



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 14 OF 2015

JARED OICHOE ONDABUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction in Ogembo Ag. CM CR. NO. 925 of 2011) (Hon. D.O. Ogola C.M. and sentence of Hon. Wairimu, Ag. Principal Magistrate)

JUDGMENT

1. The appellant, Jared Oichoe Ondabu, appeared before the Principal Magistrate at Ogembo, charged with attempted murder, contrary to **Section 220 (a)** of the penal code, in that on the **11th August 2011**, at Tulwa sub location Gucha District Kisii County, attempted to unlawfully cause the death of **Tom Obate Oyaro** by cutting him with a panga at the neck.
2. Upon his plea of not guilty, the appellant was tried, convicted and sentenced to life imprisonment. He was however, dissatisfied with the conviction and sentence and preferred this appeal on the basis of the grounds of appeal filed by himself on **19th February 2015**, and the supplementary grounds of appeal filed on his behalf on **24th March 2015** by the firm of **M/s. Oguttu Mboya & Co. Advocates.**
3. Basically, the appellant complains that he was convicted on the basis of evidence which was insufficient, unreliable and contradictory and that he was not accorded an opportunity to be heard when he was not allowed to make his submissions. That, his defence was disregarded by the trial court and that, the burden of proof was shifted to him. The appellant also complains that despite calling for the probation officer's report, the trial court disregarded the same thereby depriving him of his legitimate expectations.
4. At the hearing of the appeal, learned counsel, **Mr. Ochwangi** appeared for the appellant and presented written submissions in support of the appeal. The learned prosecution counsel **Mr. Ochieng**, conceded the appeal in his responding written submissions and stated that the appellant ought to have been convicted for the lesser offence of assault causing actual bodily harm, contrary to **Section 251** of the penal code.
5. Having considered the grounds of appeal in the light of the submissions by both sides and notwithstanding the concession by the state/respondent, the duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witness (see, **Okeno vs Republic [1972] EA 32.**)

6. In that regard, the case for the prosecution was briefly that the complainant **Tom Obare Oyaró (pw1)** and the appellant were persons known to each other and said to be relatives. On the material date at about 5.00p.m., the complainant was in his shop cum hotel when the appellant proceeded there with the intention of buying cooking fat and sugar on credit. The complainant informed him that he had an outstanding debt. It is then that he left the place and returned shortly thereafter armed with a machete (panga) which he used to inflict a cut on the complainant's neck as the complainant was bending down washing dishes. He (appellant) then left the scene.

7. **Robert Manyara (pw2)** and **Jeremiah Moranga Momanyi (pw3)**, were at the scene at the material time. They saw the appellant approach the complainant and cut him with the panga. They assisted the complainant as he was bleeding profusely from the injury suffered and arranged for him to be taken to hospital by **Justus Aibu (pw4)**, who used a motor cycle for that purpose.

The complainant was initially taken to Nyamache District hospital before being taken to Ram hospital where he was admitted for about a week.

8. **P.C. Wako Alichá (pw5)**, investigated the case after receiving the necessary report. In the process, he issued a medical examination report (P.3 form) to the complainant who was thus examined at Gucha Level 4 hospital and the report filled and signed accordingly by a medical officer.

Wycliffe Atambo (pw6), a clinical officer at Gucha Level 4 hospital produced the report in court P.ex 2) on behalf of his colleague one Mr. Okioma.

On completion of the investigation, **P.C. Alichá (pw5)** preferred the present charge against the appellant.

9. The defence case was that the appellant did not commit the offence and was framed by witnesses who gave false evidence against him. He implied that he was not indebted to the complainant as claimed and if he was, then the amount of the alleged indebtedness was inflated. He contended that he had never wronged the complainant or anybody else and reiterated that he did not assault the complainant. He said that he was away from home sowing millet (wimbi) when the incident occurred. He thus implied that he was not at the material scene when the offence occurred.

