REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO 4 OF 2019

ANDREW OMONDI OWUOR Alias

ANTONY NJENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgement and sentence of Hon J Ntuku, SRM, dated 17th December 2018 in Criminal Case No 779 of 2017 in the Principal Magistrate's Court at Eldama Ravine, Republic v Andrew Omondi Owuor Alias Anthony Njenga)

JUDGMENT

1. The appellant has appealed his convictions and sentences as follows.

Count 1 attempted murder – 40 years' imprisonment

Count 3 conspiracy to commit a felony -2 years' imprisonment.

Count 4 going armed in public -6 months' imprisonment

Count 6 being in unlawful possession of another person's identity card -6 months' imprisonment.

The sentences were ordered to run concurrently.

He was acquitted on other charges.

In his petition to this court, the appellant has raised four grounds of appeal.

2. Additionally, he has also filed written submissions in support of his appeal.

Counsel for the respondent has supported both the conviction and sentence.

3. This is a first appeal. As a first appeal court I am required to independently re-evaluate the entire evidence and making my own independent findings while deferring to findings of fact that are based on the demeanour of the witnesses. I am also required to consider and re-evaluate the submissions of both the defence and prosecution.

4. I find that the grounds of appeal in both the main petition and supplementary petition of the appellant are well covered in his submissions. And for that reason I will consider the submissions without setting out the grounds of appeal.

5. Based on the authority of *R v Turnbull & Others [1976] All ER 549,* counsel for the appellant has submitted that the appellant was not positively identified as the person who attempted to murder the complainant. Counsel further submitted that there was no link between the person who booked himself as Anthony Njenga in the visitor's book (exhibit 16) of the school and the appellant, whose names are Andrew Omondi Owuor. Counsel also submitted that no police identification parade was held. All there is dock identification since the police did not conduct a parade and dock identification is worthless, a matter in regard to which counsel cited *Mwangi v. Republic []2005] 2 KLR 371, as* an authority for that proposition.

6. Counsel for the prosecution submitted that the appellant was positively identified since the offence was committed during broad day light at 7.55 am in the morning.

7. The evidence of the complainant namely Mrs Sally Lemen Nabori (Pw 4), was that the appellant went to her office and was seeking for a job as a coach (trainer) in football and hockey. Pw 4 told him that they were not allowed to hire outsiders, since this was being done by the school teachers. In response to the question by Pw 4, the appellant told her that he was training at Ngara and that he was now in Nakuru looking for a job. Pw 4 ushered the appellant to the office of the games master. After 10 minutes Pw 4 saw the appellant returning to her office and went straight to where Pw 4 was seated. He told her that: *"Madam I am sorry; I have been sent to kill you."* The appellant then took a hammer from his jumper and hit Pw 4 on the forehead. Pw 4 screamed at the top of her voice and asked her teachers to take her to hospital.

8. Furthermore, Pw 4 was taken to hospital and was examined by Dr Philip Wainaina Kamau (Pw 15). Pw 15 found the following injuries on Pw 4. A cut eye on the eyebrows, which had been stitched. CT scan showed an orbital fracture. The injuries were about three days old and the probable weapon used was blunt. He then classified the injuries as grievous harm. Pw 15 produced his report as exhibit 19.

9. Pw 4 was able to identify the appellant due to the following reasons. The offence was committed during day time. The appellant was very close to Pw 4. The conversation between Pw 4 and the appellant took some time. I therefore find that the circumstances favouring identification were favourable.

10. Additionally, the injuries as described by Pw 4 were confirmed by the examining doctor (Pw 15), whose report was put in evidence as exhibit 16. I have scrutinized the evidence of identification in the light of the prevailing circumstances. As a result, I find that Pw 4 was a truthful witness and was not mistaken as to the identity of the appellant.

11. The evidence of identification of the appellant is supported by Vincent Kangogo (Pw 5), who was the school watchman. Pw 5 is the one who allowed the appellant to see the complainant after clearing him at the gate. The appellant told Pw 5 that he was Antony Njenga and that his phone number was 0726732128. The appellant was allowed to see Pw 4 after he signed the visitor's book, exhibit 16. Pw 5 watched the appellant walk towards the office of Pw 4. He was walking in a strange way towards the office of the complainant (Pw 4). Pw 5 followed him. He then saw the appellant talking with the complainant.

