REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. E003 OF 2024

WYCLIFFE ONSASE OGOTI……

APPELLANT

VERSUS

REPUBLIC……

……RESPONDENT

(Being an appeal from original conviction and sentence in Loitokitok SRM's Criminal Case No. E078 of 2022)

JUDGMENT

1. **Wycliffe Onsase Ogoti** (hereafter the Appellant) was charged with the offence of Attempted murder contrary to Section 220 A of the Penal Code. The particulars stated that on 2.6.2022 at **Maasai Wilderness Conservation Trust Camp** in **Loitokitok** sub-county of **Kajiado County**, he attempted to unlawfully cause the death of **Luka Belpietro** by stabbing him with a sharp object, namely a knife.
2. In the alternative, he was charged with unlawful wounding contrary to Section 237A of the Penal Code. He faced a second count of stealing by servant contrary to Section 281 of the Penal Code, particulars thereof being that on 2.6.2022 at **Maasai Wilderness Conservation Trust**

ORIGINAL

Camp, **Loitokitok** sub-county **Kajiado County**, being the servant of **Maasai Wilderness Conservation Trust Camp**, he stole Kshs. 81,962 the property of his employer which he came into his possession by virtue of his employment. He denied the charges but following a full trial, he was acquitted on the second count but convicted on the first count and sentenced to 10 years imprisonment.

3. Pursuant to leave granted to him in **Misc. Cr. Appln. No. E 011 of 2022** by R**ayola J** on 20.03.2023, the Appellant filed the present appeal. Although the six grounds of appeal attached to his application for leave to appeal out of time indicated that the Appellant intended to challenge only his conviction, the petition of appeal eventually filed herein on 7.02.2024 via four grounds, and which is the subject of this judgment, was confined to the sentence.
4. It would seem that thereafter the Appellant, probably seeking a shorter route, first opted to file an application for the revision of his sentence, as this court discovered while combing through the recesses of the original proceedings in the lower court file in the process of preparing this judgment. The court stumbled on a ruling of this court delivered on 6th October 2023 in **Misc. Cr. Appln. No. E046 of 2023.** The ruling was in respect of an application by the Appellant dated 2nd August 2023 seeking review of his sentence. The court therefore called for and perused the file in respect of the said application. That application invoked the court's revisionary powers under Section 362 and 364 of

ORIGINAL

the Criminal Procedure Code and was premised on grounds that the Appellant was a first offender, had a young family, was remorseful and that prior to sentencing he had reconciled with the complainant in the lower court case. He also cited his failing health and education and his family's and his own prospects all which he said stood adversely impacted by his imprisonment. The application was dismissed by this court **(Mulwa J)** on 6.10.2023. The prosecution, as the court, was also apparently unaware of this history.

5. It may well be that the Appellant who has all along been acting in person did not have professional legal advise and may not have realized the need to disclose to this court the existence of the foregoing revision application. However, certain aspects of the revision application replicated on this appeal suggest that the Appellant may by this appeal have been angling for another bite at the cherry. At the same time, the appeal also raises new legal questions and the court was caught in a dilemma between altogether striking out the appeal which had already been admitted, or retaining those new legal challenges on the sentence, in the interest of justice. The court shall address this matter later in this judgment.
6. Be that as it may, the present appeal filed on 7.02.2024 is based on the following grounds :

ORIGINAL

a. That the learned trial magistrate erred in law and fact when she overlooked the sentencing guidelines policy and passed on a harsh sentence.

b. That the learned trial magistrate erred in law and fact when she overlooked my social report and passed on a harsh sentence.

c. That the learned trial Magistrate erred in both law and fact when she overlooked my mitigation and passed on a harsh sentence.

d. That the learned trial magistrate erred in law and fact when she failed to consider and include the time I spent in custody during my trial.

