

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**CRIMINAL APPEAL NO. E122 OF 2024**

**KATANA MWANDE JAMANDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the sentence of Hon.Julie Oseko, Chief Magistrate, in Malindi Chief Magistrate's Court Criminal Case No.1164 of 2018 delivered on 22/11/2019)*

**JUDGMENT**

1. The Appellant was convicted on his own plea of guilty for the offence of attempted murder contrary to Section 220(a) as read with section 389 of the Penal Code. The particulars of the offence were that on the 21<sup>st</sup> June 2017 at Kavunyalalo village, Paziani sub location, Goshi location in Malindi sub county within Kilifi County, he unlawfully attempted to cause the death of Mwalimu Mwande Jamanda (herein referred to as the complainant), by inflicting deep cuts on his neck and his left hand using a panga.
2. The appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the sentence meted on him and lodged the instant appeal. The grounds of appeal as per his amended grounds of appeal;
  1. That the learned trial magistrate erred in both facts and law in failing to appreciate the fact that she sentenced the Appellant to twenty (20) imprisonment without considering the circumstance of my case.
  2. That the learned trial magistrate erred in both facts and law in failing to appreciate the charges as laid out were not proved beyond reasonable doubt.

3. That the learned trial magistrate erred in law and facts in failing to appreciate that the evidence in the instant matter was materially contradicted and inconsistent hence insufficient to attain a conviction.
4. That the learned trial magistrate further erred in both law and facts in not considering that the appellant's statement in defence was plausible and was not dislodged hence still stands.

### **Appellant's submissions**

3. The Appellant submitted that he was charged under sections 220(a) as read with section 389 of the Penal Code. That section 220(a) of the Penal Code prescribes a sentence of life imprisonment for the offence of attempted murder while section 389 of the Penal Code prescribes for a sentence of not exceeding 7 years imprisonment if the offence is punishable by death or life imprisonment. He submitted that there is a conflict between the provisions of the two sections. That the conflict between the two sections infringes on his right to fair trial under Article 50 (2) (p) of the Constitution - the right to the benefit of the least severe of the prescribed punishments of an offence.
4. It was submitted that both provisions of the Penal Code seem to have created two sentences for the offence of attempted murder. That this can be resolved by a purposeful interpretation of the constitution so as to reveal the intention of the statute. Reliance in this respect was placed in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 (2014) eKLR** where the court stated that:

**“In Pepper v. Hart [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard,**

where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

5. Reliance on the same subject was placed in the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu (2015) eKLR** where it was stated that:

Interpretation of any document ultimately involved identifying the intention of Parliament, the drafter or the parties. That intention ought to be determined by reference to the precise words used, their particular documentary and factual context, and where identifiable, their aim and purpose. To that extent, almost every issue of interpretation was unique in terms of the

nature of the various factors involved. However, that did not mean that the Court had a completely free hand when it came to interpreting documents; that would be inconsistent with the rule of law and with the need for as much certainty and predictability as could be attained bearing in mind that each case was to be resolved by reference to its particular factors.

6. On the proposition that the Appellant is entitled to the least of the severe sentences imposed by the law, he cited the case of **Evanson Muiruri Gichane v Republic (2010) eKLR** where the Court of Appeal considered the contradiction between sections 297(2) and 389 of the Penal Code and stated that:

We have considered this ground of appeal and submissions by both Mr. Monda and Mr. Odhiambo and we are of the view that indeed, there may be a contradiction between *sections 297 (2) and 389 of the Penal Code*. The section under which the appellant was convicted provides for death sentence while *section 389* provides inter alia:-

*“--- 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.”*

The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of *section 389 of the Penal Code* the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences. We find merit in Mr.

**Odhiambo’s submission. We are fortified in our conclusion by the decision of this Court in GODFREY NGOTHO MUTISO VS. REPUBLIC – Criminal Appeal No. 17 of 2008 (unreported) in which this Court stated, inter alia:-**

*“We may stop there as we have said enough to persuade ourselves that this appeal is meritorious and the Attorney General was right to concede it. On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.”*

**We think we have said enough to conclude that the appeal against conviction is unmeritorious while the appeal against the legality of the sentence has merit. Accordingly this appeal is dismissed as regards the conviction of the appellant but we allow the appeal against the sentence to the extent that we substitute the death sentence with a prison term that will result in the appellant’s release from prison since the appellant was**

**convicted and sentenced on 5<sup>th</sup> March, 2004 and should have been sentenced to imprisonment for a term not exceeding seven years.**

7. In view of the above submissions the Appellant urged the court to find that there is a conflict between sections 220(a) and 389 of the Penal Code as to the sentence for the offence of attempted murder and that the conflict violates the Appellant's rights as espoused in Articles 26, 27, 28, and 50(2) (p) of the constitution. That the court makes an order that the Petitioner is entitled to the benefit of the lesser sentence imposed by section 389 of the Penal Code. That the Appellant having been sentenced to serve more than 7 years imprisonment, the sentence of 20 years imposed by the trial court be reduced to 7 years imprisonment as provided by section 389 of the Penal Code which is the least severe of the prescribed punishment pursuant to Article 50(2) (p) of the Penal Code.

### **Respondent's Submissions**

8. The Respondent on the other hand submitted that the ingredients of the offence of defilement were proved. They did not make submissions on the cited conflict between Sections 220(a) of the Penal Code and 389 of the Penal Code.

