Case Number:	Criminal Appeal 37 of 1981
Date Delivered:	25 Feb 1982
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Eric John Ewen Law, Cecil Henry Ethelwood Miller, Kenneth D Potter
Citation:	Godfrey Gay & 3 Others v Republic [1982] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	41 of 1981)
Case Outcome:	APPEALS DISMISSED
History County:	Kisii
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: Law, Miller and Potter JJA)

CRIMINAL APPEAL NO 37 OF 1981

BETWEEN

GODFREY GAYI SIRO……..……APPELLANT

STANSLAUS MUCHORONGE……..…APPELLANT

JOHN OMBONGI ……..……APPELLANT

JULIUS OWINO……..……APPELLANT

AND

REPUBLIC ……....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisii (Scriven J) dated 6th March, 1981

in

Criminal Case No.41 of 1981)

JUDGMENT OF THE COURT

The four appellants were tried, together with a fifth man who was acquitted, in the High Court at Kisii, on an information charging them with attempted murder, contrary to section 220 of the Penal Code. They were convicted and sentenced as follows; the first appellant Godfrey to 19 years imprisonment; the second appellant Stanislaus to 14 years imprisonment; the third appellant John to 12 years imprisonment and the fourth appellant Julius to 12 years imprisonment. The reason for the apparent disparity in the sentences is that Godfrey has two relevant previous convictions and was apparently the leader of the gang and Stanislaus has one previous conviction, whereas John and Julius have no previous convictions.

At about 2 am on the night of February 10 to 11, 1980, the house of Samwel Omariba, the chairman of Kisii Coffee Farmers Co-operative, who lives at Isechu village, was broken into by a gang of thugs who smashed down the outer and inner front doors, using a heavy sledge hammer. Mr Omariba was awakened; he seized a torch and a simi and bravely attacked the invaders. He slashed one man across the nose and noticed that this man wore a spotted shirt. This man fell to the ground and called on someone to shoot. A shot was fired at Mr Omariba. It just missed his head, but passed so close that powder-burns were seen on his left temple when he was examined by a doctor a fortnight later. Another shot was also fired and two expended cartridge cases were recovered from the house by the police on the following day, together with several rungus and the sledge hammer. The gang then fled; Mr Omariba counted nine men in all. He chased them out of the house, lashing out with his simi at those he could

reach, including one man who was caught by his ear on the barbed wire fence of the compound.This man he slashed on the back. Then Mr Omariba went back into the house to see if his wife and housemaid were all right. Having satisfied himself as to this, he drove to the police station at Kisii and came back with police officers.

These facts are uncontroverted. The learned trial judge held that all the members of the gang shared a common intention to kill or rob, it mattered not which, because the nature of the weapons carried by them, rungus and a gun, indicated a general resolution to use force in the prosecution of their joint unlawful purpose, even to kill if necessary and that all were jointly liable for the consequences of putting the unlawful purpose into effect, in this case the attempted murder of Mr Omariba; for there can be no doubt that whoever fired at Mr Omariba intended to kill him and only failed to do so by inches. All the persons who formed the common intention to prosecute the unlawful purpose in conjunction with one another are deemed to have committed the offence of attempted murder which was a probable consequence of that unlawful purpose, see section 21 of the Penal Code. We agree with the legal proposition postulated by the learned judge.

The question at the trial, and on this appeal is whether each appellant has been proved to have been a member of the gang.

