



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 136 OF 2014**

**BOAZ SAIYA MUDOGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the judgment of Hon. M. L. Nabibya SRM delivered on 19<sup>th</sup> September, 2014 in Butali SRM CCR. Case No. 28 of 2014)**

**J U D G M E N T**

**Introduction**

1. The appellant Boaz Saiya Mudogo was charged with the offence of attempted murder contrary to Section 220(a) of the Penal Code. The particulars of the charge were that on the 10<sup>th</sup> day of January, 2014 at Nguvuli Bridge Nguvuli Village, Luanda “K” Sub location, Chesero Location in Kakamega North District within Kakamega County attempted to unlawfully cause death of Aggrey Shimaka by stabbing him with a knife several times on the stomach and the left side.
2. The appellant pleaded not guilty to the charge and the case proceeded for hearing before the Principal Magistrate’s Court at Butali. After hearing both the prosecution and the appellant the trial court found the appellant guilty as charged and convicted him of the same. He was sentenced to serve life imprisonment.

**The Appeal**

3. The appellant was aggrieved and dissatisfied with the conviction and sentence and filed this appeal on the following homemade grounds;-

- 1) That I did not plead guilty to the appended charge
- 2) That the trial magistrate erred both in law and a fact in convicting me yet the evidence on record was malicious, discredited, inconsistent, farfetched, un corroborated and lacked probative value.
- 3) That the trial court erred both in law and fact in convicting me using the evidence which was an afterthought by the prosecution witnesses to implicate me with this offence.
- 4) That the trial court did not consider that I was the victim and this alleged act was in self defence but went further to convict me with alleged crime.

5) That the trial court did not consider that it was highly unlikely for a single person to attack a group if the group did not have sinister motives.

6) That the trial court did not consider my alibi defence which was cogent and sufficient enough to exonerate me from wrong doing.

7) That the sentence meted was very harsh and excessive in the circumstances.

8) That more grounds will be adduced when I get the lower court proceedings.

4. The appellant prays that the appeal be allowed conviction quashed and sentence set aside and that he be set at liberty.

### **Submissions**

5. The appellant filed written submissions through M/s Onsando Advocate who also highlighted the submissions. Mr. Onsando premised his submissions on grounds 2 and 3 which according to him covered the other grounds. He stated that there was no eye witness and that it was an afterthought by the prosecution to prefer the charges against the appellant. He made mention of the P3 form PEx1 and stated that though the offence occurred on 10.01.2014 at 8.00pm the complaint was made to the police on 12.01.2014. Counsel also submitted that when the complainant went to make the report, he told police that he was attacked by an unknown person, yet according to PW3 the Clinical Officer the complainant told her that he was attacked by a person he knew which shows inconsistency in the evidence.

6. Counsel added that the P3 form showed that the complainant was injured on 13.01.2014 in the morning and as stated by PW3 the complainant took one hour before arriving for treatment which meant that the charge sheet was defective as it showed that the incident occurred on the 10.01.2014. He also submitted that PW3 classified the injuries as harm but in his opinion, if the offence was one of attempted murder the injury should have been classified as grievous harm. He added that no treatment notes were produced to show in court the hospitals the complainant was treated at in the first instance. He maintained that the P3 form cannot be relied upon to confirm the injuries sustained by the complainant.

7. He further submitted that the investigating officer never testified yet his evidence was crucial. He maintained that there was no sufficient evidence to connect the appellant to the offence. Mr. Oroni in response conceded to the appeal on grounds that treatment notes were not produced and that the investigating officer was not called to testify on how the appellant was arrested. He submitted that such an omission ought to benefit the appellant.

### **Duty of the Court.**

8. The duty of this court as a first appellate court is now well established. The court has the duty to reconsider the evidence as it is on record, analyse it and come up with its own decision bearing in mind the fact that it never observed the demeanor of the witnesses as they testified. Observation of witnesses is a preserve of the trial court. See Okeno vs- Republic 1972(E.A) 32 and Mwangi – vrs – Republic (2006) e KLR. The evidence on record now follows.

### **The Prosecution Case**

9. During the trial the prosecution called a total of four (4) witnesses. PW1, Aggrey Shimaka the complainant testified that on the 10.1.2014 at 7.30pm as they were escorting Patrick to Luanda “k” together with Boniface towards Isikhu River a man weilding a panga appeared in front of them. The person attacked his brother Boniface and stabbed him on the left side of the stomach, below the ribs. When PW1 jumped from the motorcycle, the man stabbed him on the left side of the rib cage and they started struggling. As they struggled he was again stabbed on the left side of the mouth (chin). He showed the scars that were on his body to the trial court. Both before the motorbike lights were switched off and later with the help of the moonlight, he identified the assailant as Boaz Saiya the appellant. He

then managed to escape. He informed his family on what happened had and was taken to Malava Hospital where he found Boniface who was referred to Kakamega Hospital then to Webuye District Hospital. He was also treated and discharged. He was informed later that Boniface had succumbed to his injuries while at Webuye District Hospital. Later the doctor filled a P3 form for him PEX1. He also produced a photograph of the motor bike they were using PEX2(a) and (b). He stated that he knew the appellant before.

