



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 106 OF 2017

BENSON MUTUA MWANZIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from original sentence dated 31/7/2017 in Kangundo CM Criminal Case No 678B of 2014 - D Orimba, SPM)

J U D G E M E N T

1. The Appellant **BENSON MUTUA MWANZIA** was convicted after trial of *attempted murder* contrary to **section 220(a)** of the *Penal Code*. It was alleged in the particulars of the charge that on the 21st day of October 2014 at Nduu village, Matheini location, Matungulu Sub-County within Machakos County, he unlawfully attempted to cause the death of one **SAMUEL KISOI MUSIMBA** by shooting him with an arrow. He was sentenced to serve seven (7) years imprisonment.
2. Being aggrieved and dissatisfied with the Lower Court's sentence, the Appellant filed this appeal and relied on various grounds, including; that he was not given enough time to prepare his defence and that he was convicted on unreliable evidence.
3. The complainant had a plot of land adjacent to the appellant's. The appellant has not denied having shot and injured the appellant. He alleges that he was acting in self-defence. The trial court was satisfied that the circumstances of the attack were such that the Appellant's intention was to cause the complainant grievous harm or death because he did not tell the court whether the complainant was armed and attempted to injure him, or the danger posed to his life by the complainant.
4. I have been called upon to interfere with the sentence imposed by the Lower Court. In determining the issue I must reconsider circumstances in which the Lower Court came up with the sentence imposed and come up with my own conclusion bearing in mind that I had no opportunity of hearing the Appellant mitigate.
5. In his written submissions, the appellant stated that he is a father of 6 children who entirely depend on him and have no one to take care of them. He has been rehabilitated and has changed mentally and spiritually. He is a first time offender.
6. In a response thereto, the State through **Mr. Machogu** Prosecuting Counsel opposed the appeal arguing that the sentence was not harsh and excessive as to amount to a miscarriage of justice. He urged the court to uphold the sentence imposed.
7. **Section 354 (3)(b)** of the Criminal Procedure Code provides that:-

“In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.

8. Sentencing is an exercise that is at the discretion of the trial court, and therefore I should be careful in interfering with the said discretion. In ***James v Republic (1950) EA 147***, it was observed that the court will also not ordinarily interfere with discretion exercised by a trial judge unless it is evident that the Judge has acted upon some wrong principles or overlooked some material facts.
9. There is also need to have uniformity and certainty in sentences that courts met out on similar offences committed under similar circumstances. In the case of **Francis Muteti Kimanzi v Republic** [2015] eKLR the appellant had been convicted for attempted murder and sentenced to life imprisonment, **Dulu J** reduced the sentence to 10 years imprisonment. In the case of **Jane Koitee Jackson v republic** [2014] eKLR **Mks Criminal Appeal No.140 of 2009, Gacheru** and **Jaden JJ** upheld a sentence of 10 years which the appellant had been sentenced to serve for attempted murder. In the case of **John Mithika v Republic** [2013] eKLR the appellant had been sentenced to life imprisonment for attempted murder, **Makau J** reduced the sentence to 20 years imprisonment.

10. The offence of attempted murder carries a maximum sentence of life imprisonment. The Appellant got only seven (7) years. The charge sheet showed that the Appellant was arrested on 21st October, 2014 and presented in court on 22nd October, 2014, wherein he was granted bond but the same was suspended. As he was sentenced on 31st July, 2017, it means he had spent two (2) years eleven (11) months and 10 days in remand custody during his trial.

11. I note that in sentencing the appellant, the trial court took into consideration mitigating factors. In light of the above decisions and taking into account the need for uniformity of sentence and looking at the trial court record and submissions of both parties, there would be no valid reason at all to interfere with the Appellant's sentence, which was not excessive or harsh (and in fact on the lenient side) in the circumstances of the case.

12. I will therefore not interfere with the sentence meted out to the Appellant. The appeal lacks merit. The same is dismissed.

It is so ordered.

Signed, Dated and delivered at Machakos this 9th day of November, 2018.

D.K. KEMEI

JUDGE