



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abubakar v Republic (Criminal Appeal E014 of 2024)  
[2025] KECA 631 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 631 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL E014 OF 2024  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
MARCH 7, 2025**

**BETWEEN**

**YAHYA ATHMAN ABUBAKAR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the Judgment of the High Court of Kenya at Malindi (S.M. Githinji, J.) delivered on 19th June 2023 in Malindi HCRA No. E008 OF 2022)*

**JUDGMENT**

1. In this appeal, Yahya Athman Abubakar, the appellant was charged in the trial Magistrate's court with two counts. In Count I, he was charged with the offence of attempted murder contrary to section 220 of the *Penal Code*. The particulars were that, on 12<sup>th</sup> February, 2019 at 2300hours in Wiyoni area of Lamu West Sub County of Lamu County, jointly with others not before court, intentionally and unlawfully attempted to cause the death of Musa Harun Musa (PW1), by stabbing him with a panga on the stomach and causing him severe internal injuries and multiple cuts on the head and shoulders.
2. In the alternative Count, he was charged with the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars were that, on the same day and place, he intentionally and unlawfully did grievous harm to Musa Harun Musa (PW1), by stabbing him with a panga on the stomach and further causing him multiple severe injuries and cuts to the head and shoulders.
3. The appellant pleaded not guilty and the matter proceeded to a hearing, where the prosecution called 7 witnesses.
4. At about 10 pm on 12<sup>th</sup> February 2019, PW1 left his assistant Muhamad to complete the remaining minor tasks in Mama Shomo's house of installing her DSTV connectivity. He then made his way to his house on foot. As he neared the appellant's house, he saw figures of 3 men standing on the road ahead. The appellant's house was on the left side and there was another house to the right. As he approached



the 3 men, he turned on his SAMSUNG Mobile phone spotlight and shone it directly onto their faces and instantly recognized them before trying to bypass them. Before he could pass, he was stopped and asked what he was doing there. He recognized Mohamed and Abubakar as the 2 of the men, who were holding sticks. He replied that he had come from Mama Shomo's house where he had some tasks. As he explained, he felt a hard blow on his head, when he was struck with a stick by one of the 2 men. He turned to face them to try and establish which of them had struck him when he saw the appellant standing behind the 2 men while armed with a panga.

5. The appellant attempted to slash him with the panga and, to defend himself, PW1 dived towards the panga wielding man and grabbed and held onto the weapon. A struggle ensued between PW1 and the appellant as each man struggled to wrest the panga from the other. As a result, PW1 was cut on the left shoulder and left wrist. More cuts were inflicted on PW1's arm and his other shoulder. PW1 succeeded in snatching the panga from the appellant's hand and, as he was about to flee with it, the 2 men struck him again on the head using their sticks. He became dizzy and fell to the ground. As he lay there, the appellant grabbed the panga and punctured PW1's belly, cutting it open. His intestines began to spill out of his gutted belly, which completely immobilized him. The gang then dragged him into the appellant's house. Whilst in the house, they kicked him severally, and the appellant even stepped on his ribs. He fell into semi-consciousness and remained motionless on the floor, though he could see and hear the 3 men as they conversed in the sitting room. They then bound his feet and arms with a thick rope, and then searched the house for an empty sack in which to stuff his body, but could not find one.
6. When they failed to find a sack, the appellant went back to PW1 and tightened the noose around his neck so as to suffocate him to death, but PW1 survived the strangulation. Meanwhile, Mohamed went out of the house to fetch an empty sack and, in the process, met with Lulu whose house was adjacent to the appellant's house. She immediately entered the house and found PW1 lying on the ground. He was bloodied, cut up, and bound in thick ropes. What she saw made her scream, causing the appellant to pick up one of his accomplice's sticks and hit her. He ordered her to shut up when she asked the reason for the extreme violence meted on PW1. The appellant warned her not to interfere in the case as she had allegedly done in another case involving one Ustadh Salim who ended up being convicted and imprisoned for defiling a minor who happened to be the appellant's sister-in-law. Lulu's screams attracted one Baguro, a village elder, who came and found PW1 lying motionless on the floor. The appellant misinformed Baguro that they had caught a thief armed with a panga and had just overpowered him. Baguro advised that either the chief or the police should be alerted.
7. Baguro returned with Fatuma Mohammed (PW4), the Headwoman, who ordered those present to immediately lift PW1 and rush him to hospital. Bakari, one of PW1's assailants told her that PW1 was already dead, and that there was no need to take him to hospital but, instead, to bury him immediately. The head woman reiterated her instructions that PW1 be taken to hospital. A boat was located and PW1 was rushed to the King Fahd Hospital. He saw 2 of his attackers among those taking him to the boat and thereafter following him to the hospital. The 2 insisted that PW1 should be taken straight to the mortuary, but a member of the public, one Mzee Kicheko, responded that PW1 ought to be first treated and rescued before the doctor ascertained whether or not he was dead. As soon as PW1 was admitted in the hospital, he lost consciousness.
8. He underwent various surgeries, and the X-rays revealed that he had fractured pelvic bones which necessitated his transfer to Mombasa for specialized treatment. After prolonged medical treatment, PW1 was eventually discharged and returned home to recover. His wife had earlier reported the incident to the police upon which he recorded his statement, as did other witnesses. He identified all his medical documents and 5 photographs that the police took at the hospital. He complained that, as at the date of the hearing, he was still in pain and had lost the ability to fend for his family.



