



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 98 of 2011

JANE WAMBUI GAKUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case No. 2589 of 2009 delivered by Hon. Nyakundi, PM on 8th April 2011).

JUDGMENT

Background

Jane Wambui Gakungu, the Appellant herein was charged alongside another with the offence of conspiracy to kill contrary to Section 224 of the Penal Code. The particulars of the charge were that on diverse dates between April and November, 2008 at the City Centre in Nairobi District within Nairobi Province, jointly with another before the court conspired to commit a felony namely kill Michael Muraguri Gakungu.

At the close of the hearing the Appellant's co-accused was acquitted whilst the Appellant was found guilty and sentenced to serve two years imprisonment. She was dissatisfied with both the conviction against which he has preferred the instant appeal. Her Petition of Appeal was filed on 15th April 2011. The grounds of appeal enunciated thereof are that the charge of conspiracy could not stand if the Appellant's co-accused was acquitted. Secondly, that the trial magistrate erred when he introduced testimony, conclusions and assertions into his evidence which were adduced by the prosecution. Thirdly, that the trial magistrate erred by failing to consider the discrepancies in the witnesses' testimonies. Fourthly, that the trial magistrate failed to consider the Appellant's defence. Finally, that the trial magistrate failed to note that some exhibits were neither identified nor produced by the witnesses.

Submissions.

The Appellant was represented by learned counsel, Mr. Kang'ahi whilst learned State Counsel, Ms. Aluda acted for the Respondent. They both filed written submissions. Mr. Kang'ahi submitted that the offence of conspiracy to kill was not established as the evidence adduced failed to meet the threshold of the definition of the offence. He defined the word conspiracy as per **Archbold: Criminal Pleading, Evidence and Practice** which denoted that for conspiracy to exist there must be an agreement between two or more persons towards the commission of the offence. He buttressed the submission by the case of **Christopher Wafula Makokha v. Republic[2014] eKLR and Mulama v. Republic[1975] eKLR**. He was of the view that the offence of conspiracy is specific with regard to time, date and details but that in the instant case, PW1, PW2 and PW3 were not forthright with the date, time and details of how the victim would be killed.

Counsel submitted that the trial magistrate failed to note the inconsistencies and irregularities in the evidence. He particularly referred to the evidence of PW3 which he considered to be the backbone of the prosecution case but which was lackluster and pointed to lack of knowledge on the part of the witness as to what his role was. Further, that one Henry Macharia who was an integral witness was never called as a witness for reasons that were never explained. Furthermore, the cellphone number that was used by PW3 to communicate with the Appellant was never produced. In addition, counsel submitted that the evidence of the investigating officer was also disastrous as she could not recall the numbers that were called or if they belonged to the Appellant or not. Further, the complainant, who was the Appellant's husband, could not also recall the Appellant's telephone number. He submitted that this pointed to a common intention to not divulge the telephone number as the witnesses were stage managed. He submitted that this was reinforced by the fact that the Appellant's call data was never called for by the investigating officers to corroborate the evidence of the witnesses. Counsel urged the court to quash the conviction and set the sentence aside.

Ms. Akunja who was holding brief for Ms. Aluda at the hearing chose to rely on the written submissions that were filed by her colleague on 24th October, 2017. She conceded to the appeal, submitting that the prosecution failed to prove the existence of an agreement between the accused and another person to kill the victim. Furthermore, it followed that in light of the acquittal of the Appellant's co-accused due to

insufficiency of evidence to link him to the offence, the Appellant could not be convicted as there was a failure to show that two or more persons acted in concert to execute a common intention. She relied on the cases of **Charles Karugo Ndumia alias Cyrus Wairi Kinyingi v. Republic[2014] eKLR**, **Teresia Wanjiku Njoroge v. Republic[2013] eKLR** and **Christopher Wafula Makokha v. Republic[2014] eKLR** to buttress this submission.

Evidence

The prosecution's case was that the Appellant alongside another conspired to find an assassin who would kill her estranged husband. They divulged the plan to another who informed the husband who set up an elaborate ploy by setting up a police officer as the would-be assassin. The plan lured the Appellant in and she met with the assassin and after agreeing on the price for the assassination she supplied them with information about where they could find her husband for purposes of carrying out the murder.