Submissions

7. The appeal was canvassed through written submissions. The Appellant filed two sets of submissions, dated 10.1.2024 and 27.3.2025, respectively. The former submissions address several grounds, some of which are also addressed in greater detail in the latter submissions. Concerning grounds 1 and 2 the submissions dated 10.1.2024 are to the following effect. The Appellant contended that the 10 year sentence was harsh and excessive citing guidelines in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015 (Muruatetu I).**The Appellant also relied on the case of

ORIGINAL

Felix Nthiwa Munyao vs. Republic Nairobi Court of Appeal Criminal Appeal No. 187 of 2000, and the **Sentencing Policy Guidelines (2016),** which emphasize rehabilitation as a core sentencing objective. The Appellant asserts that the trial court's acknowledgment of his potential to reform was not reflected in the sentence, which jeopardizes his nursing career and family life, hence defeating the rehabilitative purpose of sentencing.

8. On the second ground, the Appellant argued that the trial magistrate erred by failing to adequately consider the social inquiry report, which is a statutory and policy requirement under the **Sentencing Policy Guidelines (2016***)*. Here citing **Joseph Kaberia Kahinga and Others v The Attorney-General** , where the court held that ***''It would amount to the violation of accused person's right to fair trial as provided under Article 50(2) of the Constitution if the court does not receive and consider mitigating factors and other statutory and policy pre-sentencing requirements. "***
9. The Appellant faulted the trial court for only considering the fact that the complainant almost lost his life, while ignoring other numerous factors in his favor. He again cited **Felix Nthiwa Munyao vs. R** (supra), where the Court of Appeal reduced a life sentence to 15 years while stating that a court ought to consider inter alia the circumstances under which the offence was committed, as well as the circumstances of the accused person, including his antecedents

ORIGINAL

and period of incarceration during trial. The applicant contended that similar mitigating factors in his case were overlooked.

10. In the subsequent submissions, the Appellant further attacked the 10 year sentence as excessive, accusing the trial court of adopting a deterrent philosophy rather than the restorative justice model envisioned under Article 50(2)(p) of the Constitution. He cited **S V Scott-Crossley 2008 (1) SACR 223 (SCA**), to the effect that while it was in the interest of justice that crime should be punished, an excessive punishment serves neither the interest of justice nor of the society.

11. He further relied on the case Of **Titus Ngamau Musila alias Katitu V R Criminal Case No.78 of 2014,** where quoting the case of **Santa Singh V State Of Punjab [1978] 4 SCC 190,** the court held that:

> **"Proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances-extenuating or aggravation of the offence. The prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of re-integration of the offender to a normal**

ORIGINAL

life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence."

12. The Applicant contends that the injury sustained by the complainant was classified as "harm" and not "grievous harm," suggesting that the case aligns more with common assault. And invoking dicta In **Kiptanui V Republic (Criminal Revision E011 of 2024) [2024] KEHC 4785 (KLR),** where the court set aside the harsher sentence while observing that there existed a conflict between Sections 220(a) and 389 of the Penal Code which resulted in violation the petitioner's rights under Article 50(2)(p) of the Constitution, and that he was entitled to benefit from the lesser sentence imposed by Section 389 of the Penal Code.

13. For that proposition, he also cited **Boniface Juma Khisa V Rep (2011) eKLR; Elizabeth Waithiegeni Gatimu V Rep (2015) eKLR;** and **the case of Tuck And Sons V Priester (1887) 19 QBD 629** where it was held that where there are two constructions in respect of the punishment prescribed, the more lenient one ought to be adopted. He further complains that the trial court failed to consider his mitigation, including his status as a first offender, his pursuit of higher education, and his role as a father to young children. Emphasizing that

ORIGINAL

mitigation is a constitutional facet of fair trial under Article 25(c), and its omission prejudices justice.

14. Finally, he alleges contravention of Section 333(2) of the Criminal Procedure Code, as his 2 years and 10 months detention in custody during trial was not properly considered. Here citing **Ahamad Abolfathi Mohammed & Another V Rep (2018) eKLR** where the Court of Appeal stated that Section 333(2) of the Criminal Procedure Code was introduced to empower courts while sentencing offenders to include the period already spent in custody pending trial. In conclusion, the Appellant invoking Article 159 of the Constitution and Section 35 of the Penal Code, and sought that the sentence be quashed and substituted with time already served, citing **Bethwel Kibor V Rep (2009) Keca 143(KLR.**

15. By their undated submissions, the Respondents asserted that the conviction and sentence were lawful. On the former question, the Respondent reiterated that through 16 witnesses called at the trial, all elements of attempted murder were proved. On the element of mens rea, they cited **R v Whybrow (1951) 35 Cr App Rep 141,** where **Lord Goddard C.J.** stated that in a charge of attempted murder, the intent is a principal ingredient of the offence, as echoed in **Cheruiyot v Republic (1976–1985) EA**.