9. He further stated that the appellant was well known to him as his neighbor, and that they had a strained relationship over his second wife Wahida with whom the appellant claimed to be in a relationship, and intended to marry her. PW1 affirmed that he recognized all his 3 attackers as Yahya, Bakari and Mohamed.
10. On 12<sup>th</sup> February 2019 Mwanasomo Mohamed Hamisi (PW2) was returning to her house at around 11 pm when she heard noises coming from the nearby house. She went out and peeped into the neighbour's house and saw Musa lying down with 3 men stooping over him while he was bound in ropes. She went around the house and entered. She was shocked at the ghastly scene that she found which made her scream and raise an alarm. Bakari tried to silence her, but she was unable to remain silent. She rushed away to awaken the victim's wife by banging on her window. PW1's wife woke up and hurriedly went over to the appellant's house. PW2 saw that PW1 had cut all over his body and was lying in a pool of blood. She saw Bakari with a club and the appellant with a panga. The room had bright white electric lighting from its bulb in the room. Her screams of distress caused a large crowd to gather in response. They rescued the injured man and rushed him to hospital aboard a boat. The injured man appeared dead to her as well as to those present.
11. Mohamed Awadh Guro (PW3) was sitting on the balcony of his house when some villagers came and asked him to awaken his wife who was the headwoman so that she could intervene in an ongoing situation. His wife, PW4 was sick at that time so he went over with the villagers instead. On arrival at the appellant's house, he found PW1 lying on the floor bloodied and motionless. Bakari shouted to PW3, "...tumemnyoroha!" while claiming that they had caught up with a village thief who was armed. As the other entrance to the house was locked from inside by Mohamed, he told him to open it. When he entered and found PW1 lying motionless bound in thick ropes around the neck, arms, and feet, he ordered that the matter be reported to the authorities, the chief, and the police, whereupon he dashed out to call Chief Majid and Sub-Chief Ali Jelle. He also alerted his sick wife of the dangerous situation, and she struggled to get up and go over to the scene. PW3 procured a boat that took PW1 to hospital.
12. Fatuma Mohammed (PW4), wife to PW3, told the court that she rushed to the scene after her husband returned to the house with a report of the occurrence of brutal violence. On her arrival at the house occupied by Wahida and Yahya, the appellant, but owned by Bakari (father to Wahida), she met Bakari who claimed that a village thief who was armed had been cornered. By this time, a large crowd had gathered at the scene. Together with PW3, they got a boat that took the injured man to hospital.
13. Yaye Omar Mohamed (PW5) is PW1's wife. She was woken up at around 11 pm on 12<sup>th</sup> February, 2019 by banging on her window. She got up and rushed to the scene after being alerted of the chilling events. On arrival, she found her husband bound in ropes and with cuts all over his body. As he lay in a pool of blood, she cried uncontrollably over him. She saw Bakari, Mohamed and the appellant at the scene. She saw the ropes and the pool of blood as well as a sack.
14. Bakari told her to take "away her husband's corpse". The crowd became so hostile that Bakari was forced to lift the body of PW1 and place it on the bed waiting for transportation to hospital. After his admission to the facility, she reported to Lamu Police Station.
15. Madi Sheyumbe (PW6), a clinical officer, produced the medical treatment notes and discharge forms of PW1. He had suffered grievous harm from the open fractures of the pelvic bones, multiple deep cuts on the arms and legs, loss of consciousness, 7 deep cuts on the skull, cut right finger, and 3 cm deep cut wound to the loins.
16. PC Hoseah Nzuki S/NO 113138 (PW7), the investigating officer, recorded the witnesses' statements and issued a P3 Form, which was duly filed. He compiled the police file and had the appellant charged