### **Analysis and determination**

9. I have considered the grounds of appeal and the submissions of the Appellant. The issues for determination are:
- (1) Whether there is a conflict between the provisions of sections 220(a) and section 389 of the Penal Code, and if so
  - (2) Whether the Appellant is entitled to the lesser of the sentence imposed by the two sections.

10. Section 220 of the Penal Code provides as follows:

**Attempt to murder**

**Any person who—**

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

**(b) .....**

**is guilty of a felony and is liable to imprisonment for life.**

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

**“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.”**

12. A felony is defined in Section 4 of the Penal Code as an offence which is declared by the law to be a felony or if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three or more years. Attempted murder under section 220 (a) of the Penal Code attracts a sentence of life imprisonment and is therefore by definition a felony. Section 389 of the Penal Code on the other hand provides for a sentence of not exceeding 7 years where the offence attempted is punishable by death or life imprisonment. It is then apparent that there is a conflict on the sentence for attempted murder as provided in the two sections, with section 220(a) providing for life imprisonment and section 389 providing for one not exceeding 7 years.

13. The High Court in the case of **Kiptai v Republic [2024] KEHC 4785 (KLR)** (Ngetich J, as she then was) dealt with the issue of the conflict between the provisions of sections 220(a) and 389 of the Penal Code and found that there is indeed a conflict between the two sections in respect to sentencing.

14. The Court of Appeal has severally dealt with similar conflict in regard to the offence of attempted robbery with violence under section 297 (2) of the Penal code which section provides for a sentence of death for that offence yet section 389 of the Penal Code provides for a sentence of not exceeding 7 years for the same offence. The Court recognized this conflict in the case of **Evanson Muiruri Gichane v Republic** (supra) and stated that:

**We have considered this ground of appeal and submissions by both Mr. Monda and Mr. Odhiambo and we are of the view that indeed, there may be a contradiction between sections 297 (2) and 389 of the Penal Code..... The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences.**

15. The same court in the case of **Bonventure Anziena Mukangai & Another v Republic [2019] KECA 75 (KLR)** recognized the conflict between sections 297(2) and 389 of the Penal Code and agreed with the jurisprudence established in its earlier decisions in **Evanson Muiruri Gichane case** (supra) and in **David Mwangi Thuo -vs-Republic [2011] eKLR** that given the provisions of section 389 of the Penal Code to the

effect that a person who attempts to commit an offence punishable by death or life imprisonment shall not be liable to imprisonment for a term not exceeding seven years, the sentence of death provided for attempted robbery with violence under **section 297(2)** is untenable and the appellants should have been given the benefit of the less severe sentence. The court held that:

**We too, have no difficulty whatsoever quashing the said sentences for death for the plain reason that where there is a conflict in sentences available for the court to impose, as a matter of right an accused person must be extended the benefit of the less severe sentence. It is of course unacceptable that the conflict and confusion persists with section 297(2) still prescribing the death sentence when, by virtue of section 389 of the Penal Code, the sentence for attempted robbery with violence, while the offence of robbery with violence itself carries the death sentence, should not exceed seven years. It behoves the Hon. Attorney General to move Parliament appropriately to amend section 297(2) and bring it into harmony and consonance with section 389 of the Penal Code.**

16. The position established by the Court of Appeal in the cases cited above is that where there is a conflict between a sentence provided by the law with Section 389 of the Penal Code then the accused person should be accorded the lesser of the sentences established by the law. This is in line with the provisions of Article 50 (2) (q) of the Constitution that where there are two punishments established by the law the accused is entitled be accorded the benefit of the lesser of the two punishments. The High Court in the *Kiptai v Republic case* (supra) accordingly held that:

**There is conflict between Sections 220(a) and 389 of the Penal Code in respect to sentencing. Section 220 (a) of the Constitution denies the applicant opportunity to benefit from a lesser sentence provided for attempts to commit felonies under Section 389 of the Penal Code therefore violating the applicant's right under 50 (2) (p) of the Constitution.**

17. The court in that case set aside the sentence of 12 years imposed on the appellant and substituted it with a sentence of 7 years imprisonment. In view of the above, I similarly find that there is a conflict in the sentences provided by sections 220(a) and 389 the Penal Code with the former providing for life imprisonment and the latter providing for a period of not more than 7 years. This conflict ought to be resolved in favour of the Appellant by according him the lesser of the two sentences, which is a sentence of not more than 7 years.

18. The Appellant was sentenced to serve 20 years imprisonment on the 22<sup>nd</sup> November 2019. He had been in custody since the date of his arrest in December 2018. Considering the time spent in custody before he was sentenced, the Appellant has as of now served the legal sentence of 7 years and should thus be let out of prison.

19. In view of the foregoing, the sentence of 20 years imprisonment imposed by the trial court is set aside and substituted with a sentence of 7 years imprisonment. The Appellant having already served the sentence of 7 years, I order that he be released from prison custody forthwith unless lawfully held.

**Delivered, dated and signed at GARSEN this 8<sup>th</sup> day of May 2026.**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

Mr. Oluoch holding brief for Miss Ngina Mutua for Respondent

Appellant- present virtually at Maximum prison Manyani

Court Assistant: Nasra

Original