REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 146 OF 2009

JANE KOITEE JACKSON…….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising from the Original Conviction and Sentence in Criminal Case No.900/2008, at the Senior Resident Magistrate's Court at Kajiado- W.N.Kaberia

(SRM) on 4/8/2009).

JUDGEMENT

The appellant herein ***Jane Koitee Jackson*** had been charged with two counts. The 1st count was **Attempted Murder contrary Section 220 (b) of the Penal Code**. Particulars being that on the 11th day of June, 2008 at around 11.00 am at **Esilanke area** of Kajiado Province, ***she attempted to unlawfully cause the death of Gladys Waithera*** a by ***cutting her head, left hand thumb and her right hand arm endangering her human life.***

The ***2nd Count was Grevious harm, contrary to section 234 of the Penal Code***. Particulars being that on the 11th day of June 2008 at Esilanke area in Kajiado District within Rift Valley Province, she ***unlawfully wounded Gladys Waithera.***

The appellant was convicted on the first count and sentenced to ***10 years imprisonment.*** She was however acquitted on the second count. Being aggrieved and dissatisfied with the Lower Court's findings, the appellant filed this appeal and relied on various grounds. These grounds are:

1. ***The Learned Magistrate erred in law and fact by wholly relying on the evidence by the prosecution witnesses and totally failing to consider the merits of the defence tendered by the Appellant and or miscomprehending the said defence and its legal effect on the case before him.***

2. ***The Learned Magistrate misdirected himself in law and in fact in finding as he did, a conviction against the weight of the evidence on record and in total disregard of the glaring discrepancies , contradictions and blatant falsehoods in the evidence tendered by the prosecution witnesses.***

3. ***The learned magistrate erred in law in failing to find and or hold that the prosecution (did not)***

proved its case beyond reasonable doubt as he was enjoined by law so to do, and further erred in law in finding and or holding that the Appellant was guilty of attempted murder.

4. ***The learned trial Magistrate's decision in finding the Appellant guilty was actuated or guided by grief, emotion, and sympathy for the Complaiant arising from the serious injuries inflicted upon the complainant and not by law, facts and merits of the defence tendered by the Appellant and his said decision was therefore arbitrary , harsh and not guided by or based on sound and acceptable judicial practice hence unfair and prejudicial to the Appellant.***

5. ***The Learned Magistrate erred in law and fact in completely failing to consider the Appellant's mitigation on record and thereby passing a sentence which was manifestly harsh and excessive in the circumstances.***

The appellant herein through the Law Firm of **Odhaimbo & Weda** Advocates filed written submissions which she relied on entirely. The State opposed the appeal and filed its written submissions on 20/11/2012. When the appeal came up for hearing on **14/10/2013, M/s Kwamboka ,** the Learned State Counsel relied entirely on the written submissions.

This being a first appellate court, the appellant is entitled to expect the evidence tendered in the lower court to be subjected to a fresh and exhaustive examination and have this court's decision on that evidence. However, as I do so, I do bear in mind that I did not have the advantage (as the learned trial magistrate had) of hearing and seeing the witnesses and I give allowance for that. (See **Okeno Vs Republic 1972 (EA) 32 and Mwangi Vs Republic (2006)eKLR 28.**

In the Lower Court, the prosecution had called a total of five witnesses.

The appellant gave a sworn defence and called three witnesses.

The brief facts of the case are; On the 11th day of June, 2008, the complainant herein (PW1) was at home when she asked her 5 year old son called **S** to let the goats out of their pen. As soon as the goats were released, they strayed into the appellant's land. The complainant instructed her son to remove the goats from the appellant's shamba which he did. However, the appellant went and assaulted **S,** the complainant's son with a stick. When the complainant inquired from the appellant why she was assaulting her son, the appellant ignored her.

Then the appellant went to home and the complainant followed her to ask why she had assaulted the said S . The complainant found the appellant sharpening a panga and when complainant asked to be shown what the goats had had destroyed, the appellant jumped at her with a panga. The appellant cut the complainant severally on various parts of the body which made her go unconscious. The complainant was later taken to St.Mary's Hospital, where she was admitted for one week.

PW5, Joseph Biwott filled her P3 form which showed that the complainant suffered ***bruises on the forehead, deep cut wounds on the left forearm with amputation from the left wrist joint and amputated right thumb.***

The matter was reported to Kajiado Police Station by PW2, **Jackson Tipaya,** the husband to the complainant. The appellant was at large by then. PW2 assisted in the arrest of the appellant. ***PW4, No. 6472 , PC Mohammed Kofa,*** received the complaint from the complainant herein and issued her with the P3 form . Later, on 8/8/2008, he arrested the appellant with the assistance of PW2.

On her part, the appellant denied that she committed the offence. She testified that on the material day, the complainant grazed on her farm. That when the appellant inquired why the complainant had done so, the complainant attempted to beat the appellant's child. That when appellant attempted to shield her son, the complainant also attempted to cut her with the panga. Then in an attempt to protect herself , the appellant grabbed the panga and cut the complainant several times. The appellant called three witnesses to support her case. ***DW1 Moses Ole Muriu*** did not witness the incident but he told the court that on the

11th day of June, 2008, the appellant told him she had assaulted the complainant.

