REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 85 OF 2014

MARK MUTWIRI MBOGO…….....……APPELLANT

VS

REPUBLIC ……...……RESPONDENT

(Appeal from the judgment of the Chief Magistrate's Court, Nyeri Hon.C.Wekesa Ag. SRM delivered on 9th October, 2014 in Criminal Case No.316 of 2011)

JUDGMENT

INTRODUCTION

1. The appellant, **Mark Mutwiri Mbogo**, was charged with two counts; Count I was for the offence of attempted murder contrary to **Section 220** of the **Penal Code;** the particulars of the charge are that on 26th of March, 2011 at Naru Moru Police Station in Nyeri District within Central Province, he attempted to unlawfully cause the death of **Corporal James Mutembei (PW1)** by shooting him using a gun.

2. Count II was for the offence of Assault causing actual bodily harm contrary to **Section 251** of the Penal Code; the particulars are that on the 26th day of March, 2011 at Naru Moru Police Station in Nyeri District within Central Province he assaulted **P.C. Margaret Imathiu (PW2)** thereby occasioning her actual harm.

3. He was found guilty on both counts and was sentenced to 15 years imprisonment on Count I and to three (3) years imprisonment on Count II; both sentences to run concurrently.

4. Being aggrieved by the conviction and sentence he filed this appeal; the grounds of appeal are as summarized hereunder;

(i) That the trial court had no jurisdiction and should have held an Inquiry;

(ii) That crucial witnesses were not called to testify;

(iii) The conviction was based on prosecution evidence that was inconsistent, uncorroborated and fraught with discrepancies;

(iv) The prosecution failed to prove attempted murder and assault to the desired threshold;

(v) The trial magistrate rejected his defence without giving cogent reasons;

5. The submissions of the parties is summarized as follows;

APPELLANTS SUBMISSIONS

6. The appellant contends that the trial court lacked jurisdiction to hear the case and ought to have adhered to the mandatory provisions of Sections 385, 386 and 387 of the Criminal Procedure Code and Standing Order 12 of the Police Forces Standing Order and held an Inquiry.

7. The prosecution witnesses evidence was not inconsistent, uncorroborated and fraught with discrepancies; particularly the evidence of **PW1 and PW2** these witnesses were key witnesses but their evidence was not credible as they stated in their evidence that they were all armed yet none of them attempted to disarm him; that **PW1'**s evidence on the injuries he sustained was not corroborated by **PW4**; the evidence of **PW3** and **PW6** on the recovery of the weapon used was also contradictory; the prosecution failed to establish how many guns were recovered and which one was snatched from **PW2** and which gun occasioned injuries to **PW1**; that the prosecution called **PW7** who was not the maker of the Exhibit Memo Report;

8. The prosecution failed to call crucial witnesses who were at the scene of crime; those who arrested him were not called to establish whether he attempted to escape after committing the alleged offences and also that he absconded from duty;

9. That the prosecution did not establish motive (mens rea) and actus reus; and the prosecution failed to prove its case to the desired threshold.

10. That the trial court was duty bound to evaluate the entire evidence before her; but failed to give cogent reasons in compliance with the provisions of Section 169(1) and (2) of the Criminal Procedure Code.

11. The appellant beseeched this court to re-evaluate the evidence on record and to reach a different consideration; and to allow the appeal to succeed in its entirety.

RESPONDENTS SUBMISSIONS

12. Counsel appearing for the State opposed the appeal and submitted that the trial court had jurisdiction to hear the matter the case as the charge was for attempted murder and not murder;

13. That there were no inconsistencies in the evidence of **PW1, PW2** and that of **PW3** and **PW5**; that **PW1**'s evidence was that he was hit on the ear and shot on the chest near the shoulder region and the P3Form confirmed this; that the contention that **PW1** and **PW2** were not credible witnesses because they failed to attempt to disarm him was not a plausible ground of appeal as **PW2** had tried to disarm the appellant but got injured in the process.

