



REPUBLIC OF KENYA



**KENYA LAW**  
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**GMM v Republic (Criminal Appeal 6 of 2021)  
[2023] KECA 218 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KECA 218 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 6 OF 2021  
MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA  
MARCH 3, 2023**

**BETWEEN**

**GMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Machakos (D. K Kemei J.) delivered on 16th May, 2018 in Machakos HCCRA No. 95 of 2015)*

**JUDGMENT**

1. This is an appeal against the judgment of the High Court at Machakos delivered on May 16, 2018 by Kemei, J. in Criminal Appeal No. 94 of 2015. The appellant was charged with the offence of attempted murder contrary to section 220(a) of the [Penal Code](#).
2. The particulars were that on November 1, 2009 at Utithini Sub-location Miu Location in Mwala District within Eastern Province, the appellant unlawfully attempted to cause the death of NM by cutting her on the head with a panga. The appellant denied the charge, was tried, found guilty and upon conviction was sentenced to 30 years imprisonment. Aggrieved by the conviction and sentence, the appellant preferred a first appeal against both conviction and sentence to the High Court at Machakos. The same was heard by Kemei, J. who, by a judgment delivered on May 16, 2018 upheld both the conviction and sentence.
3. During trial, the prosecution called 5 witnesses, PW1, JN the complainant, testified that on November 11, 2009 at about 6:00am, she was in the kitchen making tea when the appellant came and asked her to be his lover. When she refused the entreaty, he suddenly pulled out a panga and cut her severally on the head and her left hand, whereupon she fell down and passed out. She, as well as the appellant were employees of BK, (PW2). She was taken to Machakos Level 5 hospital and thereafter to Kenyatta National Hospital where she was admitted. This evidence was corroborated by PW2 who testified that



- she was in her house when she heard a loud thud and screams coming from the kitchen, she rushed out and found the appellant at the door of the kitchen, and PW1, on the floor. When she asked him what was going on, he retorted that he had been infected with HIV by the deceased. She went on to state that a machete had penetrated PW1's hand, and she had been cut on her face and on top of her head. They took her to hospital and the appellant was arrested.
4. PW3, MK, daughter to PW2 on the material day, was also in the house when she heard somebody scream, she rushed out and heard the appellant shouting, she then heard a very loud scream. The appellant then walked out and when she peeped through the window of the kitchen, she saw PW1 lying in a pool of blood with a machete stuck in her arm. PW4, P C Ibrahim Gedi, was at work on the material day when civilians brought PW1 and the appellant. PW1 had a head injury and a machete stuck in her arm and was unconscious. He took her to hospital, locked up the appellant and charged him the next day. PW5, Dr. Muia Janet, was attached Machakos Level 5 hospital, testified on behalf of her colleague Dr. Ndenda, and produced a P3 form for PW1, in which the degree of injury was classified as grievous harm.
  5. Placed on his defence, the appellant elected to give unsworn testimony and called no other witness. He denied committing the offence and that the charge was false and malicious. The trial court after careful analysis of the evidence, found the appellant guilty and sentenced as already stated. Dissatisfied with the said judgment and sentence, he appealed to the High Court. The High Court after re-evaluating the evidence as required dismissed the appeal in its entirety.
  6. The appellant has now preferred this second appeal, on four grounds to wit, that the learned Judge erred in law by failing: to appreciate that the trial was not concluded within a reasonable time as envisaged under article 50(2)(e) of *the Constitution*; to find that one of the constituent elements of the offence was not established; to find that the P3 form was admitted in contravention of section 77 of the *Evidence Act*; and, by not only rejecting the appellant's plausible defence but also imposing a harsh and excessive sentence.
  7. The appeal was canvassed by way of written submissions with limited oral highlighting. The appellant submitted that every accused person has the right to have the trial concluded within reasonable time. That he took plea on November 17, 2009 and it was not until July 14, 2014 that the trial commenced. That the delay was occasioned by the persistent failure by PW1 to attend court. He relied on the cases of *Christopher Njeru Gitbinji vs. Republic* [2020]eKLR, *Musembi Makau vs. Republic* [2019]eKLR, to buttress the importance of Article 50(2)(c) of *the Constitution* as regards the need for the courts to ensure its compliance.
  8. The appellant further submitted that the facts before the trial court did not demonstrate that he had any intent to harm PW1. That no one saw him cut, maim or injure PW1. Further, that he never ran away from the scene of crime which was evidence enough that he did not commit the offence. The evidence on record disapproved the narrative that he attempted to murder PW1 and malice aforethought as an ingredient of the offence on his part was not proved. The appellant relied on the case of *Tubere s/o Ochen vs. Republic* [1945] 12 EACA 63, for the proposition that in determining malice aforethought, the court can consider the weapon used, the part of the body which was attacked, and the conduct of the accused before, during and after the incident. That no evidence was led with regard to the above. That the trial court erred in admitting in evidence the P3 form in the absence of the maker. This was in contravention of section 77 of the *Evidence Act*. The appellant placed reliance on the case of *J. A. vs. Republic* [2016] eKLR for the proposition that a transfer of a maker of a document is itself not sufficient ground for failing to avail the maker in court especially where the document is likely to generate intense cross examination.