16. The Respondent highlighted testimony by the victim, **Luka Belpietro (PW3),** that the Appellant, who was well known to him

ORIGINAL

contacted him before entering his tent under the pretext of showing him footage, only to attack him with a knife while aiming for his neck. And that the victim sustained injuries while defending himself; the attack itself motivated by a prior soured relationship between the victim and the Appellant's sister.

17. As concerns the sentence awarded, the Respondent submitted that the 10 years imprisonment term was lawful and lenient, given that Section 220 of the Penal Code prescribes a punishment of life imprisonment for attempted murder. That the trial magistrate considered the probation officer's report, the victim impact statement, and the Appellant's mitigation before sentencing.

18. The Respondent therefore contended that there is no demonstration that the trial court acted on wrong principles or failed to consider relevant factors. Citing **Shadrack Kipkoech Kogo v R and Wilson Waitegei v Republic [2021] eKLR**, where the Court of Appeal stated:

> **"Nothing in the proceedings or submissions by the appellant shows that the trial court acted upon wrong principles or overlooked some material factors or considered irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive as to be an error of principle."**

ORIGINAL

19. Further, relying on the case of **Ambani v Republic (1990) KLR 161**, where the court stated that a sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender, and that the court ought to consider in entirety the facts and the circumstances of the case before sentencing an offender.

20. Also cited was the Court of Appeal decision in **Bernard Kimani Gacheru v Republic [2002] eKLR**, to the effect that:

> **''It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."**

ORIGINAL

Analysis and Determination

21. The court has reviewed the entire record of the proceedings before the trial court and the rival submissions on the appeal. As the first appellate court, this court is required to re-evaluate the evidence tendered before the trial court with a view to arriving at its own conclusions.

22. The duty of the first appellate court was spelt out in the case of **Okeno vs. Republic [1972] EA 32**, as follows:

> **“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. R. [1957] E.A. 336) and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs. R., [1957] E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post, [1958] E.A. 424’’.**

23. Similarly, in the case of **David Njuguna Wairimu vs. Republic [2010] eKLR** the Court of Appeal reiterated that**:**

> **“ The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court**

ORIGINAL

and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.''

24. The Appellant was tried, convicted and sentenced for the offence of attempted murder contrary to Section 220 of the Penal Code, the trial court correctly observing that the charge sheet erroneously cited section 220A of the Penal Code. The trial court addressed itself to the anomaly as follows:

''**… the accused person herein ought to have been charged under Section 220 not 220A. This is an issue which was neither raised by the prosecution in their submission nor by the defence but I felt the need to address it. The charges were read over to the accused person and he pleaded not guilty to the charge of attempted murder, and he participated in the proceedings all through for a charge of attempted**

ORIGINAL

murder. He therefore understood the charges against him and defended himself and there was no prejudice occasioned to him by the charge sheet indicating Section 220 A instead of Section 220. The constitution guides the courts to be more concerned about substantive justice as opposed to procedural technicalities. I therefore find that no prejudice was occasioned by the wrong provision being quoted in the charge sheet". (sic)**.**

25. While the reasoning above cannot be faulted, more so as the conviction is not challenged, it is apparent that the trial court thereafter proceeded to consider the evidence primarily through the lens of Section 220(b) of the Penal Code, for good reason. Section 220 of the Penal Code is in the following terms:-

Any person who—

(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."