10. On cross –examination he testified that in his statement he wrote that he had identified the appellant. PW2 Robert Odinga Zaddock testified that on that particular day while at home he heard his son’s voice saying he was dying. He went out. His young daughter told him that people were fighting on the road. He could see what was happening at the scene and he inquired loudly about what was going on. He saw the appellant amongst the people at the scene. The appellant who had a panga stabbed someone with a panga several times. He also identified Patrick and Aggrey at the scene. He also saw Boniface at the scene who was seriously injured having been stabbed on the stomach. He called the area assistant chief. Later they met Aggrey on the road. He proceeded with Boniface to Malava District Hospital and later to Kakamega hospital and then to Webuye District Hospital. Boniface died early the next morning.

11. PW3 Sifuna Kizito the Clinical Officer Malava hospital testified that he examined the complainant who had a history of having been assaulted by a person known to him on 10.01.2014.

12. He observed him and treated him. He testified that the complainant visited the hospital one (1) hour after he was attacked and the nature of injuries was harm and that a sharp object was used to attack the complainant.

13. PW4 testified that on the 10.01.2014 at around 7.00pm he was being escorted to his home at Lwanda “k” by Boniface and his brother. When they approached Nguvuli River the appellant whom they knew came and stood in the middle of the road and they stopped. The appellant then started attacking them. He remained seated on the motorbike and saw the appellant attacking Boniface. As he went to assist Boniface he saw PW1 who was also cut. They raised an alarm and a neighbour came to assist them. They took Boniface to Malava Hospital as he was seriously injured. Later they went to Kakamega General Hospital and then to Webuye District Hospital where Boniface was operated on, but died early the next morning. He stated that PW1 was stabbed by the appellant and he ran away. He stated on re-examination that he saw appellant very well with the help of the moonlight and the motorbike head lights which were on at the time. The prosecution closed its case at this point.

14.14. The trial court found that the prosecution had established a prima facie case against the appellant who was placed on his defence.

### **Defence Case**

15. The appellant gave an unsworn statement. He claimed that he had gone to Malava Hospital on the 10.1.2014 to be treated as he had been bitten by a dog which belonged to one Timothy Luseno. He also claimed to have been attacked around where the incident occurred by people he knew and that he struggled with them as they wanted to chop off his private parts. He managed to overcome them before he escaped.

16. He claimed to have reported the incident to the area chief and told him that he had identified his attackers who were Rashid Osama, Party Machaba and Sindani Wambulwa. The chief referred him to Kimangeti AP Camp where he reported. He was then taken to Kabras Police station where he was arrested. He did not call any witness.

### **The Law, Analysis and Determination**

17. Section 220 of the Penal Code under which the appellant was charged provides as follows;- “ 220 – Any person who ;- (a) attempts unlawfully to cause the death of another, or (b) with intent unlawfully to cause the death of another does any act or omits to do any act which it is his duty to do such act or

omission being of such a nature as to likely endanger human life, is guilty of a felony and liable to imprisonment for life.”

18. Since the appellant herein was convicted of the offence of attempted murder, prosecution needed to prove beyond reasonable doubt that he had an intent to unlawfully cause the death of the complainant herein.

19. Before I come to the issue of whether or not the prosecution proved that the appellant intended to kill or cause the death of the complainant, there are other issues to be considered. Chief among these is whether the attack on the complainant took place and secondly whether the evidence on record places the appellant at the scene.

20. On the first issue, there is agreement by both sides that indeed there was a vicious attack on the complainant and on one other person at Nguvuli bridge. According to PW1, he was stabbed on the left side of the rib cage and immediately a struggle ensued. During the struggle in which PW1 appeared overpowered, the assailant stabbed PW1 on the left side of the mouth (chin). PW1 stated that the assailant also aimed a knife at his (PW1's) neck and cut him. PW1 showed all the scars to the trial Court, being a long scar on the left side below the ribs and another scar on the left side of the mouth.

21. In his unsworn evidence, the appellant told the court that at about 7.30pm on the material day, he was at Nguvuli area near the river bridge on his way home. He stated that the place was generally insecure and began to think that people or dogs had hidden in the many bushes which were on both sides of the road. Just then, he saw a motorbike which had 3 occupants and he became frightened. He however went near to where the trio was and when he got no response from those people, he decided to go behind the motorbike whose headlights were on and directed at him. Because of the bright lights that were directed at him his visibility became impaired and at once he was ordered to remove his clothes and lie down on his back. He was then held by the neck and mouth. One of the alleged assailants spat on his eyes while another held and pulled his penis. Because of the pain he felt, he hit the person who had held his neck and immediately he realized the people knew him. Then there was a fight. He then hit the person who was assaulting him and that person let go. During the scuffle, both the appellant and two of the other people were injured.

