Kibet v Republic (Criminal Appeal E018 of 2023)
[2025] KEHC 3840 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3840 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E018 OF 2023

JK NG'ARNG'AR, J

MARCH 27, 2025

BETWEEN

LEONARD CHERUIYOT KIBET ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Number E013 of 2023 by Hon. Kibelion K. in the Principal Magistrate's Court in Bomet)

JUDGMENT

1. The Appellant was charged with the offence of attempted murder contrary to section 220 (a) of the *Penal Code*. The particulars of the charge were that on 3rd January 2023 at Sauset Village in Bomet East Sub-County within Bomet County, the Appellant attempted to unlawfully cause the death of Simon Cheruiyot by stabbing him using a knife.

2. The Appellant was also charged with the alternative offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the charge were that on 3rd January 2023 at Sauset Village in Bomet East Sub-County within Bomet County, the Appellant unlawfully did grievous harm to Simon Cheruiyot.

3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case. The Appellant on the other hand gave unsworn testimony and did not call any witness.

4. In a Judgment dated 20th April 2023, the trial court convicted the Appellant of the charge of attempted murder and sentenced him to serve 20 years imprisonment.

5. Being aggrieved with the Judgment of the trial court, the Appellant, Leonard Cheruiyot Kibet appealed against his conviction and sentence on the following grounds reproduced verbatim:-

I. That the learned trial Magistrate erred in law and facts by failing to realize that the main ingredients of the offence were not proved to the requited legal standard.

II. That the Prosecution case was not proved beyond reasonable doubt.

III. That the learned trial Magistrate erred in law and fact by basing his conviction on the Prosecution's evidence which was marred with contradictions, inconsistencies, discrepancies and glaring gaps.

IV. That the learned trial Magistrate erred in law and fact by failing to analyze that the entire evidence was manufactured, manipulated and framed o meet the predetermined goal of fixing him.

V. That the learned trial Magistrate erred in both law and fact by rejecting my plausible defence without any further explanation.

6. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh, analyse it and come to my own independent conclusion. I also bear in mind that the trial court had the advantage of observing the demeanour of the witnesses during the trial. See Mark Ouiruri Mose vs Republic (2013) eKLR.

7. I proceed to consider the case before the trial court and the parties' submissions in the present Appeal in the succeeding paragraphs.

The Prosecution's/Respondent's Case.

8. It was the Prosecution's case that the Appellant attempted to murder Simon Cheruiyot (PW1). PW1 who was the Appellant's brother testified that on the material day, the Appellant stabbed him with a knife during a family meeting that was convened to iron out land issues within the family. PW1 testified that he lost consciousness and when he later came to it and found he found himself at Tenwek Hospital with two stab wounds, one on his head and the other on his chest.

9. Barchumbin Kipkurui Erick (PW5) who was a clinical officer at Tenwek Hospital produced a P3 form on behalf of his colleague, Dr. Esther Mumbi who had examined PW1. PW5 testified that the PW1 had an occipital head wound and a further wound on his thorax and abdomen. He further testified that the probable type of weapon used to inflict the injuries was a sharp object.

10. In their written submissions filed on 14th August 2024, the Prosecution submitted that they established an attempt to commit murder. That the victim's evidence of being stabbed by the Appellant was corroborated by PW2, PW3 and PW4. The Prosecution further submitted that from the nature of the injuries, the Appellant's intention was to murder PW1 and he manifested his overt act by stabbing PW1.

11. It was the Prosecution's submission that the Appellant's intent was inferred by his actions. That the Appellant's intent was clearly depicted when he stabbed the victim several times with a knife. On the issue of identity, the Prosecution submitted that PW1, PW2 and PW3 were family members and further that the incident occurred during the day. That the issue of identification was well established.

12. The Prosecution submitted that the Appellant gave unsworn testimony where he generally denied committing the offence. That he placed himself at the scene of the offence. They further submitted that the Appellant's defence did not raise any doubts that would contradict the Prosecution's evidence.

13. It was the Prosecution's submission that the 20 year sentence was just as the maximum sentence provided by the law was a life sentence. That this court should not interfere with it.

The Accused/Appellant's Case

14. The Appellant, Leonard Cheruiyot Kibet (DW1) denied committing the offence. He stated that on the material day, they were at home attempting to solve a land dispute. DW1 further testified that during the course of the meeting, fracas erupted and he escaped together with the Chief by boarding a motorcycle.

15. It was DW1's testimony that when they (Appellant and the chief (PW3) went to report the incident at Kembu Police Station, he was placed in the cells and later informed that he had stabbed PW1 causing his injuries.

