IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 134 OF 2006

ALEXANDER KILEI KASUKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Machakos (Wendoh J) dated 21st November, 2003

in

H.C.CR.A. NO 211 OF 2002

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JUDGMENT OF THE COURT

ALEXANDER KILEI KASUKI, the appellant, was on 30th November 2001 charged before the Senior Principal Magistrate, Machakos, with six counts of attempted murder contrary to **section 220(b)** of the Penal Code. However, he was convicted on four counts and sentenced to serve 15 years imprisonment on each count, the sentences being ordered to run concurrently. His first appeal to the High Court of Kenya, at Machakos (Wendoh J), was dismissed and the convictions and the sentences were upheld and hence this second appeal.

The appellant was at the material time employed as Administration Police Officer based at the D.C.'s office at Wote, Makueni District. On the 8th November 2001 at about 6.00 p.m he reported as usual for duty at the D.C.'s office. taking over from his colleague who had signed off. The appellant was in the course of his duty armed with an official G. 3 rifle containing twenty rounds of ammunition. At about 6.00 a.m. the next morning he ventured into Wote township where he aimed his gun and shot at a group of some people who were going to work. After the shooting spree, a number of people were left dead while others, including the complainants who testified before the trial court, were grievously wounded. A contingent of the local police officers including Chief Inspector Michael Gichira rushed to the scene of the incident and managed to disarm the appellant who was subsequently charged with the offences preferred against him. After the tragedy half a dozen or so dead bodies were taken to the mortuary and about ten wounded persons were rushed to a nearby medical clinic for treatment.

In his defence before the trial court the appellant stated that he took over from his colleagues at about 6.00 p.m. on the 8th November, 2001. He was not provided with a duty partner as was required. He carried on with his duty upto 2.00 a.m. when he heard shouts and saw a woman crying for help. He ignored her and she went away. He proceeded to the D.C.'s compound at 5.00 a.m. and while there a group of people appeared and dropped something like a pistol as they proceeded towards the cash office. He cocked his rifle and went into hiding and as the group left he heard an explosion. He fell down and the group advanced towards him. He opened fire from his official rifle and the group took off. He followed them while firing until he exhausted the ammunition. He therafter reported to his supervisor and then the police. He was then disarmed and arrested.

The synopsis of the evidence tendered before the trial court shows that the appellant did not seriously contest the prosecution evidence. In fact he does not in essence deny having shot at and injured the complainants. But, his defence implies that his act of shooting was directed at persons who had invaded his place of duty for unlawful purposes. This line of defence is, however, shot down by the prosecution's evidence which goes on to show that the appellant wantonly and recklessly and without any provocation at all or any threat to his life or property whatsoever embarked on a deliberate act of shooting innocent passersby. He was indeed lucky that he was only charged with lesser offences of attempted murder.

In the appeal before us, just as in the first appellate court, the appellant who had no legal representation made written submissions by which he asked the Court to quash the convictions on the ground that the proceedings were conducted in a language that he did not understand and also that he was denied the right to cross-examine prosecution witnesses. He further feigned ignorance of the entire events that took place during the material evening and the subsequent morning.

We have carefully checked the record of the trial. The plea on 30th November 2001 was taken in the presence of a court clerk and an interpreter shown as Mr. Mutisya who interpreted from English to Kikamba, the appellant's mother tongue. This interpreter was present throughout the trial and the proceedings do confirm this. Further, the appellant did cross-examine all the witnesses produced by the prosecution and at the end of the trial he made a lengthy and detailed statement of defence. We find his complaints baseless and we reject them.

The two courts below rejected the appellant's defence and made concurrent findings that the appellant shot at, killed and seriously injured innocent members of the public who were passing by the road and were no where near the appellant's place of duty. This act appeared deliberate and unprovoked. This Court, as this is a second appeal, has loyalty to accept these findings and there is no basis for us to interfere with them.

However, in our view, specific intent essential to constitute the crime of attempted murder under **section 220 (b)** of the Penal Code was not established. We think that the sum total of the evidence on record shows that an offence of grievous harm contrary to **section 234** of the Penal Code was committed.

In the result as that offence is lesser and cognate to the one under **section 220 (b)** above, we set aside the convictions on attempted murder and substitute in lieu thereof convictions for grievous harm contrary to **section 234** of the Penal Code. The four concurrent sentences of 15 years each shall stand and shall be served as from the date of conviction which was on 13th August 2002.

These shall be our orders.

Dated and delivered at Nairobi this12th day of February, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR