REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

(CORAM: R. MWONGO, J.)

CRIMINAL APPEAL NO. E049 OF 2025

DANSON NYAGA NGARI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Appeal from the decision of Hon. N. Kahara in Siakago MCCR E730 of 2024 delivered on 08th September 2025

The Charge

1. The appellant was charged with the offence of attempted murder contrary to section 220(a) of the Penal Code. The particulars were that on 29th September 2024 at Kandogo village in Gachoka sublocation, Mbeere South subcounty within Embu County, the appellant willfully and unlawfully attempted to cause the death of John Gitonga Mwaniki by shooting at him using his civilian firearm serial number B161694.
2. He pleaded not guilty to the charge and the plea was duly entered. The matter went to full hearing after which the appellant was convicted and sentenced to 7 years imprisonment.

The Appeal

3. Dissatisfied with the decision of the trial court on both conviction and sentence, the appellants filed a petition of appeal dated 19th September 2025 seeking orders that the trial court's findings on conviction and sentence be set aside, and the appellant be set free. The appeal is premised on grounds that:
    1) The Learned Magistrate erred in law and facts in arriving at findings that were against the weight of the evidence and in not finding that the Prosecution did not prove the offence of attempted Murder beyond reasonable doubt;
    2) The Learned Magistrate erred in law and facts in not finding that the Appellant acted in self defence and for self-preservation of life and limb while under a vicious attack from PW1 and used his gun in a justified manner and/or way in the circumstances;

3) The Learned Magistrate erred in law and facts in not finding that there was no proof of *mens rea* and *actus reus* on the part of the Appellant as there was no evidence that the Appellant had the intent to kill PW1 and that the ingredients of the offence of attempted Murder were never proved to the required standard and the Appellant was therefore wrongly and unlawfully convicted and given an excessive sentence;
4) The Learned Magistrate erred in law and facts by wrongly and unlawfully convicting the Appellant as there were gaps and inconsistences in the Prosecution's evidence that ought to have been treated in favour of the Appellant; and
5) The Learned Magistrate erred in law and facts in not finding that the Appellant had a credible defence that effectively rebutted the Prosecution's evidence and the Court ought to have found that the Appellant was not guilty of the offence charged on the basis of the Appellant's evidence.

The Evidence at the trial Court

4. The evidence adduced during the trial was as follows:
5. PW1 was John Gitonga Mwaniki. He stated that he had just finished cleaning Casanova club and was sitting there waiting for his payment. The appellant walked in with another person and they sat down and ordered for alcohol. After some time, they left but the appellant returned alone and started beating him up accusing him of gossiping about him. The appellant told him that he wanted to shed his blood for what he had done. PW1 stated that he took off with his bicycle, and tried to escape. However, the appellant chased after him while being armed with a piece of wood. He stated that he abandoned the bicycle and ran, then he heard a loud bang.
6. When he looked back, he saw that his bicycle had been destroyed by the appellant, and so he returned and asked him to pay for it. The appellant hit him with the wood on the head and he retaliated by hitting him with a stone on the head before running off. As he was running and looking back, he saw the appellant retrieving his firearm which he used to shoot him on his right-hand side. The bullet was lodged in his chest and it left an injury on his forearm too. He continued to walk away until he became too weak. He was assisted by members of the public and taken to Embu Level 5 Hospital. He produced his treatment notes as evidence.
7. In cross-examination, he stated that when he was cleaning the club, he had also drunk alcohol. That there was another person at the club when the appellant started beating him. That the appellant slapped him and hit his head on the wall and later hit him with a plank of wood on the head. He said he also hit the appellant with a stone

on his face and he fell down. That the appellant shot him from about 30 meters away. He denied teasing the appellant in the village saying that he has a fake pistol.

8. He also denied being a troublesome member of the village. He did not know that the appellant wards off livestock thieves from the village because he is armed. He stated that the appellant fired 2 shots, one fell near his leg and other hit him on his hand and went to his chest. He required surgery to remove the bullet. That at the scene, there were some members of the public.

