REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 127 OF 2010

WILLIAM MWAI MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against original conviction and sentence in Karatina Senior Resident Magistrates'

***Court Criminal Case No. 613 of 2008 (Hon. L Mbugua) delivered on 24th May, 2010*)**

JUDGMENT

The appellant was charged with the offence of attempted murder contrary to **section 220(a)** of the **Penal Code, Cap. 63** the particulars being that on the 24th day of September, 2008 at Gathaithi village in Nyeri District of the Central Province, jointly with another not before court, the appellant attempted unlawfully to cause the death of Christopher Mbatha Muriuki by cutting him on the abdomen using a panga.

The lower court exonerated him of the offence of attempted murder but found him culpable of the offence of grievous harm contrary to **section 234** of the **Penal Code**; he was convicted accordingly and sentenced to four years imprisonment.

Being dissatisfied both with the conviction and the sentence, the appellant appealed to this court and in his petition filed in court by his counsel on 9th June, 2010 he raised fourteen grounds of appeal which are set forth as follows:-

> "
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> *1. The learned magistrate erred in law and in fact by failing to take into consideration the gross contradictions in the testimony as adduced by the prosecution witnesses.*
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> *2. The learned magistrate erred in law and in fact in convicting the appellant on a defective charge sheet.*
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> *3. The learned magistrate erred in law and in fact in convicting the appellant for the offence of grievous harm without any weapon being produced in court by the prosecution.*
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> *4. The learned magistrate erred in law and in fact in convicting the appellant of the offence of grievous harm without establishing a motive.*

*5. The learned magistrate erred in law and in fact in failing to explain the substance of the charge to the accused as mandatorily required by **section 211** of the **Criminal Procedure Code.***

6. The learned magistrate erred in law and in fact by founding the conviction of the accused person on "the beliefs and convictions".

7. The learned magistrate erred in law and in fact in applying the wrong standard of proof in the case thereby arriving at a wrong decision.

8. The learned magistrate erred in law and in fact by shifting the burden of proof to the accused person thereby arriving at the wrong decision.

9. The learned magistrate erred in law and in fact by convicting the accused person on contradictory, uncorroborated and unreliable evidence thereby arriving at a wrong decision.

10. The learned magistrate erred in law and in fact in basing her conviction on the findings which were not backed (sic) on direct and concrete evidence.

*11. The learned magistrate erred in law and in fact in convicting the appellant by relying on and misinterpreting the provisions of **section 179** of the **Criminal Procedure Code** when the same were totally irrelevant.*

12. The learned magistrate erred in law and in fact in rejecting the appellants (sic) defence hence the conclusion that he did not have a defence at all.

13. The learned magistrate erred in law and in fact in convicting the appellant on irrelevant considerations.

14. The learned magistrate erred in law and in fact in not considering the appellant's mitigating circumstances."

Counsel for the appellant and for the state filed their respective written submissions after directions were given to the effect that the appeal be disposed of by way of such submissions. I have heard chance to read the submissions but before considering them, it is necessary to evaluate the evidence afresh for this court, being the first appellate court, to satisfy itself of the correctness or otherwise of the subordinate court's factual findings. In taking this exercise, this court is mindful that it was only the magistrate's court that saw and heard the witness and therefore was in a better position to assess such aspects of their evidence as their demeanour or disposition.

The complainant, **Christopher Mbatha Muriuki (PW2),** testified that on 24th September, 2008, at midday, he was in his house when he heard the appellant, whom he described as his uncle, talking outside. He ventured out and found him armed with a panga. There was what appeared to be bitter exchange over land between them and soon thereafter a physical confrontation ensued. According to the complainant, the appellant struck him on his left shoulder with the blunt side of the panga he was holding. The complainant held him but as they struggled, the appellant called his son who came and together they managed to wrestle the appellant down. While in this subdued position, the appellant cut the complainant's abdomen. The appellant was also injured on the head and according to the complainant the injuries were caused by a barbed wire.

The confrontation appears to have attracted the complainant's mother, Ann Njoki, his brother and others whom the complainant identified as **Rachel Wangui (PW3)** and **Ann Njoki** except that they arrived when the appellant and his son had disappeared. The complainant lost his consciousness and only regained it at Karatina District Hospital where he was taken and admitted for treatment for two weeks. He testified that the appellant had always been his enemy as they had a longstanding dispute over land which belonged to the complainant's grandfather who was also the father to the appellant and the complainant's father.

