REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 109 OF 2014

FRANCIS MUTETI KIMANZI..... APPELLANT

VERSUS

REPUBLIC…….…….....RESPONDENT

(From the conviction and sentence in Mwingi SRM Criminal Case No. 84 of 2014 – H. M. Nyaberi Ag. SPM)

JUDGEMENT

The appellant was charged with two counts. Count 1 was for attempted murder contrary to section 220 (a) of the Penal Code. The particulars of the offence were that on 8th February 2014 at Itoloni Location in Migwani District of Kitui County unlawfully attempted to cause the death of Jackson Maluki Mulonzya by stabbing him with a knife. Count 2 on the other hand was for grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on 8th February 2014 at Itoloni Location Migwani District of Kitui County unlawfully did grievous harm to Justus Muthengi Ndoo.

He denied both charges. After a full trial, he was convicted on both counts. He was sentenced to serve life imprisonment in count 1. With regard to count 2, the sentence was left to remain in abeyance.

Aggrieved by the decision of the trial court the appellant has now come to this court on appeal. He filed his own petition of appeal. However his counsel C. K. Nzili and Co. Advocates also filed a memorandum of appeal which they relied upon. The grounds of appeal filed by counsel for the appellant are as follows:-

1. The learned trial magistrate erred in law and in fact in finding the appellant guilty as charged against the weight of the prosecution evidence.
2. The learned trial magistrate erred in law and in fact in relying on un corroborated facts.
3. The learned trial magistrate erred in law and in fact in failing to consider the defence testimony.
4. The learned trial magistrate erred in law and in fact by failing to consider the circumstances surrounding the commission of the offence.
5. The learned trial magistrate erred in law and in fact by giving an excessive sentence without considering the accused mitigation.
6. The learned trial magistrate erred in law and in fact by failing to give the appellant the opportunity to defend himself and call evidence.

During the hearing of the appeal Mr. Nyaga held brief for Mr. Nzili. Counsel submitted that written submissions had been filed on behalf of the appellant. Counsel emphasized that this being a first appeal, the court should re-evaluate the evidence on record and come to its own conclusions taking into account that it did not have the opportunity to see witnesses testify to determine their demeanor. Counsel submitted that the appellant acted in self defence and relied on a case of ***Jane Koitee Vs.***

Republic(2014)eKLR. Counsel submitted that the trial court did not consider the mental status of the appellant at the time of judgment and also contended that the sentence was excessive.

Mr. Wanyonyi for the DPP, opposed the appeal. Counsel emphasized that the appellant was charged with attempted murder, and that there was no evidence of provocation. According to counsel, the evidence from witnesses was consistent in that the appellant attacked the two complainants and had also indicated that he wanted to kill two people. PW1 who was a chief who merely wanted to know the names of those two people, when he was attacked and stabbed viciously by the appellant. When PW2 tried to disarm the appellant, he also stabbed him, and the incident was witnessed by PW3. In counsels view the intention of the appellant was to kill but the members of the public intervened and arrested the appellant thus the saving the situation. Counsel submitted that the knife and P3 forms evidencing injury suffered by the victims were produced in court as exhibits and were evidence of consistency in the prosecution case. Counsel submitted that PW1 survived by the grace of God.

With regard to mental status of the appellant, counsel relied on section 162 of the Criminal Procedure Code (cap. 75) which provides that such issue should have been raised during the trial or proceedings. Such issue not having been raised during the trial, should not be raised on appeal. In any case counsel argued the appellant participated fully in the proceedings by cross examining witnesses. It cannot thus be said that he did not understand the proceedings.

With regard to provocation, counsel submitted that that issue did not arise as none of the complainants attacked the appellant. Counsel relied on a case of ***Racho Kuno Vs. Republic Nairobi Criminal Appeal No. 82 of 2011***. Counsel emphasized that the Court of Appeal specifically relied on section 208 of the Penal Code (cap. 63) which covered the defence of provocation.

Lastly, counsel argued that the sentence was proper as a probation report was availed to court before sentencing, and the court considered the same before pronouncing the sentence.

At the trial, the prosecution called 9 witnesses. PW1 was Jackson Maluki Mulonzya the complainant in count 1. He testified that he was the chief of Itoloni Location and that on 8th February 2014 at about 4.30pm he left a funeral and proceeded to his office. He met PW2 the complainant in Count 2, who was his cousin who gave him a lift on a motor bike to Kavaliani Market where they met the appellant talking to himself saying that he would kill two people that day.