9. PW2 was Rose Wangari Mwaniki the sister of PW1. She stated that while at a shop near the scene, she saw the appellant on his motor cycle carrying a passenger with whom they entered the club. After a while, they left and the appellant returned alone at about 2pm. The appellant entered the club and accused PW1 of gossiping about him. She peeped through the window and saw the appellant chasing PW1 around the pool table, before the appellant got a hold of PW1 and slapped him. PW1 took his bicycle but the appellant destroyed the nozzles and deflated its tyres. The appellant told PW1 that he would shed his blood as it had been a while since he caused bloodshed.

10. She said that she saw the appellant putting something into a gadget. 3 shots were fired and PW1 fell down. She ran home to inform her in law Joseph and her parents what she had witnessed. The matter was reported to the police at Gachoka Police Station, and PW1 was taken to Embu Level 5 Hospital. In cross-examination, she stated that she saw the appellant and PW1 fighting. That PW1 hit the appellant with a stone on the eye and then picked a second stone. That was when the appellant retrieved his firearm, but did not aim at the sky, and she heard gunshots. She denied that the villagers say that appellant prevents livestock theft; She stated that in the past when one of their neighbour's cattle were being stolen, she heard gunshots.

11. PW3 was Shadrack Mutuma a casual worker. He stated that he heard PW1 telling the appellant that he had deflated his bicycle tyres. He saw PW1 assaulting the appellant with his hands and the appellant hit PW1 with a tyre pump. PW1 picked a stone and hit the appellant near his eye and the appellant removed his firearm and shot PW1. The first shot did not hit PW1 but the subsequent one did. PW1 ran into some farm and he heard the appellant saying "*stupid he has not even died*". On cross examination, he stated that he was about 30 meters away from the scene at his hotel. That the appellant did not fall down after he was hit with the rock by PW1. That the appellant did not shoot in the air to deter PW1, but rather aimed at PW1 and fired the shots from a distance of about 30 meters. He stated that the appellant shot at PW1 3 times and it was the 3rd shot that hit him.

12. PW4 was PC Samuel Wanjora of Gachoka Police Station. He stated that he was assigned the case of a shooting incident. It was reported by the appellant, a licenced firearm holder who stated that he discharged 2 rounds from the firearm. They visited the scene and the appellant showed them where the 2 rounds were fired from and where they ended. On the same day, he received a phone call informing him that there was as person in a miraa farm who had a gunshot wound. He visited the miraa farm with his colleague PC Ndeti. There, they found a person with a gunshot entry wound but no exit wound.
13. He carried the man on a motor cycle to Gachoka Police Station where the wounded man's relative was waiting and they escorted the person to hospital. The wounded person did not introduce himself because when he was found, he was not speaking. The following day, he escorted officers from the DCI together with the appellant to the scene for its processing. The appellant was escorted to his home where he was instructed to open his safe and they confiscated several rounds of ammunition from him. The appellant was escorted to Kiritiri Police Station, and he told the police that he fired the shots to scare somebody following a confrontation. In cross-examination, he stated that when they found the wounded man in the miraa plantation, they supported him upto the main road. That the entry point of the bullet was in the right-hand side upper arm near the shoulder.
14. PW5 was Inspector Francis Karuri of DCI Headquarters, National Forensics Laboratory Ballistic section. He is a trained firearms examiner and conducted ballistic analysis on the firearm, bullets and cartridges found at the scene. He confirmed that the firearm did, in fact, discharge the bullets at the scene but never at any other time within the republic of Kenya. He produced his ballistics report as evidence. On cross-examination, he confirmed that the firearm belonging to the appellant is different from any other similar firearm because of its unique serial number. That each firearm has unique markings inside the barrel and this helps in identifying which pistol fired which bullets.
15. PW6 was Dr. Nderitu Simon a surgeon at Kenyatta National Hospital (KNH). He stated that PW 1was transferred from Embu Level 5 Hospital to KNH with one gunshot entry wound with no exit wound in sight and he was in pain. A CT scan revealed a metallic foreign object within the body in front of the chest measuring 2cm by 1.9cm. A surgery was done to remove the bullet lodged in the chest of PW1 and the repairs were done. He was in charge of the unit that attended to PW1. On cross-examination, he stated that the bullet was lodged on the breast bone which had 2 layers. The surgery was done 2 weeks after the shooting incident.

