REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

HCCRA NO. E074 OF 2024

JOSEPHAT KIOKO WAMBUA ……

APPELLANT

-VERSUS-

REPUBLIC ……

RESPONDENT

(Being an appeal against the conviction and sentence of the SPM's Court at Kilungu by Honourable F. Makoyo dated 13th September, 2024 in Kilungu CR Case No. 282 of 2022)

JUDGMENT

1. This appeal arises from the judgment of the Magistrate's Court at Kilungu in Criminal Case No. E282 of 2022, delivered on 13th September, 2024 and the subsequent sentence imposed on 25th September, 2024.
2. The Appellant was jointly charged with three others with the offence of attempted murder contrary to **Section 220 (a)** of the **Penal Code** and, in count II, conspiracy

to defeat justice contrary to section 117(a) of the Penal Code.

3. The particulars of the charge in count I are that on 8th January, 2022 at around 2330 hours at Kola Market, Kola Location within Makueni County, the Appellant, jointly with the other three accused persons, attempted to cause death to Teddy Mutua Tama by inflicting multiple serious injuries on his body, which led him to be paralyzed.
4. The particulars in count II are that between the night of 8th and 9th January, 2022 at Kee Area, Kilungu sub-county within Makueni County, the Appellant, jointly with the other three accused persons, conspired to defeat justice and caused one Teddy Mutua Tama to be dumped at Inyooni Water Way using a motor cycle registration number KMDZ 638P make SKY GO after having been injured.
5. Following a full trial, the learned trial magistrate convicted the Appellant on both counts. The co-accused persons were acquitted of the charge of attempted murder, while two were convicted alongside the Appellant on the charge of conspiracy to defeat justice.

6. Upon conviction, the Appellant was sentenced to ten (10) years' imprisonment on the first count and two (2) years' imprisonment on the second count, the sentences to run concurrently.
7. The Appellant appealed against the whole Judgment on the following grounds:
    a. ***THAT the learned trial magistrate erred in law and fact when he convicted and sentenced me without observing the charges before the Court were defective for both being in great variance with evidence on the record;***
    b. ***THAT the learned magistrate erred in law and in fact by convicting and sentencing the appellant when there was no evidence to support the charge;***
    c. ***THAT the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant on inconsistent, doubtful and contradictory evidence;***
    d. ***THAT the learned trial magistrate erred in law and in fact by failing to consider evidence that***

would have been favourable to the appellant's case;

e. *THAT the learned trial magistrate erred in both law and fact by shifting the burden of proof to the appellant and misdirected himself on the evidence and arrived on the wrong conclusion;*
f. *THAT the learned trial magistrate erred in both law and fact by failing to consider fabrication in the prosecution case in its entirety;*
g. *THAT the learned trial magistrate erred in law in failing to appreciate that the charges against the appellant were not proved beyond reasonable doubt as by law required;*
h. *THAT the conviction against the appellant was based on insufficient evidence and ought to be quashed;*
i. *THAT the sentence passed against the appellant was harsh, unreasonable and excessive in the circumstants;*

8. Parties canvassed the appeal by way of submissions. Counsel for the Appellant submitted that the conviction was unsafe and unsupported by the evidence on record. It was argued that the prosecution case rested entirely on the testimony of a single identifying witness, **PW1,** whose evidence was unreliable given the prevailing circumstances. Counsel pointed out that the alleged incident occurred at night, in poor lighting conditions, after the complainant had consumed alcohol for several hours.
9. It was further submitted that **PW1** did not previously know the Appellant and that no identification parade was conducted, rendering the dock identification unsafe. Reliance was placed on *Roria v Republic (1967) EA 583, Wamunga v Republic [1989] eKLR, and Gabriel Kamau Njoroge v Republic [1987] eKLR* for the proposition that identification by a single witness in difficult conditions must be treated with caution and cannot safely ground a conviction without corroboration.
10. On the offence of attempted murder, counsel submitted that the prosecution failed to prove the requisite intention to kill. It was argued that the alleged

weapon was never identified or produced and that the evidence did not demonstrate malice aforethought as required under **Sections 220** and **206** of the **Penal Code**. Reliance was placed on ***Cheruiyot v Republic (1976–1985) EA 47, Abdi Ali Bare v Republic [2015] eKLR, and Nzuki v Republic [1993] eKLR.***

11. With respect to the charge of conspiracy to defeat justice, counsel argued that there was no proof of any agreement or common intention involving the Appellant. It was submitted that the alleged motorcycle used to ferry the complainant was not produced and that no witness placed the Appellant at the dam where the complainant was found. Counsel relied on *Bukenya v Uganda (1972) EA 549* to submit that the prosecution's failure to call crucial witnesses who gave information that the Complainant was at the dam weakened its case.

