrate **A. Lorot** and sentence imposed by the Senior Principal Magistrate, **C.A. Ocharo**, in **Machakos Chief Magistrate's Criminal Case 1705 of 2014**. The Appellant had been charged before the lower court with the offence of attempted murder contrary to section 220(a) of the Penal Code. It was alleged that the appellant on the 14th day of October 2014 at Kinanie Trading Center in Athi River sub-county within Machakos County jointly with another not before court unlawfully attempted to cause death of **JOSPAT MUSINGA TIMOTHY** by shooting him on the head using a pistol.

2. The Appellant, having denied the allegations against him before the lower court, was taken through the trial process and a Judgment was subsequently rendered by the learned trial magistrate on 9.5.2019. The Appellant was found guilty of the offence of attempted murder and was convicted thereof and sentenced to serve life imprisonment in respect of the main count on **17.5.2019**. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal that challenged the decision of the trial court on the following grounds:

- a) *The prosecution case against the appellant was not proved beyond any reasonable doubt;*
- b) *That the appellant was not properly identified by the prosecution witnesses.*
- c) *The key ingredient of the offence with which the appellant was charged was missing hence arriving at a wrong determination.*
- d) *That the appellant's defence of alibi was dismissed.*
- e) *That the appellant's sworn defence was unchallenged.*

f) That the sentence was harsh.

g) That the appellant's submissions were not considered.

h) That the burden of proof was placed on the appellant as opposed to the prosecution.

3. Accordingly, the Appellant prayed that appeal be allowed, the judgement of the subordinate court of the 9.5.2019 and the sentence passed on the 17.5.2019 be set aside and that the court acquits the appellant.

4. In his written submissions, the appellant's counsel submitted that an identification parade was conducted and no evidence was given on the outcome of the same. Counsel challenged the conflicting evidence given by Pw2 who attended the identification parade and that of Pw3 who conducted a dock identification. Counsel took issue with the identification by Pw5 as the same took place when it was dark hence creating difficulty in identification; it was therefore the argument of counsel that doubt was created in the prosecution case and hence the conviction was unsafe.

5. It was the further submission of counsel that the ingredient of intent to commit murder under section 220(a) of the Penal Code was not proven. Learned counsel took issue with the dismissal of the appellant's defence of alibi and in placing reliance on the case of **Victor Mwendwa Mulinge v R (2014) eKLR**, counsel submitted that the appellant's defence of alibi went unchallenged as the prosecution did not cross examine him on the same.

6. Counsel submitted that the sentence that was passed did not take into consideration the mitigating factors and hence there was no basis for passing the maximum sentence.

7. The appeal was opposed by the Respondent. Counsel submitted that the issues for determination were; was the complainant shot by the appellant? Did anyone witness the incident? Were the injuries of a serious nature? Was the accused person identified properly? It was the submission of counsel that on 14.10.2014 the appellant locked the restaurant door where the complainant was then he removed a pistol and shot the complainant on the head. Counsel submitted that the testimony of Pw2, Pw3 and Pw4 stated that the complainant was in the blue restaurant where he was shot and fell down and that three people were seen fleeing from the scene of the incident. It was submitted by counsel that the injuries as per the evidence of Pw7 and the P3 form that was marked Pexh1 that the same were grievous and life threatening. Counsel submitted that the appellant was properly identified by Pw5 who knew the appellant very well since he had been a customer.

8. With regard to the defence of alibi, in placing reliance on the case of **Ssentale v Uganda (1968) EA 36** the prosecution bore the burden of disproving the same and proving the appellant's guilt. It was the argument of counsel that the prosecution proved its case beyond reasonable doubt. Counsel submitted that the charge that was meted on the appellant was proper and urged the court to uphold the conviction and sentence.

9. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno v Republic [1972] EA 32**, the Court of Appeal for East Africa expressed this principle thus:

"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..."

10. The prosecution called a total of nine witnesses before the lower court in proof of the particulars of the charge. **PW1, Joseph Musinga Kimuli** a chief of Kinanie Location who in 2014 met a man called Hassan who owns land in his location. He testified that Hassan sought to visit his land and he went ahead whereupon later he was alerted by screams that he learnt that Hassan had been attacked. It was his testimony that he went to the scene where he helped to arrest 11 people who were suspected to have attacked Hassan. He told the court that he was notified that there was cannabis in the appellant's mother's home and that the appellant's mother was taken away but in the process the appellant warned him (Pw1) of dire consequences. He testified that on 14.10.2014 he went to a restaurant called Blue Restaurant where he had some documents for Pw2; that after he handed the same to Pw2, he saw the appellant enter; that the appellant locked the door, took a pistol and shot him on the head. He told the court that he was taken to K.N.H where he was admitted and that he was issued with a P3 form at Machakos Police station, which was filled at K.N.H. On cross examination, he testified that he was given a tip that alcohol was being sold at the appellant's home by his mother and that his mother also sold cannabis. He testified that the appellant resisted the arrest of his mother and that he had carried bursary forms for Pw2 to pick. When recalled for cross examination he testified that he had been shot before in 2007 and that he was informed that those who shot at him had been arrested.

