REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL NO.34 OF 2016

(An Appeal arising out of the conviction and sentence of COURT MARTIAL delivered on 28th January 2016 in Kahawa Garrison, Nairobi in Court Martial Case No.1 of 2015)

SPTE MATHEW KIPKEMBOI MAIYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Mathew Kipkemboi Maiyo was at the material time a member of the Kenya Defence Forces. He was charged with three (3) counts. In the first count, he was charged with **committing a civilian offence** contrary to **Section 133(1)(b)** of the **Kenya Defence Forces Act** as read with **Section 220(a)** of the **Penal Code**. The particulars of the offence were that on 18th October 2014 while at Mandera Military Camp in Mandera County, the Appellant attempted to cause the death of No.78756 SPTE Said Abdi (hereinafter referred to as the complainant) by firing at him with two rounds of ammunition 5.56 mm from M4 rifle registration number KEKA W793072 which had been lawfully issued to him for service duties, an act he knew or ought to have known constitutes an offence. He was alternatively charged with **deliberately discharge** contrary to **Section 123(b)** of the **Kenya Defence Forces Act**. The particulars of the offence were that on the same day and in the same place, the Appellant discharged three rounds of ammunition 5.56 mm from his rifle registration number KEKA W793072 issued to him while on service duties, an act he knew or ought to have known constitutes an offence. He was further charged with **using insulting words** contrary to **Section 86(1)(b)** of the **Kenya Defence Forces Act**. The particulars of the offence were that on the same day and in the same place, with the intend to provoke disturbance, insulted NO.78756 SPTE Said Abdi using the word **"stupid"** or words similar to that effect, an act he knew or ought to have known constitutes an offence. When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charge. As regards the 1st count, the Appellant was sentenced to serve life imprisonment. As regard the 2nd count, the Appellant was sentenced to serve ten (10) months imprisonment. The two sentences were ordered to run concurrently. The Appellant was ordered dismissed from the Kenya Defence Forces pursuant to **Section 181** of the **Kenya Defence Forces Act**. The Appellant was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that did not support the charge to the required standard of proof. He faulted the Court Martial for failing to properly evaluate the evidence and thereby arrived at the erroneous determination that caused a miscarriage of justice to him. The Appellant was of the view that the prosecution's evidence was shaky, uncorroborated and lacked credibility. He faulted the Court Martial for failing to find that no proper investigations were conducted and therefore the evidence brought to court was not objective to sustain a conviction. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, learned counsel for the parties filed written submission in support of their respective opposing positions. They highlighted the submission during the hearing of the appeal. This court heard rival oral submission made by Mr. Osoro for the Appellant and a response thereto made by Ms. Atina for the State. Whereas Mr. Osoro highlighted aspects of the prosecution's evidence that in his view were contradictory, inconsistent and incredible to sustain a conviction on the charges brought against the Appellant, Ms. Atina for the State submitted that the prosecution had adduced evidence which established to the required standard of proof that the Appellant had indeed attempted to kill the complainant by firing at him with the rifle that he had been issued while in the course of his duties. This court shall revert to the arguments made on this appeal after briefly setting out the facts of this case.

The Appellant herein, as stated earlier was a member of the Kenya Defence Forces. He was assigned the duty by his superior officers on the material day of 18th October 2014 to go to Mandera Town to retrieve a military fuel tanker which had broken down. The Appellant was part of a military contingent that was on escort duties. According to the complainant, on the material day, he was on guard duty at the main gate of Mandera Military Camp. At about 2.30 p.m., the Appellant arrived back at the military camp. He went to the guard room to look for the rifle that had been assigned to him. He did not find it. The Appellant became agitated. He made a farce while looking for it and eventually

found it. In the course of looking for the rifle, an altercation ensued between the Appellant and the complainant. In a bid to cool down the Appellant, the complainant told the Appellant to go to the resting room.

Among officers present at the gate with the complainant at the time, were PW4 Corporal Abdi Ahamed Ali and PW7 Private Michael Nyongesa. They testified that when the Appellant found the rifle that was assigned to him he fired one round of ammunition to the ground. The sound of the fired ammunition alerted officers in the camp including PW6 Warrant Officer II Samuel Otieno. They testified that they saw the Appellant aim his rifle at the complainant. On realizing that he was being targeted, the complainant ran and hid behind the guard house. Two shots were fired at him before the Appellant was persuaded to surrender the rifle and was apprehended. When the Appellant was put on his defence, while admitting that he had indeed discharged ammunition from the rifle that was in his possession, he stated that the discharge was accidental. He denied that he had any intentions to kill the complainant. He asserted that since he was working in an operation area where he was expected to be alert at all the time, the rifle was already cocked at the time of the accidental discharge. He pleaded innocence in the charge.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence that was adduced before reaching its independent determination whether or not to convict the Appellant. In reaching its verdict, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and therefore must give due regard in that respect. (See **Okeno –vs- Republic [1972] EA 32).** In the present appeal, the issue for determination by this court is whether the prosecution proved to the required standard of proof beyond any reasonable doubt the charge of **attempted murder** contrary to **Section 220(a)** of the **Penal Code**.