12. Finally, it was submitted that the sentence imposed was harsh and excessive in the circumstances, particularly in light of the weak and doubtful evidence upon which the conviction was founded.

13. The Respondent opposed the appeal and submitted that the prosecution proved its case beyond reasonable

doubt. It was argued that **PW1** positively identified the Appellant as the assailant, having been with him in close proximity for several hours prior to the incident. The Respondent contended that the circumstances favoured recognition and that there was no possibility of mistaken identity.

14. On the charge of attempted murder, the Respondent submitted that the Appellant's intention to kill could be inferred from the nature and severity of the injuries inflicted, which resulted in spinal fractures and permanent disability. Reliance was placed on **Sections 220, 388,** and **206** of the **Penal Code**, as well as ***Cheruiyot v Republic (1976–1985) EA 47*,** to argue that the ingredients of attempted murder were satisfied.

15. Regarding alleged inconsistencies, the Respondent submitted that any discrepancies in the prosecution evidence were minor and did not go to the substance of the case, relying on ***Richard Munene v Republic [2016] eKLR.***

16. On sentence, the Respondent argued that the punishment imposed was lawful, lenient, and well within

the discretion of the trial Court, noting that attempted murder attracts a sentence of life imprisonment.

17. The Respondent urged the Court to dismiss the appeal and uphold both conviction and sentence.

ANALYSIS & DETERMINATION:

18. This being a first appeal this Court has a duty to re-evaluate and re-consider the evidence afresh and arrive at its own decision while bearing in mind that it did not see nor hear the witnesses. In ***Kiilu & another V Republic [2005] 1 KLR the Court of Appeal*** held:

> ***(i) The appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***(ii) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence so support***

the lower courts' 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."

19. I have carefully considered the evidence on record, the amended grounds of appeal, both submissions and the law. The issues I find falling for determination are as follows:

i. **Whether the charge of attempted murder was proved;**

ii. **Whether the charge of conspiracy to defeat justice was proved;**

iii. **Whether the sentence was appropriate.**

Whether the charge of attempted murder was proved

20. **Section 220 (b)** of the **Penal Code,** pursuant to which the charge was laid, stipulates that:

"Any person who—

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".

21. Further, **Section 388** of the **Penal Code** defines "attempt" as follows;

"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."

22. In ***Cheruiyot vs. Republic (1976-1985) EA 47*** the position taken was that:

"...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, 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".

23. Moreover, in the case of ***Abdi Ali Bare vs. Republic [2019] KEHC 9913 (KLR)***, the Court of

Appeal expounded that in cases of attempted murder, care must be taken to distinguish what otherwise would be acts of preparation to commit an offence and actual attempt to commit the offence. The said Court stated as follows:

> ***"... The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence..."***

24. The prosecution's case on how the alleged offence occurred rested primarily on the testimony of **PW1,** the Complainant. **PW1** testified that on 8th January, 2022, he went to Best Bar at Kola Market at about 4.00 pm after being invited by the 2nd accused. He stated that he

consumed alcohol at the bar for several hours in the company of the 2nd and 3rd accused persons. According to **PW1,** the Appellant arrived at the bar at about 10.00 pm, shone a torch from his mobile phone at him, and appeared agitated, complaining that PW1 was seated with his wife.

25. **PW1** further testified that he continued drinking until about midnight, at which point he decided to leave. He stated that as he walked past the appellant who was standing near the door, he was suddenly struck at the back of the neck and immediately lost consciousness. He testified that he later regained consciousness at Kenyatta National Hospital, where he was informed that he had sustained serious injuries to his neck and spine and had lost the use of his legs.

26. **PW1** did not see the object used to strike him. He did not describe the nature of the blow beyond stating that it was sudden and from behind. He did not testify that there were repeated blows or that the Appellant continued attacking him after he fell.

27. **PW1's** account regarding the injuries sustained was corroborated to the extent that **PW2** and **PW3** testified that the Complainant was found the following morning lying helpless near Inyooni Dam and was taken to hospital. **PW4,** the clinical officer, confirmed that **PW1** sustained fractures to the spinal cord at two levels, resulting in paralysis, and assessed the injuries as grievous harm caused by a blunt object.

28. The medical evidence therefore firmly established that the Complainant sustained very serious injuries as a result of the incident. The question, however, was whether those injuries were inflicted by the Appellant and with the specific intention to kill.

29. The learned trial magistrate inferred an intention to kill primarily from the severity of the injuries sustained. While the seriousness of the injuries is a relevant consideration, it is well settled that severity alone is not conclusive of intent.

