



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT GARISSA  
CRIMINAL APPEAL NO. 24 OF 2017

ADAN KULLOW HUSSEIN .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(From the conviction and sentence in Mandera SPM Criminal Case No. 86 of 2016 -D. A Areri SRM)**

**JUDGMENT**

The appellant was tried in the magistrate's court at Mandera with causing grievous harm contrary to section 234 of Penal Code. The particulars of the offence were that on 29th May, 2016 at Bulla Asefina in Mandera East Sub-county within Mandera county in the Republic of Kenya unlawfully did grievous harm to Abdijabir Abdow by stabbing him on the stomach. He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve 10 years imprisonment.

Dissatisfied with decision of the trial court, he has now come to this court on appeal. He relied on an amended petition of appeal, whose grounds are as follows:-

1. The trial magistrate erred in convicting him without considering that the facts and circumstances did not prove the charge of attempted murder.
2. The magistrate erred to convict him without considering that the offence was common assault and committed due to provocation.
3. The magistrate erred by not considering that there existed disagreement between the appellant and his in-laws.
4. The P3 Form was dubious and the doctor misled the court.
5. The prosecution evidence was contradictory and inconsistent
6. The Prosecution failed to prove their case beyond reasonable doubts.

The appellant also filed written submissions, which he relied upon. He elected not to tender oral submissions. I have perused and considered the said written submissions.

The learned Prosecuting Counsel Mr. Okemwa submitted that the appellant was tried and convicted of attempted murder. According to counsel, the appellant attempted to murder the complainant by stabbing him in the stomach. Counsel emphasized that a total of five prosecution witnesses gave evidence in the

case. It was the prosecution position that the appellant stabbed the complainant with a knife and that the injury suffered was serious and could cause death. Counsel also submitted that the appellant was positively identified as the culprit.

Lastly, counsel supported the sentence, as the maximum sentence for the offence was life imprisonment.

In response to the Prosecuting Counsel's submissions, the appellant stated that the complainant injured himself in a struggle which arose from a family grudge.

In summary the evidence of the prosecution was from five witnesses. It was that on 29<sup>th</sup> March, 2016 at 7.30 pm, the appellant went to the house of PW3 Adan Ibrahim Maalim at Meta meta in Mandera. The appellant, who was the son in-law of PW3, suddenly stabbed the complainant PW1 Abdijabis Abdow Issack in the stomach with a knife, and stated that he would kill the complainant and leave Mandera.

A report on the incident was made to PW2 Abdoo Issack Abdi the father of the complainant who came and took the complainant to hospital. The complainant was admitted at Mandera Referral Hospital for 3 days, treated and a P3 form filled by PW4 Abdijabil Mohamed Yussuf a registered Clinical Officer. The injury suffered by the complainant was classified as maim.

The appellant was then arrested and charged.

In his defence the appellant gave unsworn testimony. It was his evidence that he brought milk to his wife DW1 who had gone back to her parents home due to family disagreements. On entering the room where his wife was sleeping he found his wife with another man in bed. That man then jumped on him with a knife and they struggled and, in the process, that knife injured the complainant in the abdomen.

The appellant called one witness DW1 Hawa Adan his wife. She stated that indeed the complainant had been visiting her and that, on that day, the appellant found them sleeping together and a struggle ensued between the two men.

From the evidence on record the learned trial magistrate found that the prosecution had proved their case and convicted and sentenced the appellant. Therefrom arose the present appeal.

This is a first appeal. As a first appellate court, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witness testify to determine their demeanor and give due allowance to that fact. See the case of OKENO VS REPUBLIC (1972) EA 32.

I have re-evaluated the evidence on record. I have perused the charge sheet and the judgment.

The appellant was initially charged with attempted murder contrary to section 220 of the Penal Code. That was count one. In count two, he was charged with causing grievous harm contrary to section 234 of the Penal Code. On 20<sup>th</sup> April, 2016 however, the prosecutor stated that he had amended the charge and tendered the amended charge in court. The amended charge was for causing grievous harm contrary to section 234 of the Penal Code. The appellant was thus tried for causing grievous harm.

The judgment does not state the offence for which the appellant was convicted as required under section 169 of the Criminal Procedure Code (Cap.75). Because of that, the appellant initially filed an appeal against conviction for grievous harm, but later filed an amended petition of appeal referring to attempted murder. The Prosecuting Counsel fell into the same mistake of referring to a conviction for attempted murder in his submissions in this appeal.

In my view, the magistrate should have stated the offence and section under which the appellant was convicted at the conclusion of the judgment. However, in my view since the magistrate commenced the judgment by referring to the offence of grievous harm since the and sentence for grievous harm and that for attempted murder is life imprisonment, I find that no prejudice was caused to the appellant. In my

view the irregularity is curable under section 382 of the Criminal Procedure Code Cap 75. The conviction cannot thus be disturbed on that account.

Coming now to the merits of the appeal, the complainant was certainly injured. The injury was classified as "maim". The appellant stated that he struggled with a complainant because he found him in bed with his wife. He stated that the complainant was armed with a knife and that in the struggle, injured himself. DW1 the wife of the appellant confirmed that she was found in bed with the complainant by her husband the appellant. She also stated that the two men struggled.

The knife which was found with appellant during arrest was not examined for blood stains. The appellant was found with that knife a few days after the incident. It was thus not established that that was the knife which was used to stab the complainant.

However, in my view it is highly unlikely that the complainant stabbed himself in the struggle. In my view the stab on the complainant was caused by the appellant. He had a reason to stab the complainant as he found him in bed with his wife.

I thus find that the conviction was proper as there was no indication that the appellant was acting in self defence. I will uphold the conviction.

With regard to sentence, the maximum punishment for grievous harm is life imprisonment. The appellant was sentenced to serve 10 years imprisonment. I am aware that sentencing is an exercise of discretion by a trial court and that appellate courts should be slow to interfere with the sentence. However with the circumstances of this case where the complainant was found by the appellant in bed with the appellant's wife, in my view, the magistrate should have sentenced the appellant for a lesser term.

I will thus vary the sentence and reduce it to four (4) years imprisonment.

Consequently, I dismiss the appeal on conviction and uphold the conviction of the trial court for the offence of grievous harm contrary to section 234 of the Penal Code. I however vary the sentence. I set aside the sentence of 10 years imprisonment and order that the appellant will instead serve 4 years imprisonment from the date on which he was sentenced by the trial court.

**Dated and delivered at Garissa on 11<sup>th</sup> day of July, 2017**

**George Dulu**

**Judge**