11. **Pw2** was **Sheila Kamene Kilonzo** who told the court that on 14.10.2014 she went to meet Pw1 at Blue Bar where she saw a man walk towards Pw1. She stated that she heard a gunshot and she heard Pw1 shout "Muti"; she found out that Pw1 was shot on the right side of the head. On cross examination, she testified that she attended an identification parade where she picked a man who was wearing the same clothes as the man she saw on the fateful night.

12. **Pw3** was **Jenipher Syombua Kimata** a bar attendant at Blue Bar in Kinanie. It was her testimony that on 14.10.2014, at 7 p.m., Pw1 came to the bar and she served him with a soda. She told the court that she also served another man with a beer and that she gave him change then she went out and heard a gunshot. She stated that she found the chief on a chair and she saw a man in a jacket walk away hurriedly but she did not see the face. She added that the person she had served the beer was the appellant. On cross examination, she testified that the appellant left his drink then she heard a gunshot; that there were three customers who were in the bar and that she saw two men in the bar.

13. **Pw4** was **Mwangi Kituku** who told the court that on 14.10.2014 he was at work in Kinanie Market Butchery and learned that Pw1 had been shot. On cross examination, he testified that he saw Pw1 enter the bar while alone.

14. **Pw5** was **Jackson Kioko Nziki**, a bodaboda rider who testified that on the material day he heard a gunshot and he also met the appellant at the gate. He testified that he knew the appellant who was his customer. He told the court that on 23.10.2014 he saw the appellant enter a hotel and he reported to the police who came and arrested him. On cross examination, he testified that he did not see what happened as he only heard a gunshot but he saw the appellant fleeing with another man on a motorcycle.

15. **Pw6** was **Edward Kyalo Timothy** who testified that on 14.10.2014 he was called by Pw2 who informed him that Pw1 had been shot. He told the court that he went to K.N.H where Pw1 informed him that if he died, then it was Mutisya who shot him. On cross examination, he testified that he was accompanied by another chief and an elder brother when Pw1 implicated Mutisya.

16. The court pointed out on 14.9.2016 that the matter was part-heard before Hon Simiyu who was on transfer. Section 200 was explained to the appellant in Kiswahili and he elected that the matter proceeds from where it had reached. The evidence of the remaining witnesses was taken by Hon A. Lorot.

17. **Pw7** was **Alex Mundindi Mwandawiro**, Assistant Superintendent of Police attached to the Forensics Ballistics Laboratory at the DCI Headquarters who had 14 years' experience as a firearms examiner. He testified on a report dated 11.11.2014 in respect of exhibits that were brought to the laboratory for examination. He told the court that he examined the exhibits and formed the opinion that the spent cartridges were fired from a gun that would be an EKOL Pistol manufactured in Turkey. He testified that Exhibit B was a Ceska 9mm calibre.

18. **Pw8** was **Dr. Joseph Maundu**, police surgeon who testified that on 25.11.2014 he examined Pw1 who had been referred to him from D.C.I.O Machakos. He told the court that he was alleged to have been shot with a bullet on 14.10.2014 and that the examination revealed that Pw1 had a fracture of the skull bone, a penetrating wound on the right parietal region of the head that caused head injury to the victim and that the resultant effect of the injury was paralysis of the left upper limb and left lower limb. He told the court that the weapon was a sharp penetrating object; he filled the P3 form on 23.10.2014 that he tendered alongside treatment notes from K.N.H, discharge summary and follow up.

19. **Pw9** was **Pc Christine Njeri**, the investigating officer who testified that on 26.10.2014 she received instructions to process the appellant for attempted murder; that the appellant was arrested on allegation that on 14.10.2014 he had shot Pw1. She told the court that it was established that Pw1 when being shot had called the appellant's name and that after he had been shot he was taken to Shalom Hospital and later K.N.H where he underwent surgery; that a ball bearing was recovered from his head that was taken for examination together with an empty 9mm PAK blank spent cartridge. She told the court that she issued Pw1 with a P3 form and obtained treatment notes from him; that the cartridge was collected from the scene but that as per the ballistic report the same were fired from an Ekol Pistol that was not recovered from the scene. She told the court that Pw1 saw the appellant at close range and even called out his name; that Sheila Kamene also saw the appellant.

20. That was the close of the prosecution case. After the close of the prosecution case, the court found that a prima facie case had been established against the appellant and he was put on his defence.