16. From the Appellant's written submissions filed on 11th November 2024, I have noted that his submissions centred around his sentence and he provided further mitigation. The Appellant submitted that he wished this court to orders that he serves the remainder of his sentence under Community Service Order or Probation.

17. It was the Appellant's submission that he had reformed, was remorseful and he regretted his actions. That he was the sole breadwinner of his family who were suffering due to his continued incarceration. It was his further submission that he had a deteriorating health condition and had been going to Kericho Dispensary for treatment.

18. The Appellant submitted that this court should consider the time he spent in remand in accordance to section 333(2) of the *Criminal Procedure Code*.

19. I have gone through and given due consideration to the trial court's proceedings, the home-made Petition of Appeal filed on 28th April 2023, the Appellant's written submissions filed on 11th November 2024 and the Respondent's written submissions filed on 14th August 2024. The following issues arise for my determination:-

    i. Whether the Prosecution proved its case beyond reasonable doubt.

    ii. Whether the Appellant's defence placed doubt on the Prosecution case.

    iii. Whether the sentence preferred against the Appellant was harsh.

Whether the Prosecution proved its case beyond reasonable doubt.

20. The offence of attempted murder is provided for in section 220 of the *Penal Code* which provides:-

    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

21. The offence of attempted murder falls within the category of offences known as inchoate offences. Mativo. J (as he then was) extensively expressed himself on the same in the case of Moses Kabue Karuoya v Republic [2016] KEHC 2729 (KLR) where he stated:-

> " In the case of Bernard K. Chege vs Republic this court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as inchoate offences.

Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction.....

Every inchoate crime or offense must have the mens rea of intent or of recklessness, but most typically intent. Specific intent may be inferred from circumstances....."

22. The learned Judge went ahead to break down the elements as follows:-

" .....Thus, for there to be an attempt to commit an offence by a person, that person must:-

a. Intend to commit the offence;

b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;

c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,

But in fact he does not commit the whole offence. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.

The act relied upon as constituting the attempt to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case of Williams, Ex parte The Minister for Justice and A-G. The act must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that a person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relief him from criminal responsibility for the attempt which he made before desisting. For the prosecution to prove the offence of preparation to commit a felony, they must establish that the accused had the intention to commit the offence. It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute preparation to commit an offence. Spry J (as he then was) put it more authoritatively when he stated:-

"The principles of law involved are very simple but it is their application that is difficult.....The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence"

Criminal law seeks to restore order, decency and social equilibrium in society. It is aimed at curtailing or reducing to the minimum grave incidents of anti-social conduct. Punishment of an offender lies at the root of criminal law. Where an offence is committed, the offender or wrong-doers is punished, however, the criminal law also seeks to punish those who intend

to commit offences but could not successfully do so. That is, they merely attempted to commit an offence. The fact remains that they intended to commit an act which they know is unlawful and prohibited, but the completed offence was never accomplished. The offence remains inchoate because the accused could not accomplish his desires, or that the end result of his acts or omission is not what he envisaged. He has all the same, attempted to commit an offence. It is a criminal attempt and therefore an offence. Will an accused person be allowed to go scot-free because he could not finish his plans" No. He would be made to face some form of punishment even though he never completed the offence. In my view, any legal system would be defective if criminal liability only arose when substantive offences have actually been committed."

23. The word "attempt" is described by section 388 of the *Penal Code* as follows:-

(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.

24. The Court of Appeal in Abdi Ali Bare v Republic [2015] KECA 794 (KLR) held:-

> " 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:
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> "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' Introduuction 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."

25. As described by the authorities above and section 388 of the *Penal Code*, the Prosecution had to prove that the Appellant had the intention to cause the death of PW1. To do this, they had to show that the Appellant had the positive intention to unlawfully cause death and that intention had to be manifested by an overt act.

26. From the evidence, the Appellant, the victim (PW1), John Sigilai (PW2), Philemon Ronoh (PW3) and Geoffrey Kiplangat (PW4) were all in a meeting at PW2's house attempting to resolve a land issue within PW2 and his sons (including the victim and the Appellant). Philemon Ronoh (PW3) who was the Assistant Chief chaired the meeting and it was his testimony that they could not resolve the issue due to the hostilities between PW2 and his sons. That he postponed the meeting to a later date and left. It was PW3's testimony that he heard a commotion and saw members of the public chasing the Appellant on the allegation of stabbing PW1.

27. The victim (PW1) testified that during the meeting the Appellant became hostile stabbed him and he (victim) felt dizzy and lost consciousness. That he came to it at Tenwek Hospital and found himself with two stab wounds. This testimony was uncontroverted as the Appellant did not cross examine the victim.