12. Thereafter Pw 5 went back to the gate. After a short while he heard screams from the administration and ran there. As he was running there, he heard Steve Kebut (Pw 6), who was the school accountant shouting that: "*shika shika ameua madam*." (arrest him he has killed madam."

13. At that point in time Pw 5 saw the appellant ran towards the gate. Pw 5 went to lock the gate but the appellant drew out a hammer and aimed it at him; but Pw 5 dodged him. Pw 5 then chased the appellant. Due to the screams, members of the public came and chased the appellant. Members of public and Pw 6 then arrested the appellant near the tarmac. The mob attacked and beat the appellant.

14. The police then came and recorded the things they had taken from the appellant which were:

a hammer, exhibit 3

a photo of the complainant recovered from the jumper pocket

wallet of the appellant, exhibit 1.

I/D for Andrew Omondi, serial No. 218596233, exhibit 5,

I/D for Caroline Manaswa, exhibit 6,

visa card for Chase bank for Andrew Omondi exhibit 10,

ATM card for Caroline, exhibit 9,

assorted business cards, exhibit 11

match box with roll of bhang exhibit 12 and

roll of bhang, exhibit 13.

15. Pw 5 further testified that it was Steve Kebut (Pw 6), the school accountant who took the above exhibits to the police station. Finally, Pw 5 testified that the appellant introduced himself to him as Anthony Njenga and recorded his name in the school visitors' book (exhibit 16) as Anthony Njenga.

16. Steve Kebut (Pw 6), the school accounts clerk is the third witness who visually identified the appellant. It was his evidence that on 10th October 2017 at 7.50 am, while at the gate the appellant approached him and told him that he wanted to see the complainant. Pw 6 left the appellant at the gate and went to his office. After a few minutes, Pw 6 heard screams from the office of the complainant. He rushed out and saw the appellant running out. He then ran after the appellant and was simultaneously shouting at the watchman that the appellant had attacked the complainant.

17. Furthermore, Pw 6 also testified that the watchman (Pw 5) tried to lock the gate but the appellant managed to get out. Pw 5 and Pw 6 then chased the appellant but they did not manage to arrest him. They used a different route to intercept him and in the course of the chase members of the public joined them. The members of the public came from all directions. The members of the public cornered and surrounded him as he lay down on the ground. These members were beating him.

18. Pw 6 continued to testify that there were documents, where the appellant was lying down. Those members were saying that the documents were in the appellant's pockets. Pw 6 took those documents including the hammer, match box, the photograph of the complainant and the wallet. He took all these items to Eldama Ravine police station leaving the appellant, who was still being beaten by members of the public. Pw 6 testified that*: "I ran after you but when you got in the bushes I used a different route after being joined by members of the public many people came from all directions and they arrested you and beat you up."*

19. Pw 6 took all the items recovered where the appellant lay down to Eldama Ravine police station and handed them over to No 3881 Elphas Gatimu (Pw 13). Pw 13 then recorded the items down and handed them to Cpl Karanja (Pw 3). Pw 3 in turn handed them over to the office of the DCIO.

20. It is clear from the evidence of school clerk (Pw 6) that he continuously chased the appellant until he disappeared into the bushes and that members of the public who had joined the chase from all directions found the appellant lying down in the bush with the exhibits mentioned above laying down on that ground. Among the items lying down there was the national identity card of the appellant exhibit 5, that bore his name namely Andrew Omondi, serial No. 218596233.

21. The unsworn evidence of the appellant to the visual identification evidence of Pw 4, Pw 5 and Pw 6 and the recovery of the above mentioned exhibits including his national identity card was that of an alibi. Additionally, he testified that these exhibits were planted on him.

22. I have re-evaluated the totality of the prosecution and defence evidence and the submissions of the parties. As a result, I find that the visual identification of the appellant by the complainant (Pw 4), the school watchman (Pw 5) and the school clerk (Pw 6) was free from mistaken identity for the following reasons. First, the circumstances favoured identification, which included the fact that the time of the commission of the offence was during broad day light in the morning. Second, the appellant was close to both Pw 4 and Pw 5. Third, they were with him for a considerable period of time during which they were talking to each other. Fourth, the recovery of the assault weapon namely the hammer and the national identity card of the appellant at the scene of his arrest, provides ample corroboration of their evidence of visual identification.