Before they alighted from the motor bike, the appellant ran towards a canteen and the witness followed him and suddenly the appellant produced a knife turned and stabbed him on the left thigh and across the ribs while the witness had fallen down. When he screamed, Julius Muthengi PW2 approached and grabbed the appellant from behind and the appellant stood up and tried to run away. Somebody then gave him first aid by tying his ribs with a piece of cloth and at that point, he discovered that Muthengi had also suffered a wound on the right side of the face and was also having the knife which had been taken from the appellant. The two victims were then taken to hospital for treatment.

In cross examination, he denied attacking the appellant with a wooden stick. He admitted that the appellant had been married to a sister of Muthengi (PW 2) but denied that they had gone there to beat him. He denied that the knife belonged to somebody by the name Ndoo. In re-examination he stated that the appellant was married but his wife had been taken away. He stated also that the appellant was his cousin.

PW2 was Justus Muthengi Ndoo the complainant in count 2. It was his evidence that on 8th February 2014 at about 5pm, he was together with PW1 on a motor cycle As they passed Kavaliani Market they saw the appellant near a shop who said that he wanted to kill two people including the chief PW1. The chief then ordered him to stop. When the chief approached the appellant, he walked through the corridor and suddenly he heard the chief scream saying he had been stabbed.

He thus rushed towards the corridor and, on the rear of the shop found the appellant with a knife. Though he managed to get hold of the appellants hand the appellant cut him on the left side of the face before he

struggled and took away the knife. He observed that the chief had a stab wound on the neck and the abdomen.

Thereafter his brother Erick Mwangangi arrived and took them to Migwani Police Station where they reported the incident and left the knife. They were then taken to Migwani District Hospital and referred to Kwa Muthale Mission Hospital where he was admitted for a week. He was later issued with a P3 form. He stated that he did not know why the appellant had attacked and injured him as they came from the same clan.

In cross examination, he admitted that Musili Ndomo was the wife of the appellant. He denied participating in taking of the wife of the appellant back to her parents. He stated that he did not know whether the chief had beaten the appellant with a wooden stick.

PW3 was Ndomo Musili. It was his evidence that on the 8th February 2014 at 5pm, he was sitting outside a shop when the appellant told him that he would kill someone that day and showed him a knife which he had tucked in his waist belt. Before long, the area assistant chief and Justus Muthengi arrived on a bodaboda and the chief asked the appellant why he was carrying a knife. The appellant then jumped and stabbed the chief, on the side of the ribs and the leg. When Muthengi Ndoo tried to rescue the chief he was cut on the side of the face but managed to disarm the appellant. According to this witness, the appellant ran away and the victims were taken to hospital.

In cross examination, he stated that the appellant stabbed the chief outside the shop of Nzendu.

PW4 was Justus Maluki Mutisya who stated that on the said date at 5pm he heard screams while in a hotel. On rushing there, he saw chief Maluki bleeding seriously from the left side of the stomach. The chief said that he had been stabbed by the appellant. This witness tied a cloth around the abdomen of the chief and also saw MuthengI Ndoo being given first aid. The said Muthengi Ndoo also said that he had been stabbed by the appellant. He stated that the victims were taken to hospital.

In cross examination he stated that he did not witness the stabbing incident.

PW5 was Erick Mwangangi Ndoo. It was his evidence that on the day in question at 6.30pm while at home, he received a phone call form his brother Justus who informed him that he had been involved in an accident at Kavalyani Market. He rushed there and found his brother bleeding. He also found many people. His brother was holding a knife in his hand. The chief was also bleeding from his waist. He organized for the two to be rushed to Migwani Police Station and thereafter to Migwani Hospital where they were referred to Kwa Muthale Mission Hospital. While proceeding to Kwa Muthale the chief informed him that he had been stabbed by the appellant.

In cross examination, he stated that he did not witness the incident.

PW6 was Joyce Lakeli Nguli an Assistant Chief who stated that on the date in question at 6.30pm, while at home she heard noise coming from the market. She proceeded there and on arrival found the chief sitting having been tied with a cloth round his waist. In addition Justus Ndoo was holding a knife and was in a pool of blood. Justus Ndoo informed her that they had been attacked by the appellant with a knife. She thus called the OCS Migwani Police Station and reported the incident. The victims were taken to hospital by bodaboda operators.