- following his arrest. He recalled that he visited the victim at 2:20 AM at the King Fahd Hospital after receiving the initial alert of the incident. While at the hospital, the alleged suspect showed up thinking that the victim had succumbed to his injuries. The victim spoke briefly after being stabilized. He pinpointed the appellant to the police when he went over to the victim thinking that the victim had died. Photographs of the injured man were taken by the scenes of crimes officers and the Memo Form were produced as exhibits.
17. When placed on his defence, the appellant stated that, on 12<sup>th</sup> February 2019, he left his wife Wahida and set for the trip to Lamu East. This was at about 5 pm. He was expected back the next morning, but he completed the journey ahead of time and returned to his house at 11 pm. When he arrived at the main gate “B” leading into the compound, he called out to his wife. She responded in a fearful voice. When she came out of the house, instead of opening gate “B” she went to open gate “A” which was a short distance from gate B. So, he went to Gate A. As he entered he saw a man standing behind the gate. He thought that it was an intruder only to find that it was Musa Harun, his neighbor. His father-in-law Bakari and another friend who were returning with DW1 to the compound also found PW1 behind gate A trying to hide himself. The man briefly vanished before re-emerging and striking him on the head. In self-defense, he wrestled with PW1 after picking up a panga that was in the external kitchen fireplace, but lost consciousness and did not know what happened next because PW1 landed a heavy blow on his head. He denied ever injuring PW1. He recalled that his wife Wahida vanished from the scene. He admitted that PW1 was seriously injured, but pleaded that this would not have happened if the victim had not been found at the wrong place at the wrong time.
  18. Wahida Bakari Athman (DW2) was the appellant’s wife at the time. On the material day, the appellant had told her he was going on a business trip to one of the islands. The same day, Musa, the complainant, called her requesting to have a chat with her. At about 7 pm he went to her house, and it was while they were talking that the appellant arrived and found the complainant in the kitchen. They began to quarrel and, at that point, she left for her mother’s house.
  19. Upon considering the evidence, the trial Magistrate convicted the appellant of the main count of attempted murder and sentenced him to serve 20 years’ imprisonment. Aggrieved, the appellant filed an appeal to the High Court on both conviction and sentence, whereupon the 1<sup>st</sup> appellate court dismissed the appeal and upheld both the conviction and sentence.
  20. Dissatisfied, the appellant has filed an appeal to this Court on grounds: that the learned trial Judge was in error in law and fact by failing to appreciate the contradictions and discrepancies in the prosecution case; in failing to consider that the burden of proof had not been discharged beyond any reasonable doubt; in failing to consider that mens rea and actus reus were not established; and in failing to appreciate that the appellant’s defence was not conclusively considered.
  21. When the appeal came up for hearing on a virtual platform, learned counsel representing the appellant was Ms. Julu, while learned prosecution counsel for the State Ms. Nyawinda appeared for the respondent. The appellant filed written submissions where it was submitted that the prosecution failed to establish whether or not the appellant had the intention to kill in the first instance. The lack of an intention to kill is corroborated by none of the witnesses ever witnessing the appellant’s plan or eventually beating the complainant as he alleges. The only testimony that pointed to the events that evening is the testimony of the complainant, where it was his evidence that when he was accosted and then dragged into the appellant’s house. It was submitted that he made a feeble attempt to explain why he was in the appellant’s house that late at night. PW4, PW7, and his own wife, PW5, stated that there were no drag marks or a blood trail to explain the allegation that he was dragged into the appellant’s house when the complainant stated that he was cut with a panga outside the appellant’s house.