10. The learned trial magistrate after considering all the foregoing evidence concluded that the offence was duly established and proved beyond any reasonable doubt against the appellant.

This court's assessment of the evidence reveals that the basic issue arising for determination was **firstly**, whether the material ingredients of the charge were fully established and **secondly**, whether if any offence was committed against the complainant, the person responsible was the appellant.

11. The defence raised was an absolute denial coupled with an "*alibi*".

With regard to the offence, *Section 220 (a)* of the penal code provides that any person who attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life. The question herein is whether in assaulting the complainant with a panga on the neck, the assailant had the intention to cause the death of the complainant?

12. Necessary intent could be implied from the degree of injury and the position of the injury. Here, it was alleged that the complainant was bending down washing dishes when the appellant approached him armed with a panga and cut him on the neck using it.

Indeed a person who inflicts a panga blow on the neck of another person would most likely than not be viewed as having an intention to kill that other person. If the victim dies, the assailant would be a prime candidate for the offence of murder, but if the victim survives as in this case, the resultant offence would most likely be assault causing bodily harm or grievous harm or even attempted murder. It all depends on the degree of injury suffered by the victim and the circumstances leading to the assault. Medical evidence would be most vital in determining the actual offence committed by an assailant.

13. Herein, the medical report (p3 form) (p.ex.2) showed that the complainant was not maimed or grievously harmed but merely harmed without any threat to his life. The harm was thus not capable of endangering his life and therefore the offence committed was not grievous harm or attempted murder but assault causing actual bodily harm contrary to **Section 251** of the penal code. This is the more reason why the learned prosecution counsel conceded the appeal in so far as it related to the offence of attempted murder. The medical evidence herein supports that concession.

14. This court must therefore find that the ingredients of the charge of attempted murder were not established and instead what was established was the lesser offence of assault causing actual bodily harm.

The fact that the assault aimed the panga at the complainant's neck did not by itself translate into an attempt to murder for which there must be an element of positive intention to kill which was herein not established (see, **Odhiambo Owino & Another .vs. Republic (2014) e KLR**).

15. Having found that the complainant was indeed assaulted and occasioned bodily harm, the second issue for determination by the court was whether the appellant was the person responsible for the offence.

Apart from denying the offence, the appellant also raised an "alibi" which from the evidence of Robert (pw2) and Jeremiah (pw3) was clearly discredited and displaced. The two witnesses previously knew the appellant. They were present at the scene of the offence when it occurred. They firmly stated that they saw the appellant confront and cut the complainant. They therefore placed him at the scene contrary to what he stated by way of his "alibi".

16. Suffice to hold that the defence raised by the appellant was clearly unsustainable.

This court must therefore find that he was the person criminally responsible for assaulting the complainant and occasioning him actual bodily harm contrary to **Section 251** of the penal code. He is hereby convicted for that offence instead of the offence of attempted murder pursuant to **Section 179** of the Criminal Procedure Code. Accordingly, his conviction by the trial court for attempted murder contrary to **Section 220(a)** of the penal code is hereby quashed.

17. The sentence imposed on the appellant by the trial court was life imprisonment and was anchored on the offence of attempted murder. It was lawful but harsh and excessive given that the appellant was a first offender. It is hereby set aside and substituted with two (2) years imprisonment for the offence of assault causing actual bodily harm.

It is noted that the trial court asked for a probation officer's report prior to sentencing the appellant but disregarded it despite its alleged favourable nature. Such action was not unlawful as the trial court was not legally bound to act in accordance with the recommendations of the probation officer. The question of "*legitimate expectations*" did not arise herein and was a shot in the dark inasmuch as it was raised in the appellant's submissions.

18. All in all, this appeal succeeds to the extent of the findings hereinabove respecting conviction and sentence.

Ultimately, the appellant shall serve two (2) years imprisonment for assaulting and occasioning bodily harm to the complainant, contrary to **Section 251** of the penal code.

J.R. Karanja

Judge

3/3/2016

[Delivered and signed this 3rd day of March 2016.]