Waema v Republic (Criminal Case E118 of 2021)
[2024] KEHC 972 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KEHC 972 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL CASE E118 OF 2021

TM MATHEKA, J

JANUARY 26, 2024

BETWEEN

DANIEL MUTINDA WAEMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment, conviction and sentence of Hon Benson N Ireri SPM in Makindu MCCRC No. E125 of 2020 delivered on 21st October 2021)

JUDGMENT

1. The appellant Daniel Mutinda Waema was charged with attempted murder c/s 220(a) of the *Penal Code*. It was alleged that on the 15th October 2020 at Yikivumbu Market of Nzaui Sub County Makueni County he attempted unlawfully to cause the death of Joseph Kyalo Mututa by severely cutting him with a *panga* on the head.

2. He was arrested on the 16th October 2020 but took plea on the 5th November 2020 when he pleaded not guilty.

3. The case for the prosecution was that the appellant was employed in a car wash at the Yikivumbu Market. The complainant and his colleague Jonathan Musau were conductors in a Matatu KCS xxxx Ebenezer Company. On the 13th October 2020 a chaff cutter belonging to a passenger disappeared from the m/vehicle while it was at the carwash. On 15th October 2020 the reported the matter to PW1 Joseph Kisimu the Assistant Chief at Kivumbu s/ location whose office was within the market.

4. According to PW1 soon after the two reported and left his office, he heard screams and when he went to check he met some people escorting the complainant who had a deep cut on his head and was bleeding profusely. He was taken to Kivumbu dispensary. PW1 went to where the *matatu* was and he found other people who told him that it was the appellant who had cut the complainant with a panaga. The

said appellant was not at the scene but soon thereafter he heard noises like someone was being beaten by a crowd. He proceeded to the place and found the appellant who had injuries. He rescued him and took him to his office. Members of the public took him to a nearby *shamba* where he found a blood stained *panga*. He then found transport and took the appellant to Emali Police Station where he handed him over to the police together with the *panga*. The complainant was taken to Makindu Sub County Hospital where he was admitted.

5. According to the complainant when they came back from reporting to the Chief they went to ask the appellant how the chaffer could have gotten lost. His colleague Jonathan Musau began to argue with the appellant and when he, the complainant went to find out what was going on the appellant cut him with a *panga* he had taken from the same *matatu*. He testified that the appellant was known to him for a very long time as they had schooled together. That they had no grudges and he did not understand why he had cut him and why he wanted to kill him. He presented before court his treatment documents from the dispensary and the hospital, and the P3. On cross examination the appellant suggested that the said Jonathan had cut the complainant which the complainant denied. He denied any collusion to frame the appellant for the offence. On reexamination he denied that it was Jonathan Musau who had cut him and also injured the appellant.

6. PW3 Onesmus Ngolani Masika was the eye witness. He was seated outside his kiosk not far from the carwash. He saw the m/v arrive and park the *matatu*. Then they went to office of the Assistant Chief. Ten minutes later they came out. The complainant stopped to speak to his mother who was a vegetable seller nearby and he was crying. His mother was shouting and telling him they would find money to pay. The appellant and Jonathan Musau were talking near the m/vehicle, arguing. The appellant had a *panga* and was threatening to cut Musau. It was then that the complainant went to intervene and the appellant cut him. On cross examination he denied colluding with the complainant to frame him for this offence.

7. On this date 1st April 2021, the appellant told the court "I usually have a mental problem. I pray for a nearer date" The court directed "Accused person be mentally examined by a psychiatrist from Wote County Hospital on his mental status. Hearing on 27th May 2021. Mention on 6th May 2021" There is a mention dated 6th May 2021 but nothing about the outcome of the court's order. On 27th May 2021 the matter proceeded on further hearing.

8. PW Dr. Dorcas Kavuli Musyoka a Medical Officer at Makindu Sub County Hospital filled the P3 form on the complainant and produced the treatment documents. The complainant had a *panga* cut on the head. The CT scan revealed comminuted right parietal displaced calvarial fracture, right parietal acute epidural haematoma, right parietal cerebral contusion, right sided scalp haematoma.

9. The doctor observed a deep cut wound on the right side of the head with a depressed skull fracture. The doctor assessed the degree of injury as maim and described it as psychological trauma due to assault, depressed skull fracture.

10. No. 47410 Cpl John Mugo of Emali Police Station was the IO he told the court that he was assigned the case on the 16th October 2020. He did not visit the scene but took over the exhibit, issued the complainant with a P3, interrogated the appellant who had been beaten by a mob. He took the appellant to hospital. He produced all the exhibits.

