



REPUBLIC OF KENYA



**Barasa alias Suku v Republic (Criminal Appeal E101 of 2022)
[2024] KEHC 1715 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E101 OF 2022
DK KEMEL, J
FEBRUARY 22, 2024**

BETWEEN

LIPSON BARASA ALIAS SUKU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the conviction and sentence by Hon. Munyekenye (SPM) in original Webuye Law Courts Criminal Case No. E297 of 2021 delivered on 1st December 2022)

JUDGMENT

1. The appellant was charged in the subordinate Court with an offence of attempted murder contrary to section 220(a) of the *Penal Code*. The particulars of the offence are that on 26th September 2021 at Sango-B village Maraka Sub-location in Webuye East Sub-County within Bungoma County, jointly with another not before Court unlawfully attempted to cause the death of John Kiberenge Wanjala by stabbing him on the lower abdomen and armpit.
2. The evidence before the trial Court was that PW1, John Kiberenge Wanjala while at his house in Sango DEB he heard the Appellant herein quarrelling with his wife as usual. He heard the Appellant's wife screaming and it appeared the Appellant was beating her. He proceeded to their house where he cautioned the Appellant and advised him to let her go. The Appellant left his house and he went back to his. After thirty minutes, he heard his door being kicked but on opening he could not see anyone. He testified that there were three security lights in the neighbor's compound which is about five metres away and that the same enabled him to see clearly when being outside. He checked at the tree and spotted a shadow of someone. He quickly addressed the individual saying "unapiga mlango wangu na kujificha nyuma ya mti". It was then that he saw a panga thrown against him and that he saw two people. The panga came from the direction of the tree and it scratched him on the wrist behind the right hand. (I note the witness did show the trial magistrate the scar). He further testified that the individuals emerged from behind the tree and he saw them clearly and even recognized them as the



Appellant herein and one Chipo. He saw them with the help of the security light. Chipo appeared from the trees while armed and proceeded to hit him with a metal bar on his right shoulder. According to him, all this transpired with the security lights still on. From the hit by Chipo, he fell on the ground and while there he noticed the Appellant rushing to his abode and emerge with a knife. He stood up and the Appellant stabbed him in the stomach just above the umbilical cord, he also stabbed him on the armpit on the right-hand side. He clarified that he was stabbed on the armpit then the stomach. He screamed saying he had been stabbed and his wife rushed to his aid. His wife screamed crying out for help and she saw the Appellant and Chipo before they escaped. They proceeded to Webuye Police Station where they were advised to rush to the hospital first. He was taken to Lugulu Mission Hospital where they referred him to Bungoma Referral Hospital. After his recovery, he reported the incident to the police and was able to identify his assailants as the Appellant and Chipo but only the Appellant was apprehended.

On cross-examination, he told the Court that the neighbour's security light made it possible for him to identify the Appellant and that his wife also saw him.

On re-examination, he told the Court that his wife saw the Appellant prior to him fleeing the scene.

3. PW2, Dan Lawrence Wamalwa, testified that he resides at Generations and is a boda boda rider. He told the Court that PW1, the Complainant herein, is his friend and that they were neighbours prior to him shifting houses. According to him, on 26th September 2021, at around 9.30 pm while in his house sleeping, he heard sounds coming from the next house. It was PW1's wife and mother. They requested him to rush PW1 to hospital as he had been stabbed. He observed blood was splattered all over PW1's house as he was bleeding from his tummy area and his intestines were protruding. He rushed him to Webuye County Hospital where they recommended he be taken to Lugulu Mission Hospital where he was given first aid and referred to Bungoma County Referral Hospital. He testified that, as PW1 told him that Chipo hit him using an iron bar whereas Sugu whose name is Lipson stabbed him. He added that he is familiar with the Appellant as he keeps seeing him in his neighborhood.

On cross-examination, he stated that he did not find the Appellant at the scene and that he did not see him stab PW1 but that he found PW1 writhing in pain and was informed him that the injury had been inflicted by the Appellant who had stabbed him.

On re-examination, he stated that he is not related to the complainant nor the suspect.