26. In the case of **Cheruiyot v Republic (1976–1985) EA**, the Court of Appeal for East Africa held that:

ORIGINAL

"…an essential ingredient of an attempt to commit an offence is a specific intention to commit that offence. If the charge is one of attempted murder, <u>the principal ingredient and the essence of the crime is the deliberate intent to murder. It must be shown that the accused person had a positive intention to unlawfully cause death and that intention must be manifested by an overt act."</u>

27. The prosecution case through 16 witnesses was that prior to the material date, a sister to the Appellant, one **Claudia Ogoti** was an employee of **the Maasai Wilderness Trust** (hereafter the Trust), and based at the **Kyullu Wilderness Camp** at Loitokitok (hereafter the camp), a camp apparently operated under the Trust. It would appear that a romantic relationship had developed between Claudia and **Luka Belpietro** (**PW3**), a conservationist and founder of the trust, and as a result the Appellant had been hired as a store man/nurse at the camp. However, the relationship between **PW3** and **Claudia** had run into difficulties, and ended in September 2021 when she also left employment, while the Appellant stayed on. The prosecution exhibited a WhatsApp message (part of **P.Exh. 1(a)**) from **PW3** to the Appellant in October 2021 indicating assurances by **PW3** had no intention of visiting the matter of his fall-out with Claudia against the Appellant .

ORIGINAL

28. On 2.6.2022, **PW3** was expected at the camp from Nairobi, with a group of guests. During her routine work, **Emmah Wanjiru (PW7)**, manager at the camp, noted that another employee named **Brenda Ogoti,** also brought in by the Appellant's sister **Claudia**, had allocated **PW3** a distant tent no. 6 at the camp instead of his regular closer tent no. 2 . She discussed this change with **PW3** who denied having requested a change and **PW7** with **Reginah Parsanka** (**PW8**), a housekeeper at the camp reversed the allocation of the tent to no. 2 from no. 6. The latter witness claimed to have seen the Appellant during the day wandering around the tents where he ordinarily had no role to play, being a storekeeper .

29. **PW3** having arrived at the camp on the material date had retired to the said tent no. 2 for the night, after dinner when, shortly after 7:00pm, he received a WhatsApp message **(**in **P.Exh. 1(a)**) from the Appellant to the effect that the Appellant had *''ïntel"* (intelligence) he had allegedly gathered from an employee at the camp, and that he wanted to share it "*anonymously''* with **PW3** in person. **PW3** had responded to the request by stating that he would see the Appellant on the next day.

30. However, at 9:30pm, **PW3's** sensor lights at the tent veranda came on as his dogs barked. The cause was the Appellant who was at the veranda of the tent, insisting to see **PW3**, and despite the latter's refusal, the Appellant opened the zip of the tent and entered while

ORIGINAL

carrying a laptop. Which he proceeded to open, asking **PW3** to look at, but **PW3** decided to call HR personnel on his phone while seated on his bed. However, the Appellant grabbed him by the back of the head and whipping out what appeared to be a Maasai knife ordered **PW3** to *''relax"',* as he aimed the knife at him intending to slash him.

31. Whereupon, **PW3** employing his martial arts skills, reacted by kicking at the Appellant, while somersaulting to fend off the attack and at the same time screaming for help. In the ensuing scuffle, **PW3** sustained several cuts including a deep cut on the right forearm, upper limb and on the neck .The Appellant then fled the tent, which was in disarray, and the camp, as camp workers arrived , including **Sonkei Tepeli** (**PW11)**, a security officer, and the first to arrive , followed by **Christopher Kariuki Mwangi (PW2)**, **Pasiet Lekina (PW1), PW3's** daughter **Lucratia Belpiero (PW6),** and **PW7.**

32. These witnesses found **PW3** outside his tent while bleeding profusely on the injured arm which he had stemmed by wrapping a towel on the cut. **PW3** told them that *'Wycliffe"*, the Appellant had injured him. According to **PW6**, earlier that evening she had found the Appellant alone in the manager's office studying the tent allocation board, and that he had immediately left the office. She observed upon responding with others to her father's calls for help later that night, that his tent was in disarray . The computer which was identified as the

ORIGINAL

one the Appellant brought with him to **PW3'**s tent was found in the tent.

33. **PW3** was rushed to **Iltilal** Health Centre where a Clinical Officer, **Karen Oyugi (PW12)** treated him and prepared notes recording injuries, including three linear cuts to the right hand, the right forearm, neck and upper limb. She produced the notes and the **P3** form **(Exh. 11 and 12).** According to the witness, **PW3** was dizzy due to profuse bleeding from the deep cut to the right forearm which measured 15cm long and 1.5cm deep, exposing the ulna vessel, and that the injuries were caused by a sharp object. She stated that the ulna vessel is a major blood vessel which, if punctured, could lead to profuse bleeding and death.