16. PW7 was CI Janet Akelo of DCIO Mbeere South. She stated that she was informed of the incident by officers from Gachoka Police Station where the appellant had surrendered himself. She visited the scene and processed it and then proceeded to the home of the appellant. He opened the safe where he usually kept the firearm, and inside it, they found several rounds of ammunition, a firearm licence and a few other items. She recorded statements from the victim and other witnesses. The victim was taken to Embu Level 5 Hospital and later transferred to KNH where the bullet was removed.
17. She wrote to the hospital requesting for the bullet removed from the victim's body and the hospital released it for forensic examination. She drew a sketch plan of the scene and then produced all these documents as evidence. In cross-examination, she stated that the appellant is a civilian bearing a licence to hold a firearm to protect his life or the life of another person. After the incident, the appellant surrendered himself to the police station. She did not write the firearm's serial number or type in the exhibit memo.
18. DW1 was Mercy Ndaru of Kiritiri Health Center. She produced a P3 form filled by Jacinta Nyaga, a colleague with whom she had worked for 3 years. The P3 indicated that the appellant had been treated for an injury on the left side of his face. there was swelling on his lower lip and the left eye had redness.
19. DW2 was Danson Nyaga Ngari, the appellant. He stated that he went to Cassanova bar for a meeting with his brother. They were joined by a neighbor called Gitonga and he bought them drinks then he stepped out of the bar to speak on the phone. After sometime, his brother and Gitonga joined him outside. PW1 passed with his bicycle saying that he wanted to kill someone. He told PW1 that they were not in Russia where people are killing each other in a war. PW1 parked his bicycle near his motor cycle and DW2 removed it.
20. PW1 then ran and picked a stone and tried to hit him the first time but he missed. He picked another stone which he used to hit him on the face and he started bleeding. He retrieved his weapon and shot with the intention of deterring PW1 who at that point, was holding a knife. He fired another shot in the air but unfortunately, the bullet hit PW1. Being a licensed gun holder, he surrendered his weapon and ammunition to the police and reported the incident. He said that he knew the complainant before that day and there was no bad blood between them. That he had no intention of killing the complainant. He understood that a licensed gun holder must only use it when faced with danger.

21. On cross-examination, he stated that he saw PW1 holding a knife from about 5 meters away after he had pelted him with 2 stones. He retrieved his firearm when he realized that his life was in danger. He stated that his intention in using the firearm was to scare PW1 who had already attacked him. He stated that he produced a P3 form much later after the incident because he was in custody and his treatment notes had been misplaced until he was released on bond. He stated that his intention on shooting was to protect himself.
22. DW3 was Peter Gitonga Ndwiga. He stated that the appellant bought him and the appellant's brother a drink at Cassanova bar. The appellant left them drinking at the club and he went outside where he had parked his motor cycle to receive a phone call. When they finished drinking they went outside and saw the appellant sitting on his motor cycle. PW1 came by and parked his bicycle in front of the appellant's motor cycle, but the appellant removed it.
23. On seeing this, PW1 picked a stone and threw it at the appellant who started bleeding. Suddenly, he heard a noise and he saw, from about 15 meters away, that the appellant had shot PW1. He did not see the appellant attacking PW1 but he heard PW1 insulting the appellant. He went home after witnessing the incident. On cross-examination, he stated that he did not see PW1 with any weapon other than a stone which he used to hit the appellant on the left side of his face. That PW1 did not say that he wanted to kill someone.
24. DW4 was Justus Nyaga Barnabas, the appellant's brother. He stated that he was at Cassanova bar with DW3 and the appellant who bought them some drinks. PW1 came and parked his bicycle in front of the appellant's motor cycle. The appellant went and removed the bicycle and put it aside, and PW1 returned it. When the appellant removed the bicycle again, PW1 picked a stone and hit the appellant on his face with it. The appellant retrieved his firearm and shot in the sky. He said that he did not see anything happening to PW1 who had earlier said that he would kill someone. He said that he was about 5 meters from the appellant when this happened, and he ran away after that. In cross-examination, he stated that the appellant did not drink alcohol that day. That he was outside the bar when he saw all the things he spoke of. He said that he only heard one gunshot. He denied seeing PW1 with a knife.