4. PW3, David Wanikina, testified that he is a family emergency specialist working at Bungoma County Referral Hospital. He stated that PW1 had a history of assault on 26th September 2021 when he was brought to the hospital. On examination, he observed that the patient had a stab wound on the stomach, 2 by 2 cm deep into the tummy; his small intestines ileum was perforated through and through; he was taken to theatre for stitching/surgery and that he bore a 2 cm cut wound on the arm. He noted that the probable weapon of assault was sharp and blunt and classified the injuries as grievous harm. He produced PW1's P3 form as PEXH1 and his discharge summary as PEXH2.

On cross-examination, he stated that he could not identify the assailant and that the complainant indicated that he knew the assailants.

5. PW4, Noah Wafula Madara, testified that he resides at Generation and that he is a boda boda rider. According to him, on 27th September 2021 he took one of his customers to her home and when they got there he established that his customer's brother, the Appellant herein, was suspected of stabbing someone. They found him home. They escorted him to the police station as members of the public were apprehensive. They found members of the complainant's family there making a report on the incident.



On cross-examination, he stated that he did not witness the incident and could not testify as to who committed the offence.

6. PW5, No 85572 PC John Maro, testified that he is the investigating officer in this matter and that he is based at Webuye DCI. He stated that on 27th September 2021, while in the company of Sgt. Chebet, they established that a report of attempted murder had been lodged by PW1's father. They rushed to the scene at Sango B village where they found a pool of blood outside as well as inside PW1's house. They established that the suspect and PW1 were neighbours. They recovered a blood-stained knife from the victim's house. They established that PW1 had been taken to Webuye County Hospital then referred to Lugulu Mission Hospital and further to Bungoma County Referral Hospital. His colleagues visited PW1 at the hospital and reported back that the victim bore a deep cut wound in the stomach with his intestines flowing outside and a cut wound next to his armpit. On 29th September 2021, he visited PW1 at the hospital and recorded his statement. He recounted the incident that occurred on that fateful night and how his family members responded to his distress call and rushed him to the Police Station. The suspect, Appellant herein, was arrested by members of the public and booked in the cells. He added that his accomplice is still at large. He produced the blood-stained knife as PEXH4 and Ann Okunju, (Complainant's wife) statement as PEXH5.

On cross-examination, he stated that the investigation diary indicated that the complainant's father reported the incident on 26th September 2021 at 11pm. He further testified that he did not dust the knife for prints and that the same was recovered in the complainant's house but it had been interfered with.

On re-examination, he stated that the landlord did not witness the incident and that on his arrival at the scene he established that the knife had been touched by several people but it was still blood stained.

7. The Appellant was subsequently found to have a case to answer and put on his defence where he elected to give sworn evidence. He stated that on 27th September 2021, he was arrested by a boda rider whom he had given his motor cycle on 20th September, 2021 to ride for gain on condition that he pays him Kshs 500/= but he only made Kshs 300/=, which he paid leaving a balance of Kshs 200/= to be paid later. He stated that on 27th September 2021, when the boda boda rider came to see him, he told him that he had come to pick him up so that they could go to the Police Station and enter into an agreement on how he would repay the loan. According to him, on arriving at the Police Station he was booked in the cells and was charged. He insisted⁴ that he was innocent and that there exists a strained relationship with his sister who testified against him.

On cross-examination, he stated that the boda boda rider is Noah Madala and that he is not aware if he is related to the complainant. He confirmed that it was Noah who took him to the Police Station.

8. The trial court later found the Appellant guilty as charged and convicted and sentenced him to serve 14 years in prison hence the appeal.
9. The appeal was disposed of by way of written submissions. Both parties duly complied.
10. I have considered the record of the lower court as well as the submissions presented. In a charge of attempted murder, the two essential ingredients; intention to commit the offence and preparation to commit it must be proved.
11. This is a first appeal and the duty of this Court is;

“..... to analyze and re-evaluate the evidence which was before the trial Court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial



Court. There are instances where the first appellate Court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.” See *David Njuguna Wairimu v Republic* (2010) eKLR.