11. In his defence the appellant made a sworn statement. He told the court that he worked at the carwash. That Jonathan Musau who was a conductor accused him of stealing Ksh 20 from inside his uniform. He was cleaning the inside of the m/vehicle. An argument ensued. Musau hit him and he fell down. He moved out of the m/vehicle. That Musau followed him with a panga. That he lifted the panga to

cut him, but he ducked and the panga cut Kyalo. That Musau also cut him, the appellant and he fell down, only to find himself at the chief's office. The police came and he was taken to hospital while the complainant was taken to Makindu.

12. On this evidence the learned trial magistrate was of the view that the appellant was guilty as charged and sentenced him to life imprisonment.

13. Aggrieved the appellant filed this appeal against both the conviction and the sentence.

    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 act as an arbiter but seemed to take sides with the prosecution.

    iii. When he laid the burden of proof to the appellant contrary to the rule of law

    iv. When he convicted and sentenced him on the evidence which was untenable, inconsistent and was very contradictory

    v. When he dismissed his sworn defence which was clear, cogent and gave the trial court the circumstances which were present on the material day of the alleged offence which alleged a possible frame up due to the grudge that existed among the employees of the said company.

14. Parties agreed to proceed by way of written submissions which I have carefully considered together with the authorities cited.

15. The issues that arise for determination are:

    i. Whether there was an amended charge, whether the said amendment was prejudicial to the appellant

    ii. Whether the appellant was supplied with all the evidence relied upon by the prosecution

    iii. Whether s. 124 of the *Evidence Act* is applicable to this case

    iv. Whether the evidence for the prosecution was full of contradictions

    v. Whether the prosecution failed to call all the material witnesses and if so the effect on the appellant's case – see *Bukenya v Uganda*

    vi. Whether the appellant had an alibi?

    vii. Whether the charge against the appellant was proved to the required standard.

16. The appellant submitted that he was prejudiced because the charge was amended from one of assault to one of attempted murder without the court following the procedure under s. 214 of the *Criminal Procedure Code*. Record shows that the appellant was presented before the trial court on the 5th of November 2020. The charge before the court was one of attempted murder. It is the charge that was read over to the appellant. Explained to him and he pleaded not guilty. There is nothing on the court record to show that there was any application for amendment of the charge or that the court proceeded to amend the charge suo motu as submitted by the appellant.

17. It was the appellant's argument that contrary to the clear provisions of the *constitution* he was denied a fair trial because he was not supplied with the evidence upon which the prosecution was to rely on against him. A perusal of the record shows that the prosecutor on the date of plea told the court" I wish to supply the accused with a copy of the charge sheet, investigation diary, statements of 5 witnesses, P3 form, treatment notes and discharge summary." In response the appellant states "I confirm receipt

of these documents" the record indicates that those were the documents that the state relied on in the case against the appellant. The CT scans themselves were not produced and nowhere did he raise an issue that he needed them and the request was denied.

18. The appellant submitted at length that the trial court ignored the provisions of section 124 of the *Evidence Act*. This provision states;

> 124. Corroboration required in criminal cases. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

19. Evidently the appellant's position is that the learned trail magistrate failed to apply the law on corroboration as is required in all criminal cases except as provided for in the proviso to s. 124 which is not applicable to this case.

20. The appellant submitted that the evidence presented by the prosecution was contradictory, uncorroborated and full of inconsistencies and that it did not prove the charge against him beyond a reasonable doubt. The Prosecution on its part submitted that the court properly analyzed the evidence and drew the right conclusions.

21. The duty of the appellate court is re assess the evidence and scrutinize it a fresh and to draw its own conclusions always minded that the court never saw nor heard the witnesses speak.

22. The court is to be guided by the record.

23. The charge against the appellant is that of attempted murder c/s 220(a) of the *Penal Code*.

24. In supporting the charge the state relied on *Cheruiyot v Republic* (1976-1985) EA . where the court stated 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 principle 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.

25. There is no dispute that the appellant and the complainant were known to each other. They were also known by other persons in the local market, he was working at the carwash and the appellant as a conductor in the Ebenezer Matatu company. There is also no dispute between the appellant and the prosecution that an incident occurred the 15th of October 2020 in which the appellant and the complainant sustained injuries. There is no dispute that a panga was involved. The issues are who caused the injuries on the parties herein and whether there was an intention to cause death of the complainant. The onus to prove the charge was upon the prosecution as the appellant enjoyed the right to innocence until proven guilty.

26. There is an issue that must be taken out of the away first, whether the lost or stolen chaff cutter was an issue in this case. The appellant's position is that the Assistant Chief PW1 and the IO PW5 ought to have investigated this issue as it was the cause of all the disagreements. That without settling this issue then the issue of the attempted murder could not arise.

