



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL CASE APPEAL NO.113 OF 2016**

**HASSAN MOHAMMED RAMADHAN .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. L Mutai – Chief Magistrate dated 17<sup>th</sup> October, 2016 in Nanyuki Chief Magistrate Court Criminal Case No. 1012 of 2015)*

**JUDGMENT**

1. **HASSAN MOHAMMEDRAMADHAN** alias **RAMA** was convicted, after trial, of the **offence of attempted murder Contrary to Section 220 (a) of the Penal Code**. The trial court sentenced him to 10 years imprisonment. He has filed this appeal against his conviction and sentence.

2. This court as the first appellant court has a duty to re-appraise the evidence of the trial court and to come to its independent finding. This court however shall take into account that it does not have advantage of seeing and hearing the witnesses that testified during the trial. See the case of: **DAVID NJUGUNA WAIRIMU – V- REPUBLIC [2010]eKLR**.

3. The prosecution's case was that Margaret Wanjiku Wairimu (**P W 1**) who was a former girlfriend of the appellant was at her open market stall near Majengo in Nanyuki town, at about 8p.m, on 9<sup>th</sup> September, 2015. While there the appellant stabbed her. This is what she said:

*“...the accused appeared. I saw him well since the stand had electricity lights. They were on. There were security lights also from the aforesaid bars. The scene had clear and enough light. The accused (the appellant) came armed with a knife. I had turned to face him. He then stabbed me on the stomach.”*

4. P W 1 screamed as she fell down; the appellant ran away. P W 1 was in hospital for 10 days.

5. Cynthia Tajiri (**P W 2**) on that day heard P W 1 screaming and when she went to the place she found P W 1 on the ground, bleeding. It was P W 2 who took P W 1 to Nanyuki General Hospital.

6. Teresia Wangari (**P W 3**) who operated a bar next to where P W 1 had her stall was informed by P W 2 that P W 1 was lying on the ground bleeding. P W 3 went on the scene and found P W 1 still on the ground bleeding. P W 3 said of P W 1 that:

*“She could talk. I asked her what the matter was and she (P W 1) informed me that Ramadhan- the accused (the appellant) had stabbed her.”*

7. Mary Wairimu (**P W 5**) aunt of P W 1 was at scene at about 8.00p.m when she saw P W 1, who had been stabbed, being assisted to go to hospital. P W 5 went to report the matter to the police.

8. Doctor Tony Omenda, working at Nanyuki General hospital, stated that P W 1 was treated at that hospital. That P W 1 had a 8cm long wound by 4 cm. He stated that P W 1:

*“She was stitched at the theatre and given treatment. I assessed degree of injuries as maim. The stomach was left weak- stomach inside cannot be normal again.*

9. It was A P C Paul Kahoro (**P W 4**) who received the report from P W 5 that the appellant had stabbed P W 1. He arrested the appellant at Majengo in Nanyuki.

