



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Republic (Criminal Appeal 18 of 2019)
[2023] KECA 1072 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1072 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 18 OF 2019
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
SEPTEMBER 22, 2023**

BETWEEN

ALI MSUO ALI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Garsen dated 5th November 2019 by Hon Lady Justice R. Korir in High Court Criminal Appeal No 48 of 2018 Original Lamu PM Criminal Case No 171 of 2017)

JUDGMENT

1. The Appellant herein and one Yassir Omar Bwanaadi were initially separately charged in Principal Magistrate's Court Lamu Criminal Case No. 171 of 2017 and Criminal Case No. 27 of 2018 respectively. The two cases were consolidated in Criminal Case No. 171 of 2017 on 6th February 2018 with Ali Msuo Ali and Yassir Omar Bwanaadi being the 1st and 2nd Accused respectively. They were charged with the offence of attempted murder contrary to section 220(a) of the *Penal Code*. The particulars of the offence were that on 30th April, 2017 at around 3:00pm at Gardeni Estate of Langoni location, in Lamu West Sub-County within Lamu County, the Appellant and his co-accused together with others not before the court, attempted unlawfully to cause the death of Robert Manasse by cutting him on the head, both hands and left fingers with a panga.
2. Both of them were convicted and were each sentenced to serve 25 years imprisonment. On appeal to the High Court at Garsen in High Court Criminal Appeal No. 48 of 2018, the High Court (Hon. R. Lagat Korir, J) allowed the appeal against the conviction of Yassir Omar Bwanaadi and set his sentence aside. However, the Appellant's conviction together with the sentence was upheld.
3. It is that decision that provoked this appeal.



4. Being a second appeal our mandate is restricted by Section 361(1)(a) of the *Criminal Procedure Code* to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal and concurrent findings arrived at, unless it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this Court to interfere. In such appeals, this Court therefore has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings, in which event, the decision is bad in law, thus entitling this court to interfere. See *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007; *Njoroge v Republic* [1982] KLR 388; and *Karani v R* [2010] 1 KLR 73.
5. The prosecution's case was that on 30th April, 2014, the Complainant, Robert Manasseh, who testified as PW4, was seated by the roadside with one Abubakar Mohammed Abdallah, when the Appellant greeted them as he walked by. After a few meters, the Appellant turned back towards them and in an instant, he was ambushed by the Appellant together with other people who emerged from the small paths next to where he (the Complainant) was sitting. The attackers who were all armed with pangas, surrounded the Complainant and started cutting him up. The Complainant however, managed to run to a kiosk belonging to a person he described as a Meru and shut the door with the attackers chasing him. The Appellant kicked down the door and went into the shop with two other people threatening to kill the complainant while Yassir Omar Bwanaadi whom he had seen standing next to a shop and another attacker remained outside the shop.
6. In order to save himself, the Complainant threw a soda bottle towards them which broke and prevented his assailants from approaching as they were bare footed. He then heard a lady say that the police were coming and his assailants ran away. After five minutes he stepped out of the kiosk while bleeding profusely. His friend Abdallah took him to the police station where he recorded his complaint and was referred to Langoni nursing home from where he was referred to King Fadh Hospital.
7. Brian Kipyegon (PW1), the arresting officer, stated that on the 27th June, 2017, one Baraka had gone to the police station and complained that the Appellant was threatening his life in Kijitoni. That the OCS directed him and another police officer and Administration Police to go and arrest the Appellant and being led by the said Baraka, they managed to arrest the Appellant after he threatened them with a knife. They took him to the police station and booked him. They later learnt that the DCI officers were looking for the Appellant in respect of the instant case.
8. Corporal David Odero (PW2), the investigating officer, testified that on 30th April, 2017 the complainant was taken to the police station on a stretcher while bleeding profusely with his clothes soaked in blood and he had about six cuts, on his back, head, rights side of the chest, right upper arm, and left upper arm near the wrist. The complainant reported that he was ambushed by five people three of whom he knew by name as they grew up together and named them as Ali Msuo, Abdalla and Yassir Omar. The complainant was admitted at King Fadh hospital for two days but his condition worsened and he was transferred to Coast General Hospital. Following the arrest of the Appellant on 27th June, 2014 in relation to another crime, they preferred the instant charges against him.
9. The clinical officer who attended to the Complainant at King Fadh Hospital was Nicholas Charo Lewa (PW3). He filled in the P3 form (Exh 1) for the complainant from the treatment notes from Langoni Nursing Home. He informed the court that when the complainant was first treated he was bleeding from many parts of his body; that he had cut wounds on the skull, near the cervical bone near the base



of the neck, on the right shoulder, on the left hand, the small finger, at the elbow joint and on the wrist; that the complainant was rushed to the theatre where they noted that his tendons on the little finger and right thumb were cut and that the metacarpal joint was broken; and that the doctors could not repair the tendons and therefore they referred the complainant to a consultant in Mombasa for treatment. PW3 told the court that he classified the injuries as grievous harm because of the damage to the body.

10. Upon being placed on his defence, the Appellant denied the charge stating that it was a fabrication. He stated that on the 25th June, 2017 he was arrested by police officers who took him to the police station where the OCS told him he would ensure he goes to jail.
11. As we have stated above, the Learned Judge dismissed the Appellant's appeal.
12. We heard this appeal on the Court's virtual platform on 16th May, 2023 in the presence of the Appellant who appeared virtually from Manyani Prison and Learned Principal Prosecution Counsel, Ms Nyawinda who held brief for Ms Ngina for the Respondent. Both the Appellant and Ms Nyawinda relied wholly on their written submissions.
13. According to the Appellant, his appeal was restricted to the sentence and in his submissions which he christened shaming the devil, he blamed the use of drugs as the cause of his actions. According to him the period he spent in custody had taught him to appreciate human life and dignity. It was on this basis that he sought the reduction of his sentence.
14. On behalf of the Respondent it was submitted that pursuant to section 361(1)(a) of the [Criminal Procedure Code](#), severity of sentence is a question of fact and this Court, on a second appeal, has no powers to interfere therewith.

Analysis and Determination

15. We have considered the appeal and the submissions. As we stated at the beginning of this judgement, this Court's jurisdiction on second appeal is limited to matters of law. Section 361(1)(a) and (b) of the [Criminal Procedure Code](#) provides that:

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.
16. In this case, Section 220 of the [Penal Code](#) under which the Appellant was charged provides that:

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.



17. It is clear that sentence meted upon the Appellant of 25 years was legal as the maximum sentence prescribed is life sentence. It was that sentence that the High Court, sitting as the first appellate court confirmed. The Appellant does not contend that the sentence was illegal but appeals on its severity. As this Court held in *Francis Amojong Ekal v Republic* [2007] eKLR:

“...section 361 (1) (a) of the Criminal Procedure Act denies this Court jurisdiction on a second appeal to hear an appeal on a matter of fact and states categorically that severity of sentence is a matter of fact. Thus, this being a second appeal against the severity of the sentence, by section 361 (1) (a) the court has no jurisdiction to entertain it.”

18. This court is expressly barred from interfering with the decision of both courts below in these circumstances regarding the sentence.

19. Accordingly, we find no merit in this appeal which we hereby dismiss.

20. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

