REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.243 OF 2019

(An Appeal arising out of the conviction and sentence of Hon. Juma (SPM) delivered on 26th September 2019 in Nairobi Criminal Case No.2275 of 2014)

NICHOLAS SHIVACHI MBOYA .....1ST APPELLANT

JOSHUA LITSULULU AMUTAVI .....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Nicholas Shivachi Mboya and Joshua Amutavi Litsululu, were jointly charged with the offence of **conspiracy to commit murder** contrary to **Section 224** of the **Penal Code**. The particulars of the offence were that on diverse dates between 19th and 26th May 2014 in Ongata Rongai Township, the Appellants, jointly with others not before court, conspired to kill Erick Oluoch Audi. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged. They were sentenced to serve five (5) years imprisonment. They were aggrieved by the conviction and sentence. They have a filed an appeal to this court challenging the said conviction and sentence.

In their joint petition of appeal, the Appellants raised several grounds of appeal challenging their conviction and sentence. They were aggrieved that they had been convicted of the charge despite the fact that the prosecution had failed to establish the essential ingredients of the charge to the required standard of proof beyond any reasonable doubt. In particular, the Appellants complained that no evidence was adduced by the prosecution witnesses to establish the existence of an agreement between the Appellants and another person to commit the offence. The Appellants took issue with the fact that no specific evidence was adduced in regard to the time and place that the victim of the conspiracy would be killed. They faulted the trial court for relying on inconsistent uncorroborated hearsay evidence of the prosecution witnesses to convict them. They took issue with the fact that crucial witnesses, including the alleged hitmen, were not called before court to adduce their evidence. In particular, the Appellants complained that the mobile phone number that was allegedly used by the hitmen was not adduced in evidence, nor was the mobile call data to establish communication between the Appellants and the alleged hitmen. The Appellants faulted the trial court for failing to take into consideration their respective defences before reaching the impugned verdict. The appellants were aggrieved that they were convicted despite the fact that there was no evidence which connected them to the crime, and further, against the weight of the evidence. In the premises therefore, the Appellants urged the court to allow their appeal, quash their conviction and set aside the respective sentences meted out on them.

During the hearing of the appeal, this court heard oral rival submissions made by Mr. Kisaka for the Appellant and by Mr. Momanyi for the State. Mr. Kisaka submitted that the prosecution failed to establish the charge of conspiracy to the required standard of proof. He stated that for the charge of conspiracy to be proved, it must be established that two or more persons conspired with each other to commit the offence. In the present case, no such evidence was forthcoming from the prosecution witnesses. He submitted that according to prosecution witnesses, information was received from an informer to the effect that the Appellants had planned to kill the complainant. It was claimed that the Appellants had communicated with the informer with a view to securing his services to eliminate the complainant. The evidence of such communication was not produced in evidence. When a report was made to the police, a decision was made that Police officers pose as hired hitmen so as to entrap the Appellants. Learned Counsel complained that no evidence was adduced to support the assertion by the prosecution that the Appellants actually sought the services of a hitman to kill the complainant. He explained that the theory behind the prosecution case was not plausible or logical. The complainant in his testimony confirmed that there existed no bad blood between himself and the 1st Appellant. Learned counsel was of the view that the entire crime scene was stage-managed to fit into the theory the police advanced to the effect that the Appellants had conceived and then planned to bring to fruition their intention to kill the complainant.

Learned counsel for the Appellant pointed out that crucial witnesses were not called to testify in the case. The police officers who posed as hitman were not called to testify in the case. Neither was the woman passenger who was with the complainant at the time they were waylaid

and intercepted by the Police and later escorted to Ongata Rongai Police Station. The call logs reflecting the alleged communication between the Appellants and the alleged hitman were not produced into evidence. The police officer who was allegedly been paid by the Appellants after establishing that she had "accomplished" the mission was not called as a prosecution witness to testify in the case. In essence, the Appellants were saying that there were gaps in the prosecution's case which raised reasonable doubt as to their guilt. Learned counsel submitted that those doubts, together with the Appellants' defence, meant that it was unsafe and unjustified to convict the Appellants. In the premises therefore, the Appellants urged the court to allow their appeal.