DW2 Musa Ole Njukuwa, told the court that on the material day, he found the complainant severly injured but the appellant had no injuries. ***DW3 Solomon Kiringai,*** confirmed that on the material day, he saw the appellant and complainant fighting. They were fighting over a shamba. That the complainant beat the appellant's child and then the appellant grabbed a panga and cut the complainant on the right hand and left wrist as the complainant tried to grab the panga. He confirmed that the appellant cut the complainant.

That being the evidence before the learned trial magistrate which I have re-evaluate and reconsidered, there is no doubt that the appellant herein did cause injuries to the complainant.

The appellant in her sworn defence stated:-

" I cut the complainant because she came to my home carrying a panga. She tried to cut me because of the land dispute. She wanted to forcefully grab my land and she also grazed her goats on my crops. I found her goats on my shamba under her watch".

However, the appellant stated that she cut the complainant in **self defence,** while protecting her child. The appellant had testified as follows:-

"When I asked her why she was doing that, she held this child and tried to beat him. When I tried to grab the child, she tried to cut me. I grabbed the panga and cut her".

The issues now for determination are whether the prosecution did prove its case beyond a reasonable doubt and whether the learned trial magistrate erred in law and fact in dismissing the Appellant's Defence of self -defence.

As I have stated earlier, there is no doubt that the complainant herein received grevious injuries. The same were inflicted on her by the appellant herein. The P3 form showed the injuries as follows:-

- Bruises on the forehead
- Deep cut wounds on the left forearm with amputation from the left wrist joint.
- Amputation of the right thumb.

The complainant was injured with a sharp object.The complainant and appellant both testified that the injuries were caused by a panga.The complainant had further testified that when she went to the appellant's home, she found her sharpening a panga.The degree of injuries was classified as grevious harm.The appellant therefore grievously injured the complainant.

It is on record that, the appellant was charged with two counts.She was convicted on an offence ***of attempted murder*** and acquitted on an offence of ***causing grevious harm***.

Section 220 (b) of the Penal Code defines the offence of attempted murder as follows:-

" Any person who with intent unlawfully to <u>cause the death</u> 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 nature as to be likely to endanger human life is guilty of a felony;

Since the appellant herein was convicted of an offence of attempted murder, prosecution needed to prove beyond a reasonable doubt that she had an intent to unlawfully cause the death of the complainant herein.

From the evidence on record, the complainant and appellant had an altercation or confrontation over the grazing of complainant's goats on the appellant's crops.It was the evidence of the complainant that the appellant went to the complainant home and assaulted the complainant's son.Thereafter the complainant went to the appellant's home and there was a confrontation and eventually the complainant was cut

severally with a panga by the appellant.

The appellant also testified that the complainant had confronted her at her home and she attempted to assault the appellant's child.

In the process of shielding her child and in **self defence**, the appellant cut the complainant severally with a panga.There is no doubt that the

incident occurred in the appellant's home and that the complainants' goats had grazed on the appellant's farm.

From the definition of ***Section 220 of the Penal Code***, the offence of **attempted murder** is committed when a person attempts to unlawfully cause the death of another person.

The prosecution herein needed to prove beyond reasonable doubt that the appellant in this case attempted to unlawfully cause the death of the complainant.In proving the offence of attempted murder, the prosecution needed to prove the ***Actus Reus element*** . That is an act which endangered the life of another.In the instant case, the prosecution needed to prove that the appellant did an act that endangered the life of the complainant.

Having considered the evidence on record, it is evident that the appellant cut the complainant so many times with a panga.The said act caused the complainant to lose her left wrist joint, her right thumb and also received deep cut on the forearm and forehead.

The said act indeed caused the complainant to become unconscious and was admitted at St.Mary's hospital for ***10 days*** .

The said act by the appellant endangered the life of the complainant herein.

However, the prosecution also needed to prove the ***Mens Rea element*** ; That is the intention to kill.In the case ***of Gwempazi S/O Mukonzho (1943) 10 EACO 101,*** the court held that:-

" It must be shown that the accused had a positive intention to kill or cause death".

This position was later held in the case of **Hamisi S/O Tambi (1953) 20 EACA 176,** where the court held that:-

"It is an essential ingredient of the offence of attempted murder to prove an intention to murder no lesser intent suffices".

Again, the same position was reinforced in the case of **Cheruiyot Vs Republic (1976- 1985) EA 47** where it was emphasized that;

"an essential ingredient of an attempt to commit an offence is a specific intention to commit that offence. If the charge is one of attempted murder, the principal ingredient and the essence of the crime is the deliberate intent to murder. It must be shown that the accused person had a positive intention to unlawfully cause death and that intention must be manifested by an overt act".

The prosecution therefore needed to prove that the appellant had a positive intention to unlawful cause the death of the complainant and the same was manifested through an overt act.