14. That **PW7** a Ballistic Officer examined the weapon used and prepared a detailed Report and produced it as an exhibit; that the officer was the maker of the document and therefore she properly admitted it as an exhibit.

15. The Charge was not defective; that there was only one firearm and not two as alleged by the appellant; that the serial number on the firearm was one and the same and that the only omission related to the number 94 which was the year of manufacture;

16. The manner of the appellants arrest was not unlawful; that his arrest was due to the crimes committed; that he was arrested on the 27/03/2011 as he boarded a matatu in his bid to escape.

17. The prosecution called all the relevant witnesses who were eyewitnesses and expert witnesses; that those not called would not have given evidence that was adverse to the prosecutions' case.

18. That the prosecution proved intention and malice aforethought; that it satisfied the court to secure a conviction; and proved its case beyond reasonable doubt.

19. The appellant raised a defense of alibi but called no witnesses to support his defence, not even his wife came to testify; Counsel submitted the defence of alibi was an afterthought.

20. Counsel prayed for the appeal to be dismissed and conviction and sentence be upheld.

ISSUES FOR DETERMINATION

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

(i) Whether the trial court had jurisdiction;

(ii) Whether the appellant was positively identified;

(iii) Whether crucial witnesses were not called to testify;

(iv) Whether the conviction was based on prosecution evidence that was inconsistent and uncorroborated;

(v) Whether the prosecution proved its case to the desired threshold;

(vi) Whether the trial court rejected the appellants defence without giving good reasons; and

(vii) Whether the judgment specified the offences and the sentences imposed.

ANALYSIS

22. 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 and arrive at its own independent conclusion. Refer to the **Okeno vs R [1972] EA 32.**

Whether the trial magistrate had jurisdiction;

23. The appellant contends in his submissions that the trial court had no jurisdiction to hear the case and ought to have held an Inquest pursuant to Sections 385, 386, 387 of the Criminal Procedure Code; this court makes reference to the above mentioned sections which fall under the heading ***INQUIRIES AS TO SUDDEN DEATHS AND MISSING PERSONS BELIEVED TO BE DEAD;*** Section 386 (1) provides as follows;

“386(1) The Officer in charge of a police station, or any other officer specially empowered by the Minister in that behalf, on receiving information that a person-

(a) …….

(b) has been killed by another or by an accident; or

(c) has died in circumstances raising a reasonable suspicion that some other person has committed an offence;

(d) …….

shall immediately give information thereof to the nearest magistrate empowered to hold

inquests……"

24. Section 387 empowers the magistrate to make an inquiry into the cause of death.

25. The objective of the two cited sections is to establish cause of death of a person; the charges the appellant faced at the trial were for attempted murder of **PW1** and assault causing actual bodily harm to **PW2**; the charges the appellant faced at the trial were not for the offence of murder; in short the sections cited by the appellant are inapplicable as there was no death and therefore there was no need for an inquiry to be held; this court also concurs with the trial courts finding in its judgment that an inquiry under the Kenya Police Service Standing Orders had been overtaken by events;

26. This court is satisfied that the trial court was seized of jurisdiction to hear and determine the case and is further satisfied that such an omission does not vitiate the trial unless it is demonstrated that the appellant was prejudiced and that the omission occasioned a failure of justice; which the appellant has failed to demonstrate

27. This ground of appeal is found lacking in merit and is disallowed.

Whether the appellant was positively identified

28. This court has noted that the trial court made no finding on identification; whether it was by recognition and or whether it could have been a case of mistaken identity; it is an issue that needs to be addressed as it was the appellants' testimony in defence that he had left the station at 5.00pm to watch a football match at Naru Moru; there is therefore an inference that he was not at the station when the incident occurred and it could have been a case of mistaken identity.

