Makokha v Republic (Criminal Appeal 31 of 2021)
[2023] KECA 621 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 621 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 31 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

MAY 26, 2023

BETWEEN

EDWARD WANYONYI MAKOKHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Garissa (C. Kariuki, J.) delivered on 29th July 2020 in HC.CR. A No. 10 of 2020)

JUDGMENT

1. The appellant was convicted in the High Court, Garissa, on a count of attempted murder, contrary to Section 220 (a) of the *Penal Code*. The facts of the case were that, on September 25, 2014 at around 20.30 hours in Benane town, within Garissa County, he unlawfully attempted to cause the death of Ibrahim Hassan Shid. Upon conviction, the appellant, who at the time, was a police officer was sentenced to 20 years' imprisonment.

2. The appellant lodged a notice of appeal on August 5, 2020 and has proffered the instant appeal by filing a memorandum of appeal dated January 20, 2023 containing 6 grounds. The grounds are that the Judge erred in law and in fact in that: the Court failed to appreciate that malice aforethought was not well established; that the complainant's credibility was questionable and was thus an untrustworthy witness; failing to consider and appreciate the evidence tendered by the defence; failing to consider that the witness who was adversely mentioned in the proceedings was not called as a witness; and that the appellant lacked mens rea as there was no bad blood between him and the complainant.

3. When the matter was called out for hearing, the appellant was represented by Mr Makenzi who highlighted his written submissions dated January 24, 2023. The state was represented by Mr David Okachi, State Counsel who also highlighted his written submissions dated September 19, 2023.

4. This is a first appeal and the duty of the Court is to re - evaluate the evidence, assess it and reach its own independent conclusions but also warning itself that it did not hear or see the witnesses. This Court in *Gabriel Kamau Njoroge v Republic* [1987] eKLR expressed itself as follows:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. (See Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570). If the High Court has not carried out its task, it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly, misdirections and non-directions on material points are matters of law."

5. To contextualize the appeal, it is necessary for us to revisit the evidence that was tendered in the trial Court. It is common ground that the appellant was a police officer serving at Benane police station in Garissa County, while the PW1 Ibrahim Hassan Shid, the complainant, was a form four student at B Secondary School.

6. According to PW1, there was a power blackout in the school at about 8pm. His evidence was that he and some other students went to a hotel in the vicinity to take dinner. The hotel was owned by one Rukia. He testified that when eating, a police officer entered the hotel and questioned what they were doing. He stated that the police officer who was in jungle uniform was known to him as he was based at Benane police station for a long time. He stated that the light button on his phone was on, as they were using the phone as a torch when eating. He stated that the appellant snatched his phone and when he demanded it back, the appellant shouted "nitakupiga risasi", meaning, "I will shoot you."

   The appellant went out of the hotel and when PW1 followed him, the appellant opened fire and shot him in the right chin and the right foot.

7. This account of the events of that fateful night were repeated by PW2, Mahamed Mahamud Magan, PW3, Yusuf Ali Mohammed and PW4, Hassan Abdikadir Bishar, all students of B Secondary School and who were in the hotel enjoying supper. The three (3) witnesses testified that the appellant forcefully took the phone from the complainant and when he demanded it back, the appellant shot and injured him.

8. PW6, Chief Inspector Michael Wachira was the officer commanding station, Modagashe police station. He stated that Benane police station is a patrol base with nine (9) officers, and the appellant was in charge of the patrol base. His evidence was that he received a phone call from a colleague and the county commander, who informed him that a shooting incident had occurred at Benane and he mobilized officers and an ambulance.

9. PW7, Hassan Abdullahi Ahmed was the in - charge nursing officer at Garissa county hospital. He said he received a bullet from Dr. Bishar Abdi, who had removed it from a patient and he kept it in the cabinet.

