

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**CRIMINAL APPEAL NO. E013 OF 2023**

**TWAHA ABDULRAHMAN.....1<sup>ST</sup>**

**APPELLANT**

**ALI MOHAMED GUYO.....2<sup>ND</sup>**

**APPELLANT**

**SALIM SAID SALIM.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon.T.A.Sitati, SPM, in Lamu Senior Principal Magistrate's Court Criminal Case No. 154 of 2022 delivered on 23/5/2023)*

**JUDGMENT**

1. The three Appellants were convicted for the offence of attempted murder contrary to Section 220(a) of the Penal Code. The particulars of the offence were that on the 7<sup>th</sup> February, 2022 at around 1700 hours at Ama Primary school area in Mkomani location within Lamu central sub county in Lamu County they unlawfully attempted to cause the death of Zubeir Mohamed Zubeir (herein referred to as the complainant), by cutting his head twice using a panga and stabbing him on the thorax with a knife.

2. The 1<sup>st</sup> and the 3<sup>rd</sup> appellants were each sentenced to serve 25 years imprisonment while the 2<sup>nd</sup> appellant was sentenced to serve 10 years

imprisonment. The appellants were aggrieved by the convictions and the sentences and lodged the instant appeal.

3. The grounds of appeal are in summary that;

(1) The charge against the Appellants was not proved beyond reasonable doubt.

(2) The trial court convicted the appellants on the basis of contradictory and hearsay evidence of the prosecution witnesses.

(3) The trial court failed to consider the defences put forward by the Appellants.

(4) The trial court failed to consider that the appellants were not mentioned by the witnesses at the first instance.

(5) The trial court failed to consider the mitigation offered by the appellants and as a result imposed upon them harsh and excessive sentences.

### **Prosecution case**

4. The case for the prosecution is that the complainant was a resident of Mkomani village in Lamu. That on the material day at around 6 pm he was riding a donkey on his way to his family farm when he was attacked by a gang of 6 people who were armed with sticks, pangas and knives. They cut him up on the head, right elbow and hit him with a stick on the back of the head. They left him bleeding profusely. He identified some of the gang members. A cousin to the complainant, Abdul Fattah PW2, who was also on his way to the shamba on a donkey met with the gang members as they were leaving the scene. He did not talk to them. They just stared at him as he

passed them. He identified 4 of them among them the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. A short distance away he found the complainant injured. He called for a motor cycle and took him to King Fahad Hospital where he was admitted for 5 days.

5. Meanwhile police officers who were on patrol who included PC Ouma PW5 received a report of the attack and went to the scene but they did not find anybody there. They followed the complainant to the hospital and found him admitted. PC Ouma investigated the case. After the complainant was discharged from hospital he gave PC Ouma the names of three of his attackers who included the 2<sup>nd</sup> Appellant, Ali Guyo. Later the 1<sup>st</sup> appellant was arrested in Mombasa and escorted to Lamu. An identification parade was conducted on him by IP Sanganyi PW4 and he was identified by the complainant. He was charged with the offence.

6. That on 17/7/2022 the complainant was testifying against the 1<sup>st</sup> appellant in court when he saw the 3<sup>rd</sup> appellant in court and informed the trial court. The police arrested him. Later the 2<sup>nd</sup> appellant was arrested at Mokowe. Pc Ouma went and picked him at Mokowe police station. The 3 appellants were jointly charged with the offence they were convicted of.

7. The complainant was issued with a P3 form that was completed at King Fahad Hospital. He was found with multiple deep cut wounds on the head, small cut wound on right shoulder, fracture right ulna bone, fractured right metatarsals and cut tendons on right hand. He was taken to theatre for repairs. During the hearing, a clinical officer from the said hospital produced the

treatment notes and the P3 form as exhibits, P.Exh.1 and 4 respectively.

## **Defence Case**

8. When placed to his defence the 1<sup>st</sup> appellant stated in a sworn statement that he is a resident of Milimani. That the complainant was well known to him as they were at one time school mates. That on 14/6/2022 he was removed from Lamu police station and escorted to Lamu DCI offices. Cpl Odero brought the complainant and his cousin Abdul Fattah who started to question him about his association with Haitham and Badru. The two swore to teach him a lesson. They later took part in an identification parade where the complainant purported to have identified him. He denied committing the offence.

