Mudogo v Republic (Criminal Appeal 105 of 2017)
[2023] KECA 1253 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1253 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 105 OF 2017

PO KIAGE, F TUIYOTT & WK KORIR, JJA

OCTOBER 6, 2023

BETWEEN

BOAZ SAIYA MUDOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from a conviction and sentence from the judgment of the High Court of Kenya at Kakamega, (RN Sitati, J.) dated 28th March, 2017 in HCCRA No 136 of 2014)

JUDGMENT

1. In this second appeal, Boaz Saiya Mudogo (the appellant) maintains that the injuries he caused to Aggrey Shimaka were in the course of him defending himself and that his conviction for the offence of attempted murder contrary to section 220 (a) of the *Penal Code* is without foundation.

2. In his submissions before us, the appellant also sets up a second argument. He asserts that the prosecution failed to carry out its own 'ground evidence' that the charges preferred against him were not justified since he was a victim of an attack and that the charges preferred should have been an assault resulting from a fight and not of attempted murder.

3. As this is a second appeal our remit is prescribed by the provisions of section 361 of the *Criminal Procedure Code*. Of this remit, this Court in *Karani -vs- R* [2010] 1 KLR 73 stated:

> " This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court 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 which case such omission or commission would be treated as matters of law."

4. The prosecution case was that at about 7.30pm on January 10, 2014, Aggrey Shimaka (PW1), Patrick Sirikwa (PW4) and one Boniface Kulecho, rode on a motorbike with PW4 as the rider. As they approached Isikhu river, a man emerged from the side of the road. In reaction, PW1 brought the motorbike to a stop and put off the headlights. The man, recognized by PW1 and PW4 as the appellant, was armed with a panga. Suddenly, using the weapon, he cut Boniface. This was to be a fatal blow. He then turned to PW1 and also cut him on the left side of his rib cage. Although PW1 tried to defend himself, he suffered further injuries when he was cut on the left side of the chin and on the front side of the neck. To escape further harm, PW1 run away towards the gate of the home Robert Odinga Zaddock with the appellant in pursuit.

5. The version by the appellant was that on that night he set off to his home on foot and on approaching the gate of St. Anthony, a motorbike came from the opposite direction. The rider lit the headlights and, rather strangely, gestured how he could behead him. He walked on but on reaching a place called Nguvuli at the river bridge, he saw a motorbike with a rider and two pillion passengers. Headlights were lit blinding him. One of the three ordered him to remove his clothes and to face upwards and the other spat into his eyes. The assailants pulled his penis. In this close encounter he was able to see them. He fought back. The fight left him with injuries to his hand, stomach and head. He reported the matter to the chief who referred him to Kimangeti AP Camp where he lodged a complaint. The next day, he was taken to Kabras Police station where he was arrested for the offence of murdering Boniface and attempting to murder PW1.

6. The trial court (M.L. Nabibya, Ag. SRM) believed the testimony of the prosecution witnesses and rejected the defence. The learned magistrate observed:

> " His evidence that he ran away but failed to report that he had been attacked also raised doubts in his testimony. If indeed he was the one stabbed, he would have sought medical treatment. He admitted seeing PW2 at the scene, therefore he must have been there too."

7. After reevaluating the evidence, the High Court (Sitati. J) concurred with the findings of the trial court. When we read the submissions of the appellant, we are not told why we should fault those concurrent findings. The evidence of the prosecution witnesses was consistent and their accounts of what happened on that night supported each other. We agree with Mr Okango, learned counsel for the respondent, that it was most improbable that this was a case of self-defence when the appellant pursued the complainant right into the home of PW2. This, even after inflicting serious injuries on him by the roadside.

8. The testimony of Sifuna Kizito (PW3), a clinical officer at Malava District Hospital, was that those injuries were a cut wound across the left side of the face from the lower mandible to the maxilla measuring ½ cm and 6 ½ cm x ½ cm deep requiring 7 stiches. He had a cut wound to his left side of the lower abdomen measuring ½ cm x 5cm long x ½ cm deep and a cut wound on the right hand (palm) of ½ cm x 2cm x ¼ cm deep. In the end however, the witness classified the injuries as harm. Notwithstanding this classification the trial court found that:

> " The areas of PW1 injuries shows his intention. Aiming at the left side of lower ribs, the neck undoubtedly showed he wanted to cut short the life of his victim."