29. In the light of the above this court has re-analyzed the evidence in an endeavor to address this issue and makes reference to the case of **Wamunga vs R (1989) KLR** where it was held that ;

> **"…. A trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from any possibility of error before it can safely make it a basis of a conviction".**

30. On identification; this court notes that the incident took place at about 6.10pm; at that time there is sufficient daylight and the conditions cannot be said to have been unfavorable for identification; **PW1s'** evidence was that he had worked with the appellant for about one month; that he had been with the appellant that morning and they had talked; his evidence was as follows;

> **"On that day I had been with the accused in the morning and I had talked to him and he had no problem that week. The accused had disciplinary proceedings against him and I am the one who was escorting him to Inspector Omwengo. The accused had asked me to talk to the OCS to help him and forgive him and I talked to the OCS about it but had not communicated to the accused what the OCS had told me"**

31. **PW1** further states that on the 26/03/2011 at about 6.10pm he arrived at the reporting office and found the appellant with a G3 rifle that was ready to cock (to use his very words); the appellant aimed the rifle at him and shot him on the right shoulder; he fell down and lost consciousness.

32. The evidence of **PW2** was that she had worked with the appellant for three (3) weeks; that the incident occurred on the 26/03/2011; that she had been assigned duties with the appellant at the reporting desk that day; that the appellant reported on duty late and he found the Deputy OCS booking him for disciplinary action in the Occurrence Book; that after completing the exercise of booking in the Deputy OCS entered the armory and issued her with the G3 rifle serial No. 042083 and 20 rounds of ammunition; as she made an entry into the register whilst holding the issued rifle with her left hand the appellant who was standing nearby grabbed the rifle from her and started firing at **PW1** and other police officers who were in the vicinity of the record office.

33. Corporal Ibiiri Munturi **(PW6)** narrated how he had gone with the Deputy OCS to the appellants' house and didn't find him there; they then proceeded to the Reporting Office and as the Deputy OCS was booking the disciplinary action the appellant appeared in uniform; he was told that he was late in reporting on duty; the witness states that he was present when the appellant snatched the firearm from **PW2**; that she struggled to get it back from him but was overpowered by the appellant; that the appellant cocked the gun and pointed it at **PW1** and started shooting; that the appellant also pointed the gun at him but he managed to crawl to safety; he stated that the appellant was his best friend and that they used to share a house together.

34. After re-evaluating the evidence on record this court is satisfied that the evidence adduced by these three witnesses places the appellant at the scene on the material date; that it is not in dispute that the appellant was a person known to **PW1**, **PW2** and **PW3** and they all confirm having either lived and or worked with the appellant, some for a period of approximately three to four weeks; this court is also satisfied that the conditions and circumstances were also favorable and conducive for positive identification.

35. This court finds that the appellant was positively identified and that identification was that of recognition.

Whether crucial witnesses were not called to testify;

36. The appellant contends that Corporal Owino, one Mr Muturi, the car wash attendant and the prisoner purportedly being booked by **PW2** were all crucial witnesses as they were all eyewitnesses but were not called to testify; that the car wash attendant and prisoner would have been an independent witnesses; that this action was deliberate as their evidence would have been adverse to the prosecution.

37. Reference is made to Section 143 of the Evidence Act provides that the prosecution is not obligated to call a particular number of witnesses, in the absence of any provision of law to the contrary, to prove any fact; having perused the record this court is satisfied that the prosecution was not obligated to call these witnesses as any evidence proffered by them would have only been repetitive as **PW1, PW2, PW3** and **PW6** had all consistently narrated what had transpired on that material date; there were no loop holes or gaps found that needed or could have been filled by these witnesses.

38. This court is satisfied that failure to call these witnesses was not deliberate nor adverse to the prosecution's case.