30. As the Court held in ***Cheruiyot vs. Republic (1976-1985) EA 47*** the prosecution must prove a deliberate intention to kill, and such intention must be inferred from the totality of the circumstances, including

the nature of the weapon used, the manner of attack, the number of blows, the part of the body targeted, and the conduct of the accused before and after the incident.

31. From the facts of this case, no weapon was recovered or produced in evidence. The Complainant did not see the weapon and could not describe it. There was no evidence of repeated blows or a sustained attack. The evidence disclosed a single sudden blow, after which the Complainant lost consciousness.

32. Further, there was no evidence that the assailant made any attempt to follow up on the assault to ensure the complainant's death. There was no evidence of threats uttered immediately before or during the assault, indicating a resolve to kill. The earlier encounter described by **PW1** indicated a negative encounter but did not demonstrate an intention to cause death.

33. The Court of Appeal in ***Abdi Ali Bare vs Republic [2019] KEHC 9913 (KLR)*** was emphatic that in cases of attempted murder, Courts must be careful not to confuse acts that may amount to grievous harm with acts that demonstrate a clear intention to kill. The distinction

between preparation, assault, and attempt must be maintained.

34. The prosecution further relied on the fact that the Complainant was later found near Inyooni Dam as reinforcing the inference that the Appellant, as the assailant, intended to kill him. According to the prosecution's case, the complainant, having been rendered unconscious at the bar, could not have moved himself and must therefore have been removed from the bar and abandoned at the dam.

35. It is not in dispute that **PW2** and **PW3** found the complainant the following morning lying near the dam and that he was alive at the time. The Complainant himself could not testify as to how he got there, having lost consciousness immediately after the alleged assault.

36. However, no prosecution witness gave direct evidence of the Appellant transporting or dumping the complainant at the dam. No witness saw the Complainant being removed from the bar. The motorcycle allegedly belonging to the owner of the bar used was not produced as evidence, the owner of the bar

was not called to testify, and no independent witness testified that they saw the Appellant at the bar or near the dam that night.

37. The prosecution's case on how the Complainant came to be at the dam was therefore circumstantial and inferential. Circumstantial evidence must be examined with circumspection before it can be relied upon to support a conviction. In the case of ***Sylvester Mwacharo Mwakeduo & another v Republic*** ***[2019] eKLR*** the Court observed in this respect:

> ***"Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases***

for instance in the case of Judith Achieng' Ochieng' v Republic, Criminal Appeal 128 of 2006, this Court stated the law as follows:-

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy four tests:-i.The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;ii.Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;iii.The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;iv.In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating

facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt."

38. From the facts before me, the chain of events between the assault at the bar and the Complainant being found at the dam was incomplete.

39. But even assuming, at its highest, that the Complainant was removed from the bar and left near the dam after sustaining injuries, that conduct does not demonstrate a specific intention to kill. As I have hitherto stated, no evidence was led to show that the assailant ensured or attempted to ensure the Complainant's death after the alleged assault.

40. When the events of the night are considered as a whole, the evidence disclosed a sudden assault following a disagreement, the infliction of a single blow, serious but non-fatal injuries, and subsequent abandonment of the injured Complainant without any clear act directed at ensuring death.

41. In the circumstances, the fact that the Complainant was later found near the dam did not cure the deficiency on the element of intent. To a discerning mind, it only underscored the absence of proof that the assailant's actions went beyond aggravated assault to constitute an attempt to murder.

42. On identification of the Appellant as the assailant, the investigation officer (I.O) told the Court that the information relied on was as provided by the Complainant's father based on his own investigations. The I.O. confirmed that the assailant's name was not issued when the complaint was recorded and acknowledged that the report was filed several days after the incident.

43. The I.O further acknowledged that the investigations were proving difficult and that there were conflicting accounts recorded by the persons named as having been at the bar where the Complainant was, and who were later all charged alongside the Appellant in count II. From the evidence, the Appellant was not implicated by the others in being at the bar, nor in

having inflicted the injuries on the Complainant, nor in transporting the complainant from the scene.

44. Falling back on the Complainant's testimony, he stated that he knew the Appellant before the incident. However, if that were true, it would be reasonable to expect that he would have provided his name to his father and that the police report would have indicated who had attacked him. Notably, the Appellant was not arrested until six months after the alleged offence. If this were a case of recognition, why did the Complainant, in his later statement to the DCI, claim that the assailant was someone not known to him?

45. The evidence suggests that the Complainant was intoxicated on the night of the incident. There are contradictions in his testimony regarding whether he knew the assailant prior to the incident and the circumstances surrounding his intoxication.