23. In the premises, I find that the appellant was positively identified by Pw 4, Pw 5 and Pw 6. The identification was free from error or mistake.

24. I agree with the submissions of counsel for the appellant that a police identification police should have been held. However, the failure to hold the parade is not fatal to the conviction in view of the other ample evidence on record.

25. Counsel for the appellant submitted based on the authority of the Court of Appeal in *Karanja v. Republic [1983] e-KLR, which cited Victor Mwenda Mulinge v Republic [2014*] in which the court held that whenever at a late a stage the defence of alibi is raised, it is upon the prosecution to utilize section 309 of the Criminal Procedure Code to produce evidence in rebuttal to the defence of alibi. The prosecution counsel submitted that it was not possible to re-open their case since they had closed their case and because the appellant made an unsworn statement it was not possible to cross examine in relation to the possession of an identity card of another person.

26. The law in this regard is that if the defence raises a new matter in their defence that the prosecution would not have anticipated or foreseen after exercising due diligence; they may apply under section 309 Criminal Procedure Code to produce evidence in rebuttal.

27. In view of the foregoing, I find that it was not necessary for the prosecution to produce evidence in rebuttal as required by section 309 of the Criminal Procedure Code; their evidence had rebutted the alibi defence of the appellant. The reason for this is that there is ample evidence of visual identification, which was amply corroborated by the evidence of Pw 6. The corroborating evidence consists of the recovery of the assault weapon namely the hammer and the wallet which contained the picture of the complainant. These were recovered from the appellant where he was lying on the ground, having been surrounded from all sides by members of the public; who were pursuing him.

28. Counsel for the appellant has submitted that these highly incriminating exhibits were planted upon the appellant by Pw 5 and Pw 6. It is important to point out that the issue of the exhibits being planted upon the appellant was never put to the prosecution witnesses, when they were testifying. I find that this is afterthought. Pw 6 and the appellant were strangers to each other. I find that Pw 6 had no reason to plant the incriminating exhibits upon the appellant. Furthermore, it is an incredible submission that Pw 6 planted upon the appellant his own national identity card amongst his other personal belongings (appellant's). It defeats common sense that Pw 6 took the appellant's national identity card and planted it upon the appellant.

29. On the totality of the entire evidence I find that the defence of the appellant was rightly for being incredible.

30. The upshot of the foregoing is that the alibi defence of the appellant was disproved.

31. Furthermore, counsel for the appellant submitted that the prosecution failed to prove *mens rea* on the part of the appellant in respect of the offence of attempted murder. Based on section 220 of the Penal Code, counsel further submitted that the elements of the offence of attempted murder that the prosecution was required to prove are 1) an attempt to cause the death of another; 2) intent to unlawfully cause the death of another; 3) does an 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. Finally, counsel submitted that the prosecution failed to prove all the foregoing elements.

32. In view of the foregoing constituent elements, the evidence of the complainant was that the appellant walked straight into her office where she was seated and told her that: "*Madam I am sorry; I have been sent to kill you.*" The appellant then took a hammer from his jumper and hit her on the forehead severally. It is crystal clear from this evidence that the appellant intended to kill the complainant. He hit the complainant on a vital and delicate part of her body namely the head. The medical evidence is that she sustained a fracture in the head as result of which she was admitted in hospital for one day. I find that the prosecution proved all the constituent elements of the offence of attempted murder.

33. Counsel for the appellant further submitted that the offence of conspiracy to commit a felony was not proved citing section 393 of the Penal Code and the authority of *Moses Kathiari Rukunga v Republic [2018] e-KLR* in support of his submission. According to counsel the prosecution failed to prove that there was an agreement between the appellant and the second accused in the lower court to murder the complainant. In this regard, all that the prosecution was required to do was to prove that there was a conspiracy between the appellant and another person or persons to commit the felony of attempted murder. The evidence of the complainant is that the appellant told her that he had been sent to kill her. The appellant did not tell her who had sent him. I find on the evidence that the prosecution proved that there was an agreement between the person who sent the appellant to kill the complainant on the one hand, and the appellant on the other hand. It was immaterial that the appellant did not disclose the identity of who had sent him.

