



REPUBLIC OF KENYA



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**Nyakweba & 2 others v Republic (Criminal Appeal E041, E043 & E044 of 2023
(Consolidated)) [2025] KEHC 6731 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6731 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E041, E043 & E044 OF 2023 (CONSOLIDATED)**

A. ONG'INJO, J

APRIL 30, 2025

BETWEEN

RONALD MORARA NYAKWEBE 1ST APPELLANT

HALISON CHACHA MACHUKA 2ND APPELLANT

BOAZ EMMANUEL SHAMARA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence in Ogembo Magistrate's Court Criminal Case No E436 of 2022 delivered on 12th October 2023 by Hon. P. C. Biwott (S. P.M))

JUDGMENT

1. The Appellant Ronald Morara Nyakweba together with Lilian Mogutu Enoch, Chacha Machuka and Emmanuel Shamara were jointly charged with the offence of attempted murder contrary to Section 220(a) of the *Penal Code*.
2. The particulars were that the Appellant and his co-accused on the 4th Day of March 2022 at Bigege village, Nyabera Sub-Location Otendo Location in Gucha South Sub-County within Kisii County jointly with others not before the court attempted to murder Daniel Ombaso Omosa.
3. The Trial Magistrate considered the evidence of 7 Prosecution witnesses and acquitted the 2nd Accused person and placed the 1st, 2nd and 3rd Accused persons on defense.
4. The Trial Magistrate found them guilty considered the Appellant and his Co-Accused's testimonies and found them guilty and convicted them accordingly. They were subsequently sentenced to serve 15 years imprisonment.



5. The Appellants were aggrieved by the conviction and sentence and they preferred separate Petitions of Appeal filed on 25th October 2023 in the instant appeal and in CRA NO E043 of 2023 dated 26th October 2023 filed by M/S Aboki Begi and CO. Associates on the following grounds :-
 1. That the learned trial magistrate erred in both law and fact by convicting the Appellant without observing that the offence committed of attempting murder was not proved beyond any reasonable doubt.
 2. That the learned trial magistrate further erred in both law and fact by convicting the Appellant using scanty and shoddy investigation evidence tendered by prosecution.
 3. That it is in record that the Appellant was not accorded a fair trial according to the law, as this case was fast tracked, thus he was not given enough time to defend himself and thus infringing his rights under Article 50 (2) © and Article 49 (1) (c) of *the Constitution*.
 4. That the learned trial magistrate further failed in both law and facts by convicting the Appellant using shoddy and fabricated medical Report thus making conviction unsafe.
 5. That the learned trial magistrate further failed in both law and facts by convicting the Appellant despite the glaring contradictions and inconsistencies.
6. The Appellant prayed that the appeal be allowed conviction quashed and sentence set aside.
7. The Prosecution's case was that PW1 met 2 men at his gate and he shone torch at them and they asked who he was and approached him saying they were police. PW1 said he lied to them he was Denis Nyatuka but they insisted he was Moi. That they showed him a note with his name and when he denied his brother Ronald the Appellant herein emerged and said 'ndiyo huyo' and the Complainant started running. He said that he however fell and one of the people caught up with him and called his companion to bring handcuff. That he started screaming for help and the person who caught up with him drew a knife and stabbed him on the right side of the chest as they struggled. That when his screams became louder the attacker left him and together with the one who remained with the Appellant they followed the road. PW1 said that he was taken to Nyamarambe Hospital and later referred to Kisii TRH. Pw1 said that the assailants were arrested and he learnt they were hired by Enock Nyakweba from Nakuru. He said it was the Appellant who identified him to the assailants. He identified A3 Halison Chacha as the man who stabbed him and A4 as the man who remained at the road with his brother the Appellant herein.
8. PW1 said that they had not been in good terms with the Appellant who is his elder brother since their mother died 7 years earlier as the mother sold to him her share which the Appellant had not allowed him to consolidate. He said the Appellant drinks and insults him. PW1 said that he thought his attackers were police as he was wanted in relation to the Appellant's child and that is why he ran and fell 300 meters from his gate. He said he fell and one attacker caught up with him and stabbed him.
9. PW1 said his brother A1 spoke from the vegetation behind and he recognized his voice. He said the assailants were ahead of him and he identified them using the torch on his phone. He said he had not planned to kill Enock his step brother and he had not prevented A2 from harvesting her sugarcane as he had no interest in Erick's land. He said it was at night and he heard Appellant shout 'ndiye huyo'. He did not see Appellant point at him. He denied having gone to A2 to sire children with her.
10. PW2 Roseline Nyagariso Ombaso the wife to the Complainant testified that on the material day at 7.40pm she responded to the screams made by the Complainant. She found him in a pool of blood and the Complainant was crying that Nyakweba was killing him.