At cross-examination, the complainant was referred to his statement to the police in which he apparently told them that he (the complainant) had the panga and that the appellant fell on it. He never got to rise after he was brought down and injured; at one point he said that he was cut on the stomach before the appellant was injured but later changed his testimony to say that infact the appellant got injured first.

The clinical officer who attended to the complainant, **Maina Ndirangu, (PW1)** testified that was requested by the police to examine the complainant on 24th September, 2008 and that he was brought to hospital by his relatives. The complainant was said to have been in pain; his clothes were stained with blood and that he had a deep penetrating wound on the left lateral posterior aspect of the abdomen extending to the spinal area; the intestines were hanging out and the injuries were an hour or so old. The officer opined that the probable type of weapon used to injure the complainant was a sharp object. He was admitted for treatment on 24th September, 2008 and discharged on 3rd October, 2008. His abdomen was opened for repair and he was also transfused with three pints of blood and given intravenous fluids. The degree of injury was classified as grievous harm. The officer's findings and opinion were recorded in the **P3 form** which was admitted in evidence.

The officer also testified that the appellant also came to the same hospital on the same day complaining that he had been assaulted; his P3 form was also filled at the hospital. He had multiple cut wounds on the forehead and a cut wound on the back of the head, a cut wound on the left side of the head extending to the interior part of the head. The injuries were three hours old. His P3 form did not, however, show the degree of the injuries sustained.

One eye witness who testified as such was **Rachel Wangui Nguyo (PW3);** her evidence was that she was picking tea on the material day when she saw both the appellant and the complainant standing next to the latter's house. She thought they were quarrelling but could not hear what they were saying since she was about 100 metres from them; she called the complainant's mother who was also picking tea but was further away from where the appellant and the complainant were standing. She then saw the appellant and the complainant fall to the ground; the appellant called his son, Edward Murage to come to his aid. Murage came and raised the complainant from the ground and while he was still holding him the appellant attacked and cut him with the panga. The appellant and his son then left. When the complainant' mother arrived at the scene, she started screaming and this attracted other people who came and took the complainant to hospital. The witness testified that the appellant was his cousin.

The complainant's mother **Ann Njoki Masika (PW4)** testified that she was picking tea when **Wangui (PW3)** called her and told her that there was a fight at home; she rushed there and found the appellant and the complainant outside her house. The appellant's son was also there too but that he was then jumping over the fence. The complainant was in a standing position but that he was bleeding while the appellant held a bloodied panga. She started screaming, but the appellant turned to her and started pursuing her as she ran towards the farm. When people responded to her screams and came they found when the complainant had fallen to the ground with his intestines hanging out. They took the complainant to the police station before he was escorted to the hospital. The witness also testified that there was an existing land dispute apparently between the appellant and her husband's family.

Police Constable Keah Samuel (PW5) arrested the appellant on 27th October, 2008 at Gathaithi. The officer got information from an informer that the appellant and his son were at this place and therefore he went to the place accompanied three other colleagues. They found the appellant and arrested him but they could not find his son. The officer denied that he was the investigations officer and that all he did was to arrest the appellant.

That is as far as the prosecution case went.

The record shows that before he was put to his defence both the prosecution and the defence were accorded opportunity to submit on whether the appellant had a case to answer. After the learned magistrate delivered her ruling, the learned counsel for the appellant is recorded to have told the court that the accused would give a sworn statement and that he was not going to call any witness. I reckon that the counsel's submission on this issue was not only based on but he was also complying with the legal

requirements **section 211** of the **Criminal Procedure Code**. To turn around and fault the learned magistrate for not complying with that section is in my view, a hollow argument.

When he was put on his defence, the appellant gave a sworn testimony; he testified that on the material day, he was on his way to cut animal feed when he met the complainant outside his (the complainant's) house. The appellant had a panga and a bag. He saw a barbed wire outside the complainant's house. After some conversation, the complainant picked his bicycle and went to the appellant's compound. The appellant followed him and seized his bicycle. As they wrestled, the bicycle fell and the appellant's feet got stuck in it. The complainant is said to have removed a panga tied to his bicycle and started cutting the appellant with it. He called for assistance from his son Murage who came and rescued him; he is said to have removed the complainant who was then on top of the appellant. The appellant found time to take hold of his own panga and hit the complainant's panga with it; the panga fell and the complainant is said to have fled. He then went to make a report to the police and thereafter he went to hospital where he was treated. He produced the treatment card and the P3 form that was filled by a doctor. The appellant testified that he was not aware whether he cut and injured the complainant when he hit his panga.