39. This ground of appeal is found lacking in merit and is disallowed.

Whether the conviction was based on prosecution evidence that was inconsistent and uncorroborated; Whether the prosecution proved its case to the desired threshold;

40. The evidence of **PW2** and **PW3** was that the appellant found the Deputy OCS making an entry of an intended disciplinary action against him in the OB; that the appellant grabbed the rifle from **PW2** pushed her down and fired directly at **PW1** and inflicted him with life threatening injuries; that he fired another shot that inflicted fatal injuries to another police officer by the name Senior Sergeant Koross and that being still not appeased the appellant left the reporting office and went out in pursuit of another police officer notably the Deputy OCS;

41. It is this courts considered view that the above evidence adduced by these prosecution witnesses gives a vivid account as to what transpired at the Records Office; it is found to be consistent and the evidence of **PW2** is corroborated by that of **PW6;** the evidence of **PW1**, **PW2** and **PW6** also indicates that there was a continuum of actions which illustrate the appellants state of mind; from their evidence there is no doubt that the appellant acted under the influence of an unlawful passion aroused by the circumstances of the anticipated disciplinary action; that the evidence also goes to demonstrate that the appellant committed the unlawful acts without any compunction or circumspection and that the injuries inflicted on **PW1** were inflicted with malice; that there is no evidence of justification for what the appellant did.

42. This court is satisfied that the prosecution proved that the appellant had the intention (***mens rea***) to commit the unlawful acts; that the prosecution also proved that the appellant was the one who committed the unlawful acts.

43. The appellant states that the evidence of **PW1** on the nature of his injuries were not corroborated by Dr.Abdi M. Bhat **(PW4)** who was the medical officer who examined him; **PW1** had stated that he was shot on the right hand chest region; he had also indicated that he had an injury to the ear; **PW4** filled the P3Form and produced it in evidence as an exhibit in which the **PW1'**s injuries are assessed as "**maim"** and that there was a wound to the front upper chest on the right shoulder and the probable weapon was a projectile; **PW4's** confirmed the injuries and his evidence is consistent and corroborates the testimony of **PW1** on his injuries inflicted.

44. Stephen Kiama Maina (**PW5**) was the clinical officer who examined **PW2** and filled the P3Form; the injuries listed therein were soft tissue injuries to right elbow which was slightly swollen and to the right knee was slightly swollen and tender when palpitated; these injuries as enumerated by **PW5** in his evidence is found to also corroborates those narrated by **PW2** in her testimony.

45. Another inconsistency that the appellant alluded to in his submissions relates to the gun(s) used; from the evidence of **PW6** and the Investigating Officer (**PW3**) that there appeared to be two (2) sets of guns and that the prosecution did not prove which gun was used; that **PW6** had stated that the firearm was recovered near a fence were it had been thrown; whereas the **PW3** the investigating officer stated that it was recovered in a toilet.

46. The appellant goes further to point out that prosecution evidence introduced two sets of serial numbers; **PW7** states that she examined a G3 rifle bearing serial No.94-042083 whereas **PW2** stated that she was issued with a G3 rifle bearing the Serial No. 042083.

47. On perusal of the record it is noted that **PW2** stated that she was issued with a G3 rifle bearing serial no.042083 and identified the firearm in court; and **PW7** explains under cross- examination that;

"94 is the year of manufacture"

48. **PW1** in his evidence gave the serial number as 042083 and also identified the firearm in court; the Investigating Officer stated that the recovered firearm bore the serial number 042083; it is noted that the trial court examined this issue exhaustively and found no reason to doubt the evidence of **PW7** that the 94 related to the year of manufacture and found her evidence to be conclusive and further that the firearm was capable of being fired.

49. From the prosecution evidence this court is satisfied that there was only one firearm and not two as alleged by the appellant; that the serial number on the firearm was one and the same and that the only omission related to the number 94 which was the year of manufacture.

50. Notwithstanding the above this court also opines that where the firearm was recovered from and the serial number are immaterial to this appeal; even if the prosecution had failed to produce the firearm at trial it would not have been fatal to the prosecutions' case; all the prosecution had to prove beyond reasonable doubt was that the injuries to **PW1** had been caused by a firearm.

51. This court is guided by the Court of Appeal decision of **Ekai vs R (1981) KLR 569** where it was held that failure to produce the murder weapon was not fatal to a conviction provided the prosecution established beyond reasonable doubt that the injuries were caused by a sharp bladed weapon.

52. In this instant case this court is satisfied that the prosecution established beyond that the wounds to **PW1** were inflicted by a projectile in the form of a firearm; which is defined as a lethal weapon in the Forces Standing Orders.

