



**Ngeli v Republic (Criminal Appeal 117 of 2021)
[2024] KEHC 978 (KLR) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL 117 OF 2021
TM MATHEKA, J
JANUARY 26, 2024**

BETWEEN

MARTIN MUTISO NGELI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the judgment of Benson N Ireri SPM of 21st
October 2021 in Makindu MCCRC No. E050 of 2020)*

JUDGMENT

1. Martin Mutiso Ngeli was charged with two counts: one; attempted murder c/s 220(a) of the [Penal Code](#). It was alleged that on the 26th September 2020 at Kativani Village Nzau sub county within Makueni County he unlawfully attempted to cause the death of Jackline Mwikali Mutua by inflicting multiple severe cuts on her body with a panga; two; killing an unborn child c/s 228 of the same Code. That on the same date, same time, same place, by an act of hitting Jackline Mwikali Mutua on the back and hip causing her to fall down on her stomach causing injuries that prevented from being born alive a child who was to be delivered by the said Jackline Mwikali Mutua.
2. The appellant pleaded not guilty
3. After a full hearing where the prosecution called the complainant who was the wife to the appellant, her sister who witnessed some of the beatings, the clinical officer who completed the P3 form, and the Investigating officer, the court found that the appellant had a case to answer. Upon being placed on his defence, he gave a sworn statement of defence and did not call any witnesses.
4. The trial court found him guilty and convicted him accordingly on both counts and sought a pre-sentence report. Upon appellant was sentenced to one term life imprisonment.
5. Aggrieved he filed this appeal on the grounds that the learned trial magistrate erred in law and fact;



- i. When he convicted him without observing that the evidence by the prosecution witnesses was untenable, unworthy, full of contradictions
 - ii. When he failed to consider that the evidence of the prosecution was not proved beyond a reasonable doubt.
 - iii. In shifting the burden of proof to the appellant misunderstanding and misdirecting himself on the evidence, hence coming to the wrong conclusion
 - iv. When he dismissed his sworn defence which alleged the possibility of a frame up due to a misunderstanding between PW1 and the appellant
 - v. When he upheld the evidence adduced by the prosecution witnesses and which fell short due to its failure from its investigations
6. Both parties took directions to proceed by way of written submissions which I have carefully considered.
7. The duty of the appellate court is settled: to re -evaluate, reweigh, reconsider he evidence on record and to draw its own conclusions.
8. Having considered the evidence and the submissions the issues for determination are;
 - a. whether the learned trial magistrate ignored procedure and breached the appellant's constitutional rights
 - b. whether the prosecution proved the charges against the appellant beyond a reasonable doubt
 - c. whether the court ignored the appellant's defence
 - d. whether there is reason to interfere with the sentence.
9. The case for the prosecution is that the appellant was married to the complainant at the material time and they had been married for 8/9 years. They had two children and the complainant was 8 months pregnant.
10. On the material day the appellant began a quarrel with the complainant in the morning. She was making porridge when he demanded for tea, which he directed her to fetch from his mother's house. She did so. The appellant began to tell the complainant that the pregnancy was not his and that he was going to take her to the owner of the pregnancy whom he named as Mutua Makamo. On the basis of that he beat her with a panga while threatening to kill her. He even began to escort her to the alleged Mutua's home but gave up.
11. At some point the complainant's sister PW2 came to visit her. She found the complainant sleeping. She saw the injuries on her body, which was also swollen in various places. She decided to warm water so as to soothe the wounds and the swellings. When the appellant found her he began to threaten her as well telling her to call her father to come collect his prostitutes. He accused his wife of having an affair and began to hit her with the panga he had. Her sister screamed and the appellant's mother heard. She came and they began to take the complainant to hospital. The complainant however fainted and they took her to the mother in law's house, when she came to they took her to the health centre. She was treated but the clinical officer found that the fetus had no heart beat and referred her to hospital for further management. The fetus was dead and she was induced to give birth.
12. The matter had already been reported to the police and the appellant was arrested and charged.



13. PW3 the clinical officer who testified told the court that she had injuries on both hands, head, left knee, lower abdomen and was limping and in great pain. He produced treatment notes, x rays discharge summary, and the P3 form.
14. The appellant on his part told the court that he had left for Mombasa the day before the incident. He came back the following day, the material day. He got home then left and came back at night. He found a man in his home who came out armed with a panga and attacked him. His wife tried to stop the fight and in the process she was cut by that panga, she fell down, on her stomach and her pregnancy was affected.