11. In cross examination PW2 said she was not aware if her husband and the Appellant were from different fathers. She said that her husband and the Complainant had differences. She said A1 sold his land to different people. She also confirmed that there were allegations that her husband assaulted the Appellants child but she could not confirm. She said she heard her husband cry that Nyakweba had killed him.
12. PW3 Boniface Omweri Nyatike testified that he had been with the Complainant and that 15 minutes after they parted ways he heard screams from the direction of his home and a lady was wailing. That he went to Enock's gate and saw 3 men enter Enock Nyakwebas home. PW3 said the people he saw were A3, A4 and Enock Nyakweba. He said the 3 people were talking in Kiswahili and were at a speed and did not respond when he asked when he asked about the screams. That he proceeded to where he found the Complainant was in a pool of blood in a sugarcane plantation. That when they searched the area they found A4 who was asked what he was doing and he pleaded to be spared. That A4 was beaten and he disclosed that he was a Luhya from Nakuru and Enock had hired him to kill someone and he had been given a deposit of Kshs. 50,000/=. He told police that another man was hiding in the nearby sugarcane plantation and on search A3 was traced. That the public was aggrieved and wanted to lynch them. That they alleged their items were in A2's house.
13. PW3 said A1 was not at the scene although he was later arrested. PW3 said he did not talk to PW1 when he found him bleeding. He said he did not know how the assailants left Enocks home as he saw them enter as they were found hiding in sugarcane plantation.
14. PW4 Shem Bichu Ayienda the Assistant Chief of Nyabera Sub-Location testified that on 4th March 2022 at 8.00pm he was at home when he was called and informed Moi had been stabbed by unknown people. That he ran to the scene in Bigege village and found one suspect had been arrested and he rescued him from the mob. That the suspect said that Enock had brought him to kill Daniel Moi and he paid a deposit of Kshs.50,000/=. That the suspect also said that 3people were hired at Kshs. 120,000/= . PW4 said the suspect who told them he had been hired by Enock was A4. That he also told them that there was another suspect in the sugarcane plantation and he pointed to where he was and he was flushed out. PW4 identified the 2nd suspect as Machuka A3. PW4 said the 3rd suspect escaped and was not arrested. PW4 called the chief and the police who helped rescue the suspects. That the 2 suspects said they were from Nakuru and they were new in the village. He said members of public said that Enock had gone to hospital.
PW4 said he did not know why Appellant was charged.
15. PW5 Isaac Omwenga the Clinical Officer at Nduru Hospital attended to the Complainant who had history of assault by unknown people. He treated the Complainant and filled P3 form which he produced as Ex P2 assessing degree of injury as harm.
16. PW6 P. C. Thomas Makori from Moriki Police Post testified that on 4th March 2022at 8.00pm the area Chief called and reported that some suspects were being assaulted. That in company of P. C Mutai Kaoga they proceeded to Nyabera village and found a suspect cut on the nose and leg and members of public wanted to lynch him. PW6 identified the said suspect as Boaz A4 in the trial court. He said the said suspect hailed from Nakuru and he and 2 other people had been hired by Enock to kill Daniel Ombaso and that A2Lilian the wife of Enock had hosted them. That Boaz pointed to where the other 2 suspects were hiding in the sugarcane plantation and one of them Chacha the 3rd accused was flushed out. That members of public wanted to attack Lilian who was at the scene and PW6 shielded her. PW6 said the scene was near Lilian's house.