Mr. Momanyi for the State conceded to the appeal. He told the court that the inconsistencies apparent in the evidence adduced by the prosecution witnesses made him reach the conclusion that he could not support the Applicant's conviction. He pointed out that there were gaps in the evidence adduced by the prosecution witnesses who were called which could have been filled by prosecution witnesses who were never called to testify in the case. He observed that crucial documentary evidence such as the audit report that was alleged to be the cause of bad blood between the 1st Appellant and the complainant was not produced into evidence. There was no evidence to support the assertion by the prosecution to the effect that the appellants had conceived, planned and executed their intention to cause the death of the complainant. In the premises therefore, Learned Prosecutor conceded to the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial Magistrate Court with a view to reaching its own independent determinations whether or not to uphold the conviction and sentence of the trial court. The Court of Appeal in **Dorcas Jemutai Sang – Vs – Republic [2018] eKLR** held thus;

> **"This court has stated before, on the persuasive authority of the Ugandan Supreme Court decision in Uganda Breweries Ltd -Vs- Uganda Railways Corporation [2002] 2EA 634, that there is no set formula to which re-evaluation of evidence by the first appellate court should confirm. The extent and manner in which re-evaluation may be done depends on the circumstance of each case and the style used by the first appellant court. The court is expected to scrutinize and make an assessment of the evidence, but not necessarily write a judgment similar to that of the trial court."**

In the present appeal the issue for determination is whether the prosecution established,as against the appellants, the charge of **conspiracy to murder** contrary to **section 224** of **the Penal Code** to the required standard of proof beyond and reasonable doubt.

Section 224 of the **Penal Code** provides that:

> **"Any person who conspires with another person to kill any person whether that person is in Kenya or elsewhere, is guilty of a felony and is liable to imprisonment for fourteen years".**

In **Moses Kathiari Rukungu – Vs- Republic [2018] eKLR** Majanja held that

> **"…..In Archibold Criminal Pleadings Evidence and Practice, Sweet & Maxwell 2003 (Ps 2689) Paragraph 33-2) the definition of conspiracy is from Criminal Act 1977 of England which is defined as a situation where a person agrees with another person or persons that a course of conduct be pursued which, if the agreement is carried out in accordance with their intentions either will necessarily amount or involve the commission of any offence or offences by one or more of the parties to the agreement or would do so but for the existence of facts which render the commission of the offence or any offence impossible. The essential ingredient to thus prove the offence of conspiracy to commit a felony is that two or more people agree to put in effect a scheme whose ultimate aim would be the commission of a criminal offence. It will not matter that the criminal offence proposed to be done may be impossible to be undertaken. Proof of existence of conspiracy is generally a "matter of inference, decided from certain criminal acts of parties accused; done in the pursuance of an apparent criminal purpose between them". Republic –vs- Brisac [1803] 4 East 164, 71 (as quoted at page 2692 Archibold paragraph 33 -11 (SUPR) (See Njenga and 2 others –Vs- Republic NKU HCCCRA NO. 163 of 2003 [2005] eKLR."**

Ngenye Macharia J. in **Gathungu Vs. Republic [2017] eKLR** held that**:**

> **"However, it occurs to me that given the plot to trap the Appellant, the two witnesses did not aspire to the attainment of the commission goal and as such they did not possess the necessary measure to commit the crime. See Lord Bridge in Republic Vs. Anderson (William Ronald) [1986] AC 27. He delivered himself thus:**
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> > **"Beyond the mere fact of agreement the necessary mens rea of the crime is, in my opinion, establish if and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required."**

For the offence to be complete, the prosecution is required to establish that PW2 and PW3 had the intention to play a part in furtherance of a criminal purpose. Their action in this case did not seem to meet the threshold. At best, it only facilitated towards the arrest of the Appellants.

What are the facts of this appeal?

According to PW2 PC Francis Gitonga and PW3 CPL Moses Mwenda, it was on 25th May 2014 at about 3.00 pm. They were at their place of work at Ongata Rongai DCI office. They received information from an informer to the effect that there were people who intended to kill another person. On further inquiry, they established that the person intended to be killed was PW1 Erick Oluoch Audi (the complainant), an internal Auditor then working for Kenya Electricity Transmission Company (KETRACO). They asked the informers to show them the

residence of the complainant. He duly obliged. PW2 and PW3 decided to inform the complainant of the plot to kill him. However, the manner in which they went about doing this was both puzzling and perplexing. Instead of visiting the complainant's residence and giving him the information, they mounted a roadblock near his house at 5.00 am on the morning of 26th May 2014. PW2 and PW3 obtained intelligence that the complainant usually left for work at that time of the morning. As expected, when the complainant arrived at the scene, they stopped him, introduced themselves then requested him to accompany them to the Police Station. At the Police Station, the complainant was informed of the plot to kill him. Understandably, the complainant was in shock. He was kept at the police station for more than eight hours. he was told to surrender his mobile phone to assist PW2 and PW3 with investigations.