9. The 2<sup>nd</sup> Appellant stated in a sworn statement that on the 7/2/2022 his sister gave him medicine to deliver at Kwa Guyo Kokani village. That on the way he bypassed with two young men who were unknown to him running towards Ama primary school. When he got to them he found a young man who was unknown to him bleeding on the ground. He saw 2 teachers nearby. He turned back and went home. He was later arrested at Mokowe and escorted to Lamu police station. No identification parade was conducted on his part. He later saw the complainant in court. He said that he was not known to his co-appellants before they were

jointly charged with the offence. He denied committing the offence he was facing.

10. The 3<sup>rd</sup> Appellant stated in a sworn statement that he hails from Gadani village. That at the material time he had been sent home from school due to non-payment of school fees. That on the evening of 7/2/2022 he and his brother left their home and went to Pamba Roho area to fetch fodder for their donkey. That while they were there an old man passed by carrying a heavy load on a donkey. He asked him to help him push the load. He left his brother with their donkey and helped the old man to push the load up to his home. It was around 6 pm that time. He returned to his home around 6.45 pm. He resumed school on 15/2/2022. He was later arrested and jailed over another case. He denied committing the offence over this case. He however stated in cross-examination that the complainant was well known to him and he also knew him very well. He admitted that the complainant picked him in court while he was giving his evidence on 19/7/2022.

### **Submissions**

11. The appeal was canvassed by way of written submissions. The 1<sup>st</sup> appellant submitted through his counsel that the charge against him was not proved beyond reasonable doubt. That the complainant in his evidence-in-chief never stated that he was struck by the 1<sup>st</sup> appellant and only stated so during cross-examination.

12. It was submitted that there was a mention of a teacher who rescued the complainant from the attackers but the teacher was not called to testify in the case. That there was no reason given why the teacher was not called to give evidence in the case. It was submitted that the only conclusion to be made by failing to call such a crucial witness is that had he been called his evidence would have been adverse to the prosecution case, as was held in **Bukenya and others v Uganda 1972 EA 549.**

13. Counsel for the 1<sup>st</sup> appellant submitted that Abdul Fatah, PW2, in his evidence stated that he knew all the attackers by name yet when he gave the names of the attackers to PC Ouma, he did not mention the name of the 1<sup>st</sup> appellant. That this creates a high probability that the 1<sup>st</sup> appellant was not in the gang of attackers. It was submitted that the report by PW2 to PC Ouma was the first report on the incident. Counsel stressed the importance of such first report and cited the case of **Tekerall s/o Korongozi & others v Republic (1952) EACA 259** where it was stated that:

**“Their importance can scarcely be exaggerated for their often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishments or the deliberately made-up case. Truth will often come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”**

14. Counsel submitted that the case against the 1<sup>st</sup> appellant was a frame up and he should have been accorded the benefit of doubt.

15. The 2<sup>nd</sup> appellant represented himself in the appeal. He submitted that there was no credible evidence that he was among the people who attacked the complainant. He faulted the trial court for failing to consider the inconsistencies in the evidence of the complainant which tended to create doubt on whether he identified the 2<sup>nd</sup> appellant as one of the attackers.

16. He submitted that the complainant told the trial court that he circulated the photograph of the 2<sup>nd</sup> appellant to his relatives. That his arrest was as a result of family plot against him.

17. He submitted that Abdul Fattah PW2 did not mention him in his initial report to the police. That the report of PW2 contradicted his evidence in court.

18. The 3<sup>rd</sup> Appellant on his part submitted that the evidence that the complainant adduced in court on the first occasion and what he told the court when he was recalled to testify afresh was in contradiction. That the evidence showed that the attack was fast and sudden such that the complainant did not have time for positive identification of the attackers. It was submitted that the inconsistency in the evidence showed that the complainant was not a credible witness.

19. He submitted that the complainant told the trial court that he knew his attackers though not by names except Faiz who at

the time of the trial was not before court. That in his initial evidence he told the court that when he looked at his attackers after he was sent tumbling down by a blow, he saw one Haitham holding a knife. That when he was recalled he talked of Twaha (1<sup>st</sup> appellant) the holding a panga. That Twaha gave a knife to his accomplice but when recalled he mentioned one Haitham. It was submitted that the contradictory evidence created doubt whether the complainant identified the 3<sup>rd</sup> appellant as one of the attackers.