The entirety of both the prosecution and defence evidence reveals that there was some altercation between the appellant and the complainant on 24th September, 2008; the altercation ended up in a physical confrontation between them as a result of which they were both injured. In the duel which also sucked in the appellant's son, some weapon or weapons were used; the complainant testified that the appellant was armed with a panga prior to the confrontation while the appellant himself testified that he employed this particular weapon when the complainant sought to strike him with his own panga.

There was what I suppose to sufficient evidence proving that both the appellant and the complainant were injured; the complainant was severely injured and going by the opinion of the clinical officer (PW1) the severity of the complainant's injury was classified as grievous harm. Although the extent of the appellant's injuries was not given, the clinical officer (PW1) who apparently examined him also testified that that the appellant sustained several bodily injuries most of which were concentrated around the head region. Indeed his P3 form showed this to be the case; it also showed that the injuries were caused by a sharp object.

The trial against the appellant was about the complainant's injuries and the question the trial court had to contend with was whether the appellant was the assailant and if so whether he intended to murder the complainant in the process. The first limb of this question has to do more with the evidence rather than the law.

The only eyewitness who testified as having seen the appellant attack the complainant with a panga was **Rachel Wangui Nguyo (PW3);** she saw the appellant attack the complainant after the appellant's son separated the two; the latter was allegedly holding the complainant when the appellant seized the opportunity to assault the appellant with his own panga. The appellant did not deny that he attacked the complainant with the panga except that he only struck the complainant's panga; according to his testimony, he was not aware whether the complainant was injured in the process. The complainant himself testified that indeed it was the appellant who assaulted him with the panga.

My assessment of the evidence of the complainant, **Rachel Wangui Nguyo's (PW3's)** testimony and that of the appellant himself leads me to the conclusion that the appellant perpetrated the complainant's injury. There is no doubt, and his own evidence was clear, that he was armed with a panga before they even confronted each other outside the complainant's house. There is also no doubt, and this is also apparent from his own testimony, that he attacked the complainant with the panga. Although he alleged that he only struck the complainant's own panga, there was in my view, sufficient evidence that the appellant ended up injuring the complainant, and seriously so, despite feigning ignorance that he may not have been aware whether the panga struck and injured the complainant. I agree with the learned magistrate and I hold that she properly directed herself on facts when she found the appellant to have attacked and injured the complainant.

The second limb of the question is whether the appellant's intention was to murder the complainant;

related to this question is whether learned magistrate was correct in convicting the appellant on the offence of causing grievous harm contrary to **section 234** of the **Penal Code** if she came to the conclusion, as she indeed did, that there was no proof of intention to murder. The starting point in interrogation of this question is **section 220 (a)** of the Penal Code under which the appellant was charged; for better understanding, it is necessary to reproduce here the entire section; it states:-

> ***220. Attempt to murder***
>
> ***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 be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.***

To establish the offence of murder itself one must necessarily prove malice aforethought on the part of the accused person. In the offence of murder, malice aforethought is the mental element or *mens rea* of the offence; ordinarily, it takes the form of an intention unlawfully to kill which is the express malice or an intention unlawfully to cause grievous bodily harm which is the implied malice.

Section 206 of the **Penal Code** illustrates when malice aforethought is deemed to be established; it states:-

> ***206. Malice aforethought***
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> ***Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances—***
>
> ***(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> ***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
>
> ***(c) an intent to commit a felony;***
>
> ***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

Section 220 of the **Penal Code,** as noted**,** deals with attempted murder, and the operative word here is 'attempt'; in its technical sense, this word is defined in **section 388** of the **Penal Code** which states as follows:-

> ***388. Attempt defined***
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> ***(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.***
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> ***(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he***

desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

The essence of the offence of attempted murder under **section 220(a)** of the Penal Code therefore is the intent to murder; intent is the principal ingredient of this crime. Inorder to sustain a conviction under this section it is not sufficient to demonstrate or to prove that the offence would have been murder if death had ensued; it must be proved that the appellant had a positive intention unlawfully to cause death.

The Court of Appeal for Eastern Africa had occasion to deal with this question in **Republic versus Luseru Wandera s/o Wandera (1948) EACA 105**. In that case the appellant went to fetch his wife from the house of her step-mother where she had stayed overnight, and as she declined to leave, he struck her. Soon after this, and without any provocation, the appellant struck one Dorosiya in the neck with his knife though there was evidence that on slapping his wife the appellant was seized by four other persons who began to beat him.