21. In his defence, the Appellant gave sworn evidence that on 14.10.2014 he was at work till evening fixing a vehicle that belonged to Michael Meto. He told the court that on 23.10.2014 he was at a restaurant where Ap's from Kinanie Chiefs camp entered and disarmed Stephen Kioyo Toret who was with him and arrested both of them. He told the court that Stephen was later released.

22. **Dw2** was **Rose Mwikali Matheka** the appellant's mother who testified that Pw1 lied that he had arrested her over alcohol.

23. **Dw3** was **Peter Mutisya Mwathe** who told the court that he had sued the chief over a land issue because he was interfering with the land in Kivae that is in Kinanie; that the chief was harassing him. He produced the pleadings in E.L.C 1546 of 2013. On cross examination, he testified that there were six defendants in E.L.C 1546 of 2013 and that the chief did not appear as one of the defendants.

24. The trial court took into account that the appellant had threatened Pw1 with dire consequences and that Pw1 saw the shooter; further that Pw2 had heard Pw1 shout "Muti" and that Pw1 named the appellant as his assailant to Pw6. It was noted that the appellant was seen leaving Blue Bar in a hurry. The court dismissed the appellant's defence of alibi and took issue why the same was not raised during cross examination and found that the prosecution case was proven and it found the appellant guilty; he was subsequently convicted. It was this decision that prompted the instant appeal

25. From the foregoing summary of the evidence adduced before the lower court, the grounds of appeal as well as the submissions, the pertinent questions to pose in this appeal are:

[a] Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of attempted murder to the requisite standard;

[b] Whether the trial court went into error in failing to consider the appellant's defence.

[c] whether the sentence meted on the appellant was excessive warranting for a review downwards.

26. Section 220 (a) of the Penal Code stipulates that:

"Any person who—

(a) attempts unlawfully to cause the death of another; is guilty of a felony.”

27. Section 388 of the Penal Code defines “attempt” as;

“(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.”

28. In the case of **Abdi Ali Bare v Republic (2015) eKLR** the Court of Appeal in considering the offence of attempted murder stated:-

“..... 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. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:

“D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position. loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder...”

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. In CROSS & JOINES' INTRODUCTION TO CRIMINAL LAW, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:

‘..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted...’

The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts.”

29. Having looked at the provisions of section 220(a) of the Penal code, as well as the above case it can be elicited that in a case of attempted murder, the prosecution must prove beyond reasonable doubt that:

a) The intention to unlawfully cause death of another (malice aforethought).

b) Manifestation of that intention by an overt act.

c) Participation of the accused.

30. I shall address myself to the elements of the offence in performing the duty of the 1st appellate court. As to whether there was intention to cause the death of another, the evidence of Pw1 was that he was attacked and shot with a gun; the P3 form, an admitted document indicated that the appellant had a deep penetrating wound that was caused by a sharp penetrating object and the injury that Pw1 suffered was classified as grievous harm. The injury would be one that points to the fact that the aggressor intended to end the life of the victim. The weapon used can be classified as a deadly weapon which if used on a vulnerable part of the body would result into death. It is quite obvious that Pw1’s injuries were a result of an overt act by his assailant or assailants to put into action their intention to kill him.

31. In my view, sufficient evidence was adduced to prove the first two ingredients of the offence of attempted murder beyond reasonable doubt.

32. Only Pw1 witnessed the attack against himself which the prosecution contends was an attempt at Pw1’s life. Pw2 told the court that she heard Pw1 scream “Muti” and Pw5 supported that evidence by claiming that he saw two men rushing from the scene towards a waiting motorcycle that was being ridden by Benedict Ndonola; that he saw the appellant at the gate of the scene and he recognized him as he was a customer. Pw6’s evidence was to the effect that the appellant was blamed for the attack.

33. As regards the element of the participation of the appellant, the evidence of identification of the appellant ought to be tested. In determining the correctness of visual identification, I have taken into account the following factors:

- (i) The length of time the appellant was under observation;
- (ii) The distance between Pw1 and the appellant;
- (iii) The lighting conditions at the time; and
- (iv) The familiarity of Pw1 with the appellant.

30. The court's dictum in **Roria v Republic (1967) EA. 583** is instructive in stating that the evidence of an identifying witness should be tested for its truthfulness and where conditions for correct identification are favorable, such task will be easier. Conversely, where the conditions are difficult, it would be unsafe to convict, in the absence of some other evidence connecting the accused with the offence.