12. 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.
13. 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.
14. From the above section, firstly, 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 Actus Reus element. That is, the prosecution needed to prove that the Appellant did an act that endangered the life of the complainant herein.
15. Secondly, the prosecution needed to prove the Mens Rea element; that is; the intention to kill. This position was stated in the case of *Cheruiyot v 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.”
16. It is not in doubt that the complainant sustained severe injuries when he was repeatedly stabbed by the Appellant. The prosecution attributes the incident to an alleged murderous intention exhibited by the Appellant when he and another intentionally accosted him in their compound and assaulted him. Further, the prosecution submitted that the act of the Appellant in going into his house and bringing out a knife and subsequently stabbing the complainant in the stomach and armpit was not meant to cause just fatal harm but to cause his death.



17. The appellant on the other hand submitted that the prosecution failed to avail eye-witnesses such as the alleged Anne Okunjo, who witnessed the Appellant assaulting the complainant and chose to rely on hearsay evidence and which makes the evidence of PW1 inconclusive and insufficient to maintain his conviction. He further maintained that the prosecution's evidence was marred by contradictions and inconsistencies thus raising reasonable doubts. He contended that the evidence was not in anyway related to the incident at hand but rather it was a blame game.
18. The Court of Appeal (Githinji, Mwilu and M'Inoti, JJA) in *Abdi Ali Bare v Republic* (2015) eKLR, 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.”
19. Lord Goddard C.J. in *R. v Whybrow* (1951) 35 (1951) 35 CR APP REP, 141, stated as follows on mens rea in respect of the offence of attempted murder: -
- “..... But if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime.”
20. 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.
21. The fact that, on that fateful night the Complainant had separated a squabble between the Appellant and his wife beseeching him to let her go back to her people instead of assaulting her on a daily basis only for the Appellant to leave and comeback later in the night in the company of another not before the Court to attack the Complainant with an iron bar and him taking it a notch higher by heading into his house picking up a knife and coming back to the Complainant and stabbing in in the stomach and the armpit established the possibility that the Appellant intended to do harm. His evidence was corroborated by that of PW3, the medical doctor that examined him. The complainant was able to identify the knife in court as the one used by the Appellant. The Appellant was past the preparatory stage in the execution of his intention. This, in my view, was not mere assault by a dangerous weapon, it entailed a conscious decision to aim the knife at the victim's stomach and armpit. The areas targeted by the Appellant left no doubt that he intended the injuries to cause death of the victim. Indeed, the Appellant got angry at being reprimanded by the complainant for frequently assaulting his wife and nudging his wife to go to her parents. This then made him to plan to kill the complainant when he went back to his house and came while armed and attacked the complainant. The Appellant and his accomplice first knocked on the complainant's door and then hid behind some tree within the compound so as to attack him without him noticing them and did carry out their mission. The fact that the complainant's intestines came out of his stomach, then it shows the level of attack and the intentions of the attacker. Had the complainant not sought treatment in time, he would have died. I am satisfied that the ingredients of the offence were proved by the prosecution against the Appellant beyond any reasonable doubt.



22. On the issue of identification, it is imperative to note that PW1 testified that the incident occurred under the ample lighting of the three security lights of the neighbour which made it very clear for him to identify his assailants by recognition. The Appellant did not adduce any viable evidence to controvert that of the complainant herein. The Court in the case of *Leonard Kipkemoi v Republic* (2018) eKLR while dealing with the issue of recognition stated that;

“the factors to be considered with respect to recognition as set out in *R v Turnbull & others* (1976) 3 ALL ER 549 must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

23. In this instant appeal, it is evident that the complainant knew the Appellant as they resided in the same compound and were neighbours. The complainant also stated that earlier on that night he separated a fight between the Appellant and his wife beseeching him to let her go back to her people instead of assaulting her on constant basis. He further identified the Appellant as the man before the Court.

24. Regarding the issue of contradictory and inconsistent evidence, the Appellant submitted that PW1's evidence was to be corroborated by that of his wife, Ann Okunja, now deceased. Her statement was already recorded and it was adduced as evidence by PW5 as PEXH5 pursuant to section 33 of the *Evidence Act*. The statement was that PW1 went to ask the Appellant and his wife to stop quarrelling and that he found them in the house with one Amos Makhanu. The couple stopped arguing and that the Appellant left with this Amos. This is inconsistent with the evidence of PW1 as he testified that he went to ask the Appellant to stop beating his dear wife and that he saw a child in the house doing their homework. PW1 never mentioned any Amos Makhanu.