22. The appellant faulted the High Court for misconstruing the evidence to find that there was an intention on the part of the appellant to kill the complainant; that, if at all such intention existed, the facts failed to provide any plausible explanation for it; further that having established that there was no proximate or manifest intention on the part of the appellant to kill the complainant, the charge of attempted murder could not be legally sustained.
23. It was also submitted that there was no evidence that the appellant attacked the complainant and that, therefore, the alternative charge could not also be lawfully sustained; that the High Court did not holistically analyze the facts and evidence and failed to discharge its legal duty to evaluate, re-consider and analyse the evidence, thereby causing a miscarriage of justice.
24. On their part, the prosecution submitted that it proved its case to the required standards; that the ingredient of the intention to commit the offence was established by the complainant's evidence; that he testified that he was attacked by the appellant and others not charged; that they beat him thoroughly as a result of which he sustained panga cuts on the left wrist and left shoulder; that he fell down on the appellant's corrugated iron fence. The appellant pulled him inside his house where they continued assaulting him with kicks and blows, and the appellant even stepped on his ribs; that, when PW1 lay motionless on the floor, the appellant bound feet and legs and tied a rope around his neck; that he found a sack in which they were to put him and were about to throw his body in the ocean; that the prosecution proved both the elements of actus reus and mens rea with regard to the offence of attempted murder; that the High Court rightfully upheld the conviction; that the appellant was well known to the complainant; and that he was identified as his assailant by not only the complainant but also by PW2.
25. On the appellant's defence, counsel submitted that the court below considered whether the defence of provocation was caused by the alleged relationship between the complainant and his wife, and found that it was not established.
26. With regard to the alleged contradictions, counsel submitted that there were no contradictions in the evidence of the prosecution witnesses and that, if there were any, they were minor and did not go to the root of the prosecution's case.
27. On the sentence, counsel submitted that the appellant was charged with the offence of attempted murder contrary to section 220 of the *Penal Code*, which attracts a maximum sentence of life, but that he was sentenced to serve 20 years' imprisonment, which was reasonable in the circumstances and which sentence should be upheld.
28. This being a second appeal, the Court is restricted under section 361(1)(a) of the *Criminal Procedure Code* to considering matters of law only. Section 361 of the *Criminal Procedure Code* provides as follows:

- “361. 361.(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section
  - a. on a matter of fact, and severity of sentence is a matter of fact; or
  - b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”



29. The provision that confines this Court's jurisdiction was aptly set out by this Court in *Karingo v R* [1982] KLR 213 that:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja v R* [1956] 17 EACA 146)”

30. In the case of *Boniface Kamande & 2 Others v Republic* (Crim. App. No 166 Of 2004), this Court expressed itself as follows:

“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it.”

31. With this in mind, the issues that arise for this Court's determination are:

- i. whether the prosecution proved its case beyond reasonable doubt; ii) whether there were contradictions and discrepancies in the prosecution case, and iii) whether the appellant's defence was not considered by the trial court.

32. In finding that the offence was proved beyond reasonable doubt, the trial court held:

“The gang was armed with crude but dangerous weapons and without wasting time, the gang descended on the complainant with strikes, kicks and cuts from pangas and clubs which they had armed themselves with. They then dragged their bleeding victim of the present accused person so that they could have an uninterrupted session dismember the victim. In the house they beat him and cut him up so gravely that he became immobilized. Seeing that he was half dead, the gang then tied ropes around his neck, feet and hands then fetched for a sack to stuff up his body into with a view to dump him into the Indian Ocean which was close by but their plan to dispose of his body was cut short by the arrival of neighbours who heard the victim wailing and crying for help.