20. He submitted that the complainant mentioned the names of his attackers through consultation with his family members. That the names he gave to the police were given to him by his family members yet one of the family members who testified in court, Abdul Fattah, PW2 did not mention his name to the police. Therefore, that his dock identification by PW2 did not carry much weight.

21. The appellant submitted that his arrest may have been instigated by the fact that he was not a man of good character since his name did not appear on the first report made to the police. That he was arrested out of suspicion by the family members of the complainant. That he ought to have been accorded the benefit of doubt.

### **Analysis and determination**

22. This being a first appeal, this court is mandated to analyze and re-evaluate afresh the evidence adduced before the trial

court in line with the holding in the case of **Odhiambo v Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

23. The appellants were convicted on a charge of attempted murder contrary to section 220 of the Penal Code. Attempt is defined in section 388 of the Penal Code as follows:

24. Section 388 of the Penal Code defines the term “attempt” as follows:

### **388. Attempt defined**

**(1) When a person, 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.**

**(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.**

25. The ingredient of the offence of attempted murder is the intention to kill and the overt act done towards the fulfilment of that intention. The trial court in this respect cited the case of **Cheruiyot v Republic (1976-1985) EA 47** where it was stated thus:

**In order to constitute an offence under section 220, it must be shown that the accused had a positive intention to unlawfully cause death.**

26. I have considered the grounds of appeal, the record of the trial court and the submissions tendered by the parties herein. The issue for determination is whether the case against the appellants was proved beyond all reasonable doubt and more so whether the trial magistrate was correct in his finding that the appellants were positively identified to have been in the gang that attacked the complainant.

27. It is trite that the court before basing a conviction on evidence of identification should examine the evidence carefully and satisfy itself that the circumstances of identification were favourable and free from the possibility of error. This position was re-stated by the Court of Appeal in the case of **Kariuki Njiru and 7 others v. Republic CR. Appeal No. 6 of 2001** that;

**The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.**

28. The same was stated in **Wamunga v Republic** [1989] KLR 424 where the Court of Appeal stated thus:

**It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.**

29. The trial court in convicting the appellants of the offence stated that the complainant recognized all the three appellants during the incident and that he named 2 of them to the police and gave the description of the rest. That conditions at the time of the attack were favourable for positive identification. That the complainant knew the 1<sup>st</sup> appellant having been his classmate in primary school and named him as one of his attackers. In addition, that he picked him in an identification parade. That he is the one who cut the complainant thrice on the head.

30. The trial court held that the complainant described the 2<sup>nd</sup> appellant to the police. That the complainant sighted him at Mokowe and took a secret photo of him which he circulated to his

uncle and the police who arrested him. That PW2 had seen the 2<sup>nd</sup> appellant at the scene and was armed. That the 2<sup>nd</sup> appellant admitted that he was at the scene of crime at the material time.

31. As regards the 3<sup>rd</sup> appellant, the trial court stated that he was recognized by the complainant during the incident who described him to the police. That the complainant saw him in court and had him arrested. That he is the one who struck the complainant on the back of the head.

32. In view of the serious injuries occasioned to the complainant, the trial court came to the conclusion that the three appellants pursued a common intention of killing the complainant which was thwarted by the sudden appearance of an unnamed teacher at the scene. Hence the trial court found that the appellants were guilty of attempted murder.

33. In the first place, the trial magistrate misapprehended the evidence when he stated that the complainant recognized all the three appellants during the incident and that he named 2 of them to the police and gave the description of the rest. According to the evidence of the investigating officer PW5, the complainant in his initial statement to the police only named Ali Guyo, the 2<sup>nd</sup> Appellant. The other two he named in the statement were not before the court whereas the 1<sup>st</sup> and 3<sup>rd</sup> Appellants were not mentioned therein.

34. Despite that, the complainant insisted that the 1<sup>st</sup> appellant was in the gang that attacked him. That the 1<sup>st</sup> appellant was his

classmate during their formative years in school but that he had forgotten his name when he moved to Mombasa many years back. That he gave the description of the people who had attacked him and his family members stated their names from the description he had given. He later identified the 1<sup>st</sup> appellant in an identification parade.