25. It is trite that a court should weigh the nature and strength of the alleged contradictory evidence against the entire evidence tendered as a whole before dismissing a case. It is not every contradiction that calls for an acquittal. It will depend on the magnitude of the contradiction against delivery of substantive justice. The trial Court held that had the statement, PEXH5, been consistent and made by several persons, the same would have fallen within the scope of section 33(h) but since that was not the case here it was a statement of an individual person. The trial Magistrate further held that the prosecution mistook the statement, PEXH5, fell within the scope of a statement made by the deceased person under section 33(a) and proceeded to further hold that the same did not fall within the scope of statements admissible under section 33 and that the same was riddled with inconsistencies rejecting the same. This simply means that the trial Court did not consider the statement of Anne Okunja, PEXH5, when it made its determination. Indeed, the prosecution had relied on that statement as if it was a dying declaration by a deceased person under attack. It was erroneous and was rightly rejected by the trial magistrate.



26. The Appellant also alleged that his rights as an accused person were violated. He quoted Article 50 (2) of the Constitution claiming that his rights to a fair trial were violated.
27. Article 50 of the Constitution provides as hereunder:
- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - (a) to be presumed innocent until the contrary is proved;
 - (b) to be informed of the charge, with sufficient detail to answer it;
 - (c) to have adequate time and facilities to prepare a defence;
 - (d) to a public trial before a court established under this Constitution;
 - (e) to have the trial begin and conclude without unreasonable delay;
 - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
 - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (i) to remain silent, and not to testify during the proceedings;
 - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
 - (k) to adduce and challenge evidence;
 - (l) to refuse to give self-incriminating evidence;
 - (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
 - (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - (i) an offence in Kenya; or
 - (ii) a crime under international law;
 - (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
 - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. information shall be given in language that the person understands.



28. The Appellant was put on his defence on 13th October 2022. The Court record indicates that the Appellant opted to give a sworn statement and that he had no witnesses. It is clear that he knew his options and he exercised them effectively. The purpose of the section 211 of the Criminal Procedure Code is to concretize the right to fair trial by ensuring that an accused person understands his rights – including the right to call witnesses and or give an unsworn statement. The purpose of the right is not merely formalistic. If one takes this functional view of the section, it seems plain that even if it were true that the section was not explained to the Appellant, he suffered no prejudice at all because he was clearly aware of his options and he exercised them. He participated in the trial from start to finish and ably cross-examined the witnesses and capped it all with a defence. All through, there is no evidence that he had any challenges such as violation of his rights under the Constitution. If there was an error here, it was evidently a harmless one and which was curable under section 382 of the Criminal Procedure Code.

29. On sentence, it is noted that 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 Appellant was sentenced to serve 14 years imprisonment. The principles applicable in considering whether to interfere with the sentence of a trial Court on appeal were enunciated in the case of *Mbogo & another v Shah* (1968) 1 E.A. 93 thus:-

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

30. In sentencing the Appellant, the trial magistrate stated as follows:-

“I have considered the Probation Officer Report. I have considered the fact that the society is apprehensive of the behavior of the accused person. I have also considered the circumstances of the offence and the weapon used to inflict injury. The accused acted in bad faith.

Rehabilitation within the society will not aid the accused to change his behavior. The accused is hereby sentenced to 14 years imprisonment. Right of appeal 14 days.”

31. It is clear therefore that the trial Court considered the fact that the Appellant was a first offender, his mitigation that he prayed for leniency. It also considered the circumstances of the victim. In this regard, i am satisfied that due consideration was made in safeguarding the interests of the victim, the Appellant and the community at large.

32. It is elaborate that the trial Court took into consideration the period the Appellant was remanded when it issued the prison term of 14 years. There is no valid reason at all to interfere with the Appellant’s sentence which was richly deserved (and in fact on the lenient side) given the circumstances of the case as the complainant missed death by the skin of his teeth thanks to the Appellant.

33. In the result, i find this appeal is without merit and is hereby dismissed.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY 2024.

D. KEMEI

.....



JUDGE

I certify that this is a true copy of the original

Signed

DEPUTYS REGISTRAR

In the presence of:

Lipson Barasa alias Suku Appellant

Miss Kibet for Respondent

Kizito Court Assistant

