



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 62 OF 2018**

**(BEING AN APPEAL FROM THE JUDGEMENT OF HON. P. BIWOTT**

**IN CRIMINAL CASE NO. 3130 OF 2017 DATED 7TH AUGUST 2018)**

**FRED SIFUNA NYASIMBA.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with the offence of **Attempted Murder contrary to Section 220 (b) of the Penal Code**. The particulars of the offence were that **on the 30<sup>th</sup> day of December, 2016 at Lessos within Trans-Nzoia County with intent to cause unlawfully the death of SHEILA SHITAKWA KUTWA by cutting her severally with a panga**.
2. The Appellant was convicted and sentence to 15 years' imprisonment hence this appeal. The Appellant's grounds of appeal as contained in his petition inter alia states that the evidence as presented by the Respondent was contradictory and did not meet the threshold of a conviction; that the charges did not meet the ingredients of an attempted murder and that the court ought to have considered his cogent defence.
3. Before looking at the merits or otherwise of the appeal it shall be necessary to summarise the evidence as presented during trial.
4. **PW1 SHEILA SHITAKWA KUTA** testified that the Appellant was her fiancée or boyfriend and that on 30<sup>th</sup> December, 2016 at around 6.00 a.m he attacked her using a panga. Previously he had threatened her and the matter had been reported at the police station. This was on the 29<sup>th</sup> December, 2016 and that was the reason she had gone to sleep at the neighbours.
5. She went on to state that after cutting her he disappeared. She was taken to Cherangany Nursing Home as well as the district hospital. She said that Mama Jane and Mama John were part of the people that rescued her. She said that the Appellant wanted to kill her after she had decided to leave her.
6. When cross examined she said that one Pastor Samson had reconciled them and that is why she withdrew the case from the police station. The said pastor had taken the three knives the Appellant had surrendered to him. She denied that she had any relationship with the pastor.
7. **PW2 ESTHER NJERI KIMIRI** testified that she was a neighbour to the parties and was at home Lessos on 30<sup>th</sup> December, 2016 at around 6.00 am when she heard screams. She was told by a neighbour that the Complainant Mama Grace also called Sheila was being killed. The door was locked from inside and the appellant was cutting her using a panga. Although they could not open the door she could see from the window. The appellant then opened the door and came out threatening to cut those who were around. He disappeared into a nearby forest.
8. They called for a taxi and rushed her to Cherangany hospital. The Complainant's father was called and he reported the incident at the police station.
9. When cross examined she insisted that she saw him through the window injuring the Complainant. She said that she assisted her all the way to the hospital. She also said that the Appellant had been arrested and taken to the police on the 27<sup>th</sup> and 28<sup>th</sup> December, 2016.
10. **PW3 SAMSON CHIBOYELI OMBIMA** is pastor from Makuti area. He said that he had tried to reconcile the Appellant and the Complainant previously and had even visited their home. He said that the Appellant rode his motor bike and he had reported to him that the

Complainant had run away from home.

11. As a result of the reconciliation the Appellant handed over two knives and poison which he intended to take after assaulting the Complainant to him and hoped that they had reconciled. The Appellant had also warned him that he will do something that it would be aired in the Television stations. After two days he received the information that the Appellant had assaulted his wife.

12. When cross examined he said that he threw the two knives and the poison into the pit latrine. He said that he had no other relationship with the Complainant and that he did not intent to wreck the Appellant's family.

13. **PW4 GICHUKI GABRIEL** a Clinical Officer from Kitale County Referral hospital examined the Complainant and filled the P3 form. He concluded that she had sustained deep cut injuries on the head, finger and elbow. He classified the same as grievous harm.

14. **PW5 CPL ISAAC MACHUKA** carried out the investigation after the matter was handed over to him. He recorded statements from the witnesses and had the P3 form filled. He also organised for an ambush and the subsequent arrest of the Appellant on 25<sup>th</sup> August, 2017 and thereafter preferred charges against him.