28. Geoffrey Kiplangat (PW4) who was the victim and Appellant's uncle testified that he witnessed the Appellant stab PW1. No. 90401 Cpl Erik Omondi (PW6) who was the Investigating Officer testified that the Appellant was brought to the police station by PW3 and PW4 on the accusation of stabbing his brother (PW1). He produced the kitchen knife as P.Exh 2. When PW6 was cross examined, he testified that he had been given the knife by PW3 and that his brother (PW1) stated that the Appellant had the knife in his pocket during the meeting. He further testified that the victim saw him (Appellant) stabbing the victim.

29. The injuries sustained by PW1 were confirmed by the clinical officer, Barchumbin Kipkurui Erick (PW5). PW5 testified that PW1 had stab wounds on his head and his chest. PW5 produced a P3 form as P.Exh 1. I have looked at the P3 Form and its contents support his testimony. PW5 classified the injuries sustained by PW1 as grievous harm. It is my finding that the findings in the P3 Form were consistent with the testimony of PW1 in regards to the injuries she suffered.

30. The ingredients for the offence of attempted murder are mens rea (intent) and the overt act itself. Intent may be inferred from the circumstances or actions of the Accused. When a person, intending to commit an offence, begins to put his intention into execution and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the offence.

31. From the analysis above, it is clear to me that the Appellant was determined to cause the death of PW1. His intent was clear from his actions. After they could not agree on how to resolve the land dispute between themselves, the Appellant picked up a knife and stabbed PW1 on his head and chest occasioning him serious injuries. I agree with the Prosecution/Respondent that the nature of the injuries pointed to a clear intent to kill. Stab wounds in the head and chest are different in impact

compared to a stab wound in the leg or hand. Moreover, according to the Appellant's father (PW2), the Appellant roared that he intended to kill him (PW2) and PW1 and that they should prepare for their funerals. I therefore have no doubt in my mind that intent was proved beyond reasonable doubt.

32. The next ingredient the Prosecution had to prove was whether the Appellant was positively identified as the perpetrator. In the present case, there were two eye witnesses (PW2 and PW4) in addition to the victim's evidence on identification. Moreover, it was the Appellant, the victim (PW1), PW2 and PW4 were all family members. The evidence of recognition as shown in this particular case was convincing and free from any doubt.

33. Further, the Appellant was placed in the scene of crime by PW1, PW2, PW3 and PW4 who all attended the meeting. The Appellant himself testified that he was in attendance and therefore placed himself in the scene of crime. Flowing from the above, it is my finding that the Prosecution was able to prove the identity of the Appellant and his intent in the commission of the offence of attempted murder.

34. Having found all the ingredients of the offence proven, it is my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

Whether the Appellant's defence placed doubt on the Prosecution's case.

35. I have already laid out the Appellant's (DW1) defence earlier in this Judgment. In summary, he denied committing the offence. He admitted to attending the family meeting on the material day but he fled with the Assistant Chief (PW3) when the fracas begun in the meeting, which in essence meant that he had an alibi defence. In considering this evidence alongside that of PW3, I find the Appellant's defence as an afterthought. The Appellant had a chance to cross examine PW3 regarding the same but he did not. The Prosecution's witnesses were clear and consistent that the Appellant fled the scene after stabbing the victim and was arrested by PW3 and taken to Kembu Police Station where he was booked and placed in the cells by PW6.

36. I have considered the Appellant's defence in its entirety and after analysing the Appellant's defence as a whole, it is my finding that his defence was weak and did not create any doubt on the Prosecution's case which I have already found proven.

Whether the sentence preferred against the Appellant was harsh.

37. The penal section for this offence as stated earlier in this Judgment was life imprisonment. The trial court sentenced the Appellant to serve 20 years imprisonment.

38. In this Appeal, the Appellant is aggrieved with the sentence. It is therefore important to set out the circumstances under which an appellate court interferes with sentence. The Court of Appeal in Shadrack Kipkoech Kogo vs R. Eldoret Criminal Appeal No.253 of 2003 stated thus:-

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered"

39. I have noted that the Appellant has expressed remorse at the trial court and in his submissions before this court.

40. Having considered the circumstances of the case, I am of the view that in as much as the 20 year sentence was a fair sentence, the Appellant deserved the mercy of this court. I consequently reduce his sentence

from 20 years to 15 years imprisonment. For avoidance of doubt, this court upholds the Appellant's conviction.

41. By dint of section 333(2) of the *Criminal Procedure Code*, the 15 year prison sentence shall run from 3rd January 2023 being the date of the Appellant's arrest and pre-trial custody.

42. In the end, the Appeal succeeds partially to the extent that the Appellant's sentence is reduced from 20 years to 15 years imprisonment.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 27TH DAY OF MARCH, 2025.

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J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant Mr. Njeru for the Respondent and Susan (Court Assistant).