In cross examination she stated that the appellant was arrested by members of the public and that she did not witness the incident.

PW7 was Dr. Kevin Piketi Kituyi of Muthale Mission Hospital. He stated that he treated a patient named Jackson Maluki on 8th February 2014 who gave a history of an attack by a person known to him. He found an injury on the right thigh and a penetrating injury on the right hand side of the chest. There was blood in the right hand side of the chest cavity. He admitted the patient in hospital. On the same day Justus Muthengi was also brought with a history of assault by Jackson Maluki. He sustained a deep cut on

the left side of the face and had lost a lot of blood. He was also admitted to hospital and treated. He produced treatment notes for both patients. He stated that the injuries sustained by both patients amounted to grievous harm.

In cross examination he stated that the weapon used was not brought to hospital but it was a sharp weapon.

PW8 was PC. Jackson Karumba of Migwani Police Station the investigating officer. It was his evidence that on 8th February 2014 at 7pm two men were brought to the station on motor cycles. These were the complainants herein and both had injuries. He took brief notes from the information from the public as the injured persons were not talking. He referred the victims to Migwani District Hospital for treatment. When he later visited the hospital he found that the two had been transferred to Kwa Muthale Misison Hospital. He later visited Kwa Muthale Mission Hospital and talked to the victims. He also stated that the appellant was arrested by members of the public. He initially charged the appellant with assault causing actual bodily harm. After the P3 forms were completed the charges were changed to attempted murder and grievous bodily harm. He produced an exhibit which he called a panga 2 feet long. He also produced a knife as an exhibit.

In cross examination he stated that Justus Ndoo gave the knife to the assistant chief.

PW9 was Thomas Gichoni a Clinical Officer at Migwani District Hospital. It was his evidence that on 18th March 2014 he completed P3 forms for both victims. He stated that the injuries were caused by a sharp weapon. The degree of both injuries was grievous harm. He produced the two P3 forms as exhibits.

When put on his defence, the appellant gave unsworn testimony. He stated that at about 6pm on the day in question when he was in his fathers shop, Maluki Mulonzya was brought on a boda boda by Justus Ndoo and they stopped on the side of the road, alighted and came to the shop. They passed through the corridor and he wanted to know where they were heading to.

When he got out of the rear door he found Maluki holding a big wooden stick and the said Maluki told him that he would remove his stupidity immediately and struck his head with the stick and he started bleeding. He also saw Justus Ndoo holding a knife. The said Justus Ndoo tried to stab him. The appellant then got hold of Maluki to shield himself and in the process Justus Ndoo stabbed Maluki. In the course of the struggle Justus Ndoo stabbed Maluki again on the leg. In addition, when the appellant struggled with Justus Ndoo, the knife cut Justus on the face and the appellant got a chance to run home. Youth who were nearby then chased him and he entered the house and locked himself. The youth started hitting the house with stones and he came out and pleaded with them to take him to Migwani Police Station. He stated that he had no grudge against Justus Ndoo and that he had married Musili who was his niece. He stated that in December 2013 Justus Ndoo went and took his wife stating that he had married within the prohibited blood relationship. According to him, Justus Ndoo brought the chief to attack him at his parent's shop.

This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to take in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanor and give due allowance to that fact. See the case of ***Okeno Vs. Republic [1972] EA 32.***

I have re-evaluated the evidence on record. I have perused the judgment of the trial court. I have also considered the submissions of counsel for the appellant and the prosecuting counsel, both written and oral.

From the grounds of appeal and the submission of counsel for the appellant, in my view there is no challenge to the fact the incident occurred. The appellant and the two complainants were involved in a fracas that day at around 5pm. Both the prosecution evidence and the defence testimony agree on this. In addition the complainants were injured on that day in that fracas. Both the prosecution and defence testimony agree on this. The complainants were injured by knife stabs. The knife was produced as an exhibit. Again both the complainant's story and the story of the appellant is that indeed the wounds

suffered by the complainants were caused by a knife.

The difference between the prosecution and the defence position, is how the incident occurred, who had the knife, and who stabbed the two victims/complainants. The prosecution position was that it was the appellant who stabbed both complainants. The defence version was that it was the complainants who attacked the appellant and that the knife was in possession of the complainant in count 2 and that in a struggle with the appellant, the complainant in count 2 ended up stabbing the complainant in count 1 and also stabbing himself with a knife.