This court has carefully re-evaluated the evidence that was adduced before the Court Martial. It has also considered the submission both written and oral made by parties before this court. The Appellant was charged with an inchoate offence. Black's Law Dictionary, 8th Edition defines **"inchoate"** thus:

"Partially completed or imperfectly formed: Just begun Cf choate – inchoateness. "The word "inchoate" not much used in ordinary discourse, means "just begun", "undeveloped". The common law has given birth to three general offences which are usually termed "inchoate" or "preliminary" crimes – attempt, conspiracy, and incitement. A principle feature of these crimes is that they are committed even though the substantive offence is not successfully consummated. An attempt fails, a conspiracy comes to nothing, words of incitement are ignored – in all these instances, they may be liability for the inchoate crime." Andrew Ashworth, Principles of Criminal Law 395 (1991)."

Section 220 of the **Penal Code** provides as follows:

> ***"Attempt to murder***
>
> ***Any person –***
>
> ***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."***

Section 388 of the **Penal Code** defines what constitutes an attempt. It provides thus:

> ***"(1) when a person, intending to commit an offence begins to put his intention into execution by means adapted to is fulfillment, and manifest his intention by some overt act, but does not fulfill his intention to such an extend 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 offence 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."***

In **Gerald Wathiu Kiragu –vs- Republic [2016] eKLR**, Ngaah J held thus when considering the ingredients of what the prosecution must establish to prove the charge of **attempted murder**:

> ***"The essence of the offence of attempted murder under Section 220(a) of the Penal Code therefore is the intent to murder; intent is the principle ingredient of this crime. It appears that much as the submission by the counsel for the State appears logical and attractive, they are inconsistent with the law on attempted murder as understood under Section 220(a) of the Penal Code. Contrary to what the learned counsel suggested and what the learned magistrate held, in order to sustain a conviction under this section it is not sufficient to demonstrate or to prove that the offence would have been murder if death had ensued; it must be proved that the Appellant had a positive intention unlawfully to cause death."***

In support of his decision, Ngaah J cited the Court of Appeal case of **Republic –vs- Luseru Wandera s/o Wandera (1948) EACA** where it was held that the intention to merely cause grievous harm, whilst sufficient to support a conviction for murder, is not sufficient to support a conviction under **Section 208(1)** of the **Penal Code** for attempting unlawfully to cause death. The court was of the view that a conviction for this latter offence can only be supported by proof of a positive intention to unlawfully cause death. This court agrees with the reasoning.

In the present appeal, the prosecution was required to establish to the required standard of proof that the Appellant intended to murder the complainant. From the evidence adduced, it was clear to this court that the Appellant, a trained soldier, would have killed the complainant if he had the intention to do so. He was armed with a rifle which had 30 rounds of ammunition. He discharged three rounds of ammunition, one of which was aimed to the ground. The rifle was in working condition when it was examined by the Firearm Examiner. There was nothing that would have stopped the Appellant from discharging the 30 rounds of ammunition if he intended to kill the complainant. The complainant testified that the Appellant chased him while shooting at him. The distance between the position where the Appellant was and where the complainant was said to be less than 10 metres.

This court's re-evaluation of the evidence adduced clearly points to the fact that the Appellant did not have the intention to murder the complainant as required under **Section 220(a)** of the **Penal Code**. It was apparent from the evidence adduced, that the Appellant was under extreme stress on account of the escort duties that he had been assigned on that day. He was not happy when he found the rifle that he had been assigned missing. It was apparent that the complainant's intervention in trying to calm him down the agitated complainant did not achieve the desired result. Instead, it worsened the situation. The complainant because the target of the Appellant's abuses. To his credit, the complainant did not react to the abuses.

From the evidence adduced, it was clear that prior to the incident, the Appellant had a good record. Taken in the context in which the incident occurred, this court is not prepared to find that the Appellant had the intention to kill the complainant. The shots that he fired were more out of frustration and work related stress than an intention to kill the complainant. This court is fortified in its decision by what subsequently happened when the Appellant was approached by his colleagues to surrender the rifle. The Appellant dropped the rifle to the ground. He was subdued by his colleagues. He did not resist arrest. It appeared that once the Appellant discharged the three rounds of ammunition, he regained his mental stability. This court therefore holds that the prosecution failed to prove to the required standard of proof beyond any reasonable doubt that the Appellant had the intention or formed the intention to kill the complainant. The mere fact of shooting at the complainant is not sufficient to establish intention in a charge of **attempted murder** contrary to **Section 220(a)** of the **Penal Code**. The Appellant's appeal in regard to conviction for attempted murder is allowed.

As regard to the alternative offence of **unlawful discharge of ammunition** contrary to **Section 123(a)** of the **Kenya Defence Forces Act**, this court holds that the prosecution did proof to the required standard of proof that the Appellant did negligently discharge ammunition from the rifle that he was assigned. He did so in frustration and when he was under stress from the circumstances of his work environment. He was properly convicted by the Court Martial. This court accordingly convicts the Appellant of the alternative charge.

In the premises therefore, in respect of the Appellant's appeal against conviction on the 1st count of committing a civilian offence of **attempted murder** contrary to **Section 220(a)** of the **Penal Code**, this court holds that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt. The Appellant is acquitted of the charge. As regard the alternative charge of **unlawful discharge of ammunition** contrary to **Section 123(a)** of the **Kenya Defence Forces Act,** the prosecution proved its case to the required standard of proof beyond any reasonable doubt. Since the Appellant has served custodial sentence in respect of the 2nd count, in respect of the 1st count, the Appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. He shall be dismissed from the Kenya Defence Forces as ordered by the Court Martial. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF JUNE 2018

L. KIMARU

JUDGE