31. In **Donald Atemia Sipendi v R (2019) eKLR** where Justice Mativo observed that in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

- a) *What were the lighting conditions under which the witness made his/her observation?*
- b) *What was the distance between the witness and the perpetrator?*
- c) *Did the witness have an unobstructed view of the perpetrator?*
- d) *Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?*
- e) *For what period of time did the witness actually observe the perpetrator?*
- f) *During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?*
- g) *Did the witness have a particular reason to look at and remember the perpetrator?*
- h) *Did the perpetrator have distinctive features that a witness would be likely to notice and remember?*
- i) *Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?*
- j) *What was the mental, physical, and emotional state of the witness before, during, and after the observation?*
- k) *To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?*

32. As regards the length of time the appellant was under observation, the same was more than a fleeting glance. He saw the appellant on the material day and by the time he was being locked in a room and being shot they were pretty close hence it can be said that this is enough time for Pw1 to have noticed his attacker. As for the distance between them, they were close enough when they were in the same room. As for the source of light at the time, the act occurred within the bar and there was natural evening light. As to the familiarity of Pw1 with the appellant, the appellant and Pw1 had met before. I see nothing to suggest that the complainant was not truthful; his evidence is believable.

33. The appellant told the court nothing that was of assistance to controvert the evidence of the prosecution witnesses who identified him. He imputed that he did not commit the act, that he was not at the crime scene on the material day. In my view, there was identification made under favourable conditions and the appellant's activities for the day did not shake the evidence of the prosecution. I am of the view that Pw1 had no doubt in the identity of the appellant as the person who shot him. Indeed, the complainant had already known him earlier when he had gone to arrest illicit brewers and drug dealers who included the appellant's mother when the appellant threatened to revenge.

30. There is also the aspect of identification by voice. Identification by voice is acceptable with a rider that it must be regarded with the greatest care and caution to avoid mistaken identity. (See **Kooky Sharma & Anor v Uganda (2002)2 EA 589.**) The evidence of Pw2 is to the effect that the appellant's name was partially shouted hence suggesting that the appellant was connected to the gunshot that she heard. The appellant had been adversely mentioned by Pw1 to Pw6 and this evidence would be persuasive and circumstantial in pointing towards the appellant as the attacker.

34. The appellant's counsel in his submissions had assailed the evidence pursuant to the identification parade, however in my view the parade is independent corroborative evidence. The identification having been conducted in favourable circumstances, in my view an identification parade would serve no useful purpose. Hence, any shortcomings on the identification parade were cured by the appellant's identification by the complainant and the witnesses.

35. The appellant's counsel challenged the trial court's dismissal of the appellant's defence of alibi. I find that the same would not absolve the appellant of culpability. The prosecution adduced evidence proving that the appellant was the perpetrator of the unlawful actions. In this case, the prosecution's evidence largely rests on the accounts of Pw1, Pw2 and Pw5 that placed the appellant at the scene of the crime. I have examined closely the identification evidence of Pw1 and the circumstantial evidence of Pw2, Pw5 and Pw6 and found it to be free from the possibility of mistake or error and therefore I reject any imputation of a defence of alibi. Even though the appellant's evidence on his alibi was not tackled by the prosecutor through cross-examination the same did not in any way watered the prosecution's case since the evidence

adduced was quite overwhelming against him. I am satisfied that there was cogent and consistent evidence which put the appellant at the scene of crime. His defence evidence was thus properly rejected by the trial court. I am satisfied that the elements of the offence were proved to the required standard. The resultant conviction was therefore safe and I see no reason to interfere with it.

36. With regard to sentence, the dint of section 220 of the Penal code is stated as “*is guilty of a felony and is liable to imprisonment for life.*” The appellant’s counsel has assailed the trial magistrate for failing to consider the mitigating factors. According to the court record, the appellant was considered as a first offender with no previous record who had aged parents who depend on him. I see no other mitigating factors that were brought to the attention of the court and were not considered. However, the appellant being a first offender ought to have been given a lenient sentence going by the decision of the Supreme Court’s decision in Francis Kariokor Muruatetu and 2 others Vs R (2017) eKLR wherein the courts were given a leeway to tinker with minimum sentences when meting out upon offenders. It would appear to me that the appellant ought to benefit from the said decision. The appellant remained in custody from 27.10.2014 until 22.6.2016 when he was released on bond. The said period will be taken into account herein. I am of the view that a sentence of twenty (20) years would be appropriate in the circumstances taking into account the fact that the victim suffered serious and life threatening injuries such as paralysis of both upper and lower limbs as confirmed by the doctor (Pw8).

37. The upshot of the foregoing is that the appeal partly succeeds. The appeal on conviction lacks merit and is dismissed while the appeal on sentence succeeds to the extent that the sentence imposed by the trial court is set aside and substituted with a sentence of twenty (20) years imprisonment.

It is so ordered.

Dated and delivered at Machakos this 13th day of October, 2020.

D. K. Kemei

Judge