10. PW8, Cpl. Wilfred Kingara and PW9, were police officers who were mobilized and went to the scene after the shooting incident. They said that upon reaching the scene, the appellant identified himself and stated that he had been attacked by some boys. PW10, Bishar Abdi Aden is the doctor who was on duty that night. He stated that he operated on the complainant, who had wounds on the right chin, right thigh, fracture of the femur and a bullet lodged in the knee joint of the right leg.

11. PW11, Emily Ibeere the investigating officer, then working for the Independent Oversight Policing Authority took possession of the bullet. Later she handed it over to Mr Paul Otieno Otiende, PW 16 an investigating officer who took over the case from her. The other material witness was Alex Chirchir, PW15 who is a firearm examiner. He produced a report dated October 7, 2014 that had been prepared by his colleague; Lawrence Ndiwa. The report confirmed that the two spent cartridges which were recovered, were fired from the AK 47 rifle that had been issued to the appellant.

12. On his part, the appellant upon being put on the defence, gave sworn evidence that at 9.00pm, he was at Benane trading centre, when he spotted three (3) to five (5) people who were smoking bhang. He ordered them to stop but they dashed to a hotel, locally known as "Dash." He followed them but they exited through the back door. He found about ten (10) people who were seated and who were using two phones to light the hotel. He said that PW1, the complainant was one of those holding the phone.

13. He further testified that he requested them to identify themselves and the complainant produced a student identity card. He requested him to hand over the identity card and the phone and the complainant complied. It was his testimony that when he asked the old man why they were chewing miraa with students, he was attacked with a stick on the back. He then dashed out and found a crowd that started throwing stones at him. Some attackers tried to grab his gun and two gunshots were released. He stated that he also heard other gunshots; that he had no intention to shoot the complainant.

14. The defence also called witnesses. DW2, Mutwiri Bernard Nyaga, testified that he was a clinical officer at Modagashe county hospital. He produced the patient's medical card dated September 26, 2014 and the P3 form filled on April 17, 2015. DW3, Dekow Mohamed Hassan, the principal of B secondary school produced a photocopy of the school register, that showed the lackluster attendance by the complainant as did not attend school regularly and was absent most of the times. DW4, Inspector Rodgers Wangila Masinde, the O.C.S of Modagashe police station produced the occurrence book which had the entry made on September 25, 2014, after the incident. DW5, Peter Masiga who was a teacher at B Secondary School, at the time the incident occurred, confirmed that the complainant's attendance in school was very poor.

15. Having set out the evidence and having considered the grounds of appeal and the submissions, it is now our duty to re - assess and re - analyze the evidence and reach our own independent conclusion. We have warned ourselves that we did not hear or see the witnesses and that as an appellate Court, we must give allowance for that.

16. The first ground raised by the appellant, is that the prosecution failed to prove the elements of the offence of attempted murder against the appellant. Relying on section 220 of the *Penal Code* the appellant submitted that the prosecution failed to prove beyond reasonable doubt, that the appellant had a positive intention to unlawfully cause the death of the complainant. The appellant cited the cases of *Dickson Mwangi Munene v. Republic*, [2014] eKLR and *Stephen Ngila Nthenge v Republic* [2021] eKLR in support of the argument that the essential ingredients of the offence were not proved.

17. On his part Mr Okachi, State Counsel submitted that the offence was proved beyond reasonable doubt.

18. We have carefully analyzed the parties' submissions and the evidence. The evidence shows that: the appellant was armed with an AK 47 rifle on the material night; that he entered the hotel where the complainant was having dinner; that the complainant, PW2, PW3 and PW4 were students and were unarmed; the complainant had a phone whose torch light had been switched on; that the appellant took the phone from him and this is corroborated by PW2, PW3 and PW4; and that the only point of divergence is what transpired thereafter.

19. The evidence of PW1, PW2, PW3 and PW4 is consistent to the effect that the appellant forcefully took the phone from the complainant, PW1 and threatened to shoot him when he demanded his phone back. Whereas, the appellant's evidence is that the AK 47 rifle discharged two bullets during a struggle and that he was attacked by a mob. This piece of evidence is at the very least unbelievable. The appellant is a trained police officer and if indeed he was shooting in the air as he stated, the question that begs for an answer is how would the bullets hit the complainant in the chin and the other one on the right knee. It is not even clear why he forcefully took the phone from the complainant as he was not part of the people, he alleged to have been taking bhang, and who he said had ran away.