34. Meanwhile, a search party comprising community rangers led by an animal tracking expert and scout at the Trust, **David Emmanuel Kenani, (PW9)** having failed to find the Appellant at the camp, pursued him to **Moilo, Oyaratta** village on the same night. The party, having spent the night surrounding a nearby hill, were able on the next morning to sight and arrest the Appellant while trying to flee towards **Rombo**. He was handed over to **P.C Alhamisi** (**PW4**) of Loitokitok Police Station where the incident had been reported.

35. On arrest by the search party, the Appellant was found in possession of a bag containing his phone, a large sum of money, and a red notebook (**P.exh. 6**. In the red note book were entries stating

ORIGINAL

inter alia that : ***''I came in peace, but ready to kill…Sometimes good is not enough, best best is enough"*** . The red notebook was submitted by the investigating officer **Cpl. Ngeno (PW15)** for forensic examination alongside the Appellant's known writings. The forensic document examiner **P.C Osundwa (PW16)** by his report (**P.Exh 17 (b**) confirmed that the writings were by the Appellant. At the close of investigations, the Appellant was charged.

36. In his sworn defence statement, the Appellant said he was a nurse by profession and on duty at the camp on the material date until 9:30pm. He then went to the gym, and on retiring to his tent/house at 10.00pm, **PW3** came in saying he wanted to talk. Presently, he offered to help him while flattering him on his appearance before he started touching him and making sexual advances. However, when **PW3** fondled his private parts, the Appellant ordered him to leave as he threatened to report him for sexual harassment. The Complainant left but threatened to fire him as he had fired the Appellant's sister

37. Thereafter, when the Appellant went outside to access the telephone network, he heard screams and returned to his tent, only to hear a report circulating on the camp radio that he had inflicted injuries on **PW3**. He later heard on the same radio that **PW3** was to be escorted to hospital, and a search would be mounted for him as the Appellant had escaped to the bush. Next, he heard people approaching his room, and switching off his phone, he went into hiding until the

ORIGINAL

next day, when he left the camp intending to report at Loitokitok Police Station, only to be arrested on his way there. He denied visiting **PW3'**s tent on the material night or assaulting him.

38. As already indicated, the Appellant confined his appeal to sentence. Three main complaints were raised in that regard, first, that in sentencing the Appellant, the trial Court failed to adhere to the Sentencing Guidelines (2016); second that with respect to the penalty, there is a conflict between Section 220 of the Penal Code and Section 389 of the Penal Code and that the Appellant's rights were violated, as pursuant to Article 50(2) (p) of the Constitution he was entitled to the most lenient penalty; and thirdly, that a period of over 2 years he allegedly spent in custody during trial was not factored into the sentence, as prescribed by the provisions of Section 333(2) of the CPC. The court proposes to first address the second complaint.

39. Regarding the second complaint, the Appellant highlighted the fact that the injuries sustained by **PW3** were minor and classified as "harm" rather than grievous harm hence more aligned with an assault than attempted murder. His argument was that the asserted conflict between the sentence provided under Section 389 and 220 of the Penal Code, he ought to benefit from the least severe sentence in the former Section. The trial court, upon weighing the evidence in the trial, found that the offence of Attempted murder contrary to Section

ORIGINAL

220 of the Penal Code had been established beyond reasonable doubt, and rejected the Appellant's defence.

40. The trial court in its judgment considered provisions of Section 388 of the Penal Code in arriving at its decision. That section states as follows:

> **-"(1)When a person, <u>intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence</u>.(2)It is immaterial, except so far as regards punishment, whether the offender 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''.**

41. As stated in **Cheruiyot vs. Republic** (supra) concerning the offence of attempted murder, ''***'the principal ingredient and the essence of the crime is the deliberate intent to murder. It must***

ORIGINAL

be shown that the accused person had a positive intention to unlawfully cause death and that intention must be manifested by an overt act." The intention constitutes the criminal intent or *mens rea* of the offence while the actual execution or overt act is the *actus reus*, an act made in furtherance of the intention. The trial court was satisfied, and this court agrees, that the evidence tendered proved the ingredients of the offence. Under Section 388 of the Penal Code, it is immaterial, except so far as regards punishment, whether the complete fulfilment of the intention is prevented because of external circumstances or inability on the part of the offender to complete commission of the offence.