According to PW2, after they secured the safety of the complainant, they called the 2nd Appellant. The informer had informed them that it was the 2nd Appellant who was the linkman to the person who had actually planned to eliminate the complainant. They had obtained the 2nd Appellant's mobile phone number from the informer. PW2 and PW3 were accompanied by other police officers to the scene where the 2nd Appellant had informed them he was. He told them that he was at Sabina Joy Club at Nairobi Central Business District (CBD). They found the 2nd Appellant at the club. According to PW2, they told the 2nd Appellant that they had "accomplished the mission". PW2 and PW3 posed as hitmen who had fulfilled "the job" of eliminating the complainant. They requested the 2nd Appellant to escort them to the 1st Appellant's house. Incidentally, the Appellants are relatives. They are brothers. According to PW2 and PW3, the 2nd Appellant agreed to take them to the residence of his brother. This version of events is disputed by the 2nd Appellant. He explained in his defence that he was called by someone through his mobile phone who requested to see him. He told them where he was. The people arrived and introduced themselves as police officers. They asked him to lead them to the 2nd Appellant's house. He obliged. He took them to the residence of the 2nd Appellant at Mwiki.

At Mwiki, according to PW2 and PW3, they knocked at the gate to the 2nd Appellant's residence. There was reluctance on the part of the people in the house to allow them in. They jumped over the fence and gained entry into the house. They found the 2nd Appellant in the house. They searched the house and recovered the sum of Ksh 200,000/-. According to PW2, this was the amount their informer had told them would be the agreed sum to kill the complainant. They also recovered a Pistol and several rounds of ammunition. The 1st Appellant is a licenced firearm holder. The sum of Kshs 200,000/- was produced as an exhibit during the trial.

When the Appellants were put to their defence, they denied the allegation that they had formed any intention or indeed brought into fruition the intention to kill the complainant. The 2nd Appellant, while admitting that he worked with the complainant at KETRACO, denied the thrust of the prosecution's case to the effect that there existed bad blood or a grudge between them. Indeed, the complainant confirmed under oath that he had no problem with the 2nd Appellant. They had not had any disagreement at their place of work though an audit report prepared by the complainant led to the termination from employment of the 2nd Appellant by the management of the KETRACO. The 2nd Appellant denied the assertion by the prosecution that he was embittered by his termination from employment or that he blamed the complainant for his travails.

On re-evaluation of the evidence adduced before the trial court, in light of the submission made on this appeal, it was clear to the court that the prosecution failed to establish the essential ingredients of the charge of **conspiracy**. As was held in **Moses Kathiari Rukunga Vs. Republic (supra) ,**for the charge of conspiracy to commit a crime to be proved to the required standard of proof beyond reasonable doubt, it must be established that the Appellants entered into an agreement with the aim of putting into effect a course of conduct that is in furtherance of a criminal purpose ,which the agreement was intended to achieve.

In the present appeal, no evidence was adduced by the prosecution to establish the existence of an agreement between the Appellants, either by themselves, or with others, to put into effect a course of conduct in furtherance of a criminal purpose, namely the killing of the complainant. There was no evidence in form of communication data between the Appellants and the alleged hitman to support the contention by the prosecution that the Appellants had conspired to kill the complainant. Other than the information allegedly received from an informer, there is no direct evidence connecting the Appellants to the alleged plot to kill the complainant. The prosecution was unable to prove the existence of a reason that would have motivated the Appellants, especially the 1st Appellant, to desire to eliminate the complainant. Indeed, the complainant himself confirmed in his testimony that there existed no grudge between him and the 1st Appellant. The prosecution adduced no evidence to support the thrust of their case to the effect that the Appellants had put in motion a course of conduct that could be in furtherance of a criminal purpose which was to achieve the objective of the killing of the complainant.

There was no evidence adduced by the prosecution to support the assertion that the Appellants, either singly or jointly, had communicated with the police officers who posed as hitman, and agreed on the facilitation fees, to enable the court reach determination that indeed such instructions were given. What emerges from the evidence adduced by the prosecution witnesses is conduct by Police that not only showed the wrong use of information, but also the wrong execution of a task to nab those allegedly involved in the planning and commission of a criminal offence. The treatment of the complainant is symptomatic of how the police bungled the investigations. It is unfortunate that the complainant was treated and held like a criminal while the Police were conducting investigations. This court wondered whether the whole exercise was in pursuit of fighting crime or meant to achieve another purpose. We may never know.

Enough said. It's clear that this appeal is for allowing. The prosecution, correctly in the opinion of this court, conceded to the appeal. The Appellant's conviction is quashed. The sentences meted on them is set aside. The Appellants had at the conclusion of the hearing of the appeal been released on bail pending the delivery of this judgment. The sums they had deposited in court to secure their release on bail is ordered refunded to them.

It is so ordered.

DATED at Nairobi this 23rd day of September 2020.

L. KIMARU

JUDGE