PW1, Michael Muraguri Kegungu was the Appellant's husband and the victim of the crime. He recalled that on 12th November, 2008 at around 12.30 p.m. he received a phone call from an unknown person. The person informed him that he wanted to meet him so that they could discuss some business. He met the person, one Joseph Kahara Gatundu (PW2) at around 2.00 p.m. He informed him that he had some sensitive information of a plot to murder him being orchestrated by Jane Wambui, his wife and Hezborn Kabuto, a clansman. He informed him that the two had asked him to look for a hit man to carry out their plan. That they went and met his brother before heading to the office of one Henry Macharia where they decided that they would get someone to pose as the hit man. They decided to rope in one Peter Odhimo Oduor a police officer at Muthaiga Police Station to act as the hit man.

A meeting was planned through Joseph for Jane to meet Oduor. On 12th November, 2008 PW1 sent Jane a message stating that he would return their children to her house on 14th November, 2008 at 2.00 p.m. He was with Joseph and Oduor when he sent the message and Jane forwarded the message to them. Oduor had also been given a photograph of the complainant to the assist in his task. On the following day he went and reported the matter at Kilimani police station.

PW2, Joseph Kahara Gatundu, a businessman recalled that in the month of July, 2008 he was introduced to the Appellant by her co-accused one Hesbon Kabutu Wanjie. He became a good friend of the Appellant but after some time they lost touch. He learnt from Hesbon that the Appellant was undergoing marital problems. At a later date when he met the Appellant, she informed him that she was thinking of eliminating her husband as their marital problems had become unbearable. She asked him to participate in this mission. He told her he could not as this went against his Christian ideals. At another meeting in August, 2008 the subject came up again and the Appellant revisited it once more in November, 2008. She told him to look for someone who would carry out the murder.

PW2 looked for PW1 and informed him about the plan to kill him. The two then met one Oduor (PW2) who would act as the hit man. He called the Appellant and a meeting was set where a price of Kshs. 60,000/- was agreed for the would-be assassin. The Appellant then gave details of PW1's movements including his car registration number. She detailed that he would at one time be driving along Thika Road. They went back to the office of one Macharia and later that night PW1 informed him (PW2) that the Appellant had been arrested. In cross examination he denied demanding money from the Appellant.

PW3, Peter Oduor Odhiambo recalled that on 12th November, 2008 he met PW1 and he agreed to be the hit man. He met the Appellant and PW2 on the following day and the deal was sealed. The Appellant in turn gave him PW1's phone number, a photograph of him and the registration numbers to his vehicle. She later informed them that PW1 would be dropping the children at her house and they went to the house the following day. PW3 testified that after informing the Appellant that they were to follow PW1 to Muranga to carry out the murder they reported the matter at Kilimani Police Station on Monday. On the next day, in the company of CPL Mutugi, they arrested the Appellant at around 7.00 p.m.

PW4, No. 76037 PC Wycliffe Nyandikisi, then attached to GSU headquarters recalled that on 12th April 2008 he was called by a friend, PW2, who required some advice. PW2 informed him that a friend of his by the name pastor was conspiring with a lady called Jane to kill her husband, and they wanted someone to pose as the hit man. The pastor and Jane arrived later and informed him she would give a title deed to whoever killed her husband. He testified that on the following week, pastor was sent to give him Kshs. 1,800/- as a morale booster. He urged PW2 to report the matter to the police and let PW1 know. He testified that he had informed CPL Mutugi of the incident before she became the investigating officer.

PW5, CPL Jane Mutugi partly investigated the matter. She testified that the investigations were prompted by a report made by PW1 on 13th November, 2011 that he feared for his life as some people were following him whom he suspected had bad intentions. She entirely corroborated the evidence of PW1,2,3 and 4. In addition, she testified that during investigations she met the Appellant's co-accused and after interviewing him she decided to use him as a witness. She however did not know that he was charged. Investigations were thereafter taken over by CPL Issa and then **PW6, No. 51728 PC Joseph Weru** attached to Kilimani Police Station.

After the close of the prosecution case, the court ruled that a prima facie case had been established and the Appellant was put on her defence. She gave a sworn statement of defence but did not call any witnesses. She testified that she worked as a public relations manager and was aware of the charges facing her. She testified that she was married to the complainant but that he left her and went to cohabit with another woman. She recalled the troubles that had rocked their marriage and explained how the complainant had tried to get her out of their house even though they were joint tenants. That he had also tried to get her to sell other property that they owned. She denied she committed the offence.

Determination

Before I delve into the merit of the evidence on record, it is worthwhile to note that the record of appeal does not have the charge sheet against which the Appellant was convicted. The Appellant's co-accused Hesbon Kabutu Wanjie was originally charged in Criminal Case No. 2589 of 2009 whilst the Appellant was charged in Criminal Case No. 3560 of 2008. The two cases were consolidated and the respective

charge sheets substituted and merged into one in Criminal case No. 2589 of 2009. Consequently, the two accused took plea afresh on 27th October, 2009. The original record of proceedings does not have the consolidated charge sheet. The only charge sheet on record sets out the offence of conspiracy to commit a felony contrary to **Section 393 of the Penal Code** and it relates to the Appellant's co-accused. However, from the judgment of the trial court, it can be deduced that the accused persons jointly took plea for the offence of conspiracy to kill contrary to **Section 224 of the Penal Code** to which they pleaded not guilty. The court would then have to reevaluate the evidence and make its independent conclusions that this offence was proved beyond a reasonable doubt. But for the defect presented by the lack of the consolidated charge sheet, a retrial would be the most appropriate recourse to undertake. I say so because this is a court of record which must premise its decision on record. The drastic recourse would nonetheless only be reverted to if, on evaluation of the evidence, a retrial is likely to result in a conviction, would not aid the prosecution to fill up gaps in its case, would not prejudice the Appellant and would serve the interests of justice. See Mwangi v. Republic[1983] KLR 522.

I now grapple with the question of whether a retrial would likely result in a conviction. Both the Appellant and the Respondent are of the view that the Appellant was wrongfully convicted given her co-accused's acquittal; the rationale being that she could not commit the offence of conspiracy alone. I cannot agree more. The offence of conspiracy requires two or more persons to act in concert towards the attainment of a common goal. Whilst it is clear from the evidence that the Appellant's co-accused was not part of any conspiracy, the evidence of PW2 and PW3 was that they acted in concert towards the common goal to murder her husband. They agreed on a price to be paid for the same. She gave them directions as to where her husband would be for the intended purpose of facilitating the murder and she also gave them photographs and car registration numbers to enable the tracking of the victim. These appear to be actions in concert towards the ultimate goal of killing the victim.

However, it occurs to me that given the plot to trap the Appellant, the two witnesses did not aspire to the attainment of the common goal and as such they did not possess the necessary *mens rea* to commit the crime. See Lord Bridge in R v. Anderson(William Ronald) [1986] 2 AC 27. He delivered himself thus;

“[B]eyond the mere fact of agreement, the necessary mens rea of the crime is, in my opinion, established 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, PW2 and PW3 had to have the intention to play a part in furtherance of the criminal purpose. Their action in this case did not seem to meet the threshold. At best, it only facilitated towards the arrest of the Appellant. A case that more closely compares with the instant case is in Yip Chiu Cheung v. R[1994] UKPC 2, [1995] AC 111, where the Privy Council held that:

“The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea for the offence. As Lord Bridge pointed out, an undercover agent who has no intention of committing the crime lacks the necessary mens rea to be a conspirator.”

I conclude in no uncertain terms that PW2 and PW3 were therefore not conspirators as they acted solely as agents of the complainant and had no intention of participating in the killing of their principal. Consequently, a conviction founded on the evidence at hand against the Appellant would be tantamount to holding that she conspired with herself which is both ridiculous and untenable. In the circumstances, ordering a retrial would be an exercise in futility as it would not yield results towards a conviction. It would serve no justice.

In the result, I hold that the appeal is meritorious. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 11TH DAY OF DECEMBER, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Kang'ahi for the Appellant
2. Miss Sigei for the Respondent.