42. The offence of attempted murder contrary to Section 220 of the Penal Code falls under the category of offences referred to as inchoate or incomplete offences, comprising a criminal intent, or recklessness accompanied by an overt substantial step taken in furtherance of the intent or acts that indirectly point to participation in the commission of a crime. **"Black's Law Dictionary 9th Edition " defines "inchoate" as:**

> **"Imperfect; unfinished; began, but not completed; as a contract not executed by all parties".**

43. Thus, an inchoate offence is an offence where the person convicted did not actually complete the commission thereof, as to justify the charging of such person with the commission of the actual offence. In **Simiyu vs. Republic (2021) KECA 247 (KLR)** the Court

ORIGINAL

of Appeal was confronted with an argument similar to the one raised here by the Appellant in respect of 389 of the Penal Code, albeit in respect of the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code which attracts a death sentence.

44. The court expressed itself as follows:

‘’We think the single issue for our consideration is whether there is conflict between Section 297(2) and Section 389 of the Penal Code.

9. To appreciate the import of the two provisions, we find it necessary to replicate them here. Section 297(2) provides.

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”. **(emphasis ours)**

Section 389 on the other hand reads;

“Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence

attempted, but so that if that offence is one punishable by death or life imprisonment, he shall not be liable to imprisonment for a term exceeding seven years". (emphasis ours).

45. The Court proceeded to state that**:**

"10. The appellant contends that <u>there is a conflict between the two provisions to the extent that they prescribe two different punishments for the same offence of attempted robbery with violence, namely, the sentence of death and imprisonment for a term not exceeding seven years. In the circumstances, the appellant argues, he should bear the less severe sentence, which is imprisonment for a term not exceeding seven years.</u>

11.We concede that this Court has on certain occasions in the past opined that there is a conflict between the two Sections. However, the Court thereafter clarified and affirmed that the two provisions are undoubtedly distinct. It comprehensively interpreted the two provisions and the previous decisions suggestive of conflict, in the case <u>Charles Mulandi Mbula -vs- Republic</u> [2014] eKLR (Per Kihara Kariuki (P), Kiage, J. Mohammed, JJA). The Court stated thus;

"It is clear from a plain reading of Section 389 of the Penal Code that it applies only where no other punishment is expressly prescribed in the penal statute. Section 297(2) of the Penal Code provides for a specific penalty for attempted robbery with violence and is thus ousted from the remit of Section 389 of the Penal Code. This Court has clarified this interpretation in Mulinge Maswili vs. Republic (Criminal Appeal No. 39 of 2007), where we stated:'The *general* penalty for offenses attempted is given as half of the sentence for the completed offence. There is, however, an exception regarding those offences which carry the death penalty or life imprisonment. For such offences, the court is given discretion to mete out sentences not exceeding seven years' imprisonment, and even for those ones, there is a further exception. For attempted offences for which separate and distinct punishment is provided, Section 389, above, would not apply. In the former category are offences like murder contrary to Section 203 as read with Section 204 of the Penal Code respectively. Such an offence carries the death penalty. ……. In the latter category, namely, the offences attempted which carry a separate and distinct sentence that is where the offence

of attempted robbery with violence falls. Parliament in its wisdom considered it essential to provide specific sentences for the offences attempted. To obviate conflict Section 389 of the Penal Code was worded in such a way as to create an exception to the general penalty provided therein. Hence the inclusion of the phrase "if no other punishment is provided.'"

12.We note that the High Court cited and followed the above interpretation, and correctly so."

46. The Court in **Simiyu's** case however citing the decision of the **Supreme Court in Francis Karioko Muruatetu & Anor -vs-Republic [2017] eKLR** was persuaded to interfere with the sentence. By allowing the appeal on sentence only, setting aside the sentence of death, and substituting it with a term of twenty (20) years imprisonment to run from the date the appellant was first sentenced.