Analysis & Determination

15. The appellant submitted that the learned trial court ignored procedure and breached his rights: failing to call for the body of the dead fetus for DNA examination between his wife and the so called Mutua Makamo, and failing to order that the said Mutua Makamo be produced in court, and failing to recognise his right to legal representation at state expense.
16. He submitted that the Parliament had failed to enact the law on legal aid.
17. The state relying on *Charles Maina Gitonga* [2018] eKLR responded that it has been held that the right to legal representation at state expense is not an inherent right.
18. It is evident from the appellant's submissions that he misapprehended the issue. This was not a matter about the paternity of the deceased child. This was a matter about him causing grievous bodily harm on his pregnant wife. Whether or not the wife had had an affair the appellant had no right to beat her. There is no excuse for domestic violence. If he was persuaded that his wife was indeed cheating on him, the lawful thing was not to beat her or harangue her. Persons in such relationships must always keep in mind that violence is not the solution. Perhaps when such things begin to happen it is a sign that the relationship has broken down and parties need to seek help or agree to part ways. Marriage does not confer ownership rights over the other party. It ought to be a mutually satisfying relationship, with parties establishing avenues to deal with differences when they occur. There are lawful means of dealing with those difference but none of them includes is the inflicting violence.
19. It is the appellant who alleged that his wife was having an affair and for the sake of his argument it was upon him to provide proof of the alleged affair because it is him who brought it up. The prosecution's obligation was to prove that the appellant had unlawfully assaulted the complainant, and caused her to lose her pregnancy.
20. The appellant submitted at great length how much he loved his wife, and how he reacted like any other human being in defending /protecting his relationship with his beloved. However, nothing was placed before the court to support the alleged mitigating factors. The court had no obligation to bring the alleged Mutua to court or to order for DNA.
21. On whether the charge was proved; From the record the appellant attacked and beat his wife who was 8 months pregnant. The child in her belly died and according to the medical history, the baby stopped kicking from the date of the assault. It is on that day that she collapsed and was taken to her mother in law's house before being taken to hospital. I note that the P3 says that she sustained grievous harm.
22. Section 388 of the *Penal Code* provides the definition of attempt
 - (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.

23. The prosecution relied on *Cheruiyot v Republic* (1976-1985) EA 47 on the ingredients to be established in a charge of attempted murder: deliberate intent to murder, manifestation of the intention by an overt act. The prosecution led evidence to demonstrate the overt acts; that the appellant caused the complainant grievous harm and that had it not been for the intervention of others he would have completed the murderous intent. The prosecution needed to lead evidence that the appellant had malice aforethought as defined by s. 206 of the Penal Code. The evidence presented was of the sporadic assaults on the complainant by the appellant throughout the day on 26th September 2020 in the state she was in, 8 months pregnant. That the appellant forced her to cook, fetch tea from his mother's house, warm it, all the while under threats, while the appellant was telling her that the pregnancy belonged to another man, to whom he would take her, the efforts made by the appellant to escort her to the home of this man, calling her a prostitute, even telling the sister to call their parents to come collect their prostitutes (referring to the complainant and her sister) It is the case for the prosecution that all these actions coupled with the allegations of infidelity, and the injuries inflicted demonstrates the state of a mind that of a person who was prepared to kill the complainant . This evidence demonstrates that the complainant was beaten, and harassed the whole day by the appellant who was armed with a panga. He inflicted several small cuts on the complainant's body but none indicative of the intent to kill her. However, the fact that he was aware that she was 8 months pregnant and took her through that whole haranguing confirms that his state of mind , to get rid of was ready to see both the baby he claimed not to be his, and its mother. I did not find any material inconsistencies in the evidence of the witnesses.
24. On the second count it was evident that it was on the same day that the appellant beat up the complainant that she ended up in hospital and there was no fetal heartbeat. There is no evidence that on the material date she had any complications with regard to her pregnancy. After a long day of harassment and beatings the complainant had decided to go to the home of the appellant's brother. Around 8:00pm she fainted only to find herself in hospital the following day. The medical evidence was that she presented with pain in the left abdominal side among others and the history was that the baby had stopped kicking on the day of the assault. Evidently the medical examination related the lack of fetal heartbeat to the assault on the complainant.
25. Did the court ignore the appellant's defence? The learned trial magistrate analysed the defence. The appellant had testified that the complainant had suffered injuries when she tried to intervene in the fight between him and the man he claimed was her boyfriend. That she had a fall which affected her pregnancy. The court was of the view that:

‘the multiple injuries suffered by the complainant could not have been sustained from a single blow or through a single fall, which the accused person wants this court to believe. In the foregoing I therefore find the accused person's defence a sham and I proceed to dismiss



the same ...I am convinced beyond a shadow of doubt that it was the accused person who grievously injured the complainant herein’

26. It is evident from the foregoing that the appellant’s defence was not only considered but well analyzed. I have noted from the P3 form that the complainant had multiple injuries. This could not have been caused by a single fall and are consistent with her testimony.
27. With respect to the sentence, the jurisprudence from the superior courts is that an indeterminate sentence though provided by the law is unconstitutional. The courts have substituted life imprisonment with a determinate sentence of up to 40 years’ imprisonment.
28. I have carefully considered the pre-sentence report presented before he learned trial court. It indicates that the appellant had a drug problem, smoking bhang a habit that made him unreasonable and violent towards not only his wife but his mother and siblings. It is not clear what the underlying issues were and what could have led him to pick up the said habit. The same was however known to the family and the local administration. Perhaps if there had been interventions this would not have reached this far. While it is not an excuse, it is a factor that ought to be taken into consideration.
29. Imprisonment is intended to reform and rehabilitate the offender. I believe that is why our Prison’s motto is ‘Kurekebisha na Haki’. In view of the current jurisprudence on indeterminate sentences, I substitute the life imprisonment sentence to 20 years’ imprisonment on each count to run concurrently from the date of arrest.
30. The upshot is that the appeal on the conviction fails. The conviction is sustained. The appeal on the sentence succeeds in part and the appellant is sentenced to serve 20 years’ imprisonment on each count to run concurrently from the date of arrest.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY 2024

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MUMBUA T. MATHEKA

JUDGE

CA Mwiwa

Appellant

For Prosecution