34. It is important to bear in that the lower court found the second accused guilty of conspiracy to commit a felony under section 393 of the Penal Code and convicted her of that offence on 17/12/2018, but she died apparently before she was sentenced. In view of this finding it is clear that the second accused (now deceased) in the lower court was a co-conspirator of the appellant. I find on the evidence that it was the second accused who sent the appellant to kill the complainant. I further find on the evidence that she took the photo of the complainant and sent it to the appellant. This was the photo that was recovered from the appellant after being beaten by members of the public. It is therefore clear that the prosecution proved the existence of the agreement between the appellant and the second accused in the lower court.

35. It is equally important to point out that in order to prove conspiracy, it is enough for the prosecution to prove an agreement between either a known or an unknown person. The existence of the agreement may be inferred from the circumstances of the case; for conspirators do execute their conspiracies in secrecy. It is not a must that the agreement must be explicit.

36. The upshot of the foregoing is that I find no merit in the submission of counsel for the appellant that a conspiracy to commit the offence of conspiracy was not proved. I hereby dismiss it for lacking in merit.

37. Furthermore, counsel for the appellant has submitted that to offence of going armed in public contrary to section 88 of the Penal Code was not proved as no one saw the appellant with the offending weapon namely the hammer. The short answer to this is that Pw 4, Pw 5 and Pw 6 saw the appellant armed with the said hammer. I therefore find no merit in this submission which I hereby dismiss.

38. In the premises, I find that the offences charged were proved beyond reasonable doubt with the result that the appellant's appeal on conviction fails and is hereby dismissed.

39. It appears that the appellant did not appeal against his sentence of 40 years' imprisonment. I have considered it on my own initiative (*suo motu).* I find that the appellant was a first offender. The trial court failed to take this into account in sentencing the appellant.

40. I have taken into account that the appellant has now been in prison custody for slightly over two years.

41. In sentencing the appellant, the trial court only took into account the boldness with which the appellant executed his mission which "*sends shivers down any sane person 's spine."*

42. I have also taken into account that the appellant has three children whom he was taking care of. Furthermore, the appellant told the trial court that*: "I was badly injured by members of the public during the arrest. I still suffer from head problems due to those injuries."*

43. After taking into account all of the foregoing matters, I find that the sentence imposed was manifestly excessive in the circumstances of the case.

44. In the premises, I hereby reduce it to 25 years' imprisonment, which will begin to run from the date of this judgement.

45. There are two matters that merit attention namely the pre-sentencing prayer by the prosecutor in calling for the imposition of a deterrent sentence. Furthermore, the prosecutor also urged the court in his own words that: "*He deserves a custodial sentence. I pray for a sentence of life imprisonment*." While such prayers are common in countries that apply the continental European civilian system of law such as France, such prayers are not allowed in Kenya due to our inheritance of the English common law in terms of section 3 of the Judicature Act (Cap 8), Laws of Kenya. I am aware that in the USA, which also inherited the English common law, prosecutors are allowed to recommend for such sentences. The reason is that the USA has changed her laws in that regard. In Kenya we have not changed the law in that regard. It therefore follows that until the law is changed, it has to be applied as it stands. It was incumbent upon the trial court to explicitly ignore that prayer by the prosecutor.

46. The second matter that merits attention is that the trial court delivered a judgement convicting the second accused in the lower court after that court confirmed that the second accused was dead. It seems the court was influenced by the submission of counsel for the second accused (Mr. Kemboi), who submitted that: "I have instructions to have the judgement delivered posthoumsly. The estate humbly requests that the judgement be delivered for further action by the estate.

47. The court should have declined to accede to the request by counsel for the second accused; because a court does not issue an order in vain. If the estate of the deceased sought to have the judgement delivered; there was no administrator of the said estate to receive the said judgement. It follows that even the said request was made by an unauthorized person; since his instructions ceased upon the death of the

deceased. In the end, counsel for the second accused applied for the refund of the cash bail for the second accused to a representative. The court rightly declined to do so on account that the family of the deceased had to apply for the grant of letters of administration, so that the money could be released to the petitioner and/or administrator in terms of the Law of Succession Act (Cap 160) Laws of Kenya. The trial court made the right order in that regard.

Judgment dated, signed and delivered in open court at Kabarnet this 12th day of February 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Sitienei and Mr. Kemboi Court Assistants.

Mr Wakiaga for the appellant.

Mr. Mong'are for the Respondent.