REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL CASE NO.28 OF 2013

(Being an appeal from the original conviction and sentence in Criminal Case No.253 of 2012 of the Principal Magistrate's Court at Kilgoris delivered on 21st March, 2013 by Hon. B. O. Ochieng – SPM)

JEREMIAH OLOSHIRO KELIAN ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein, **JEREMIAH OLOSHIRO KELIAN**, was charged with the offence of attempted murder contrary to **Section 220 (a) of the Penal Code Cap.63 Laws of Kenya**.

   The particulars of the charge wee that on 14th September 2011 at Shartuka village in Transmara District within Narok County, the Appellant unlawfully attempted to cause the death of **Daniel Kelian** by stabbing him on the stomach with a sharp knife.

2. The prosecution called a total of 4 witnesses in support of the charge and at the close of the prosecution's case, the court ruled that a prima facie case had been established against the appellant and placed him on his defence.

3. The Appellant gave sworn evidence in his defence and called one witness.

4. After due consideration of the evidence of both the prosecution and the defence, the trial court found that the prosecution had proved all the ingredients of the charge beyond reasonable doubt and the Appellant was accordingly sentenced to serve 20 years imprisonment.

5. Being aggrieved by the judgment and sentence of the lower court, the Appellant filed this appeal wherein he cited 11 grounds of appeal as follows:-

1. **The Learned Trial Magistrate erred in Law in finding and holding that the ingredients in respect of and/or attendant to the offence charged, had been established, laid out and/or proved, to warrant the conviction and sentence meted out against the Appellant, whereas the evidence and circumstances, before the court militated against such findings.**

2. **The Learned Trial Magistrate erred in law in holding and finding that the circumstances obtaining prior to and during the commission of the offence, were sufficient to facilitate positive identification of (sic) the Appellant, contrary to the evidence on record.**

3. **The Learned Trial Magistrate erred in law in finding and holding that the Appellant was positively identified by PW1, yet the evidence of PW1, in its entirety, is testament to the fact that the extent of darkness, could not enable and/or facilitate any positive identification, whatsoever and hence (sic) the Inquiry by PW1, to ascertain the details of the person (sic) who was next to the house.**

4. **The facts and analysis captured and/or contained in the Judgment of the Learned Trial Magistrate are at variance with and/or contradictory to the evidence on record. Consequently, the Judgment of the learned Trial Magistrate is founded on misrepresentations, mis-reflections of and failure to appreciate the totality of the evidence.**

5. **The Learned Trial Magistrate erred in law in entering a conviction and rendering a Sentence against the Appellant, in respect of the offence charged, contrary to and in contravention of the doubts entertained by the Honourable Court as to the nature of the offence, (sic) committed.**

6. **The Learned Trial Magistrate erred in law in failing to appreciate the Burden and Standard of proof and on whom same laid. Consequently, the Learned Trial Magistrate erred in not evaluating the evidence on record with a view to ensuring that the statutory threshold, was met and/or satisfied.**

7. **In finding and holding that the Defence by the Appellant was very unlikely, the Learned Trial Magistrate misconceived and/or misapprehended the relevant and attendant principle of law and thereby placed a higher burden on the shoulders of the Appellant.**

8. **The Learned Trial Magistrate erred in law in denying and/or depriving the Appellant of the benefits of doubts, which were apparent in the Prosecution's case and thereby violating the established and hackneyed principle of law that requires doubts to be resolved in favour of the Appellant.**

9. **The Learned Trial Magistrate erred in law in failing to consider and/or in disregarding the Appellant's Defence without assigning any credible reason(s) and/or explanation(s), for such disregard. Consequently, the trial court did not afford the Appellant a fair and reasonable treatment.**

10. **The Learned Trial Magistrate failed to cumulatively evaluate and/or analyze the totality of the evidence tendered and consequently, the Learned Trial Magistrate reached and/or arrived at an erroneous conclusion, contrary to and at variance with the weight of evidence on record.**

11. **The Learned Sentencing Magistrate erred in law in failing to adopt, consider and/or take into account the mitigation by the Appellant. Consequently, the Sentence Meted out against the Appellant is manifestly excessive and punitive.**

At the hearing of the appeal, the Appellant was represented by Mr. Ochwangi while the state was represented by Mr. Otieno.

6. Mr. Ochwangi counsel for the Appellant, submitted that the charge was defective since the ingredients of the offence of attempted murder was not proved and that instead, the charge should have been that of assault causing grievous bodily harm. Mr. Ochwangi observed that the alleged knife used in the attack was not brought to court as an exhibit in order to confirm if it is the weapon that was used and neither was a rungu alleged to have been used also brought as an exhibit.

7. Mr. Ochwangi also submitted that the P.3 form that was produced as Exhibit 1 during the trial was false as the injuries stated therein did not support a fight.

8. Mr. Ochwangi took issue with the identification of the Appellant at the scene as the offence took place at night and it was dark.

9. Lastly, Mr. Ochwangi submitted that the P.3 form produced in court showed that the complainant suffered "grievous harm" and not attempted murder. Furthermore the magistrate was not sure if the case was that of attempted murder thus the case against the Appellant was not proved to the required standards and as such, his appeal should be allowed and the conviction and sentence quashed/or set aside.