As to this, the evidence is as follows. When it was daylight, Mr Omariba and others followed a track of bloodstains. About 2 or 3 miles away, near Mwange Market, they found a man lying by the roadside, bleeding from a big cut across his nose. He was wearing a spotted shirt, and Mr Omariba recognized him as being the first man he had slashed, on the nose, in his house. That man was the first appellant, Charles. Another witness, Helen Manyala, is a nurse at Pala Health Centre. She treated a man, who came to the Health Centre, on the morning of February 14. He was suffering from a very big cut wound on his back. He came back for further treatment on February 17. On the same day police officers came and inquired of Mrs Manyala whether she had treated a man with cut wounds on the back. As a result of information supplied by the nurse, a man was arrested and identified by the nurse as the man she had treated. It was the fourth appellant, Julius. He also had a wound on his ear. According to Mrs Manyala, the injuries were about three days old when she first treated the fourth appellant on February 14. He was also identified in court by Mr Omariba as being the man he had slashed on the back when caught by the ear on the barbed wire.

The second appellant, Stanislaus, and the third appellant, John, were arrested subsequently, as a result of being implicated by being named in a statement made by the first appellant. All four appellants made inquiry statements under caution, confessing to participation in the attack on Mr Omariba's house. All these statements were subsequently retracted by the makers, who all claimed to have put their fingerprints to previously prepared documents, as a result of actual or threatened violence from the police. Each one of these statements was the subject of a trial within a trial, and on each occasion the trial judge admitted them in evidence, being satisfied on the evidence adduced before him that they had been made voluntarily.All four appellants made unsworn statements in their defence at the trial denying participation in the crime, and all knowledge of its commission. The first appellant Charles explained his injuries by saying that he was attacked and robbed when walking home from Manga Market, the last bus having broken down, by thugs who cut his nose with a panga and left him unconscious by the road-side where he was found next morning. The fourth appellant Julius said that he was attacked and stabbed with a knife in his aunt's house by a Tanzanian visitor on the night of February 12, when he sustained, amongst other injuries, the big cut on his back and the cut to his ear described by Nurse Manyala. We find, like the judge and the assessors, these explanations to be most improbable. The injuries found on the first and fouth appellants correspond exactly with the injuries inflicted on two of the gang by Mr Omariba, and for identical injuries to have been inflicted by other persons at about the same time seems

to us to be an impossible coincidence. Furthermore, we have no reason to doubt that the inquiry statements made by the first and fourth appellants under caution were made voluntarily and their truth is fully demonstrated by ample corroboration, particularly as regards their injuries which they both admitted in those statements to have been sustained in the course of the raid on Mr Omariba's house. We do not rely on the court identifications of these two appellants by Mr Omariba. We have no doubt that the first and fourth appellants were properly convicted.

The case against the second appellant Stanislaus and the third appellant John is based on their inquiry statements under caution, in which they both admitted being members of the gang which attacked Mr Omariba's house, one of these members, in second appellant's words, having a gun "which would assist us in our raid". The third appellant also said, in his statement, that "one of the six Luos carried a gun". The learned judge found that these statements were made voluntarily, and we see no reason to differ.He also found that they were true, being corroborated in many respects and we have come to the same conclusion. The learned judge also took into consideration, as he was entitled to do, under section 32(1) of the Evidence Act, the confessions of their co-accused which implicated both the second and third appellants. We see no reason to doubt that the second and third appellants were also rightly convicted.

As regards the sentences passed by the learned judge, they were very severe. He gave as his reasons that - "hired killers, robbers or terrorists must be isolated from the general run of impulsive, overwrought or drunken men who commit dreadful crimes for which they quickly genuinely repent. These men were not hungry, poverty stricken or desperate, they allowed themselves to be organized into a killer gang for fees … I would not be doing my duty to the victim and the will of parliament who have legislated for a life sentence in this case (ie attempted murder) and death for armed robbers, if I did not pass a very sever sentence on each …"

We associate ourselves with those sentiments and do not propose to interfere with the sentences passed on any of the four appellants. We consider that the appeals of all four appellants must be dismissed both as regards conviction and sentence and we order accordingly.

Delivered at Nairobi this 25th day of February, 1982.

E.J.E LAW

JUDGE OF APPEAL

C.H.E MILLER

JUDGE OF APPEAL

K.D POTTER

JUDGE OF APPEAL