10. C P L David Kyalo(P W 7) by then was based at Nanyuki police station. He stated that the appellant had previously damages P W 1's property and that he, the appellant, had been warned against visiting P W 1.
11. Appellant made written submissions in support of his appeal.
12. In his submission the appellant stated that the prosecution failed to produce before court the knife used to stab P W 1 and failed to also produce P W 1's clothes she wore on the fateful evening. By his submissions the appellant stated that failure to produce those items weakened the prosecution's case.
13. The Principal Prosecution Counsel Mr Tanui on behalf of the respondent, in response to that ground of appeal submitted that the prosecution's evidence was that the appellant, after stabbing P W 1 ran away. That therefore the prosecution could not produce the knife used to stab P W 1.
14. The learned counsel further submitted that failure to produce the clothes worn by P W 1, on the night of her attack did not affect the prosecution's case, because even without those clothes the prosecution proved the charge.
15. I wholly agree with the submissions of the learned Counsel for the respondent. The prosecution's evidence as narrated by P W 1 was that the appellant came to her stall at 8p.m on the night in question. P W 1 saw the appellant with the aid of security lights and from lights from the two bars that she had placed her stall and the light at her stall. She also noted appellant take aim and stabbed her. The fact that the appellant stabbed P W 1 on her stomach means that he was within her clear view and she identified him. He was her previous boyfriend and undoubtedly would have therefore had been familiar with his appearance
16. The evidence of the doctor who filled the P 3 form was clear that P W 1 suffered life changing injury. The injury left P W 1's weak and the stomach would not thereafter, be normal.
17. With the above evidence the fact that there was no knife or soiled clothes produced at the trial by the prosecution did not impair the prosecution's case. It should also be appreciated that the appellant ran away with the weapon after committing the offence. On being arrested the police did not recover the knife.
18. Accordingly that ground of appeal is discounted.
19. The Learned trial Magistrate who had the opportunity to see and hear the witnesses testify, in her considered judgment stated, on the ground raised in that issue, thus:
- “Although the accused (appellant) was not arrested anywhere near the alleged scene of crime and although the alleged weapon was not recovered with the accused at the point of his arrest, I was still satisfied with the prosecution's evidence that the accused caused the said grievous harm on the person of the complainant (P W 1). The complainant, the court heard mentioned the name of the accused to P W 3 her cousin as the assailant immediately the offence was committed and this evidence went unchallenged.”***
20. I find it difficult to appreciate the next ground raised by the appellant: that there was an attempt to hide the relationships of prosecution's witnesses.
21. The fact is that P W 3 stated that she was not a sister to P W 1. P W 5 in her evidence stated that P W 3 was her daughter and that P W 1 was her niece; she was a daughter of her late sister. There was no evidence of concealment of those relationships.
22. Also on the issue of there being no other witnesses to the stabbing P W 1 stated while being cross examined that when the appellant stabbed her there were no other people walking there. Further it should be noted P W 1 did raise an alarm when she was stabbed and it was because of that, that she received assistance from P W 2 to go to hospital.
23. The appellant stated in submissions that he was charged with two different offences touching on the same facts.
24. The fact that there are two charge sheets, one for the offence of assault causing actual bodily harm, and the other for the offence of attempted murder.
25. The trial court's proceedings reveal that on 11<sup>th</sup> September, 2015 the charge of assault was read out to the appellant and on 14<sup>th</sup> September, 2015 that charge was substituted with the charge of attempted murder.
26. There is therefore no anomaly in the charges before the trial court. The appellant's submission, therefore, in that regard is rejected.
27. There being two charge sheets well explains why there were two O. B. numbers. It follows that there is no contradiction on the issue on O. B. numbers.
28. The appellant's defence was one of alibi. He stated that on the day in question at 5p.m. he was at his place of work. At 6.30p.m he left his house to buy food and returned home soon thereafter. On the following day he was on his way to work when he was arrested. He denied that he went to P W 1's place of work on the material date.

29. What is telling about that defence is that appellant did not deny that he previously was P W 1's boyfriend. That being so both of them must have been familiar to each other. This was also the finding of the trial court in the judgment thus:

***“I was convinced that the accused (the appellant) person who was well known to the complainant (P W 1) and who had been warned against going anywhere near the complainant as per the prosecution evidence was indeed at the alleged scene of crime, well-armed with a knife and that he was the one who assaulted the complainant.”***

30. The above was the finding of the trial court which court had the advantage of hearing and seeing those witnesses testify at the trial. In the case **PANDYA – V- REPUBLIC [1957] EA 336** the court had this to say on how an appellant court should pay regard to the trial court's consideration of evidence:

***“When the question arises which witness is to be believed rather than another and that question turns on a manner and demeanour, the appellant court must be guided by the impression made on the Judge or Magistrate who saw the witnesses...”***

31. That is the guide for this court. I however do find that I am in agreement with the finding for the trial court.

32. The prosecution's case was water tight. The evidence adduced met the required criminal standard of proof as was discussed in the case: **MILLER V MINISTER OF PENSIONS [1942] 2 ALL ER 372 AT PAGE 373** where it was held:

***“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not, mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”***

33. The maximum sentence on a conviction for attempted murder is life imprisonment. The appellant stabbed P W 1 in the stomach. She had to undergo major surgery following that attack. The doctor in his testimony stated that P W 1, following that attack, would not again be normal. In my view the sentence of 10 years imprisonment that the trial court passed against the appellant was lenient. It is for that reason I find no merit in the appeal against sentence.

**34. The appellant's appeal against conviction and sentence is hereby dismissed. The appellant's conviction is upheld and his sentence is confirmed.**

**Dated and Delivered at Nanyuki this 18<sup>th</sup> APRIL, 2018**

**MARY KASANGO**

**JUDGE**

**Coram**

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Hassan Mohammed Ramadhan Alias Rama

For state: .....

Language .....

**COURT**

**Judgment delivered in open court**

**MARY KASANGO**

**JUDGE**