The trial Magistrate continued:

“The overt intention to kill was also manifest from the ambush and preparation made to violently strike the complainant. The other over (sic) acts showing the intention to kill was the action of tying ropes around the neck of the maimed and half- dead man and the efforts made to stuff up his body in an empty sack with a view to dispose the body in the Indian Ocean so as to completely destroy him...”

The High Court, for its part, stated thus:

“Mens rea for the offence of which is the intention to kill and the overt act are well established in the case by the prosecution beyond reasonable doubt. The inflicted injuries were intended to cause death and in my view it was just not the day meant for his death that he survived the ordeal.



33. The appellant was charged with the offence of Attempted Murder contrary to Section 220 of the *Penal Code* which provides:

“Any person who—

- a. 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.”

34. Section 388 of the *Penal Code* states:

- “1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil 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 fulfilment 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.

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 successfully or not.

Mens rea in attempted murder was also explained in Criminal Law, Butterworths (1998) 6th Edition at page 288 as, “Nothing less than an intention to kill will do.”

35. The principle was explained by this Court in the case of *Abdi Ali Bare v Republic* [2015] eKLR thus:

“to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder.”

36. In the case of *Hamis Tambi v Republic* [1950] 20 EACA 176, it was held;

“that it is an essential ingredient to prove intent to kill in a charge of attempted murder. While the Tanzanian Court of Appeal in the case of *Bonifas Fidelis Abel v Republic*, Criminal Appeal No. 301 of 2014 (unreported) laid out the ingredients of the offence of attempted murder thus:



Firstly, proof of intention to commit the main offence of murder. Secondly, evidence to prove how the appellant began to employ the means to execute his intention. Thirdly, evidence that proves overt acts which manifests the appellant's intention. Fourthly, evidence proving an intervening event, which interrupted the appellant from fulfilling his main offence, to such extent if there was no such interruption, the main offence of murder would surely have been committed.”

37. In other words, to sustain a charge of attempted murder, the evidence must show that there was a specific intent to unlawfully cause the death of another.
38. In the instant case, it is of significance to note that the evidence relied on by the trial court was the direct evidence of PW1 who, despite the gruesome and life-threatening ordeal that he endured, lived to testify as to the facts as they transpired on the material evening. PW1 provided explicit details of how the appellant together with others attacked and cut him with a panga on his shoulders, hands and his stomach; that the appellant stabbed his stomach with the panga thereby puncturing it; that they hit his head with a stick and stamped on his ribs; and that the horrendous attack continued with his hands and legs bound and a rope tied around his neck with the intention of strangling him.
39. It is evident that, on account of the vicious attack on PW1, the appellant made several attempts to end his life by the severe blows and deep cuts inflicted all over his body with a panga, including puncturing his stomach, culminating in the attempt to strangle him, all of which would have led to his untimely death. The actions were a proximate and manifest intention on the part of the appellant to kill the complainant and, therefore, the charge of attempted murder was sufficiently established. In view of our conclusions, we have no basis on which to fault the concurrent findings of fact of the two courts below.
40. As concerns the appellant's complaint that his defence was not considered, we have been through the judgments of the two court below, and find that the various elements of the appellant's defense were analysed and weighed out against the prosecution's evidence. For its part, we are satisfied that after the High Court took into account the appellant's defence, it rightly concluded that it did not dislodge the prosecution's case, and that the offence of attempted murder was proved to the required standard that the appellant attempted to murder the complainant.
41. With regard to the issue as to the alleged contradictions and discrepancies in the evidence of PW1 and PW2 with regard to the evidence that there were drag marks, this Court in the case of *John Nyaga Njuki & others v Republic* [2002] eKLR stated that:

“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case.”
42. It is trite law that major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained. Minor ones, on the other hand, will only lead to rejection of the evidence if they point to deliberate untruthfulness.



43. In the instant case, against the overwhelming facts of the prosecution’s evidence, we find the inconsistencies to be minor and inconsequential and, as such, curable by section 382 of the Criminal Procedure Code. This ground is accordingly lacking in merit.

44. In view of the foregoing, we are satisfied that the prosecution proved its case to the required standards. The appeal has no merit and is hereby dismissed in its entirety.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF MARCH, 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA, CArb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

