REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 483 OF 2009

(An Appeal arising out of the conviction and sentence of B.A. OWINO – SRM delivered on 30th October 2009 in Thika CMC. CR. Case No.5264 of 2007)

SAMUEL MBURU GATUA……..…….....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Samuel Mburu Gatua was charged with the offence of **Attempted Robbery with Violence** contrary to **Section 297(2)** of the **Penal Code**. The particulars of the offence were that on 11th November 2007 at Kinyoho village in Murang'a South District, the Appellant jointly with others not before court, attempted to rob Lydia Muthoni Mungai of cash Kshs.1,100/- and at the time of such attempted robbery, used violence to the said Lydia Muthoni Mungai. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death as is mandatorily provided by the law. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification which did not stand up to legal scrutiny. He faulted the trial magistrate for convicting him on the basis of contradictory evidence. He was aggrieved that the trial court believed the complainant's testimony that she had been cut using a panga yet no panga was produced in evidence as an exhibit. He faulted the trial magistrate for reaching the finding that he was guilty without considering the evidence that he had adduced in his defence. This evidence in his view exonerated him from the crime. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. In particular, he submitted that there was no sufficient evidence which had been adduced by the prosecution witnesses to support the finding made by the trial court that he was guilty of the charge of **Attempted Robbery with Violence** contrary to **Section 297(2)** of the **Penal Code**. On her part, Miss Matiru for the State submitted that the prosecution had adduced evidence of identification which had established, to the required standard of proof, that the complainant and her son had identified the Appellant when he attacked the complainant and injured her. She submitted that the evidence of the complainant and his son was infact the evidence of recognition: the Appellant was known to the complainant and her son prior to the attempted robbery incident. She urged the court to dismiss the appeal and confirm the conviction and sentence of the trial court.

Before giving reasons for our decision, it is imperative that we give the brief facts of this case. The complainant, PW3 Lydia Muthoni Mungai testified that she was a businesswoman working in Nairobi. On 11th November 2007 she travelled to her rural home in Murang'a with the intention of spending the night there. She testified that at about 9.00 p.m., while she was in the kitchen with her son PW1 Patrick Kiarie Mwea, two men entered the kitchen. She identified the two men as the Appellant whom she referred to as Sammy and another man whom she referred to as John. Both men were known to her prior to the material night of the assault. They demanded that she gives them money. Sammy demanded to be given Kshs.100/- while John asked to be given Kshs.1,000/-. The complainant recalled that before she could respond, the Appellant cut her left wrist with a panga. She raised alarm. Nothing was stolen from the complainant. The Appellant and his accomplices ran away from the scene. In regard to the evidence of identification adduced by the complainant, PW1 the son of the complainant corroborated her testimony. He testified that it was Sammy (the Appellant) and John who attacked them on the material evening. After the attack, the complainant made a report of the attempted robbery to Gaichanjiru Police Post. The complainant was then taken to Thika District Hospital where she was treated and discharged. After being treated, the Appellant's complaint was referred to Kabati Police Station.

The complaint was investigated by PW4 PC Denis Muchiri. After concluding his investigations, he reached the determination that a case had been established that indeed it was the Appellant who attempted to rob the complainant. He made the decision to charge the Appellant. PW2 George Maingi was the Clinical Officer who attended the complainant when she sought medical attention at Thika District Hospital. He produced the P3 form of the complainant. He noted that the complainant had sustained a deep cut on the wrist joint which affected the radius bone. The complainant's injury was stitched and plaster of paris applied. He formed the opinion that the injury was caused by a sharp object.

When the Appellant was put on his defence he denied committing the offence. He testified that there existed a grudge between his family and that of the complainant. He narrated how on 13th November 2007 he was accosted by the complainant while she was with her husband and her children. They assaulted him. He did not know why they had assaulted him. He sustained injuries. He reported the incident to the police. He was examined by a doctor who filled a P3 form indicating the injuries that he had sustained. He testified that the complainant is her neighbour. They had a boundary dispute which had escalated in their being a bad relationship between the two families. He was of the view that the complaint was fabricated to fix him.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court and reached its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its determination, the court must put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any finding regarding the demeanour of witnesses (see **Njoroge –Vs- Republic [1987] KLR 19)**. The issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the guilt of the Appellant, to the required standard of proof beyond any reasonable doubt, on the charge of **Attempted Robbery with Violence** contrary to **Section 297(2)** of the **Penal Code**.

The facts of this case raise disturbing questions. The Appellant and the complainant are neighbours. From the evidence adduced by both the Appellant and the complainant, it was apparent that there existed a dispute between the family of the Appellant and that of the complainant. In a span of two days, between 11th November and 13th November 2007, two incidents took place where, firstly, the complainant was a victim and secondly where the Appellant was also a victim. In the first instance, the subject of this case, the complainant testified that on the night of 11th November 2007, the Appellant and three others went to her house demanding to be given the sum of Kshs.1,100/-. According to the complainant, before she could even react, the Appellant cut her hand with a panga. Immediately after cutting her, the Appellant and his accomplices made good their escape.

It is instructive that in the first report that the complainant made at the Gaichanjiru Police Post, she did not name the Appellant as her assailant. The circumstances narrated by the complainant did not in any way describe an attempted robbery. In fact, it was clear from her evidence that the Appellant went to her house with the intention of assaulting her. If the Appellant intended to rob her, nothing would have

prevented him from realizing his objective after he had subdued the complainant. On his part, the Appellant testified that on 13th November 2007 while he was at a local shopping centre, he was assaulted by the complainant's children. He made a report to the police of the assault. The complainant confirmed this incident in her testimony, the only difference being that the complainant claimed that it was the Appellant who was the aggressor.

Having carefully re-evaluated the evidence adduced before the trial court, it was clear to this court that there indeed existed bad blood between the families of the Appellant and the complainant. The Appellant explained that there existed a land dispute between the two families. This issue was not interrogated by the trial court in its judgment. The two incidences of assault followed each other closely that any reasonable court would have reached the conclusion that the assault of the complainant by the Appellant was motivated by other reasons other than the charge that brought against him of attempted robbery with violence. It is our conclusion that the prosecution did not adduce evidence which established, to the required standard of proof beyond any reasonable doubt, that indeed the Appellant attempted to rob the complainant. There are too many gaps in the prosecution's case that this court is unable to make a finding that indeed there was an attempted robbery.

This court however holds that a cognate offence was disclosed in the evidence that was adduced before the trial court. That cognate offence is that of **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code**. It was clear from the evidence of the complainant that the Appellant assaulted her with the intention of causing her to suffer bodily harm. In the premises therefore, the Appellant is acquitted of the charge of **Attempted Robbery with Violence** contrary to **Section 297(2)** of the **Penal Code**. The death sentence that was imposed upon him is hereby set aside. The Appellant is however convicted of the disclosed offence of **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code**. Taking into account the nature of the injury that the complainant sustained, this court is of the view that the period that the Appellant has been in lawful custody is sufficient punishment. In the circumstances therefore, the sentence of the Appellant is commuted to the period already served. The Appellant is ordered released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF JANUARY 2014.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE