

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. E052 OF 2023**

**JULIUS KIAMBA MUTUA .....**

**APPELLANT**

**VERSUS**

**REPUBLIC**

.....

**RESPONDENT**

*(An appeal from the conviction and sentence in the SPM Magistrates Court at Makindu, Criminal Case No. E016 of 2022 Judgment delivered on 12<sup>th</sup> October, 2023 by Hon. B. Ireri, SPM.)*

**JUDGMENT**

1. The Appellant was charged with the offence of Attempted Murder contrary to **Section 220 (a)** of the **Penal Code**. The Particulars of the charge were that on the 28<sup>th</sup> day of January, 2021 at Kalamba area in Kibwezi subcounty within

Makueni County, the Appellant attempted unlawfully to cause the death of Rita Mwendu by inflicting two deep cuts on the back side of the neck, using a panga. He was found guilty of the offence and sentenced to 50 years imprisonment.

2. The Appellant was dissatisfied with the Judgment and brought this appeal against both the conviction and the sentence. The Appeal was canvassed by way of written submissions. The Appellant and the ODPP filed their respective submissions and the court has considered the same at great length.

3. Having considered the grounds of appeal and the submissions, I find that there are two issues for determination;

**a) Whether the offence of attempted murder was proved to warrant conviction.**

**b) Whether the sentence imposed was fair and justifiable.**

4. This being a first Appeal, this Court has a duty to revisit the evidence tendered before the trial court afresh, evaluate,

analyze it, and come to its own independent conclusion, but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence, and give allowance for that. (See **Okeno vs. Republic (1972) EA 32** and **Mark Oiruri Mose vs. R (2013) eKLR.**)

**Whether the offence of attempted murder was proved to warrant conviction**

5. The Offence of Attempted Murder is set out in **Section 220 (a)** of the **Penal Code** which provides as follows:

***“Any person who attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life.”***

6. **Section 220 (b)** states:-

***“For the offence of attempted murder under the said Section to stand, it must be proved that:-***

***a. The appellant had intention to unlawfully cause the death of the complainant.***

***b. He committed an act or omitted to do an act which was his duty to do.***

***The said act or omission was of such a nature as to be likely to endanger human life”.***

7. Courts have settled the essential elements for the offence of Attempted Murder. In **Emmanuel Kipkorir Langat v Republic [2022] KEHC 761 (KLR)**, the Court held as follows;

***19. From the above legal provisions, the main ingredient of an attempted offence is the intention to commit the said offence, whether or not the same is actually carried out to fruition or not. This intention is what constitutes the criminal intent or mens rea of the offence while the actual execution of any act in an attempt to commit the crime is the actus reus. Thus, in the present case, the main ingredients for attempted murder would be the intention to cause the death of another and the actus reus would be the actual***

**act that would likely to lead to the death, but which subsequently fails.**

8. **PW1** was the Complainant. She told the Court the Appellant tied her hands and legs and attacked her. She testified that the Appellant tricked her by telling her that they needed to perform some rituals at the back of the house. She stated that the Appellant first directed her to tie his hands and legs as part of the ritual, which the Complainant did. Afterwards, it was the Complainant's turn to partake in the ritual and the Appellant tied her hands and legs. To her shock, the Appellant left her in that state and came back/returned after 30 minutes and attacked her with a panga.
9. In my view, this is sufficient evidence to show that the Appellant had premeditated on how he would carry on the attack. It appears that the alleged ritual was only a plan to trick the Complainant and lure her to a place that he considered safe to commit the attack. Based on these facts, I find that the prosecution proved that the Appellant had the intention to cause the death of the Complainant.

10. The Complainant gave a chilling account of how the Appellant cut her with the Panga. She testified that on the first cut, the Appellant cut her on the backside of the neck. She also testified that on the second cut, the Appellant cut her around the spinal cord. She stated that she fell down as a result of the cuts and the Appellant ran away and left her there.
11. This testimony was corroborated by the medical evidence that was adduced by **PW2**, the medical officer. The Complainant was medically examined 8 months after the incident and the degree of the injury was described as grievous harm. The medical examination revealed that the Complainant sustained 2 scars on the posterior aspect of her neck, which reduced power on her hands and legs. It also revealed that the probable weapon was a sharp object.
12. In my view, the Appellant's attack on the complainant was projected to kill the Complainant. This is particularly so given the manner in which he carried out the attack. The Appellant attacked critical body organs, particularly the neck and the spinal cord. The attack was so serious that the

Complainant was admitted in the hospital for 25 days. She was discharged in a wheelchair.

13. Based on these facts, I find that the prosecution established the essential elements for the offence of attempted murder. The facts demonstrate that the Appellant had both the *mens rea* of the offence as well as the *actus reus*. He had the intention to cause the death of the Complainant another and his attack was likely to lead to the death, but which subsequently failed.

14. I have also relooked at the Appellant's defense. In my view, the defense does not shake or cast any reasonable doubt on the prosecution's case. I therefore uphold the conviction.

### **Whether the sentence imposed was fair and justifiable**

15. The offence of attempted murder is a felony and attracts a maximum sentence of life imprisonment. The lower court sentenced the Appellant to 50 years imprisonment. The Appellant also appealed against this

sentence and hence this Court is being invited to determine whether the said sentence was proper.

16. I have considered the manner in which the Appellant carried out his violent attack on the Complainant, who was his spouse. He then took off, abandoning her to her fate. The Complainant stated that she is still having difficulties performing tasks she was able to perform before.
17. I have also taken into account the pre-sentence probation officer's report, as well as the views of the Appellant, Complainant, and community. The call was for a deterrent measure.
18. In my view, I find that the imprisonment term imposed on the Appellant was fair and justifiable in the circumstances of the case. The same is hereby also upheld.
19. In the end, I find no merit in the Appeal and the same is hereby dismissed.
20. Orders accordingly.

**DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 13<sup>TH</sup> day of APRIL, 2026.**

.....

**HON. C. KENDAGOR**

**JUDGE**

**In the presence of:**

Court Assistant: Beryl

Appellant - present

Ms. Musango, ODPP