20. Upon re-analyzing and re-evaluating the evidence, we reach our own independent conclusion, where we agree with the holding of the trial Court, that the appellant intentionally shot the complainant.

21. On the question of the intention to unlawfully attempt to cause death, the evidence is clear that the appellant who is a trained police officer, intentionally shot and injured the complainant, a young man who was still attending school. The fact that the complainant was notorious, for skipping lessons is immaterial as what is in issue is not whether he had sneaked out of school, but the events that led to his being shot. The mere fact that he was skipping lessons did not mean that he was an unreliable witness as submitted by the appellant. By firing a lethal weapon, an AK 47 rifle for that matter, the appellant knew that such a weapon was lethal, dangerous and could certainly kill or at least cause grievous bodily harm to the complainant. The appellant ought to have known that by unlawfully shooting at the complainant he intended to cause grievous bodily harm or his death. Given the circumstances, we find that the learned Judge correctly held that malice aforethought was proved.

22. This Court in the case of *Abdi Ali Bare v. Republic* [2015] eKLR, held:

> " Like in virtually all other offences, the prosecution, in a charge of attempted murder, must prove both the mens rea and the actus reus of the offence. In R V. 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.'
>
> And while discussing the mens rea of the offence of attempted murder, J. C. Smith and Brain Hogan, the learned authors of the preeminent text, Criminal Law, Butterworths, 1988 (6th Ed), at page 288 state that in a charge of attempted murder:
>
> 'Nothing less than an intention to kill will do.'
>
> In Cheruiyot v Republic [1976-1985] EA 47, Madan, JA, as he then was, quoting with approval R. v Gwempazi S/o Mukhonzo [1943] 10 EACA 101, R. V. Luseru Wandera(1948) 15 EACA 105 and Mustafa DagaS/O Anduv R. [1950] EACA 140, stated as follows on the mens rea of attempted murder:
>
> '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.'
>
> Section 388 of the Penal Code defines "attempt" as follows:
>
> 388. (1) 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.

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.

The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by

Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:

'D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position, loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder...'

In the present appeal, 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. In Cross & Jones' Introduction To Criminal Law, Butterworths, 8th 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."

23. From the facts of the case, the appellant was a well-trained police officer and not just a lay man, which connotes that he knew what he was doing and knew how to handle a gun. The testimony that the gun discharged bullets during a struggle with a rowdy mob and only the complainant is hit by one bullet in the chin and the other on his right knee, is ludicrous. The nature and intensity of the attack on the complainant demonstrated the intention to kill, as particularly after the shooting, the complainant ended up with wounds on the right chin, right thigh, fracture of the femur and a bullet lodged in the knee joint of the right leg.

24. The intention to unlawfully cause death was therefore established by the use of the AK 47 a lethal weapon, which the appellant must have known would cause death or grievous harm to the victim. We are therefore satisfied that the prosecution proved the ingredients for the offence of attempted murder beyond reasonable doubt, and we so find.

25. The second ground of appeal was that the complainant was an incredible and unreliable witness. To support this assertion, the appellant relied on section 125 of the *Evidence Act* and cited the cases of *Akumu v Reginam* [1954] 21 EACA and *State of Punjab v Jagir Singh and Others* [1974] 3 JCC 277.

26. As we have already stated, the fact that the complainant was notorious for skipping lessons as per the register produced in Court, is immaterial for the purposes of this case. There was no evidence that the complainant was a criminal or that he was armed at the material time. The fact that he was skipping classes severally is an issue for the school code of discipline. There was no record that the complainant and his fellow students who had sneaked out of school threatened the life of the appellant. The allegation that the complainant was unreliable is far - fetched and not supported by any evidence.