9. As regards the failure to consider the appellant's defence, the appellant submitted that though he tendered unsworn defence in which he explained himself on the circumstances that led to his arrest and that the charges were a fabrication, the same was not considered. Finally, he urged that the 30 years imprisonment imposed on him was too harsh and excessive in the circumstances, and pleaded with us to exercise our discretion in his favour and grant any other sentence that we deem fit, just and reasonable, in the event we throw out the appeal on conviction.
10. The appeal was opposed. On the first ground, the respondent submitted that the appellant was positively identified by both PW2 and PW3 who immediately came to PW1's rescue after they heard her scream. That was therefore no possibility of mistaken identity as the offence was committed in broad daylight. Both PW2 and PW3 testified that they found the appellant while still at the scene, to wit, the kitchen and PW1 was lying in a pool of blood. PW1 too positively identified him, as he attacked her. He even spoke with her before the attack. That there was no inconsistency in the testimonies of the key prosecution witnesses particularly PW1, PW2 and PW3. PW5, produced her P3 form showing the degree of injuries which were grievous harm, hence the conclusion that the intention of the appellant was to inflict very serious injuries on PW1 was well founded. That contrary to the submissions of the appellant, the P3 form was produced in accordance with the law.
11. On the second issue, it was submitted that the appellant on being placed on his defence, chose to give unsworn evidence in which he merely denied committing the offence. However, the first appellate court properly considered the appellant's defence and held that the same did not shake the prosecution's case and that the appellant had a motive to attack PW1 blaming her for infecting him with HIV. That this court should treat the issue of their having been a grudge between the appellant and PW1 as an afterthought, as it was neither raised before the trial court or the first appellate court.
12. Finally, the respondent submitted that given the injuries sustained by PW1 at the instance of the appellant, the sentence imposed was justified and there was no basis for this court to interfere.
13. Having duly considered the record, the judgments of the two lower courts and respective submissions, we start by reminding ourselves of the approach that this court takes when faced with a second appeal, and that is, it only dwells on matters of law. See *Karungo vs. Republic* [1982] eKLR. Further, when invited to interfere with the concurrent findings of the trial court and the first appellate court, in *Boniface Kamande & 2 Others vs. 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.”

14. In our view all the grounds of appeal raises issues of law that we shall address.

The appellant has alleged that his trial took too long to be concluded on account of PW1's inability to appear in court to testify. From the record, the case was adjourned severally because PW1 had been admitted at Kenyatta National Hospital from the injuries sustained after the attack by the appellant. It is apparent from the record, that indeed, PW1 stayed in hospital for more than a year, before she was discharged hence the adjournments. This was an issue that was beyond the prosecution's and PW1's control. In any event, even if it was true the appellant's remedy lies elsewhere and not us allowing the appeal on such ground.



This court in the case of *Ezekiel Oramat Sonkoyo v Republic* [2012] eKLR, faced with a similar matter stated thus: -

“Applying the above principle to the instant case, I hold the considered view that the breach complained of by the appellant at this stage cannot be undone, and accordingly the appellant can only be compensated for that breach by way of damages. The appellant’s block of grounds of appeal based on the issue of breach must therefore fail.”