10. Mr. Otieno, counsel for the State submitted that failure to produce the weapons used in the attack as exhibits was not fatal to the prosecution's case as the P.3 form produced as an exhibit was clear that the probable weapon used was a sharp object.

11. On identification, Mr. Otieno submitted that the Appellant was positively identified by PW1 and PW2 since the conditions prevailing at the time of the attack were conducive for positive identification and that in any event, the complainant was the father to the Appellant and therefore, he knew him well.

12. According to Mr. Otieno, the charge of attempted murder was properly preferred against the Appellant because the nature of the attack on the complainant clearly showed that the Appellant intended to kill him.
13. This being a first appeal, this court is mandated to re-evaluate the entire evidence adduced during the trial in order to arrive at its own conclusion and draw its own inferences (**See Okeno vs R. [1973] EA 353**).

14. In doing the re-evaluation, this court will bear in mind the fact that the trial court had the advantage of hearing and seeing the witnesses testify.

15. The prosecution called a total of 4 witnesses as follows:

PW1 Daniel Kasuji Ole Kerian was the complainant. He testified that on 14th September 2011 at about 8.00 p.m., he arrived home from a safari when he found the Appellant near his house and upon enquiring who it was, the Appellant clicked and threw a rungu at him. The Complainant tried to run away but the Appellant pursued him, wrestled him to the ground and stabbed him in the stomach thereby injuring him gravely. The complainant was admitted in hospital for 2 weeks following the vicious attack. The Complainant stated that the Appellant was his own biological son and that immediately after the assault, the Appellant disappeared from home and was arrested in Eldoret town six months later in March 2012.

The Complainant stated that he recognized the Appellant well even though the attack took place at 8.00 p.m., in the night because the Appellant came close to him during the attack and he was able to see his face because there was bright moon light.

16. **PW2, Samson Kelian** a brother to the Complainant testified that on 4th September 2011 at about 8.00 p.m., he heard screams emanating from the Complainant's home whereupon he got a torch and rushed to the scene. At the scene he found the Complainant lying in a pool of blood with his intestines jutting out. He assisted the Complainant to get to the hospital. PW2 stated that he saw the Appellant on the fateful night after the incident and that he was armed with a rungu and a knife. The Appellant however went into hiding after the incident but was later arrested in Eldoret months later.

17. **PW3, Daniel Shoshoroi** was the Clinical Officer who examined the Complainant and filled the P3 form which he produced as Exhibit 1 during the trial. He also produced the Complainant's treatment notes. PW3, assessed the degree of injury as grievous harm.

18. **PW4, PC. James Ngunjiri** was the Police Officer who investigated the case, issued the

Complainant with the P3 form and charged the Appellant with the offence of attempted murder. PW4 produced the clothes the Complainant wore on the night of the attack as exhibits.

19. In his defence, the Appellant gave a sworn statement and called one witness. The Appellant stated that on the fateful day, he had supper at a neighbour's house before going home. He said that he was in the company of his brother one James when at about 8.00 p.m., his father, the Complainant, and PW2 called him and started beating him on allegations that he was disrespectful to his parents. The duo threatened to kill him and this prompted him to run away to Nakuru for his dear life where he stayed for one year. He later on learnt that his father had been injured.

On being cross-examined by the prosecutor, the Appellant stated that he was attacked by his father and uncle while he was in the company of his brother one James. The Appellant stated that he was injured on the shoulder following the attack. He denied that he ever stabbed the complainant but added that the elders tried to solve the dispute between him and his father in accordance with the Maasai traditions.

20. **DW2, Narikungera** is the mother to the Appellant and the Complainant's wife. Her testimony was that she found the Complainant in hospital and took care of him until he was discharged. She however, stated that she was not present when the Complainant was attacked but that she was told, by the Complainant, that it was the Appellant who injured him.

Analysis and Determination:

21. From the proceedings, it is not in doubt that the Complainant was attacked and gravely injured on the fateful night. The Complainant's injuries were confirmed by PW3 and the exhibits he produced in court.

The questions which however arise in the Appellant's submissions are:

a. *Whether it was the Appellant who attacked the Complainant?*

b. *Whether in the circumstances of the case, the attacker can be said to have attempted to murder the complainant*?

22. To answer the first question, the evidence of both PW1 and PW2 is clear that it was the Appellant who attacked the Complainant. The Appellant is the Complainant's own biological son and he was positively identified by both the Complainant and PW2 at the scene of the crime. The Appellant, in his own sworn testimony confirmed that he was at the scene of the crime albeit as a victim of an attack by PW1 and PW2. There was light from both the moon and the torch that could have enabled the witnesses to properly see and identify the Appellant.

23. Furthermore, it was clearly in the evidence of PW1, PW2 and PW4 that the Appellant went into hiding soon after committing the offence which to me was a clear pointer that the Appellant was aware of his unlawful actions and was afraid of the facing the consequences.

