



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 43 OF 2016

KARISA KAHINDI KATANA.....1ST APPELLANT

JEFFA KAHINDI MKARE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal

Case No. 91 of 2013 of the Senior Principal Magistrate's

Court at Kilifi – D.W. Nyambu, SPM)

JUDGEMENT

1. The 1st Appellant, Karisa Kahindi Katana and the 2nd Appellant, Jeffa Kahindi Mkare were charged, tried, convicted and sentenced to serve ten years imprisonment for the offence of attempted murder contrary to Section 220(a) of the Penal Code. Aggrieved by both the conviction and sentence, they have appealed to this court.

2. The appellants' amended grounds of appeal and submissions are the same. Their summarized grounds being that:

- a) There was no investigating officer, arresting officer or any police officer summoned as a witness leading to a mistrial;
- b) The sentence was in breach of Section 389 of the Penal Code hence unlawful;
- c) The trial court erred in fact and law by failing to consider the sharp contradictions in the evidence adduced by the prosecution witnesses;
- d) The trial court erred in fact and law by failing to consider the contradictions in the medical evidence; and
- e) The trial court erred in fact and law by failing to consider their defences.

The appeal was disposed of by way of written submissions which the parties adopted in their entirety.

3. The appellants submitted that the investigating officer was an essential witness and failure to summon the investigating officer led to the case remaining unproved. Reliance was placed on the decision in **Geoffrey Nguku v Republic, Kisumu C.A. No. 166 of 1983** in support of the proposition that failure to avail the investigating officer renders the case unproved. The appellants further submitted that no investigation was carried out and the case against them was therefore not proved. They urged the court to draw a negative inference from the failure to call the investigating officer.

4. On the issue of sentence, the appellants submitted that the sentence meted out was unlawful as it breached sections 388 and 389 of the Penal Code. The decision of the Court of Appeal in the case of **Evanson Muiruri Gichane v Republic, Nairobi C.A. No. 227 of 2007; [2010] eKLR** was cited in support of this submission.

5. In support of their claim that the evidence adduced was contradictory, the appellants submitted that the P3 form produced indicated that the offence occurred on 17th March, 2013 and the complainant was sent to hospital on 21st April, 2014 under the escort of a police officer by the name Abdalla who was not called as a witness. Further, that the P3 form indicated the age of the injuries as five weeks thereby not being in accord with the evidence adduced by the witnesses. It was the appellants' submission that although the P3 form was filled at the Coast Provincial Hospital, the same was produced by a medical officer from Kilifi County Hospital. In their opinion, it was necessary to call a witness from Coast Provincial Hospital to come and ascertain the nature and degree of injuries sustained by the complainant.

6. The appellants accused the trial court of making a case against them where there was none thereby taking over the duty of the prosecution. In support of the submission that it is not the duty of the trial court to make a case against an accused person, the appellants referred this court to the decision in **Okethi Okale v Republic [1965] E.A. 555**.

7. Finally, the appellants submitted that the trial court failed to advert to their defence in making the decision.

8. The State opposed the appeal. It was submitted for the Respondent that the conviction and sentence were proper as the case against the appellants was proved beyond reasonable doubt. According to the Respondent, the complainant and PW2 Gona Ngumbao Gona identified the appellants. Further, that the complainant was taken to hospital and PW6 Dr. Hashim Suleiman verified the injuries. The State urged the court to find that there was prove of the appellants' malice aforethought and attempt to kill the complainant. Reliance was placed on the decision in the case of **Jeremiah Oloshiro Kelian v Republic, Criminal Appeal No. 28 of 2013** in support of the Respondent's submissions.

9. On the sentence imposed, the Respondent held the view that the same is not proper as the provision of the law called for life imprisonment. The State therefore urged for the enhancement of the sentence to life imprisonment.

10. This being a first appeal, the court has an onus of looking into the evidence afresh, reconsidering and reevaluating it so as to reach its own conclusion keeping in mind that the trial court had the opportunity of observing the demeanour of the witnesses as they testified. In doing so, the court must be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or there is a misapprehension of the evidence or the trial court acted on the wrong principles of law – see **Okeno v Republic [1972] E.A. 32; Chemagang v Republic, Criminal Appeal No. 150 of 1983; and Gunga Baya & another v Republic [2015] eKLR**.

11. In brief, the prosecution' case was that on the material day the complainant was asleep in his house at about 10.00 a.m. when the appellants landed on him with sticks threatening to kill him on allegation that he was a witch. The complainant was injured on the head and right eye.

12. PW2 Gona Ngumbao Gona and PW3 Stephen Bidii Baya were among those who went to the complainant's rescue. PW4 Jumwa Ngumbao Gona, the complainant's wife, was among the people who witnessed the assault on the complainant. After the rescue, the complainant was taken to Kilifi District

Hospital from where he was referred to Coast General Hospital for further treatment. A P3 form was produced by PW6 Dr. Hashim Suleiman detailing the injuries sustained by the complainant.

13. The appellants elected to give unsworn testimonies. The 1st Appellant denied committing the offence and testified that on the material day at around 6.00 a.m. he was heading to work when he found a crowd of people who arrested him and handed him over to the police.

