



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 220 OF 2009

GEOFFREY CHOMBA MUTHONI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Chief Magistrate's Court, Nyeri (L. W.Gitari)

delivered on 10th November, 2009 in Criminal Case No. 729 of 2008)

JUDGMENT

INTRODUCTION

1. The appellant, **Geoffrey Chomba Muthoni**, was charged with the offence of attempted murder contrary to **Section 220 (a)** of the **Penal Code**.
2. The particulars of the charge were that on 4th July, 2008 at Hotpot area in Nyeri District of the Central Province, attempted unlawfully to cause the death of **A K M** by stabbing him using a sharp metal rod. He was found guilty and sentenced to 14 years imprisonment.
3. Being aggrieved by the conviction and sentence he filed this appeal. The grounds of appeal were as follows ;
 - i. There was no identification of the appellant
 - ii. The charge was not proved beyond reasonable doubt
 - iii. The evidence was contradictory
 - iv. The appellant's defence was not considered.

FACTS

4. The facts of the case as recorded were that on 16.7.08 the Appellant pleaded guilty to the charges as read to him by the court. Later, on 28.7.08 the charges were read again to the appellant but he changed his plea to not guilty. The matter proceeded to hearing where **A K K (PW1)** a minor gave unsworn testimony. It was his testimony that on 4.7.08 he had come home from school at 3.00 p.m. When he

pushed the door of the house open, a man caught him, pushed him down and started stabbing him on the neck, eyes, chest and stomach. The man put him under a bed before attacking their house help who later died as a result of the injuries. **PW1** managed to escape and call for help. It was his testimony that he did not see the face of the man who attacked him and could not identify him.

5. **PW2** testified that on 4.7.08 he was plying his matatu on the way to Karatina from Kangocho when he received a call from his neighbor Emily (**PW4**), telling him thugs had broken into her house. He then picked a police officer and went to Emily's house at about 5.00pm. Upon reaching the house he realized there was someone inside who was ordered to open the door and the man complied. When the man opened the door he said that he saw the dead body of Emily's house help and the man said he had killed the house help and Emily's son. He also found a child aged five months whom he handed to Emily.

6. **PW3** testified that on 4.7.08 at about 4.00 pm he was cutting grass near the house of **John Muriuki (PW5)**, when **PW1** came by and told him that there was a man beating them and had killed their house help. He noted that **PW1** had injuries on his eyes, ears and neck and had stab wounds which were bleeding. He escorted **PW1** to a police check where they got a matatu that took him to school where his mother worked and from there he was taken to hospital.

7. **PW4** was **PW1's** mother. She testified that on 4.7.08 at 8.00 a.m. she left for work together with her two children leaving her house help taking care of her 5 months old child. Later, her son went back to school with blood stained clothes. **PW1** told her that there was someone killing them at home and had already killed the house girl. She went to her home accompanied by police officers and found the doors closed but were able to access the house girl's bedroom where they found her dead. Afterwards they were able to get into the rest house when the appellant was ordered to open the door. She said that she knew the appellant as the son of the person who had sold them a shamba. The weapons he used in the crime namely arrows, a spear and sharp rod were also taken. The appellant had told her that he had committed the crime and had said he wanted to finish them. She went on to identify the arrows, metal spear, metal rod and fuse that had been produced as exhibits.

8. **PW5, J M**, the father to **PW1** testified that on 4.7.08 at about 5.00 p.m. he received a call from the Appellant who asked him whether he had a title deed and he said he did not. The Appellant then confessed to having killed his house girl and his son. He stated that he later visited his son at the hospital before heading home. He confirmed that he had bought land from the Appellant's mother with the blessing of all her sons.