27. The third ground of appeal was that the defence raises doubts on the prosecution case. We note that this ground reiterates the same arguments: that the appellant had no intention to harm the complainant; that as a police officer he had a duty to question the complainant and that he was attacked when doing so; and that there was no evidence that he targeted to shoot the complainant. We have already held that the prosecution's evidence of the events of the night and how the attack happened are clear. The evidence of the complainant and PW2, PW3 and PW4 is consistent.

28. The evidence of PW10, Bishar Abdi Aden the medical doctor at Garissa general hospital who examined the complainant, testified that the injuries had been inflicted by the gun shots. We find and hold that the Injuries to the nose, right chin, the fractured femur and a bullet lodged on a knee joint could not be inflicted by a trained officer who was firing in the air. The injuries are too many for the infliction thereof to have happened without the intention to cause them. We are satisfied that the evidence adduced by the prosecution when read in totality, established that the particulars of the offence were proved beyond reasonable doubts.

29. The final ground was that the prosecution failed to call crucial witnesses. The appellant cited the cases of *Suleiman Otieno Aziz v Republic* [2017] eKLR and *Donald Majiwa Achilwa & 2 others v Republic* [2009] eKLR, to support his argument that the prosecution has a duty to call all witnesses who are necessary to establish the truth, even if the evidence of some of those witnesses may be adverse to the prosecution. The appellant argues that one Rukia, the owner of the hotel and one Ibrahim Mohammed Ahmed who was registered as the owner of the confiscated phone ought to have been called as witnesses.

30. The authorities cited by the appellant are clear that no number of witnesses are required to prove any fact. An adverse inference is only drawn by the court where the evidence adduced by the prosecution is barely adequate to establish the truth. Turning to this appeal, there is no evidence that Rukia and Ibrahim Mohammed Ahmed played any role on the material night. The ownership of the hotel and Rukia's involvement in the altercation was not material in the case facing the appellant, thus their

presence or absence would not change the issue before the Court and the ultimate holding on the appellant having had the requisite mens rea. Equally, the registration status of the phone that was in possession of the complainant was not an issue. Indeed, the appellant himself admitted that he confiscated the phone from the complainant. With respect, this ground of appeal amounts to nothing but a desperate attempt to clutch at straws.

31. In conclusion, we are satisfied that the case facing the appellant was proved beyond reasonable doubt and this is a safe conviction that should not be disturbed.

32. Regarding sentence, we note that upon conviction the learned Judge sentenced the appellant to serve 20 years' imprisonment. The state has given a notice to enhance sentence to life imprisonment. The notice was read to the appellant and the Court gave the appellant's advocate time to consult and advise the appellant on the consequences of the notice in case his appeal failed. Upon consultation, the appellant informed the Court that he wished to exercise his right of appeal. We note that section 220(b) of the *Penal Code* read as follows:

> " Attempt to murder
>
> Any person who 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."

33. The sentence upon conviction on the case of attempted murder is life sentence.

Clearly, the appellant upon conviction should have been sentenced to life imprisonment. We note that the sentence prescribed by section 205 is expressed in mandatory terms. The issue of mandatory sentences has been subjected of decisions of this Court and the Supreme Court in the following cases:

a) *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, Petition No 15 of 2015, where it expressed itself as hereunder:

> " 47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of *the Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.
>
> (48) Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of *the Constitution*; an absolute right.
>
> 51. The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the

distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

52. We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst *the Constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the *Penal Code*. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

51. If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

34. We note that in Muruatetu case (supra), the Court clarified that, that decision only applies to murder cases only. It is our view that the recent trend in sentencing, where the Courts have discretion in sentencing, is a step in the right direction. Whereas, the appellant ought to have been sentenced to serve life imprisonment, we will restrain ourselves and not interfere with the discretion of the trial Judge.

35. We therefore hold that on the sentence, the appellant shall serve the 20 years as imposed by the Court. Save for this clarification, the appeal is without merit and we dismiss it.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

A. K. MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR