

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. E109 OF 2023

CHRISTABEL KIPKOGKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal against the Judgment of Hon. O. Mogire - SPM, delivered on 14/11/2023 in Eldoret
Chief Magistrate's Court Criminal Case No. E1565 of 2023)*

JUDGMENT

1. The Appellant was charged in the said criminal case with the offence of attempted murder contrary to **Section 220(a)** of the **Penal Code**. The particulars were that on 22/05/2023 at Eldoret town in Turbo sub-County within Uasin Gishu County, attempted unlawfully to cause the death of **Valentine Chepkoech**, her own child aged 6 years by stabbing her on the neck, stomach and on the hand.
2. The Appellant pleaded not guilty to the charge but after the first Prosecution witness (the child victim) had testified, the Appellant opted to change her plea to one of guilty. After applying the usual cautionary steps, the Court then convicted the Appellant on her own plea of guilty and eventually sentenced her to a life imprisonment sentence on 14/11/2023.
3. Dissatisfied with the decision, the Appellant filed this Appeal on 29/11/2023 only against the sentence. The Grounds preferred, quoted verbatim, were as follows:
 - i) **THAT**, this Honorable Court be pleased to find that the sentence of life imprisonment meted against me is unconstitutional pursuant to Court of Appeal decision in Appeal No.12 of 2020 **Kitsau Vs Republic** at Court of Appeal at Malindi.
 - ii) **THAT**, this Hon. Court be pleased to find that during my conviction and sentence I was first offender.
 - iii) **THAT**, this Honorable Court be pleased to find that I am a family woman whose life and that of my family has been greatly affected by the imprisonment.

iv) **THAT**, the Honorable Court finds that I am fully reformed having taken full advantage of the rehabilitation programs offered in the facility is evident in the attached documents.

v) **THAT**, I am seeking for a pro-bono lawyers during the hearing and determination this appeal thereof.

vi) **THAT**, I am very remorseful and repentant.

vii) **THAT**, the Honorable Court do issue any further orders as may be just and expedient in the circumstances.

4. The Appellant also filed what he described as “**Grounds of Appeal for Leniency**” and a “**Supporting Affidavit**”, which however are basically similar to the grounds already cited above.
5. The parties then filed written Submissions. The Appellant’s Submissions is undated, while the Respondent’s (State) is dated 6/10/2025.
6. In her Submissions, the Appellant basically contended that **Section 220(a)(b)** of the **Penal Code** is discriminative for those convicted of the offence of attempted murder since the offence is an incomplete capital offence, and urged that **Section 389** of the **Penal Code** stipulates that a person convicted of an incomplete offence is liable to a prison sentence not exceeding 7 years. He submitted further that the life sentence imposed upon her was a mandatory sentence thus improper. The rest of the contents of her Submissions are a restatement of the matters contained in her grounds of Appeal already recounted above.
7. On her part, **Prosecution Counsel Ms. Mureithi** denied that the sentence was not legal, or that it was harsh, or excessive, and submitted that sentencing discretion lies with the trial Court. She cited the case of **Bernard Kimani Gacheru vs. Republic [2002] eKLR** and asserted that the trial Court considered all relevant factors and did not act on wrong principles, and that the circumstances of the offence warranted the sentence imposed.

Determination

8. The sole issue that calls for determination in this Appeal is “**whether this Court should interfere with the sentence of life imprisonment imposed by the trial Court for the conviction on the charge of attempted murder**”.

9. Regarding interference with the sentence imposed by a trial Court, the applicable principles were restated by the Court of Appeal in the case of **Ogalo s/o Owuora 1954 24 EACA 70**, in the following terms:

“This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice.”

10. The above position was affirmed by the Court of Appeal in the case of **Bernard Kimani Gacheru v Republic [2002] eKLR**, in the following terms:

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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”.

11. It is also clear that the allegation that the Appellant was a 1st offender cannot by itself amount to a ground for Appeal against the sentence. That was an issue of mitigation before the trial Court and it has not been alleged that the Appellant was not given the opportunity to mitigate. In respect to the allegation that the Appellant has now reformed and repented, that, too, is a matter that, even if true, arose after conviction and sentence. It cannot therefore also form a ground for Appeal. The only viable ground for Appeal raised by the Appellant can only therefore be that the sentence was either illegal, or manifestly excessive or harsh.

12. The offence that the Appellant was convicted of was **“attempted murder”** contrary to **Section 220** of the **Penal Code** which stipulates as follows:

“Any person who—

- (a) attempts unlawfully to cause the death of another; or**
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(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.”

13. The Appellant raised the contention that the sentence of life imprisonment imposed under **Section 220(a)(b)** of the **Penal Code** for the offence of attempted murder is discriminative and in breach of the provisions of **Section 389** which is the default provision stipulating a prison sentence not exceeding 7 years. **Section 389** provides as follows:

“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.

14. Considering the wording **“if no other punishment is provided”**, it may appear clear that the lesser punishment prescribed under **Section 389** only applies where no other punishment is expressly prescribed in law, which is not the case herein since **Section 220** provides a specific penalty for the offence of attempted murder.

15. No so however since there has been a raging debate on whether there is a conflict between the two provisions to the extent that they prescribe two different punishments for the same offence of attempted murder, namely, the sentence of life imprisonment and the sentence of imprisonment for a term not exceeding 7 years. I have in mind, for instance, the Court of Appeal of cases of **Wasali v Republic (Criminal Appeal 296 of 2018) [2024] KECA 1214 (KLR) (20 September 2024) (Judgment)**, **James Maina Magare & Another -v- Republic [2012] eKLR**, and **Charles Mulandi Mula - v- Republic [2014] eKLR**.

16. This issue conflict was however laid to rest by the Court of Appeal in the case of **Simiyu v Republic [2021] KECA 247 (KLR)**, in which the Court observed as follows:

“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 Eldoret High Court Criminal Appeal No. E109 of 2023

interpreted the two provisions and the previous decisions suggestive of conflict, in the case *Charles Mulandi Mbula -vs- Republic* [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. The offence of attempted murder does not have a separate distinct punishment. That being so, and because there is no way one can half the death penalty, the trial court has the discretion to mete out a sentence not exceeding seven years’ imprisonment.

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.” (emphasis in original)

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

17. Since the Court of Appeal, whose decisions this Court is bound by, has since spoken, it follows that the Appellant's argument that there is a conflict between **Section 220** and **Section 389** of the **Penal Code** to the extent that they prescribe two different punishments for the same offence of attempted murder is therefore no longer viable.

18. In respect to the issue of the sentence of life imprisonment, there has been emerging jurisprudence questioning its constitutionality. In regard thereto, I cite the Court of Appeal case of **Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) 7 July 2023 (Judgment)**, which dealt with a case of a sentence of life imprisonment imposed on an Appellant for the defilement of a 4 years old child. Upon setting aside the sentence of life imprisonment, the Court of Appeal substituted the same with a prison sentence of 40 years. However, on further appeal, the Supreme Court faulted the Court of Appeal for abrogating to itself jurisdiction to determine the issue of constitutionality of the life sentence yet that issue had neither been canvassed at the Court of Appeal nor at the High Court, and thus usurping the role of the Legislature by purporting to declare the life sentence as unconstitutional, which the Supreme Court then swiftly reinstated. This was in the case of **Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) [2025] KESC 16 (KLR)**, in which the Supreme Court held as follows:

“70. Our findings hereinabove effectively lead us to the conclusion that the Judgement of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial Court and affirmed by the first appellate Court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the Sexual Offences Act.”

19. There is also the Supreme Court case of **Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (Judgment)**, delivered concurrently with **Manyeso (supra)**. In the **Ayako** case, like in **Manyeso**, the Supreme Court similarly reinstated the life sentence imposed on the Appellant by the Magistrate's Court in respect to a conviction for defilement of a minor, and which the Court of Appeal had set aside on the ground that life sentence is unconstitutional, and had substituted it with a prison sentence of 30 years. As in **Manyeso**, the Supreme Court found that the issue of constitutionality of the life sentence had not been raised or canvassed before the High Court, and the Court of Appeal could not therefore assume jurisdiction on the issue at the Court of Appeal stage.

20. In view of the above decisions made by the Supreme Court, this Court will be acting *ultra vires* were it to set aside the life sentence imposed in this case, on the sole basis that the life sentence is unconstitutional.

21. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now proceed to do.

22. In respect to sentencing, the Supreme Court, in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, guided that the following mitigating factors would be applicable; **(a)** age of the offender; **(b)** being a first offender; **(c)** whether the offender pleaded guilty; **(d)** character and record of the offender; **(e)** commission of the offence in response to gender-based violence; **(f)** remorsefulness of the offender; **(g)** the possibility of reform and social re-adaptation of the offender; and **(h)** any other factor that the Court considers relevant.

23. Similarly, in the case of **Daniel Kipkosgei Letting v Republic [2021] eKLR**, the Court of Appeal held as follows:

“..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.”

24. I also cite **Majanja J**, in the case of **Michael Kathewa Laichena & another v Republic [2018] eKLR**, in which, quoting the **Muruatetu case (supra)**, he stated that:

“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four-tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances.”

25. Applying the above principles to the facts of this case, I take into account the fact that the offence of attempted murder is categorized as a felony, thus treated as a heinous and

serious crime under Kenyan law and the society at large, and is always severely punished. It is also relevant to note that in this case, the victim of the murder attempt was the Appellant's own 6 years old daughter, and the motive for the attack is said to have been a disagreement between the accused and her estranged husband. The child was such a vulnerable soul who required protection from none other than the accused as her mother, whom she must have trusted, but who instead, attacked her by stabbing her multiple times with a knife on the neck, stomach and other sensitive parts of the body. Had it not been for the emergency medical care that she received in hospital the at the Intensive Care Unit, the child would very likely have died. She will no doubt suffer lifelong trauma resulting from the heinous act. Taking all these factors into account, it cannot be denied that the offence merited a stiff and deterrent sentence. It is also not in dispute that the Appellant was given the opportunity to mitigate, which she did, and which the trial Magistrate considered. Considering the gravity of the offence committed, the trial Magistrate may be excused for meting out the life imprisonment.

26. However, in view of the legal guidelines set out in the various authorities cited above, I find that the sentence of life imprisonment should be reduced to a determinate period of imprisonment. I also deem it necessary to give the Appellant the opportunity to reform while in prison and thereafter be released to achieve social re-adaptation. I believe that after a reasonable prison term, the Appellant will have endured sufficient retribution for her actions and will be ready for rehabilitation into the society.

Final Orders:

27. In the end, I make the following Orders:

- i) I set aside the sentence of life imprisonment and substitute it with a prison sentence of 10 years.
- ii) The said sentence of 10 years imprisonment shall be computed from the date of arrest, namely, 22/05/2023.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2026

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Appellant present in open Court at Eldoret

Ms. Mureithi for the State

Court Assistant: Brian Kimathi