24. On the question of whether the circumstances of the case warranted the Appellant being charged with the offence of attempted murder, **Section 220 (a) of the Penal Code** under which the Appellant was charged states as follows:

> ***"Any person who attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life."***

25. Having reviewed the record before me, I find that the evidence presented against the Appellant at the trial was watertight. Identification of the Appellant as the attacker was positive. The totality of the circumstances is that the prosecution's case reached the threshold of proof beyond reasonable doubt.

26.**Section 22(b) of the Criminal Procedure Code** states:-

> ***"Any person who – with intent unlawfully to cause the death of another does any act or omits today any act which it is his duty to do. Such act or omission being of such a nature as to use likely to endangers human life, is guilty of a felony and is liable to imprisonment for life."***

27.**Section 220 (b)** states:-

For the offence of attempted murder under the said Section to stand, it must be proved that:-

a. ***The appellant had intention to unlawfully cause the death of the complainant.***
b. ***He committed an act or omitted to do an ac which was his duty to do.***

The said act or omission was of such a nature as to be likely to endanger human life.

28.The appellant armed himself with a knife which is a dangerous weapon, lay in wait for his father outside his house, he knew it was his father because the complainant enquired who he was, he immediately attacked him with a club, and when the complainant tried to run away for his life, the appellant gave chase, caught up with him, subdued him to the ground and stabbed him with such brutal force that his intestines were said to have been hanging out of his stomach – surely what other intent could such an attacker have other than to kill his victim? I find no other rational for the attack other than intent to kill. The evidence of the doctor showed the complainant had two perforated intestines and a lot of blood in the abdomen. He was transfused 2 units of blood.

29.This being a criminal trial the onus was not on the appellant to prove his innocence. He however offered to give a sworn statement on his defence and called one witness and it is the duty of this court to assess his evidence and that of his witness the context of the rest of the evidence on record.

30.The court observes that the demeanor of the appellant after the act, bespeaks his guilt rather than his innocence. He fled the scene and went into hiding for about 6 months after the incident. He alleges that he was the one assaulted by PW1 and PW2 yet he did not report his assault to the relevant authorities. The analysis of the evidence shows that the appellant was not truthful in his testimony that he was attacked and assaulted by PW1 and PW2.

31.From the evidence on record, even though the magistrate expressed some difficulties in determining whether the circumstances of the case presented before him disclosed the offence of attempted murder, he, however, eventually arrived at the conclusion that offence of attempted murder was established and stated as follows:-

> **"However when I analyse this further by looking at the weapon used, it was a knife. Somebody cannot thrust a knife into another's belly without knowledge that it would cause death or grievous harm."**

32.Madan, Miller & Potter JJA held in the case of **Cheruiyot –vs- Republic** as follows:-

> ***"An essential ingredient of an attempt to commit an offence is specific intention to commit that offence, if a charge is one of attempted murder, the principal ingredient and the essence of the crime is the deliberate intent to murder as it is presented by the prosecution, and, therefore it must be shown that the accused person had a positive intention unlawfully to cause death; in a prosecution under Section 220 of the Penal code it is not sufficient that it would have been a case of murder if death had ensued or that the accused was indifferent as to what was likely to be the fate of the victim, or that the acted in a manner so rash as to endanger the life of another person or as to be likely to cause harm to him and an intent, merely to cause grievous harm is not sufficient to support a conviction under***

Section 220 for attempting unlawfully to cause death in addition to the requisite intent, there must be a manifestation of the positive intention by an overt act."

33. In the instant case the positive intentions of the appellant was manifested when he lay in wait for his father outside his house and as soon as the father approached and enquired who he was the appellant without any provocation threw a nut studded club at him whereupon the complainant took to his heels but the appellant still pursed him and when he fell, he subdued him and stabbed him with a knife on the belly and thereafter he ran away leaving the complainant for the dead.

34. The learned trial magistrate considered and disregarded the defence offered by the appellant. I have reevaluated the defence evidence side by side with the rest of the evidence on record and I fully agree with the learned trial magistrate. The appellant was placed at the scene of the crime by the prosecution witness and by his own testimony under oath.

35. Schreiner J in **Rex vs Huebsch 1953 (2) SA 561 (AD)** page 567 when referring to a statement by Watermeyer CJ in the judgment in **R V Sofi & another 1945 AD 809** said:

"The statements shows that in order to support a conviction or attempted murder there need not be a purpose to kill proved as an actual fact."

36. The brutal actions of the Appellant exposed the complainant's life to grave danger and it was purely by the grace of God that the complainant survived the ordeal. The learned trial magistrate who heard the witnesses testify was therefore right to have concluded as follows:-

"I am convinced beyond doubt that the accused had intention of finishing his father."

37. After weighing all the evidence and the circumstances of this case. I am satisfied that the learned trial magistrate properly convicted the Appellant based on cogent evidence adduced by the prosecution. I therefore confirm the conviction and sentence and hereby dismiss the appeal.

38. The sentence of 20 years shall stand and shall be served as from the date of the conviction which was 21st March 2013.

39. It is so ordered.

Dated, signed, and delivered in open court at Kisii this 3Oth day of October, 2015.

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Majale for the State
- M/S Moseti for Oguttu for the Appellant
- Appellant
- Mr. Ogega: Court clerk