47. A similar position concerning asserted conflict between Section 297 (2) of the Penal Code and Section 389 of the Penal Code was adopted by the Court of Appeal in **Sutse v Republic (2022) KECA 678 (KLR)** and in **Michael Kimani Kungu v Republic (2020) KECA 584.** The Court observing in the latter case that**:-**

"**As regards sentence, the appellant contends that the death sentence meted on him was excessive since the offence of attempted robbery with violence is dealt with**

under Section 389 of the Penal Code and is punishable by seven (7) years imprisonment. The respondent counters this argument by stating that Section 389 can only be invoked in instances where the accused person commits a felony or misdemeanor and no sentence is provided under the Section he is charged under. However, this is not the case here given that the Section under which the appellant was charged provides that the punishment for attempted robbery with violence is death. Section 297(2) of the Penal Code under which the appellant was charged provides inter alia:

"If the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

Section 389 of the Penal Code on the other hand provides that:

"Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted,

but so that if that offence is one punishable by death or life imprisonment, he shall not be liable to imprisonment for a term exceeding seven years." (Emphasis ours).

48. The Court concluded by stating that: -

''A plain reading of Section 389 shows that it was intended to apply to matters where no other punishment was expressly prescribed in the Penal Code. Section 297(2) of the Penal Code under which the appellant was charged provides for a specific penalty for attempted robbery with violence hence it is ousted from the remit of Section 389 of the Penal Code. It is worth noting that at no given time during trial did the appellant contend that he had been charged under the wrong provisions of the law, he knew all along the charge he was facing and the penalty it carried. He therefore cannot then ask this court to review his sentence in light of Section 389 of the Penal Code".

49. The logic above is readily applicable to the facts of this case. The Appellant was convicted under Section 220 of the Penal Code for the offence of attempted murder which attracts a maximum sentence of life imprisonment, as modified by the dicta in the decision of the Supreme Court in **Muruatetu I** [supra]. He was awarded ten years

imprisonment. The Court is unpersuaded by the argument that the Appellant was entitled to benefit from a sentence under Section 389 of the Penal Code in the circumstances of this case. The second complaint therefore lacks a basis.

50. Now to the first and third complaints which are to the effect that the trial court failed to adhere to the Sentencing Guidelines by failing to fully consider the objects of sentencing and other relevant matters stated in **Muruatetu I** such as his mitigation and pre-sentence report, and that the trial court failed to apply the provisions of Section 333(2) of the CPC by factoring into the sentence, the period of his incarceration pending trial. Having considered the application in **Misc. Cr. Application No. E046 of 2023**, the court noted that the first complaint is essentially a replica of the former application, and this court declines to adjudicate upon that complaint which was considered and dismissed by this Court on 6.10.2023.

51. Regarding the complaint premised on Section 333(2) of the CPC, the Appellant claims that he spent a period of over two years in custody during the trial, which period was not considered during sentence. The application of Section 333(2) of the CPC in sentencing was considered at length in **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** where the Court of Appeal held that:

ORIGINAL

"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by Section 333(2) of the Criminal Procedure Code. By dint of Section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to Section 333(2) of the Criminal Procedure Code was

ORIGINAL

introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. <u>We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012</u>." (Emphasis added)

52. The same court in **Bethwel Wilson Kibor v Republic [2009] eKLR** expressed itself as follows:

"By proviso to Section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at September 22, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the

ORIGINAL

appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

53. The Judiciary Sentencing Policy Guideline provides that:

"'The proviso to Section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial''.

54. Having perused the lower court file, the Court noted that the Appellant was arrested on 3rd June,2022 and remained in custody during his trial, which terminated with his sentencing on 10th November 2022. This is a period of five months and 7 days. The trial court did not take this period into account and the Appellant's complaint in that regard has some merit. Accordingly, this court will intervene by making an order under Section 333(2) of the CPC to the effect that the Appellant's sentence of ten years imprisonment shall be reckoned to run from the date of his arrest, that is on 3rd June 2022. The appeal therefore succeeds to that limited extent.

DELIVERED AND SIGNED AT KAJIADO ON THIS 23RD DAY OF OCTOBER 2025.

C.MEOLI

JUDGE

In the presence of:

For the State: Mr. Kilunda

Appellant: Present

C/ A: Lepatei

ORIGI