14. The 2nd Appellant's testimony was that he had gone to purchase groceries when he met four people who took off on seeing a crowd of people. The crowd then surrounded him and demanded to know why the four had taken off. They beat him up before taking him to the police station where he was informed he would be released as there was mistaken identity. He was even promised that an identification parade would be held but he was surprised to be charged for committing an offence he knew nothing of.

15. The appellants' co-accused, Samson Charo Ngumbao jumped bail before the conclusion of the trial.

16. The question to be answered in this judgement is whether the prosecution proved its case to the required standard. If the conviction is found to be safe, the issue of the legality of the sentence imposed will also have to be considered.

17. The complainant's evidence was that he identified his attackers as they lived in the same village. When cross-examined he stated that he was attacked at home and not at the shops as stated in his statement. He stated that PW3 rescued him. Further that the incident took place at 2.00 p.m. and not at 10.00 a.m. and denied knowing of any occurrences that took place at 10.00 a.m.

18. The complainant's son Gona Ngumbao Gona testified as PW2. He stated that on 17th March, 2013 at about 10.00 a.m. his father had loudly called his name and upon going to check he found Tanga and Kasena blocking his father's path. He tried to lead his father away but Kasena attempted to attack him with a stick. He grabbed the stick and led his father away. He then decided to go and report the incident to the parents of Tanga and Kasena and as he was doing so he received a call from his wife that his father had been killed. He proceeded home but did not find his father. He heard screams from a distance and when he proceeded there he found his father in Mzee Baya's farm with serious injuries. Tanga and Kasena, who had earlier threatened his father, had been detained by the villagers. The men had claimed that his father was a witch. His father was taken to hospital. He identified Tanga and Kasena as the appellants herein.

19. PW3 Stephen Bidii Baya testified that on the material day he was approaching home when he heard distress calls from his homestead. He hurried there and found the appellants hitting the complainant who lay on the ground. He tried to intervene but the appellants continued hitting him. He dashed to his house to get a pen and paper so as to record the names of the attackers. On coming back, he found that they had covered the complainant with grass wanting to burn him but luckily they did not have a match box. PW3 telephoned the chief and alerted him of the incident. The witness then heard screams from the direction of the complainant's home. The appellants were detained by villagers as they were trying to burn the complainant's house and clothes. PW3 stated that the appellants were from their village and he knew them well prior to the incident.

20. PW4 Jumwa Ngumbao Gona, the wife of the complainant, testified that on the material day at about 10.00 a.m. her husband arrived home surrounded by the appellants. The appellants left and came back at 2.00 p.m. threatening to strangle her or her husband. She scampered for safety and when she came back twenty minutes later she found her husband with injuries.

21. PW6 examined and filled a P3 form for the complainant and noted injuries which she classified as grievous harm.

22. The thread running through the evidence adduced by the prosecution reveals that the appellants attacked the complainant threatening to kill him for allegedly being a witch. The complainant received serious injuries that required hospitalization for some time. Any contradictions on the time and sequence

of events does not in any way detract from this big picture.

23. The appellants' defences were mere denials which could not upset the evidence adduced by the prosecution. The trial magistrate's findings on facts cannot therefore be disturbed.

24. The question is whether those facts proved the offence with which the appellants were charged. The appellants submitted that the offence against them was not proved since the investigating officer was not called to testify. Whether failure to call the investigating officer is fatal to the prosecution case depends on the circumstances of the case under consideration. In most cases, the investigating officer's role is to give a summary of the activities undertaken in a case otherwise the evidence that will determine whether an accused person is guilty or not is normally adduced by the eyewitnesses.

25. In **P.M. & 2 others V Republic [2014] eKLR**, it was held that:

“Failure of an investigating officer to testify in court is not fatal to a conviction. Provided the evidence on record is sufficient to sustain a conviction, the failure of an investigating officer to testify cannot vitiate a conviction.”

26. In this case, the prosecution was required to establish the ingredients of the offence with which the appellants were charged. The evidence adduced showed that there was a death threat. The complainant was covered in dry grass. There was an attempt to set the complainant on fire. The complainant was assaulted and sustained serious injuries. All these point to the fact that the appellants wanted to take away the life of the complainant. The conviction was therefore supported by the facts and the law. I therefore reject the appellants' appeal against conviction.

27. As for the sentence, I note that Section 220 provides that a person convicted for attempted murder is liable to imprisonment for life. In **Evanson Muiruri Gichane v Republic [20110] eKLR**, the appellant was convicted for attempted robbery with violence contrary to Section 297(2). The Court of Appeal upheld the conviction but set aside the sentence of death stating that:

“The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of Section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences.”

The same logic applies to this case. Under Section 220 of the Penal Code the appellants were liable to imprisonment for life. This means they could be sentenced to life imprisonment or given a lesser sentence. The Respondent's agitation for enhancement of the sentence to life imprisonment is thus not backed by law.

28. Is there a conflict between Section 220 and Section 389 of the Penal Code? I do not see any conflict. Section 389 of the Penal Code only comes into play **“if no other punishment is provided.”** In the case of attempted murder, another punishment is provided by the law. The sentence imposed by the trial court was in accordance with the sentence provided by the law namely liability to life imprisonment. The sentence imposed was therefore lawful.

29. I do not find any other reason to make me disturb the sentence imposed by the trial court. The appeal on sentence also fails.

30. The outcome is that the appellants' appeals fail and they are dismissed.

Dated, signed and delivered at Malindi this 8th day of March, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT