



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NOS. 40 AND 41 OF 2011

1. ISAACK MBUVA MWASIA
2. GABRIEL MUTHII MBOREI APPELLANTS

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in CR 132/09 at Embu Chief Magistrate's Court by L.K. Mutai - PM on 25th April, 2011)

JUDGEMENT

1. In these two consolidated appeals, the appellants have appealed against their conviction and sentence of fifteen years imprisonment in respect of the offence of attempted murder contrary to section 220 (a) of the Penal Code (Cap 63) Laws of Kenya and were acquitted in count 2 of the offence of shop breaking and stealing contrary to section 304 (1) and 279 (b) of the same Code. The sentence was imposed by the court of the Principal Magistrate on 25th April 2011 at Embu.

2. The state through Ms Mbae supported both the conviction and sentence.

3. This is a first appeal. As a first appeal court, according to Peters v. R *Sunday Post Ltd (1958) EA 424* I am required to re-assess the evidence upon which the appellants were convicted and thereafter arrive at my own independent conclusions. At the same time, I am required to generally defer to findings of fact as found by the trial court. The reason being that the trial court had the advantage of seeing and hearing the witnesses, an opportunity that this court does not have.

4. The appellants were convicted on the direct evidence of the complainant, Joseph Murati Mbindio (PW 1). PW 1 testified that he was a watchman at Kimiyu Deport Center at Karaba market. In the course of his duties, he saw four men who took two different positions near some shops. One of those four men was the second appellant whom he used to call “Kamweu”. He stood next to where PW 1 was. According to him, there was plenty of electricity security light at the scene. The second appellant was with the first appellant, whom he also recognized very well. They were less than a meter from him. PW 1 had known both appellants before. He knew the second appellant as a sand harvester and the first appellant as a person who runs some hotel business in the same market.

5. Suddenly the first appellant who had gone to open his hotel turned round and held his arrows. He then covered him with “a lesa” and they carried him away. The first appellant then inflicted cut wounds in his head and he lost consciousness in the process. He was in that state of unconsciousness for seven days. When PW 1 recovered he found that he had been admitted in Kimbibi Hospital at Mwea, from where he

was discharged on 17th April 2009. It was the evidence of PW 1 that the appellants wanted to kill him. It was also his further evidence that he recognized them very well because he says there was plenty of electricity at the scene of crime.

6. On 25th March 2009, No. 62888 Cpl Joshua Njue Njoka and No. 53719 Cpl Samuel Kirui got a report of the attack on the complainant and the breaking and stealing from the shop of PW 2 at Karaba market. They proceeded there and found the complainant lying down unconscious in a pool of blood. They found he had three deep cut wounds in the head. His hand was also injured. They took him to Kimbibi hospital where he was admitted for treatment. They also found that the shop of Selesio (PW 2) had been broken into and property worth Kshs 15,500/- had been stolen.

7. It is also the evidence of Cpl Joshua Njue Njoka that he visited the complainant who told him that he had been attacked by the two appellants on the material night. The two appellants were then arrested on 19th April 2009 and were charged with the offences of attempted murder and shop breaking and stealing.

8. The complainant was examined by a clinical officer, Ann Muthoni Ndungu (PW 5) and was found to have a cut wound on the occipital region with another cut wound on the right side of the head measuring 2.4 cms with a laceration on the lower lip. The right face of the complainant was swollen and he was semi unconscious. According to this clinical officer, a sharp and blunt objects were used in inflicting the injuries, which he classified as grievous harm. She then produced the report as exhibit 1.

9. The first appellant gave sworn evidence and described himself as a hotelier in Karaba market. He testified that he knew the complainant who was his customer. He further testified that he had no differences with the complainant. Finally, he testified that the complainant knows him very well and he also testified that there was plenty of electricity at the scene of crime. The first appellant did not call any witnesses in his defence.

10. The second appellant also gave sworn evidence in his defence. He testified that he was a casual worker at Karaba market. He also testified that he had differences with the complainant arising out of a piece of land which he wanted to buy. He further testified that the complainant knew him very well. Finally, he testified that there was electricity lighting at the scene, where the offence was committed. Like the first appellant, he also did not call any witnesses in his defence.

11. The first appellant in his petition has stated in ground 1 the unchallengeable fact that he did not plead guilty. In ground 2 he has faulted the trial court for convicting him on evidence which was based on electricity light that was weak. I find from the evidence that there was plenty of electricity where the assault of the complainant took place. I also find that the complainant knew the appellant very well before this incident. I therefore find that the recognition of this appellant was positive and was free from mistake or error of identity.

12. In ground 3 he has faulted the trial court for failing to find that the motive of the attack was not established. The prosecution in terms section 9 (3) of the Penal Code (Cap 63) Laws of Kenya, is not required to prove motive for the attack of the complainant. In terms the provisions of that section state that: *“(3) Unless otherwise expressly declared, the motive by which a person is induced to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”* I find that the vicious attack on the complainant was intended to kill him so that he could not testify against them in respect of breaking and stealing from the shop, an offence with which they were acquitted in count 2. They actually left him for dead and that to me appears to be the motive for the vicious attack. In ground 4 he has faulted the trial court for not finding that no stolen items from the shop were recovered from him. This ground is without merit because he was acquitted of this offence. It is therefore an irrelevant ground of appeal and is hereby dismissed.

13. The second appellant in grounds 1 to 4 has raised the same complaints as those raised by the first appellant in his grounds of appeal. It is only in ground 5 that he has raised a complaint to the effect that the trial court failed to consider that this appellant had a grudge with PW 1 arising out of a land deal. In this regard, the trial court found the evidence of the complainant overwhelmingly credible. It appears that

the trial court rightly rejected the evidence of the second appellant in this regard. This ground of appeal is without merit and is hereby dismissed.

14. Having reassessed the entire evidence, I find that there is ample evidence to support the conviction in respect of the attempted murder that was entered against both appellants and for that reason, I dismiss their appeals against the conviction.

15. Both appellants have also faulted the trial court for imposing an excessively harsh sentence. In sentencing the appellants, the trial court took into account that each of the appellants was a first offender. The court also found that the offence was very serious. It went further and found that the complainant was seriously injured by the two appellants and was attacked without any provocation. Finally, that court found that he had been left for dead by the two appellants. In the circumstances, I find that there is no misdirection or error of law committed by the trial court in sentencing each of the appellant to fifteen years imprisonment to warrant intervention by this court. I therefore find that the sentence was merited and I similarly dismiss their appeals in that regard.

16. The appeals of both appellants are hereby dismissed in their entirety.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this 15th day of June 2016

In the presence of both appellants and Ms Mbae for the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

15.06.16