Parties' Submissions on the Appeal

25. The appellant relied on the case of **Selle and Another v Associated Motor Boat Company Ltd and Others [1968] EA 123** and urged the court to re-evaluate the evidence adduced and reach an independent finding. He stated that section 17 of

the Penal Code allowed for application of English Common Law which includes self-defense. He relied on **Palmer v R [1971] AC 814, Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR** and **Mokua v Republic [1976-80] eKLR 137**. He stated that he used the firearm to protect himself since a threat was posed upon his safety. He relied on sections 220 and 388(1) of the Penal Code and stated that the threshold for an attempted offence must be met. He relied on the case of **DPP v Whyte [1972] AC 849, Nzuki v Republic [1992] KEHC 76 (KLR), Joseph Kimani Njau v Republic [2014] KECA 229 (KLR), Abdi Ali Bare v Republic [2015] KECA 794 (KLR)** and **Kimanyi v Republic [1979] KECA 5 (KLR)**.

26. In submissions, the respondent relied on section 220(a) of the Penal Code and the case of **Abdi Ali Bare v Republic (Supra)**. It argued that the appellant shot PW1 who was fleeing the scene. That the appellant's deadly weapon was used with the intention to kill PW1 but the intention failed. It placed further reliance on the cases of **Bonaya Tutu Ipu & another v Republic [2015] KECA 335 (KLR), Chesakit v Uganda, CR App No 95 of 2004** and **Rex v Tebere c/o Ochen (1945) 12 EA CA 63**.

27. It argued that the appellants argument on self-defense is unmerited since there was no sudden provocation. On this, it relied on the case of **MTG v Republic [2022] KEHC 16212 (KLR)**. On the question of sentencing, it relied on the case of **Bernard Kimani Gacheru v Republic [2002] KECA 94 (KLR)** and stated that the sentence was fair and just.

Issues for Determination

28. The issues for determination are:

1) Whether the trial court erred in its findings on conviction; and
2) Whether the sentence imposed is harsh and excessive.

Analysis and Determination

29. The duty of the first appellate court is to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of **Okeno v. Republic [1972] EA 32**, with which I agree where the court held:

> "***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own***

finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

30. On the offence of attempted murder, Section 220(a) of the Penal Code provides as follows:

> "***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***."

31. An attempted offence is one which is a precursor to the actual offence, such that if the actions of a person accused of an attempted offense were to progress, they would end up with the actual offence. It means that in this case, if the actions put in motion had progressed, they would have resulted in murder. In proving an attempted offence, the court has to establish that the aggressor was identified and that he possessed *mens rea* to do the unlawful act, which he in fact did.

32. In the case of **Moses Kabue Karuoya v Republic [2016] KEHC 2729 (KLR)** the learned Judge stated:

> "***In the case of Bernard Kariuki Chege v Republic [2016] KEHC 3200 (KLR) this court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An inchoate offense requires that the accused have the specific intent to commit the underlying crime. An inchoate crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place. Strictly inchoate crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves***…" *[Emphasis added]*

33. An inchoate or attempted offence is defined under Section 388 of the Penal Code as follows:

"***(1) <u>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.</u>***

(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." *[Emphasis added]*

34. PW1 was an eye witness. He narrated that he was waiting to be paid his dues after cleaning Cassanova bar/club when the appellant attacked him, hit his head on a wall and slapped him. That he then ran outside and took his bicycle and as he tried to cycle away, the appellant deflated its tyres. He returned to confront the appellant for deflating the tyres and he took a rock with which he hit him on the face.

35. PW2 the complainant's sister, also an eyewitness, said that the accused was in the club when she heard him ask PW1 why he was gossiping against him, the complainant; that PW1 denied gossiping then the complainant got hold of PW1 and slapped him. PW1 took his bicycle and there was a struggle for it. Then she heard 3 shots and PW1 fell down. In cross examination, she admitted that PW1 and the accused fought; that PW1 hit the accused on the eye with a stone, that PW1 picked a second stone to hit the accused; that the accused then pulled out his gun and fired at PW1.

36. On their part, the accused, DW3 and DW4 who were also at the scene, stated that PW1 hit the appellant with a rock on his face after he had parked his bicycle in front of the appellant's motor cycle, and the appellant had removed it. In his evidence as DW2, the appellant stated that PW2 threw two stones at him, one of which hit him on the face. Further, DW2 and PW1 had a knife at the time of the altercation, but DW3 and DW4 said that they did not see any knife.