9. On its part the High Court observed:

> "The final issue for determination is whether the appellant had the intention of killing the complainant in this case. The evidence is clear that the injuries inflicted upon the complainant were of a very serious nature as per P. Exhibit 1-P3 form.
>
> The trial court was shown and did observe the big scars left behind by the injuries. The trial court in its judgment concluded that by inflicting such injuries on the complainant, the appellant's intention was to kill the complainant.
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> The appellant struck the complainant with a *panga* several times and the only inference that this court can draw from such ferocious attack was that the appellant intended that the complainant should either die or be permanently maimed. It is also clear from the evidence that the complainant knew the appellant by name and called the appellant's name without getting a response.
>
> It is my considered view that upon realization that he had been recognized, the appellant was motivated to eliminate the complainant. That is why the appellant pursued the complainant right into the home of PW2. PW2 saw the appellant still armed with a panga and also threatened to cut PW2."

10. We are not persuaded by the argument of the appellant that he should have been charged with the offence of assault merely because the injuries sustained by the complainant were classified as harm. Indeed, the statutory provisions that create the offence of attempted murder do not require that the subject of the attack should suffer any harm or injury at all for the offence to be established. Section 220 of the *Penal Code* reads:

> 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.

11. The nature of the attack, the type of weapon deployed and target of the blows are important in assessing the motive of the appellant. Using a panga he struck and cut the complainant several times. The blows were targeted at the rib cage and the neck of the complainant. The intention of the appellant was to kill or permanently maim the complainant and he should not get off with a less serious offence merely because the complainant was lucky to suffer much less serious injuries than would in all probability have been the likely outcome of the savage attack. We affirm the finding of the two courts below that the prosecution successfully proved the offence of attempted murder and that marks the end of the road for the appeal against conviction.

12. The law is that for purposes of a second appeal, a challenge to severity of sentence is a question of fact which cannot be entertained in a second appeal (Section 361 (1) (a) of the *Criminal Procedure Code*). Just as at the High Court, the Appellant has, before us, raised the issue of the severity of the life sentence

imposed against him. In paragraph 3 of the High Court decision, the learned Judge identified this as a ground of appeal as follows:

> " That the sentence meted was very harsh and excessive in the circumstances."

13. For some reason this ground appears to have completely escaped the attention of the learned Judge who neither discussed nor made a determination on it. Because of this omission the issue of sentence takes on a shade of a question of law and is properly before us.

14. The easy thing for us to do is to remit the question of sentence to the High Court for consideration. But we are concerned at the possible injustice this would cause to the appellant. The appellant was first arraigned before the trial court on January 14, 2014. He was convicted and sentence to serve life imprisonment 8 months later on September 19, 2014. The record of the trial court shows that he was in custody throughout the trial. The first appeal was determined on March 28, 2017 and all this while the appellant has been serving a jail term.

15. It is now about 9 years since the appellant lost his freedom and it would only be just that he knows his fate without further delay. Fortunately, we have enough material before us upon which we can determine whether the sentence imposed was harsh and excessive. A person convicted of the offence of attempted murder contrary to section 220 (a) of the *Penal Code* is liable to imprisonment for life. Life imprisonment is the harshest sentence possible for the offence and should be left to the most depraved of circumstances. Here, whilst the appellant attempted to kill the complainant and indeed caused him injuries, the injuries were described as harm by the clinical doctor. This may not be one of the most ferocious attempts of murder that we shall hear of. We also consider that the appellant was only 21 years old at the time the sentence was imposed. We are minded to interfere with it to give him a second chance in life.

16. The upshot is that the appeal on conviction fails but the one on sentence succeeds. The sentence of life imprisonment is set aside and in its place the appellant is sentenced to a prison term of 20 years with effect from January 14, 2014 as he has been in custody or serving a prison term from that day (**Section 333 (2)** of the *Criminal Procedure Code*.) Those are our orders.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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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.

DEPUTY REGISTRAR.