The appellant was convicted of attempting unlawfully to cause death contrary to **section 208 (1) Penal Code** of Uganda which is in *pari materia* with **section 220 (a)** of the Kenyan Penal Code, unlawful wounding with intent to do grievous harm contrary to section 220(1) of the Penal Code (U), and unlawful wounding contrary to section 226(1) of the Penal Code (U). He was sentenced to ten years' imprisonment with hard labour on each of the first two counts and to three years in prison on the third count, all sentences being concurrent.

On appeal the court held that an intent merely to cause grievous harm, whilst sufficient to support a conviction for murder, it is not sufficient to support a conviction under **section 208(1)** of the Code for attempting unlawfully to cause death. The court was of the view that a conviction for this latter offence can only be supported by proof of a positive intention unlawfully to cause death.

In analysing the evidence at the trial, the court held that the circumstances may well have been that the appellant struck out wildly with the knife without any specific intent to kill or even to strike at any vital part of his assailants. The court held that the appellant was entitled to the benefit of any reasonable doubt in this respect and there was considerable doubt whether he used the knife with positive intent to cause death.

Coming back to the case at hand, there was sufficient evidence to support the fact that there was some overt act on the part of the appellant that resulted in the injury of the complainant; however, it was not proved that the injury was in execution of the appellant's intention to murder him. The available evidence showed that there was an altercation between the appellant and the complainant; in the physical confrontation that ensued, both the appellant and the complainant were injured. There is nothing from the evidence that suggests that the appellant intended to murder the complainant and in the absence of proof of intent the conviction of the appellant under **section 220(a)** could not have been safe. I would therefore agree with the learned magistrate and hold that she properly directed herself on the law when she held that necessary ingredient of intent in an offence of attempted murder was not proved and therefore no conviction could be sustained under this section.

Having held that there was in effect no evidence to support the charge of attempted murder, was the learned magistrate correct in convicting the appellant of the offence of g**rievous harm contrary to section 234** of the **Penal Code**? In convicting the appellant for the offence of grievous harm in lieu of the offence of attempted murder, the learned magistrate invoked **Section 179 of the Criminal Procedure Code which** provides as follows:-

Section 179. When offence proved is included in offence charged

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the

remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

My understanding of this provision of the law is that one may only be convicted of a substituted charge under this section if that charge is minor to the offence for which the accused person was initially charged. It does not appear to me like a felony can be substituted with another felony. In the trial against the appellant, he was charged with attempted murder which carries a maximum life sentence upon conviction; the substituted charge for which he was convicted is also a felony which, again, he was liable to imprisonment for life though the learned magistrate sentenced him to only four years imprisonment. Here, I am of the humble view that the learned magistrate misdirected herself on the law when she substituted a felony with another felony much as the facts disclosed the commission of felony other than that which the appellant was charged with.

If section 179 of **the Criminal Procedure Code** was to be invoked, the lesser offence for which the appellant ought to have been convicted of was that unlawful wounding contrary to **section 237**(a) of the Penal Code; that section states:-

237. Unlawful wounding or poisoning

Any person who—

(a) unlawfully wounds another; or

(b) unlawfully, and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered to, or taken by, any person, is guilty of a misdemeanour and is liable to imprisonment for five years

The facts disclosed this offence and it is an offence which is no doubt a minor offence compared to the offence with which the appellant was charged. In **R versus Luseru Wandera s/o Wandera** (supra), the court held that though the attempt to murder was not proved against the appellant, the court was entitled to presume that the appellant knew and intended the natural and probable consequences of an assault committed by him with the knife and that those consequences were likely to cause grievous harm; the court thus sustained the conviction under section **220(1)** of the Code of wounding with intent to cause grievous harm. By parity of reasoning, the appellant ought to have been convicted of the offence of unlawful wounding rather grievous harm, which as noted, is a felony and therefore which the appellant could only be convicted of if the charge was amended at the appropriate time.

I would in the circumstances allow the appellant's appeal only to the extent of quashing the conviction of the offence of grievous harm contrary to **section 234** of the **Penal Code**; I will instead substitute it with the conviction of the offence unlawful wounding contrary to section **237 of the Penal Code** and sentence him to four years imprisonment. Orders accordingly.

Dated, signed and delivered open court this 10th June, 2016

Ngaah Jairus

JUDGE