53. This ground of appeal is found lacking in merit and is disallowed.

Whether the trial court rejected the appellants defence without giving good reasons.

54. It is the duty of the trial court to look at the evidence as a whole and then consider whether or not the defence case casts any doubt on the prosecutions' case.

55. Upon perusal of the judgment it is noted that the trial court considered the defence of alibi raised by the appellant and made the following findings;

> **" In considering the above, its noted that the accused does not have to even prove his alibi, however I find the above not to have displaced the prosecution's case since the evidence adduced by the prosecution has placed the accused person squarely at the scene of crime despite him not provided his alibi at the earliest time possible".**

56. Having perused the appellant's unsworn statement of defence this court concurs that it does not in any way dislodge or controvert the evidence of the prosecution witnesses (**PW1 PW2 and PW6**) that places him at the scene on that material day; this court is satisfied that the trial court analyzed the appellants statement of defence and weighed it against the evidence tendered by the prosecution and gave good reasons for disregarding as it did not cast any doubt on the prosecutions' case.

57. This ground of appeal is found lacking in merit and is disallowed

Whether the judgment complied with Section 169(2) of the Criminal Procedure Code;

58. The appellants submitted that the trial in its judgment failed to state the section of the Penal Code under which it convicted and sentenced the appellant.

59. This court notes that the judgment states as follows;

> **"The accused person is found to be guilty as charged and convicted accordingly'**
>
> **"….the 1st Count is a serious one and it attracts a penalty i.e life imprisonment. Having put all the above consideration I sentence the accused person to serve fifteen years in prison (15 years).**
>
> **In Count 11 accused is sentenced to serve 3 years and both sentences to run concurrently"**

60. Section 169(2) of the Criminal Procedure Code provides that the trial court must specify the section in the Penal Code under which an accused person is convicted and sentenced.

61. This court notes that the trial court omitted to do so; but such an omission does not vitiate the judgment and such an anomaly can be cured as it has not been demonstrated that the error occasioned a failure of justice.

62. This court further notes from the record that appellant was ably represented at the trial by Learned Counsel Mr. Njuguna Kimani who pointed out to the trial court that the charge had been substituted from grevious harm to attempted murder and that the appellant was at all times aware that he had been charged on Count I with the offence of attempted murder contrary to Section 220 of the Penal Code.

63. Section 220 of the Penal Code provides that any person who attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life; the sentence imposed by the trial court is within the parameters provided by law; it is noted that the trial court exercised its discretion and that it took into account that the appellant was a first offender and accorded him with a lenient sentence; the sentence is therefore legal.

64. Count II relates to an offence under Section 251 and provides that any person who is liable to imprisonment for a term of five years; the sentence imposed was a term of three (3) years and is found to

be legal.

65. The ground of appeal does not vitiate the judgment and can be cured.

FINDINGS

66. For the afore-going reasons this court makes the following findings;

(i) The trial court was seized with jurisdiction to hear and make a determination in the case;

(ii) The appellant was positively identified;

(iii) There were no material inconsistencies found in the evidence of the prosecution witnesses **PW1, PW2, PW3, PW4, PW5** and **PW6**; and their evidence is corroborative;

(iv) The prosecution called the crucial eyewitnesses and expert witnesses; the prosecution proved motive and actus reus and proved its case to the desired threshold;

(v) The trial magistrate considered the appellants statement of defence and had good reasons for rejecting it; and the omission by the trial court is curable.

DETERMINATION

67. The appeal is found lacking in merit and is hereby dismissed.

68. The conviction on Count I is for the offence of attempted murder contrary to Section 220 of the Penal Code and Count II is for the offence of Assault causing actual bodily harm contrary to Section 251 of the Penal Code; the convictions on both counts are found to be safe and are both affirmed;

69. The sentences on both Counts are found to be legal and are hereby affirmed.

That is the Order of the Court.

Dated, Signed and Delivered at Nyeri this 28th day of July 2016.

HON. A. MSHILA

JUDGE