15. When cross examined by the Appellant he said that an earlier report had been made against the Appellant at the station and the Complainant had forgiven the Appellant. He further said that the Appellant had threatened those who attempted to aid the Complainant while being assaulted and that the Appellant escaped with the panga.

16. When placed on his defence the appellant gave unsworn evidence denying the charge. He said that the Complainant was his wife and had an affair with his boss. He admitted that their matter had been reported at the police station and that he had been incarcerated at the said station. He also learned that PW1 had befriended on Peter who was a CID Officer.

17. After being released from the police station he went home and on 30<sup>th</sup> December, 2016 and as he dressed that morning the Complainant closed the door and a fight ensued. They were both injured by some broken glasses as the neighbours forcefully opened the door. She thereafter went to his home in Kakamega till the voting period when he came to vote and was arrested and subsequently charged.

#### **ANALYSIS AND DETERMINATION**

18. The court has read the lengthy home-grown submissions by the Appellant. Apparently there was none from the Respondent. The duty of the appellate court is to re-evaluate the evidence afresh and come up with an independent finding noting that it did not have the benefit of seeing the witnesses or their demeanour like the trial court. See **OKENO V.REP.1972 E. A. 32**

19. There is no doubt from the proceedings on record that the Appellant and the Complainant were having a relationship whether wife and husband or boyfriend and girlfriend. They lived together and they had two children. Their relationship was not good as they had gone as far as having the matter reported at the police station and PW3 pastor Samson adjudicated over the matter. These were issues found both in the evidence of the Appellant as well as the Complainant.

20. The issue for determination is whether the Appellant assaulted the Complainant occasioning her serious bodily injuries. It appears that prior to the assault the appellant had been incarcerated at the police station for two days and when he came home he decided to take the drastic action. This is exemplified by the evidence of PW3 who said that he had promised to do something that would be reported in the media.

21. The eye witness was PW2 who testified that they went to rescue the Complainant that early in the morning. She said that she saw the Appellant through the window cutting the Complainant. Was she a truthful witness? In my view, there is no reason to doubt her. She went further to state that the Appellant disappeared thereafter and after threatening those who were attempting to rescue PW1.

22. The allegation by the Appellant in his defence that they were both injured by broken glasses does not hold water for the twin reasons that the P3 form produced showed more severe injuries and that the same was of not much probative value as it was unsworn and thus not subject to cross examination.

23. Having carefully evaluated the evidence on board, it is not true that the trial court erred by relying on inconsistent evidence or contradictory evidence for that matter. The Appellant in his own unsworn evidence did not deny the fact that there was a fight between him and his wife that material morning. There was no evidence that he was injured or at all.

24. Further it is clear that the Appellant took off and he was arrested several months later as he came to vote according to him. If at all there was no guilty conscience, why did he disappear for all that period.

25. The Appellant has also raised an issue that the doctor who examined the Complainant was not called to testify. This stands no chance since the clinical officer produced the P3 form which essentially indicated the injuries suffered by the Appellant.

26. The attack by the appellant was premeditated. It was well planned by the Appellant as demonstrated by an earlier incident mediated by PW3. The Complainant by virtue of the said mediation led her to drop the charges against the Appellant at the police station. This was demonstrated further by the Appellant handing over the knives and poison to pw3 who in turn threw them inside a pit latrine. The early morning attack was well planned and was calculated to maim or kill the complainant and the more reason why he had to lock the door from inside.

27. Consequently, this appeal has no merit and the same is hereby dismissed.

28. However, on sentencing it is noted that the Appellant despite being granted bail was in custody all through. That period ought to have been reckoned.

29. The period therefore of 15 years' imprisonment shall run from 28<sup>th</sup> August, 2017.

**Dated, signed and delivered in Kitale via zoom this 16<sup>th</sup> day of June 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**16/6/2020**