27. The facts do not support that argument. It is correct that the complainant and his colleague went to report the issue of the lost chaff cutter to the Assistant Chief. There is nothing on the record to

show that there was any confrontation between the complainant and the appellant on the issue of the alleged lost/ stolen chaff cutter. In fact the complainant came to intervene on an argument between the appellant and one Musau. According to the appellant this argument was about Kshs 20 that had disappeared from Musau's uniform and it was not about the chaff cutter. Clearly the prosecution has not laid an argument before the court that the reason for the cutting of the complainant was the chaff cutter. That was an independent complaint by the owner of the chaff cutter to the *matatu* company which the complainant and his colleague reported to the Assistant chief. In addition, nowhere did the assistant chief state that the appellant was the suspect of the loss.

28. This incident happened around 6:30pm the evening. The complainant saw the person who cut him. The evidence was corroborated by PW3 who also witnessed the incident. PW1 arrived at the scene immediately and was the one who rescued the appellant. True, Musau did not testify for the prosecution. The appellant's position that it is Musau who cut him the complainant and also injured him is not supported by the evidence. There was no reason at all for Musau to injure the complainant, and PW1testified to the recovery of the panga immediately upon the rescue of the appellant. There was no reason for which the PW1 would frame the appellant for this offence.

29. Hence it is my view that there was sufficient evidence to identify the appellant as the person who cut the complainant and no reason to support the allegations of a frame up.

30. True, Musau did not testify. The prosecution felt that their key witnesses had testified and that is what mattered, whether they had indeed presented their material witnesses. The absence of Musau does not negate the fact that the complainant was cut, by a person whom he identified clearly and that his evidence was corroborated in material particulars by the evidence of other witnesses.

31. The appellant raised an issue with his mental health. The court made an order for his assessment but that was never done, and if it was the report is not on the record. Did that prejudice the right to a fair trial? I have looked at the record. The appellant effectively cross examined the witnesses. He also made his statement of defence which through not persuasive appeared cogent and well thought out. It is noteworthy from the Probation Officer's Report that the family members revealed that the appellant had a drug problem- abusing both bhang and alcohol. While he may have had other underlying issues, these would only have been revealed through a psychiatric or other mental health assessment. Nevertheless, it appears to me that this mental health issue was not debilitating and did not affect the manner in which he conducted his trial. Had it been serious I am certain this would have been pursued even through the prison authorities as he was in custody all along. Other than the two times he raised the issue, he never raised it any other time and neither did he, in mitigation produce evidence to demonstrate that he had mental health issues that had been diagnosed and attended to. Be that as it may, the learned trial magistrate, having made the order for a mental health examination over the appellant, he had the obligation to follow through on the same and to ensure that he received it and considered its contents.

32. Did the evidence establish an attempt on the life of the complainant?

33. The P3 indicates that the assessment by the doctor was that the degree of injury was maim. There is a definition set out on the P3 where maim is defined as "destruction or permanent disabling of any external or internal organ, member or sense", and grievous harm as "any harm which amounts to maim or endangers life, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ". Basically maim is grievous harm.

34. S. 206 of the *Penal Code* defines malice aforethought as follows;

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (c) an intent to commit a felony;
>
> (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

35. In this case the appellant by the act of cutting the complainant with a sharp panga aimed at the head demonstrated the intent of causing grievous harm. However, the key question is whether the intent was to cause the death of the complainant. And my considered view of the evidence brings back the answer: no. Taking into consideration the circumstances, where there was an argument and the appellant acted in the spur of the moment. That does not fit the bill of malice aforethought to cause the death of the complainant to warrant the charge of attempted murder. My view of the evidence is that it establishes the charge of causing grievous harm c/s 234 of the *Penal Code*.

36. In the circumstances the conviction is upheld but for the offence of grievous harm v/s 234 of the *Penal Code*.

37. The sentence provided by law for attempted murder and for grievous harm is the same. Life Imprisonment.

38. The current jurisprudence is that an indeterminate sentence is unconstitutional. Life imprisonment has been substituted with 40 years' imprisonment in some cases. In this case, having found that the offence of attempted murder was not proved, and having substituted it with grievous harm, would a life imprisonment sentence still subsist?

39. I do not think so. Looking at the circumstances of the offence, he was a first offender, the sentence of life is substituted with 10 years' imprisonment to run from the date of arrest.

40. Ultimately the appeal succeeds in part.

DATED SIGNED AND DELIVERED THIS 26TH DAY OF JANUARY 2024

MUMBUA T MATHEKA

.....

JUDGE

CA Mwiwa

Appellant

For State