22;. The appellant also stated that during the struggle, one of the people who had attacked him was stabbed on the hand with the sickle. Then the fight ended.

23. It is therefore clear that an attack took place at around 7.30 pm on 10.01.2014. According to the prosecution case, the appellant is the one who attacked the complainant and his two colleagues. According to the appellant, he was attacked by Rashid Osama, Party Machaba and Sindani Wambulwa, but he was arrested when he went to report the incident to the AP Camp at Kimangeti.

24. The second issue that falls for determination is whether the prosecution placed the appellant at the scene of the attack on the evening of 10.01.2014.

25. PW1 had the following to say.” Towards Isiku river, we saw somebody emerging from the side, when we approached him, Patrick stopped the motorbike suddenly and put off the headlights. There was total darkness. The man had a panga on his left hand. I then saw my brother saying aii. I saw him off the motorbike. He had been held on the collar, he had been stabbed on the left side of the stomach. (below the ribs) When I jumped off the motorbike, the person left Boniface and stabbed me on the left side of the ribs again. I started struggling with him with the intention that Boniface gets a leeway to escape. I struggled with the person, I pushed him to the side, he pushed me back on the road and stabbed me on the left side of the mouth. There was a bit of moonlight. I identified the assailant. I identified the assailant as Boaz Saiya the accused before court. He then aimed his knife on the neck (shows scar on the front side of the neck).”

26. PW4 Saul Patrick, who was on the motorbike with PW1 stated thus in part of his evidence in chief:-

“When we went home, we approached Nguvuli river. Somebody came from the side of the road, he was Saiya Boaz whom I knew before. He stood in the middle of the road. The motorbike had to be stopped and since we knew him, we wanted to know why he decided to stand on the road. What followed is that he hit the deceased on the forehead using his head. The deceased and Aggrey alighted from the motorbike. Since I was seated in the middle, I remained to ensure the motorbike did not fall and break. Accused then boxed deceased on the cheek..... I saw Saiya with a knife throwing his hand to me. I bent down Aggrey was following me from behind, the knife went to Aggrey and at his neck”

27. PW2 Robert Odinga Zaddock also testified that he saw the appellant armed with a panga and that he (appellant) threatened to cut PW2. PW2 stated further that the appellant and one Patrick actually entered his(PW2’s) compound, but later left together after failing to respond to questions raised by PW2.

28. So, from all the above evidence the appellant was clearly at the scene of crime. The prosecution witnesses knew him and he knew them as well. In this regard, the question of identification was that of recognition as opposed to the identification of a stranger. See the well-known case of **R-Vs- Turnbull [1976] 3 All ER 549.**

29. As an appellate court of first instance, I am satisfied on reconsideration of the evidence that the appellant was properly and clearly recognized by the prosecution witnesses. I am also fully satisfied that before the lights of the motorbike were turned off, the appellant who was well known to the prosecution witnesses had been identified by all the witnesses since he emerged from the side and stood on the road in front of the oncoming motorbike. I do concur with the findings of the learned trial court on the issue of identification when it said, “ in this case, identification was very clear, the rider of the motorbike whose headlights was on stopped when he saw somebody he knew, this somebody was accused.” I am also satisfied that it is the appellant who attacked and injured the complainant.

30. The final issue for determination is whether the appellant had the intention of killing the complainant in this case. The evidence is clear that the injuries inflicted upon the complainant were of a very serious nature as per PExhibit 1- P3 form. The trial court was shown and did observe the big scars left behind by the injuries. The trial Court in its judgment concluded that by inflicting such injuries on the complainant, the appellant’s intention was to kill the complainant. The appellant struck the complainant with a panga several times and the only inference that this court can draw from such ferocious attack was that the appellant intended that the complainant should either die or be permanently maimed. It is also clear from the evidence that the complainant knew the appellant by name and called the appellant’s name without getting a response. It is my considered view that upon realization that he had been recognized, the appellant was motivated to eliminate the complainant. That is why the appellant pursued the complainant right into the home of PW2. PW2 saw the appellant still armed with a panga and also threatened to cut PW2.

### **Conclusion.**

31. In light of all the above, reasons, I find the grounds as raised by the appellant in his appeal to be lacking in merit. I also do not agree with prosecution counsel that the appeal should be allowed. The appeal therefore fails in its entirety. Right of appeal within 14 days from today.

Orders accordingly

Judgment delivered dated and signed at Kakamega this 28<sup>th</sup> day of March 2017

RUTH N. SITATI

JUDGE

In the presence of:-

..... Mr. Onsando (present).....for appellant

.....Mr. Juma Ochieng.....for State

..... Polycap.....Court Clerk;