REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 68 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

MOSES KATHIARI RUKUNGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, SRM dated 16th June 2017 at Principal Magistrate's Court at Tigania in Criminal Case No. 743 of 2014)

JUDGMENT

1. The appellant, **MOSES KATHIARI RUKUNGA**, was charged with the offence of conspiracy to murder contrary **section 224** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It was alleged that on 15th April 2014 at Kimbo Bar, Kamuru Shopping Centre in Tigania East District within Meru County, he conspired with Jeremiah Gakula, Taylor Mwiti and Julius Karoti to kill **JOHN KOBIA MUKIRA**. He was convicted and sentenced to five years' imprisonment. He now appeals against conviction and sentence.

2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

3. John Kobia Mukira (PW 1) testified that on 19th April 2014 he met Richard Mutuma, Jeremy Gakula, Julius Kaloki and Taylor Miriti at his home at 10.00pm. They told him that on 15th April 2014, they had met the appellant at a canteen where he had asked them to kill him with pangas and rungus and to damage his property in exchange for Kshs. 20,000/-, a suit and a pair of shoes. He reported the matter to Mikinduri Police Station. on 20th April 2014.

4. Richard Mutuma (PW 2) recalled that in the morning of 19th April 2014, Gakula, Mutwiri and Taylor went to see him and told him that they had been sent to kill him by the appellant. They also told him that they were asked to eliminate PW 1. They all went to see PW 1 and told him what had transpired.

5. Jeremiah Gakula (PW 3) and Julius Mutwiri (PW 4) both recalled that on 15th April 2014 at about 7.00pm, they were with Taylor at a canteen when the appellant came in and told them that he had a job for them. They testified that he gave them Kshs. 500/- and requested them to kill the appellant. He told them that he would pay them Kshs. 20,000/- and buy them a suit and shoes. PW 3 told him that he would execute the job but they did not. After two days, the appellant confronted them about the job and told them he would hire someone else. They decided thereafter to inform PW 1 and PW 2 of what the appellant had planned. The final witness, PC Stanley Kipchumba (PW 5) of Mikinduri Police Station, gave an account of the investigations.

6. In his sworn defence, the appellant denied that charges and told the court that PW 2 was once his co-worker at a spare parts shop and that he was PW 1's chief campaigner in 1997, 2012 and 2017 but in 2018 he refused to campaign for him and that is why he fabricated the charges against him. Michael Miriti (DW 2) and Simon Muteithis Kiariangi (DW 3) both confirmed that they knew that the appellant and PW 1 were friends and that he was his chief campaigner and they parted ways in 2013. DW 3 told the court that thereafter PW 1 started maliciously hunting the appellant.

7. The question for determination is whether the prosecution proved the offence of conspiracy to murder beyond reasonable doubt. **In *Archibold Criminal Pleading, Evidence and Practice, Sweet & Maxwell 2003* (page 2689, para 33-2)** the definition of a conspiracy is from the ***Criminal Law Act 1977*** of England which is defined as a situation where a person agrees with another person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions either will necessarily amount to 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 of the offences impossible. The essential ingredient to thus prove the offence of conspiracy to commit a felony is that two or more people agree to put into 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 the existence of a conspiracy is generally a, *"matter of inference, deduced from certain criminal acts of the parties accused, done in the pursuance of an apparent criminal purpose common between them,"* **R v Brisac [1803] 4 East 164, 71 (as quoted at** page 2692 Archibold para 33 – 11 (supra) (see ***Njenga and 2 Others v Republic*** **NKU HCCRA No. 163 of 2003 [2005] eKLR**).

8. The thrust of the appellant's appeal is that the prosecution did not prove its case beyond reasonable doubt. He contended that the prosecution case was grounded on hearsay evidence and that the witnesses relied upon lacked credibility and could not be believed. He noted that an essential witness was not called and that his defence was not considered. The respondent supported the conviction on the grounds that the prosecution proved the elements of the offence.

9. I have re-evaluated the evidence and I find as follows. Contrary to the submission of the appellant that the prosecution case was based on hearsay evidence, there was direct testimony of PW 3 and PW 4 who were present when the appellant approached them to request them to kill PW 1. They testified that he gave them Kshs. 500 and promised them rewards. PW 3 and PW 4 initially accepted the offer but had a change of mind and when the appellant came to see them on 19th to follow up on the issue, he found they had changed their mind. He told them he would seek other people to do the assignment. The totality of the testimony of PW 1 and PW 2 proved the intent of the appellant to kill PW 1. The felonious intent was put into action as evidenced by the fact that the appellant paid PW 3, PW 4 and their friend. Although the third person was not called, there was sufficient evidence of the conspiracy from PW 3 and PW 4 and there is nothing in the evidence to suggest that the additional witness would add or subtract from the prosecution evidence.

10. The prosecution case was founded mainly on the credibility of the testimony of PW 3 and PW 4. Nothing was put to them in cross-examination that implied that they were lying or that they had a grudge against the appellant. As the trial magistrate noted that the evidence was fairly consistent and displaced the appellants defence. I affirm the conviction.

11. The maximum sentence under **section 224** of the **Penal Code** is fourteen years' imprisonment. The trial magistrate did not explain why he imposed the sentence of 5 years' imprisonment although it is clear that the appellant was a first offender. I therefore reduce the sentence to **three (3) years** imprisonment.

DATED and DELIVERED at MERU this 30th day of May 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mwathi, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.