9. **PW6**, a police officer testified that on 4.7.08 at about 4.00 p.m. he was on duty at Karatina road block when a matatu stopped and **PW1** reported that a stranger had entered their house and attacked them and had killed their house help. He then went to scene accompanied by **PW4**. They found the dead body of the house-help with a piece of bloodstained cloth on her neck. They were however not able to access the master bedroom where the intruder was until they called for reinforcements. He recounted that as they waited for backup he stood guard at the door the appellant came out of the room dressed in a lady's dress and went to the house help's bedroom. He heard the appellant make a phone call saying he had finished his work. Once reinforcements came they arrested the Appellant who had also removed arrows and a metal rod which he had used in the crime. The witness went on to identify them as exhibits.

10. **PW7** was a medical doctor at Nyeri PGH who produced a P3 form for **PW1**. He testified that **PW1** had been stabbed severally. That he had stab wounds on the neck which was stitched, stab on the thorax intercostal stage. He said that the probable type of weapon was a sharp object and the degree of injury was grievous harm.

11. **PW8** testified that on 4.7.08 at about 4.30 p.m he was at Karatina police station when **PW2** went to report a break-in at **PW4's** house. **PW2** reported to him that the person in the house had killed the house help and injured a child. He said that officers from flying squad went to the scene where they ordered the man inside the house to open the door and the Appellant complied. The Appellant appearing composed told him that he had killed the house girl and **PW1**. The appellant then directed them to the bodies but they only found the body of the house-girl. They also found a six month old boy. Upon interrogating the

suspect, the appellant said that he wanted to eliminate all the members of the family apart from the baby over a piece of land that **PW5** had bought from his mother. The appellant had then told him he had killed the house help since he did not want to be identified. He reported that the body of the house girl had injuries on the neck and head and had bled profusely. The appellant then gave up his weapons namely, a sharp metal rod and arrows. The appellant was then arrested and charged. He added that the following day **PW4** called and informed him that he had found a spear behind the children's bedroom. The same was produced as an exhibit.

12. When the appellant was arraigned in court before the **Ag. PM Lucy Mbugua (PW9)** in Karatina he confessed to the crime and a caution was recorded. She testified that she was the Ag. Principal Magistrate at Karatina Law Courts. On 7.7.08 the prosecutor informed her there was a suspect who wanted to record a charge and a caution. She then proceeded to caution the suspect before he recorded the statement which was produced as "**PExb 6**" in court. **PW10** the court clerk confirmed **PW9's** account.

13. The appellant was put on his defence. He gave a sworn statement and did not call any witnesses. It was his defence that on 5.7.08 at about 2.30 p.m he passed through Muriuki's home. He said that he found the main gate open and the main house open. He said the place was quiet and he decided to knock on the door. He said he did not get a response and that was when he saw **PW4** accompanied by policemen entering the compound. He said that he went two steps from the door and tried to greet one of the policemen who ignored him. He said that the police went inside and they later called him in where he was beaten. He denied having committed the crime. He said he looked for a way out and that's how he locked himself in one of the rooms. He later was escorted to the police station. He said that he was forced to say that he had committed the crime.

14. The appeal was heard on 21.03.2016 where the prosecution made oral submissions in court in opposing the appeal. The prosecution submitted that the appellant confessed to having committed the offence. That the Appellant said that he had been aggrieved by the complainant's father who had purchased a piece of land from his mother. It was stated that a statement given to **PW9**, the Principal Magistrate was produced as "**PExb 6**". That the Appellant did not object to the production of that evidence nor did he dispute the evidence in his defence. It was argued that according to the record the Appellant had conceded that he had given the said evidence to the Principal Magistrate. Further, it was advanced that the evidence of **PW5** was corroborative as he testified that the appellant went to the complainant's house on the material date and proceeded to kill all the members of the family. That he had succeeded in killing the house help. It was stated that the complainant had been lucky and fled from the place where he had been dumped. In addition, it was submitted that the appellant had malice aforethought as he intended to kill. The prosecution submitted that there were witnesses who testified that they had taken the complainant to hospital and others stated that they had arrested the appellant at the complainant's father's house. Finally, the prosecution said that they had proven the case beyond reasonable doubt and the appeal should be dismissed.

15. The Appellant filed written submissions and made oral submission in court 21.03.16. He said that the confession was a frame up as the magistrate had told him what to write. He argued that there was neither a P3Form nor any weapons found and the magistrate had not indicated this in the confession. He said that there was no evidence of the number used to call the father of the complainant. He said that the attack was not targeted on that family or the 6 month child would have been killed instead it was aimed at **PW2**. He submitted that **PW2** was a driver plying on Embu- Nairobi- Kerugoya route and would have reported the matter at the police road block at Kagocho. He claimed he could not have committed the crime by himself.

ISSUES FOR DETERMINATION

16. Upon reading the appellants written submissions and hearing the oral submissions made by Prosecuting Counsel for the State this court has framed the following issues for determination;

- i. Whether the charge and caution statement was retracted;

- ii. Whether the confession formed the basis for the conviction;
- iii. Whether the charge was proved to the desired threshold;
- iv. Whether the trial court failed to consider the appellant's defence.

ANALYSIS

17. This being the first appeal it is the duty of this court to evaluate the evidence as a whole and subject it to an exhaustive examination. Refer to the **Okeno vs R [1972] EA 32**.

Whether the charge and caution statement was retracted; and formed the sole basis of the conviction:

18. The testimony of PW1 was that he had come home from school at 3.00 p.m; that when he pushed the door of the house open, a man caught him, pushed him down and stabbed him on the neck, eyes, chest and stomach; the man then pushed him under a bed and then went to attack their house-help; that he managed to escape and sought for help; that he did not see the face of the man who attacked him and could not identify him.

19. The appellant had been taken before **PW9** who was a Principal Magistrate and his confession of his intention to kill **PW1** was made before her and it was admitted into evidence; she produced it as **"PExb.6"**; and her clerk (**PW10**) testified that she was present when the confession was being taken and that she had done the translation.

20. The appellant when giving his sworn statement of defence retracted his confession and stated that he had been forced to confess and stated as follows;

"More policemen came. They opened the door for me and escorted me to the police station. I was forced to say that I am the one who committed the offence. I denied the investigation.

PW8 told me whether I am the one who committed the offences or not I have to be jailed. I realized I was at their mercy. After a few days I was taken before a magistrate and I told her what I was forced to tell. I was then charged with the offence."

21. When subjected to cross-examination the appellant still denied the statement and said;

"I saw the magistrate who came and read a statement here in court. I am the one who gave the statement to the magistrate when I was taken before her. I deny the statement. I am not the one who committed the offence".

22. The trial court in its judgment considered the confession and found that it was corroborated by the evidence of **PW8**; it rejected the appellants defence as a sham and made a finding that the prosecution had proved the charge against the appellant; the trial court stated inter alia;

"The accused also confessed to have committed the offence when he was charged and cautioned in court by a magistrate Lucy Mbugua (PW9) who recorded a confession and produced it in this court as exhibit 6. I find that the prosecution has adduced well corroborated evidence which is overwhelming to show that the accused is the one who attempted to kill the complainant A K M and caused him injuries which were grivious (sic) as per the P3 Form exhibits-1.

I find that the defence of the accused is a sham and so I reject it. I find that the prosecution has proved the charge against the accused".

23. Upon perusal of the record this court notes that before the appellants statement was produced and admitted as an exhibit an enquiry was made by the trial court to the appellant as to whether he objected to

its production and he responded by stating;

“I have no objection. I recorded the statement, it can be read”.

24. The appellant did not raise any objection to its production but later on when put on his defence he became adamant and claimed that the confession was not made voluntarily and that he had been at the mercy of the police as he had been told that he had no way out and was thus forced to make the statement.