17. That the following day the Complainant booked the report of attempted murder and handed over the knife used to stab him and it had blood stain. The 2 suspects were arrested and handed over to the DCI Gucha South for investigation.
18. In cross examination PW6 said he did not arrest the Appellant and the Investigating Officer would be in a better position to explain. He said the scene was near A2's home and that her husband was mentioned as having hired people to kill the Complainant. He further said that they had no pending case against the Complainant.
19. PW7 the Investigating Officer Ouya Laben from Gucha South DCI testified that he started investigating the offence of attempted murder that was committed on 4th March 2022 at Nyabera village. He said Lilian and Cthrine were arrested and placed in custody at Moticho Police Post while another suspect Boaz was at the Kisii TRH undergoing treatment for injuries sustained members of public on arrest. He said he collected the suspects and a Maasai knife used to inflict injuries on the Complainant was handed to him. The Complainant was treated and P3 issued and duly filled assessing injuries as harm. PW7 recorded statements and subsequently preferred charge against the suspects. He established upon investigations that the Appellant and the suspect at large had hatched a plan to eliminate the Complainant and incorporated 3 others and A2 accommodated them. That the suspects executed their plan but the Complainant managed to escape narrowly upon raising alarm and neighbors and relatives responded and arrested 2 suspects but one escaped.
20. In being cross examined by Mr. Nyariki for the Appellant he said he recorded his statement when trial had commenced on 20.7.2022 as he was still investigating the issues between the Appellant and the Complainant. He further said that the Complainant was due to be arrested. He said that the Complainant struggled with the assailant and described him to the I/O as he and A4 were strangers to him.
21. The Appellant gave unsworn testimony and denied having committed the offence. He said that when he heard screams and came out he recognized the voice of the person screaming as Boniface Nyatilke who said the Complainant had been attacked by thugs. That when he went and found the Complainant and took him to hospital.
22. That Boniface said he heard people speaking in Kiswahili heading to the Complainant's place. He said they looked for the 2 men and traced them and they said they had been hired by their step-brother Enock Mose Nyakweba to Kill Daniel Ombaso his younger brother. The Appellant said he called the Chief who went to the scene with police from Moticho Police Post. That the Police Officers called for a vehicle from Etago and the 2 suspects they had arrested were re-arrested.
23. The Appellant said he had a frosty relationship with his younger brother the Complainant as he had injured his child and he did not visit him in hospital. He said the Complainant joined others in blaming him for injuring him. That he went to the Police Station when he was blamed for injuring the Complainant. The Appellant said he was charged together with Chacha Harison and Shamara as well as his wife who was later released. The Appellant denied committing the offence.
24. The Appellant in HCCRA No E043 of 2023 was the 3rd Accused in the trial court and he gave sworn statement and said that on 4th March 2022 he was with Shamara the 4th Accused when they came from Nakuru to Enock Nyakweba where they were to buy sugarcane. He said they were received well by Nyakweba's wife who cooked for them as Enock was sick. That after 20 minutes they heard screams and they were attacked by people they did not know. That Police came and arrested them and they were taken to Etago Police Station and later to Nyamarambe and Ogembo Court.



25. Boaz Shamalla the 4th Accused in the matter which the Appellant has appealed against also gave unsworn testimony and said he lived in Nakuru and worked for Cargos which deals with building materials. He said the charges against him are false. He said that he came from Nakuru with A3 who was to witness him purchase sugar agreement. That on arrival Nyansidenya Kibwato received them and took them to a hotel where they had food and soda. That Kibwato called Enock and took them to Etago where mzee Samuel was to sell to them sugarcane. That they however found Samuels' son had sold the sugarcane to 2 other people and Mzee Samuel differed with him. DW3 said Kibwato took them to Enock's place and they found he was sick and was in pain an he asked for Kshs.10,000/= for medical checkup. That he gave Enock the money and it was written down and a boda boda man picked him and took him to hospital as he remained with Kibwato. That Kibwato took him to see sugarcane which they also found had been sold and they returned to Enock's place to wait for him.
26. That on arrival at Enock's home Kibwato left saying he would be back later and he remained with Harison Chacha. That when Enock got admitted Kibwato returned and assured them all was well. That Kibwato left and he did not see him again. Shortly thereafter Enock's wife came and told them there were screams on the lower side of the farm. That they went out and it was dark and decided to go back into the house. That while in the house over 5 men came and switched off the D-Light lamp that was in the house and pulled them out and asked if he knew Ronald Nyakweba and promised him he would be dead. That he asked them to call his host Enock . That he was beaten and he loast consciousness and found himself in hospital. He said 2 police Officers said they rescued him and his money was not recovered. He said his wallet, ID card, ATM and a copy of his wife's ID were recovered. He said phone cards and jacket were not recovered todate. He said he did not know his attackers.
27. A4said he was taken to Nyamarambe where he was joined by 4 others in the morning. He said among those who joined him he only knew A2 the wife of Enock and Harrison Chacha. He said Ronald Nyakweba was with his wife nd were also charged for injuring Daniel Ombaso. He said Enock was not found in hospital.
28. The appeal herein was canvassed by way of written submissions. The Appellant's submissions are dated
The Respondent filed dated.....