15. As we say so, we are well aware that in the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence, an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and proper investigations and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously guarded and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are in conformity with the constitutional mandate contained in articles 50 of *the Constitution* of Kenya 2010. The right to a fair trial is one of the cornerstones of a just society.
16. The foregoing notwithstanding, we are satisfied that the trial of the appellant was conducted in a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism. In other words, considering the flip side of the maxim “justice delayed is justice denied”, the appellant’s right to a fair trial was not at all eroded to the extent that it was totally unfair.
17. The appellant was charged with the offence of attempted murder contrary to section 220 (a) of the *Penal Code*. The said section provides as follows:

“Section 220 -Attempt to murder 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.”

However, the prosecution, in a charge of attempted murder must strictly prove the intent. In *R vs. Whybrow* [1951] 35 CR APP REP, 141, Lord Goddard CJ, stated that:

“But if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime.”

While discussing the mens rea of the offence of attempted murder, J. C. *Smith and Brain Hogan, the learned authors of the prominent book, Criminal Law*, Butterworths, 1988 (6<sup>th</sup> Ed), at page 288 state that in a charge of attempted murder: “Nothing less than an intention to kill will do.”

18. Dealing with the same issue, Madan J.A (as he then was) in the case of *Cheruiyot vs. Republic* (1976-1985) EA 47, quoting with approval from *R. vs. Gwempazi s/o Mukbonzo* (1943) 10 EACA



101, *R. vs. Luseru Wandera* (1948) 15 EACA 105 and *Mustafa Daga s/o Andu vs. R.* (1950) EACA 140, stated as follows:

“In order to constitute an offence contrary to section 220, it must be shown that the accused had a positive intention unlawfully to cause death...The essence of the offence is the intention to murder as it is presented by the prosecution.”

It follows then that the acts of the appellant must be considered and determined as to whether they were intended for the death of a victim.

19. As to whether the offence of attempted murder was proved, the appellant has complained that the facts before the trial court did not show that he possessed any intent to harm PW1, no one saw him cut, maim or injure her, further he never ran away, showing that he had nothing to fear, as he had not committed the offence. To prove attempted murder, the prosecution must prove that the appellant took steps towards the commission of murder, which steps were immediately and not remotely connected with commission of the murder. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder.
20. In Cross & Jones' *Introduction To Criminal Law*, Butterworths, 8<sup>th</sup> Edition,(1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:

“...[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted...”

The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts.

21. The appellant is said to have been working with PW1 in the same homestead and on the material day, attacked PW1 with a machete and stabbed her severally. She cried out for help which necessitated PW1 and PW2 to go to her rescue. PW2 met the appellant making his exit from the kitchen and when asked what had happened, the appellant retorted that he could not suffer when he was infected with HIV by PW1. PW1 was seriously injured and had to spend more than a year in hospital. From this evidence it is clear that the appellant intended the death of PW1. It must have taken meticulous planning by the appellant to commit the offence. He armed himself with a machete and struck when PW1 was alone in kitchen and most vulnerable. His decision to move from where he was to the kitchen and cause harm to PW1 by cutting her severally on the most vulnerable part of the body, the head, the intention couldn't have been more clearer. It speaks to a person who was prepared to kill. Having explained much in this judgment of the offence of attempted murder, we are satisfied that the ingredients of the offence were proved.
22. On failure to have the maker of the P3 form come to court in person to testify, the reason given for the said doctor not being able to testify was that he was conducting an operation. Since they worked together, PW5 was able to produce the same. Further, from the record, it is clear that the appellant did not object to the production of the document by PW5. Indeed, the appellant cross examined her at length on the same. Accordingly, no prejudice was occasioned to the appellant by PW5 producing the P3 form and not the maker. In any event, section 77 of the [Evidence Act](#) provides for such scenario.
23. On the ground that both courts below did not consider his alibi defence, we have gone through the record and from the trial court, to the first appellate court, the appellant's defence was factored in



before the final verdict was made. The High Court while making its decision was of the view that the same did not shake the prosecution's case and that the appellant had a motive to attack PW1 blaming her for infecting him with HIV.

24. Section 220(b) of the *Penal Code* provides for up to life imprisonment for a person convicted of the offence. It cannot be said that 30 years' imprisonment imposed on the appellant was harsh, granted the aggravated nature of the injuries that PW1 sustained at the hands of the appellant.

25. The appeal is devoid of merit, and, is accordingly dismissed in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH, 2023.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**G. W. NGENYE -MACHARIA**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