Learned counsel for the appellant has raised the issue of provocation and self defence on appeal. In my view the application of those defences were fully recovered in the case of ***Racho Kuno Vs. Republic (Supra)*** cited by counsel for the respondent.

The law is clear that the prosecution is required to prove its case against an accused person beyond any reasonable doubt. The accused can raise several defences and also create a doubt in the prosecution case. The provisions of the law which address the defence of provocation and self defence are sections 208 and 17 of the Penal Code respectively. In my view self defence is a complete defence to a criminal charge. Provocation may be a partial defence in that the offence might be reduced from a more serious to a less serious offence.

Though the appellant stated that he was hit with a big bar by PW1 and injured on the head, there is no indication at all that he suffered any injury in the fracas. Though he stated that he struggled with two people and that one of them had the knife which ended up injuring both PW1 and himself, I find that story unbelievable. In that vicious struggle that he described with two people, I would not imagine that he would get away without the slightest injury. In any event he appears from his own line of cross examination and defence, to have had an existing grudge regarding the taking away of his wife. That in my view was the reason why he thought he should attack someone or some people who were connected with the taking away of his wife.

Admittedly, both complainants met him on that day, but the evidence doesn't show they either attacked him or had the intention of attacking him. I thus agree with the finding of the trial court that it was indeed the appellant who attacked and caused the injuries on both complainants.

During the appeal also, learned counsel for the appellant has referred to a defence of insanity that the court did not consider the mental status of the appellant when dealing with the case. In my view the learned magistrate had no reason to consider the issue of lunacy or incapacity of the appellant in the circumstances of this matter. Section 162 of the Criminal Procedure Code (Cap. 75) clearly describes when and how a court should consider or enquire into the soundness of mind of an accused person. The accused person is always presumed to be sane unless there is something which would convince the court to consider otherwise. Nothing in the trial process indicated any unusual conduct by the appellant. In addition, there is no record that a defence of insanity was raised at the trial which could cause a reasonable court to enquire into the sanity of the appellant. I thus find that it is too late in the day to talk about the state of mind of the appellant either when he committed the offence or when he was tried.

The injuries suffered by the two complainants match the convictions for both attempted murder and grievous harm respectively. In fact for the complainant in count 1, had he not been taken in hospital quickly, would have died. The injury or stab into his chest was certainly vicious and intended to kill. The other complainant also suffered a serious unjury. It should be noted that by the time both complainants were taken to Migwani Police Station about three hours after the incident, they were all not talking. In my view, if medical facilities were not available nearby, they would both have died in hours due to excessive bleeding. I thus find that the conviction of the trial court were proper and I uphold the same.

With regard to sentence, the maximum sentence for attempted murder is life imprisonment. The learned trial magistrate sentenced the appellant to life imprisonment which was the maximum sentence. The appellant was said by the prosecution to be a first offender as the prosecution did not state that he had previously committed any offence. The appellant asked for leniency.

The learned magistrate after going through the probation report, wrote a short paragraph on sentencing. He did not refer to the fact that the appellant was a first offender and that he asked for leniency. In addition, no reason was given for handing down the maximum punishment. The magistrate also left the sentence on count 2 in abeyance presumably because of the life sentence.

Looking at the totality of the matter, in my view the sentence on count 1 was harsh and excessive and I will interfere with the same.

Since the learned magistrate did not sentence for grievous harm, in my view the justice of the matter requires that I sentence for the offence of grievous harm. The sentence for grievous harm I also note under section 234 of the Penal Code is life imprisonment. That is the maximum sentence, and I will hand down an appropriate sentence.

Having found that the sentence imposed on count 1 was harsh and excessive, I will set aside the sentence and substitute therefore a sentence 10 years imprisonment. I will also impose a sentence of 10 years imprisonment for the offence of grievous harm. The two sentences will run concurrently.

Consequently and for the above reasons, I dismiss the appeal against conviction and uphold the conviction of the trial court on both charges. With regard to sentence, I set aside the sentence imposed by the trial court on count 1 and order that the appellant will serve a sentence of 10 years imprisonment for attempted murder, and 10 years imprisonment for grievous harm from the date on which the appellant was sentenced by the trial court. The two sentences will run concurrently as the offences arose from the same incident.

Dated and delivered at Garissa this 19th day of October, 2015

GEORGE DULU

JUDGE