



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO.31 OF 2013

BONIFACE ATEKA ONGARA.....APPELLANT.

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment of the Hon. D. Ochenja (Ag. Chief Magistrate)

in

Kibera Chief Magistrate's Criminal Case No.287 of 2013 delivered on

24th January, 2013)

JUDGEMENT

Boniface Ateka Ongara the appellant herein was charged with attempt to murder contrary to Section 220 of the Penal Code. It was alleged that on the 22nd day of January 2013 at Nkoroi village in Kajiado County jointly with another not before court attempted to murder Edward Maina Nguchuga. He was convicted on his own plea of guilty and sentenced to twenty years imprisonment on 24th January 2013.

His initial appeal was both against the conviction and sentence but at the time of hearing the appeal he proceeded only against the sentence. He submitted that the same was harsh and excessive in the circumstances; he suffers from Kidney failure and is remorseful. He urged the court to reduce the same.

The appeal was opposed. Learned state counsel M/s Wario submitted that the offence was serious, the complainant was injured and admitted to hospital and in any event given the facts of the case the sentence was lenient.

I have looked at the facts of the case. The appellant was a hired mercenary having been engaged by the wife of the complainant to kill the complainant. Both the complainant and his wife had marital differences. He was paid Kshs.10,000/- as down payment out of the Kshs.50,000/- agreed for the task. On the material date, 22nd day of January 2013 the appellant went to the house of the complainant and hid himself under the bed during the entire day awaiting the complainant to get home and execute the mission. The complainant went to the home at night and at about 9.30pm the appellant emerged from under the bed and accosted him while armed with a knife. A commotion ensued and the complainant seeing eminent danger struggled with the appellant and subdued him. The appellant managed to escape in the darkness but the complainant suffered serious stab wounds on the neck. His relatives were able to rescue him in time and they took him to Nairobi Hospital where he was admitted in serious condition. By the time the appellant took the plea, the complainant was still admitted in the Intensive Care Unit of the

Hospital. The appellant was known to the complainant and that is how he was arrested.

Under section 220 (b) of the Penal Code, any person who is convicted of the offence of attempt to murder is liable upon conviction to imprisonment for life. Where the law does not set a minimum sentence, the trial court must exercise its discretion in sentencing judiciously. The sentence must be commensurate with the offence, facts of the case and the moral blameworthiness of the offence. See **OmuseVs. Republic 2009KLR, 2014** where the Court of Appeal in referring to **AmbaniVs.Republic (1990) KLR, 161** noted as follows.

“Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence”.

In the instant case, the appellant’s hired task was to murder and not injure. What saved the complainant was his tact and probably God given strength to defend himself. Had the complainant not been strong enough to defend himself he would be history by today. I find therefore that the circumstances of the case were very serious and called for stiff penalty as a deterrent measure. Although the appellant is ailing from kidney problems I am unable to fathom that the sickness should be treated as a mitigating factor against such heinous act. In any event he can access treatment while in the prison. In the circumstances, this appeal fails and the same is dismissed.

DATED and DELIVERED at NAIROBI this 8th day of June 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the Presence of:

1. The appellant in person.
2. M/s Nyauncho, for the respondent.