Analysis And Determination.

29. In a first appeal, the duty of the court was held in Mark Oiruri Mose vs. R (2013) eKLR thus;

.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
30. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are whether the ingredients of the offence of defilement were proved beyond reasonable doubt.
31. The offence of attempted murder is created by Section 220 of the penal code. It states;

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.
32. Attempt is defined by Section 388 of the [Penal Code](#) which states as follows:-
- (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, 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 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 fulfilment 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.
33. From the above section, the prosecution needed to prove beyond reasonable doubt that the Appellant attempted to unlawfully cause the death of the complainant. The prosecution needed to prove the element of the act that endangered the life of the Complainant and the intention to kill the Complainant. This position was stated in the case of *Cheruiyot Vs Republic (1976- 1985) EA 47* where it was emphasized that;
-an essential ingredient of an attempt to commit an offence is a specific intention to commit that offence. If the charge is one of attempted murder, the principal ingredient and the essence of the crime is the deliberate intent to murder. It must be shown that the accused person had a positive intention to unlawfully cause death and that intention must be manifested by an overt act.
34. The complainant herein sustained stab wound injuries to the chest as evidenced by PW5 who examined him and observed swollen neck with stab wound on the chest measuring 3 cm. He filled P3 form assessing injuries as harm.
35. The Complainant testified that one of the assailants pursued him and when he fell he caught up with him and stabbed him on the chest on the right side. That he however struggled with him as he screamed loudly and the assailant ran away when members of public responded. The Complainant identified the assailant who stabbed him as A3 in the trial court and the Appellant in CRA No E043 of 2023. Although the Complainant alleged that he heard the voice of his brother Ronald the Appellant herein identifying him to the assailants and although the Complainant confirmed he had bad blood with the Appellant his wife PW2 said that the Complainant said Nyakweba was killing him. PW2 did not say if she saw the Appellant at the scene and PW3 said he saw the Appellant in CRA No E043 and E044 of 2023 being A3 and 4 in company of Enock Nyakweba the husband of A2 walking hurriedly into Enocks home when he responded to the alarm that had been raised in the direction of the Complainants home and the 3 did not respond to tell him what the alarm was all about. PW3 was therefore able to identify the people who walked away from the direction of the scene as the step brother of the Complainant one Enock Nyakweba and the rd and 4th Accused persons in the trial court. If the Appellant was one of them he could have identified him as they were known to each other being they came from the same village.



36. The Complainant said that he heard the voice of the Appellant in the vegetation behind him and he did not see the Appellant physically.
37. When the Appellant was taken to hospital it was indicated he was assaulted by unknown people. PW6 the Investigating Officer said the scene of the attack was near Lilian's home and the Appellants in CRA No E043 and E044 of 2023 confirmed they had visited A2's husband allegedly to buy sugarcane and that A2 welcomed them and cooked for them as the husband was sick. They were however flushed out of their hiding in the sugarcane plantation near the scene and were identified to be strangers in the village as no one knew them and it was the fast action by the police that saved their lives from the irate members of public who wanted to lynch them.
38. From the evidence of the prosecution witnesses A3 and A4 on being apprehended and on interrogation disclosed that they had been hired by Enock Nyakweba and paid to kill the Complainant. There was no evidence adduced to prove that the Appellant herein and the said Enock Nyakweba hatched a plan to eliminate the Complainant as alleged by PW7
39. This court finds that since it was at night and the Appellant was not positively identified at the scene of the offence there is no sufficient evidence to find that he committed the offence of attempted murder and it was erroneous on the part of the Trial Court to return a verdict of guilty on his part. His appeal therefore has merit and is allowed. The appeals by the Appellant's co-accused in CRA No E043 of 2023 and E044 of 2023 do not have merit and are dismissed.
40. On sentence, the offence of attempted murder Contrary to Section 220 of the *Penal Code* is a felony and attracts a maximum sentence of life imprisonment. The Appellants were sentenced to serve 15 years imprisonment and that cannot be said to be excessive. I find no reason to disturb the sentence.

Right of Appeal 14 Days Explained.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF APRIL, 2025

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HON. JUSTICE A. ONGINJO

JUDGE

In the presence:

Mr. Oimbo for Koima for State / Respondent

Appellant – No appearance

Victor / Lola Court Assistant