35. The complainant first testified in court against the 1<sup>st</sup> appellant before the cases for 1stthe 3 appellants were consolidated. When he testified against the 1<sup>st</sup> appellant he stated that the 1<sup>st</sup> appellant cut him thrice on the head with a panga after which he gave it to an accomplice called Faiz who cut him twice on the head. When the cases were consolidated and the complainant was called back to testify against the 3 appellants, he initially stated that the 1<sup>st</sup> appellant cut him on the head with a panga before giving it to Faiz who cut him on the right ankle. However, in cross-examination by the 1<sup>st</sup> appellant he stated that the 1<sup>st</sup> appellant cut him once on the head after which he gave the panga to Faiz cut him thrice on the head. If then the complainant clearly saw the 1<sup>st</sup> appellant cutting him with a panga and identified him, how many times did he cut him on the head? Was it thrice or once? In view of the contradictory evidence of the complainant in regard to the 1<sup>st</sup> Appellant and the evidence of the investigating officer that the complainant did not name the 1<sup>st</sup> appellant in his initial statement to the police, I am not satisfied that it was safe to hold that he identified the 1<sup>st</sup> appellant as one of the people who attacked him.

36. Abdul Fattah PW2 on his part stated that though the 1<sup>st</sup> Appellant was involved with the attack, he did not name him among the people he mentioned in his statement. That he said that he could identify him as he lived at Gadeni village within the locality. However, no identification parade was conducted to see whether he could identify the 1<sup>st</sup> appellant. His evidence that the 1<sup>st</sup> appellant was one of the attackers was not credible.

37. On the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants the complainant said that he saw them in the gang and that they were armed with clubs. That the 2<sup>nd</sup> appellant was arrested by his uncle at Mokowe after he circulated his photographs. That he identified the 3<sup>rd</sup> appellant in court when he appeared for the hearing of the case against the 1<sup>st</sup> appellant. He said that he had forgotten the name of the 3<sup>rd</sup> appellant.

38. Though the complainant said that the 2<sup>nd</sup> appellant was in the gang that attacked him, he did not say what exactly he did during the incident. He said that the 2<sup>nd</sup> appellant was arrested by his uncle at Mokowe after he circulated a photograph of him sent to him by a friend. He did not disclose the name of the friend who sent him the photograph and the said person did not testify in court. How did the person know that the 2<sup>nd</sup> appellant was one of the gang members who attacked the complainant? I am not satisfied that the complainant identified the 2<sup>nd</sup> Appellant.

39. Similarly, though the complainant identified the 3<sup>rd</sup> appellant in court when he appeared for the hearing of the case against the

1<sup>st</sup> appellant he did not say what the 3<sup>rd</sup> appellant did during the incident that made him identify him. 40. His evidence that the 3<sup>rd</sup> appellant was in the gang was not corroborated by Abdul Fattah PW2. I do not find sufficient evidence that the complainant identified the 2<sup>nd</sup> appellant.

41. Abdul Fattah PW2 said that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were part of the gang members he found near the scene of the attack. That he knew them by names. He testified that he mentioned the 2<sup>nd</sup> and 3<sup>rd</sup> appellants in his statement to the police. That the 2<sup>nd</sup> appellant was well known to him as he drove donkeys for transport like him. That the 3<sup>rd</sup> appellant was armed with a club. That the gang members just stared at him as he passed them. Later he saw the 3<sup>rd</sup> appellant, Salim in court when he was testifying against the 1<sup>st</sup> appellant and he informed the trial magistrate. That there was sufficient day light at 6 pm and he clearly saw them. However, his statement to the police only mentioned Ali Salim alias Yuru, the 2<sup>nd</sup> Appellant to have been in the gang (though the investigating officer PW5 said that PW2 did not mention Ali Guyo in his statement). Why then did he mention the 3<sup>rd</sup> Appellant in court when he never mentioned him to the police? Was he lying to the police when he mentioned the 2<sup>nd</sup> appellant? This creates doubt whether he, Abdul Fattah, is a truthful witness. I am not satisfied that he identified the appellants as among the people he found close to the scene.

42. It was the duty of the prosecution to prove the charge against the appellants beyond reasonable doubt. For the reasons stated above, I am not satisfied that the threshold was reached. Accordingly, I do find merit in the appeal and the conviction entered by the trial court on the appellants is quashed and their sentences set aside. I order the appellants be set at liberty forthwith unless lawfully held.

Orders accordingly.

**Delivered, dated and signed at GARSEN this 12<sup>th</sup> day of November 2025.**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

**Mr. Soita for 1<sup>st</sup> Appellant**

**Ms Mkongo for Respondent**

**Appellants: All present**

**Court Assistant: Jumaa**

Original