37. The evidence of DW2, DW3 and DW4 shows that a fight begun between PW1 and the appellant concerning PW1 barricading the appellant's motorcycle with his bicycle. There was a to and fro about the position of the bicycle, then an altercation

began. PW1 hit the appellant with a stone on the cheek which led to bleeding from the injury.

38. From the evidence of PW1, the appellant shot at him 3 times and the third time the bullet penetrated his chest through his right hand. DW2 stated that he shot 2 times in the air with the intention of scaring PW1 who had attacked him at that point. He said that he did not intend to injure PW1 in any way but unfortunately, PW1 sustained an injury.

39. Section 17 of the Penal Code provides as follows; -

> "***Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law***."

40. At common law, the defence of self defence is available to one who proves that he used reasonable force; -1. To defend himself; 2. To prevent attack on other person; or 3. To defend his property. The Court of Appeal in ***Ahmed Mohamed Omar and 5 Others v. Republic (Supra)*** recognized the common law principles in a defence of self-defence and holding as follows:

> "***It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. …..Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. ….. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will***

remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

41. In examination in Chief, PW1 said that after the accused hit him with a piece of wood, he *"took a stone and threw it at his head".* In cross examination too, he admitted *"I hit the accused on the face with a stone. Accused did not fall down…. I ran away after hitting the accused on the face."* It is therefore common ground that PW1 and the appellant were engaged in a fight when the appellant used his gun.

42. As noted, the appellant asserts he fired his gun after being hit with a stone. After firing the gun, and keeping in mind that he is a licenced civilian firearm holder, he reported the matter to the police together with the weapon and ammunition. He told the police that he fired the shots in self-defense, a matter that was repeated severally throughout the defence case, and adverted to in the prosecution case. The burden to prove or disprove this fact lay on the prosecution, and at no time was this burden to be shifted to the accused person.

43. In **Beckford v R [1988] AC 130** it was held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.

44. The Court of Appeal in **Victor Nthiga Kiruthu & another v Republic [2017] KECA 251 (KLR)** relied on the cases of **Republic v Andrew Mueche Omwenga [2009] KEHC 1573 (KLR); Roba Galma Wario v Republic [2015] KECA 521 (KLR)** and **Ahmed Mohamed Omar & 5 Others v Republic (supra)** and summarized the principles arising through the defense of self-defense, thus:

"***The principles that have emerged from these and other authorities are as follows:-***

(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily

harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case."

45. The appellant in this case sustained injuries from the altercation before he retrieved his firearm and fired the shots. The accounts of PW1, DW2, DW3 and DW4 all draw out the fact that the complainant was also an aggressor at the time; and that he too inflicted injuries upon the appellant by hitting him on his face with a stone. Even though the appellant did not bear the burden of proving self-defense, DW1 did, in fact, produce the appellant's P3 form as evidence of the injury.

Conclusion and Disposition

46. From the totality of the evidence, the circumstances of the case paint a picture of an altercation which led both the complainant and PW1 to seek self defence; a fight or flight situation. Indeed, both of them were aggressors, only that PW1 ended up with worse wounds than the appellant. It is noted that the appellant is a civilian who is licensed to hold a firearm which he retrieved and used when he faced a threat from the complainant. From the evidence, it appears that the appellant did not retrieve his firearm to defend himself as his first option of defense during the fight.

47. In the circumstances of this case, I find that the prosecution failed to prove beyond reasonable doubt that the appellant attempted to murder the complainant. Given the totality of the evidence and the fact that the two protagonists were in a fight, the defence of self defence ought to have been taken into account.

48. Accordingly, the appeal must succeed, and I so find. In the result, the findings of the trial court on conviction and sentence are hereby set aside, and the accused is set at liberty forthwith unless he is otherwise lawfully held.

49. Orders accordingly.

Delivered, dated and signed at Embu High Court this 6th day of May, 2026.

R. MWONGO
JUDGE

Delivered in the presence of:

1. Appellant Present in Court
2. Ms. Mwaniki for the Respondent
3. Kimathi holding brief for Okwaro for Appellant
4. Francis Munyao - Court Assistant