46. Additionally, the lack of electricity at the scene at the time and the fact that the Complainant relies on a torch from the assailant's phone for illumination raise questions. Based on that I do not believe there were favourable conditions for identification.

47. The prosecution case rested entirely on the testimony of a single identifying witness, **PW1**, whose evidence was unreliable given the prevailing circumstances

48. The appellant provided an *alibi* defense, and considering all the evidence in totality, I am not convinced that the prosecution proved beyond reasonable doubt that the appellant was the assailant.

ii. Whether the charge of conspiracy to defeat justice was proved

49. The Appellant was convicted of the offence of conspiracy to defeat justice contrary to **Section 117 (a) of the Penal Code**, which provides that:

> **"Any person who conspires with another to prevent, defeat or obstruct the course of justice is guilty of a felony."**

50. The elements of the offence under section 117(a) is therefore the existence of a conspiracy, that is to say, an agreement between two or more persons to prevent, defeat or obstruct the due course of justice.

51. **Black's Law Dictionary, 10th Edition**, at page 375 defines conspiracy as follows:

> ***"An agreement by two or more persons to commit an unlawful act, coupled with intent to achieve the agreement's objective, and motive and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose."***

52. Similarly, **Archbold, Criminal Pleading, Evidence and Practice**, states:

> ***"The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons so long as a design rests in intention only, it is not indictable. There must be an agreement; proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."***

53. The same principle was reiterated by the Court in ***Marete v Republic (Criminal Appeal E068 of 2024) [2025] KEHC 11385 (KLR)***, where it was held that:

> ***"It follows from the foregoing that proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.***

54. From the foregoing authorities, it is clear that while conspiracy may be proved by inference, such inference must arise from proved criminal acts demonstrating a common unlawful purpose, and not from mere suspicion, inconsistent explanations, or disbelief of an accused person's defense.

55. In the present case, the learned trial magistrate inferred the existence of a conspiracy primarily from the fact that the Complainant was found near Inyooni Dam after sustaining injuries, coupled with what the court described as contradictory explanations offered by the accused persons as to how the complainant sustained

those injuries, including references to a fall, a bridge, a wall, a motorcycle accident, and the Appellant's assertion that he was at home.

56. Those matters did not amount to proof of an agreement within the meaning of **Section 117(a)** of the **Penal Code**. The prosecution did not adduce evidence of any discussion, coordination, or arrangement between the Appellant and the co-accused persons to prevent or obstruct the course of justice. No witness testified that they saw the Appellant transport the complainant to the dam. The Complainant himself could not testify as to how he got there. The motorcycle allegedly used was not produced as an exhibit.

57. The alleged recanted statements, which featured prominently in the reasoning of the trial court, were disputed and were not admitted as confessions in accordance with the law. In the absence of properly admitted confessional evidence, those statements could not form a lawful basis for inferring a meeting of minds.

58. Further, the contradictory explanations relied upon by the trial Court, while raising suspicion, were equally

consistent with individual attempts at self-exculpation. As stated in the exposition of the law above, conspiracy cannot be inferred from suspicion alone. There must be criminal acts proved to have been done in pursuance of an apparent criminal purpose in common.

59. The evidence did not demonstrate that the Appellant acted jointly with others pursuant to a shared plan to defeat justice. The chain of events relied upon by the prosecution was incomplete, inferential, and incapable of excluding other reasonable hypotheses. There are many loopholes, and the prosecution cannot shift the burden of proof to the appellant.

60. I therefore find that the prosecution did not prove, beyond reasonable doubt, the existence of an agreement, consent, or combination between the Appellant and any other person to prevent, defeat or obstruct the course of justice as required under **Section 117 (a)** of the **Penal Code.**

61. The conviction of the Appellant for the offence of conspiracy to defeat justice was therefore unsafe and cannot stand.

DISPOSITION:

62. In the result, the appeal succeeds.

63. The conviction of the Appellant for the offence of attempted murder contrary to **Section 220** of the **Penal Code** is hereby quashed and the sentence imposed thereon is set aside.

64. The conviction of the Appellant for the offence of conspiracy to defeat justice contrary to **Section 117 (a)** of the **Penal Code** is hereby quashed and the sentence imposed thereon is set aside.

65. The Appellant shall be released forthwith unless otherwise lawfully held.

66. It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** through the Microsoft Online platform on this **17TH day of FEBRUARY 2026.**

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HON C KENDAGOR

JUDGE OF THE HIGH COURT

In the presence of:

Court Assistant: Beryl

Mr Munyao for Appellant

Ms Mutua, ODPP