25. The law is that even after the confession has been admitted the appellant is at liberty at any stage of the trial to introduce evidence that his confession was not made voluntarily and must provide good reasons for retracting his statement; and it is incumbent upon the trial court to examine with the closest of care and attention all the circumstances in which the confession was obtained and satisfy itself that the confession was made voluntarily. Refer to the case of **Kanini Muli vs R [2014] eKLR**.

26. Therefore when the appellant retracted the confession at the stage of defence the trial court was obligated to interrogate the process and the reasons given and to make a finding that after reviewing the evidence tendered by the appellant on the use of inducements, threats or force that it was satisfied that the statement was voluntarily given by the appellant and that the same was still admissible; the trial court failed to do so; this omission gives rise to the next issue.

Whether the retracted confession formed the sole basis of the conviction;

27. This court has noted that the trial court also addressed its mind to other independent evidence that was both direct and circumstantial which pointed to the appellants' guilt.

28. Circumstantial evidence must be examined in the light of the principles set out by the Court of Appeal in **Sawe vs Republic [2003] KLR 364**. The court held as follows;

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. There must be other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused”

29. The actual circumstances as to what transpired leading to the appellants arrest and giving rise to the prosecutions inference of the appellants guilt are discernable from the evidence adduced by the prosecution witnesses; a summation of the evidence is as follows; PW2 stated in his evidence that after receiving a report from his neighbor (Emily PW4) that her house had been broken into he proceeded there in the company of a police officer and upon reaching the house they found the appellant inside; he was ordered to open the door and the appellant complied; when the appellant opened the door he saw the dead body of Emily's house help and the appellant admitted to having killed the house help and Emily's son.

30. This evidence was corroborated by **PW4, PW6** and **PW8** they all narrated that when they got to the house they found that appellant had locked himself inside the house belonging to **PW4**; when ordered to open the door he complied; he admitted in their presence that he had killed the house-help and **PW1** and that his intention was to eliminate the family of **PW5** because of land the family had bought from his mother; he showed them an assortment of weapons he had carried with him to carry out his mission; the arrows, metal spear and metal rod were produced as exhibits.

31. **PW2** also testified that the appellant had directed him to the roof of the garage where he had hidden the fuse after he had disconnected the power at the house; the fuse was recovered there and was also produced as an exhibit.

32. The inference of guilt is also based on the place where the appellant directed **PW4, PW6** and **PW8** as

to where he said he had placed the bodies; the body of the house help was found in the exact place as had been directed; unbeknown to him **PW1** had managed to escape; the injuries occasioned to him were corroborated by **PW7**; these are facts that also justify the drawing of this inference.

33. This court is satisfied that the trial court in its judgment that it did not convict the appellant solely on the retracted confession and took into consideration other independent circumstantial evidence; the facts and evidence brought forth by the prosecution were enough to enable it to draw an irresistible inference of guilt as against the appellant.

34. This court is disinclined to interfere with the trial courts finding that the prosecution proved the charge and is satisfied that the prosecution proved its case to the desired threshold.

Whether the trial court failed to consider the appellant's defence.

35. Having perused the appellant's sworn statement of defence and this court concurs that it does not in any way controvert the evidence of the prosecution witnesses that places him at the scene on that material day.

36. This court is satisfied that the trial court analyzed the appellants' statement of defence and had good grounds for rejecting it as it did not raise any doubts in the prosecutions' case.

FINDINGS

37. For the foregoing reasons this court makes the following findings;

- i. The trial court did not convict the appellant solely on the retracted confession and took into consideration other independent circumstantial evidence; the conviction is found to be safe.
- ii. The charge was proved to the desired threshold;
- iii. The trial magistrate considered the appellants statement of defence and had good reasons for rejecting it.

DETERMINATION

38. The appeal is found lacking in merit and it is hereby dismissed.

39. The conviction and sentenced are hereby affirmed.

That is the Order of the Court.

Dated, Signed and Delivered at Nyeri this 9th day of June 2016.

HON.A.MSHILA

JUDGE