It is evident that the complainant and appellant had an altercation over the complainant's goats grazing on the appellant's farm.The appellant beat the complainant's child (S).

In return, the complainant followed the appellant to her home.Though the complainant testified that she found the appellant sharpening a panga, there was no evidence that appellant intended to kill the

complainant at that stage. If the complainant had not followed the appellant to her home, could the appellant have inflicted the injuries on the complainant?.

The appellant alleged that the complainant attempted to assault her child and also cut appellant with a panga.DW3 told the court that he saw a fight between the appellant and the complainant. After re-evaluating the evidence on record, I find that if the complainant's goats had not strayed into the appellant's farm and if she had not followed the appellant to her home, then there would have been no confrontation.The appellant therefore did not have unlawful intent to cause the death of the complainant.The appellant therefore ought not to have been charged with the offence of attempted murder.The prosecution herein failed to prove the essential element of ***mens-rea*** or intention to kill.

I find that prosecution did not prove its case beyond a reasonable doubt on the first count of attempted murder. Though there is evidence that the appellant cut the complainant and endangered her

life, there is no evidence that she intended to kill her.

Having carefully reconsidered and re-evaluated the evidence on record, I find that the appellant was wrongly convicted for an offence of attempted murder and I proceed to quash the said conviction.

However, as I had stated earlier, there is no doubt that the complainant herein was grievously injured.There is no doubt that she was grievously injured by the appellant herein.The appellant did confirm she cut the complainant.However, she testified that she did so in self defence.The appellant in her appeal argued that the learned trial magistrate erred in law in failing to consider her defence of self defence.

In his findings; the trial magistrate stated as follows:-

"The accused in her defence told the court that she had grabbed a panga from the complainant and cut her as she tried to defend herself. The court does not believe this because if the accused aim was merely to defend herself, she would not have cut the complainant viciously as she did. One cut to immobilize the complainant would have sufficed".

The learned trial magistrate therefore considered the appellant's defence of self defence but dismissed it due to the nature of injuries occasioned to the complainant.

Did the appellant herein act in self Defence?.

I will rely on the case of **Ibrahim Kinyua Kingau Vs Republic (2010) eKLR where J.Ouko** quoted the case of **Palmer Vs Regina (1971) ALL ER 1077** and held that:-

"Where the evidence is sufficient to raise the issue of self defence , that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self- defence".

I have considered the injuries occasioned to the complainant.She has been rendered disabled for life since her left wrist joint was amputated.The attack on her was so vicious that one would really wonder whether that was done by way of self defence.I am therefore persuaded by the evidence that the appellant did not act in self defence.

The appellant herein caused grevious harm to the complainant.The appellant was acquitted of the offence of causing grevious harm.I have found that there was no sufficient evidence to prove that the appellant attempted to murder the complainant herein.However, there is sufficient evidence to prove that the appellant caused grevious harm to the complainant.She was however acquitted of that charge. ***Under Section 354 of the Criminal Procedure Code***, this court has the power to alter that order of the subordinate court.

Section 354 (3) (a) (11) of the Criminal Procedure Code provides as follows.

"In an appeal from a conviction, the court may alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence".

In this case, I find that there are sufficient reasons for me to alter the findings of the lower court.I consequently, quash the appellant's conviction on the first count of attempted murder and convict her on the second count of causing grevious harm contrary to ***Section 234 of the Penal Code.***

The appellant on ground 4 of her appeal had argued that the sentence was arbitrary harsh and wasactuated by grief, emotion and sympathy for the complainant.***Section 234 of the Penal Code*** provides that:-

"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life".

The appellant herein was sentence to serve **10 years imprisonment** on 4/8/2009. In sentencing the appellant, the learned trial magistrate considered the injuries occasioned to the complainant.

Though the maximum sentence is life imprisonment, the appellant was sentenced to serve **10 years imprisonment.** ***Section 354 (3) (b) of the Criminal Procedure Code*** provides that:-

" In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence".

The above discretion must be exercised judiciously as was held in the case of ***Macharia Vs Republic (2003)KLR 115,*** that:-

" The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence.....The court will also not ordinarily interfere with the discretion exercised by a trial judge unless as was held in James Vs Republic (1950) EA 147. It is evident that the Judge has acted upon some wrong principles or overlooked some material facts".

The other criteria is that the sentence is manifestly excessive in view of the circumstances of the case as was held in the case of **Republic Vs Shershewky C. CC 28 TLR 364.**

I have considered that in this case, the appellant was treated as a first offender.In mitigation, she sought for leniency because she was a first offender.She was however not remorseful.I have considered the gravity of the injuries occasioned to the complainant.Her left arm was totally disabled having lost her left palm and right thumb.Taking into account the totality of the circumstances, I find that the sentence

by the trial court was lawful and it was neither harsh nor excessive.The maximum sentence is life imprisonment.I find no reason to interfere with it.

The appeal partially succeeds on the findings but is dismissed on sentence.

L .N .GACHERU

NVI.

Dated, Signed and delivered at **MACHAKOS** this 18th day of February 2014

B. T. JADEN

NVI.