REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 69 OF 2012

(From the original conviction and sentence in criminal case no. 380of of 2010 the Principal Magistrate's Court at Kilifi before Hon. R K. Ondieki – SRM)

KASHAHA DAVID CHARO…..….....…..……APPELLANT

VERSUS

REPUBLIC.....….....….....…RESPONDENT

JUDGMENT

1. The Appellant herein was tried and convicted before the Lower Court for the offence of Attempted Murder contrary to Section 220(a) of the Penal Code. The particulars of the charge stated that on 31st March, 2010 jointly with two others he attempted to cause the death of Erick Mwahunga Kalama by causing grievous harm to him. The offence was committed at Kauma, Kilifi District.

2. The Appellant was sentenced to serve 10 years imprisonment. He now appeals to this court against conviction and sentence, citing 5 grounds as follows;

   "1. THAT the learned trial magistrate erred in law and fact by believing the prosecution evidence without proper seeing that the same was insufficient to warrant just conviction.

   2. That the learned trial magistrate failed in the rule of law by putting more weight on PW's evidence without seeing that PW1 did not identify his assailants

   3. That the learned Hon. Trial magistrate failed in the rule of law by convicting me without seeing that the prosecution case was governed by mass contradiction contrary to section 163(1) (c) of the Evidence Act.

   4. That the learned Hon. Trial Magistrate erred in law and facts by basing my conviction and sentence without seeing that there was breach of Article 50(2) of the Constitution.

   5. That the learned Hon. Trial magistrate erred in law by dismissing my defence which was reasonable enough to cast out doubts upon the prosecution."

3. He filed written submissions dwelling primarily on the paucity of the evidence adduced by the prosecution at the trial. In addition he raised a legal challenge to the effect that the second learned magistrate who took over the case upon the transfer of the initial trial magistrate, did not comply with the mandatory provisions of Section 200 (3) of the Criminal Procedure Code.

4. The State through Mr. Nyongesa opposed the appeal. Although in my considered view this appeal turns on the question of compliance by the trial court with Section 200(3) of the Criminal Procedure Code, I find it necessary to restate the evidence adduced at the trial.

5. The prosecution case was as follows. The complainant, Erick Mwahunga Kalama was a mason and resident of Kauma. He was a close relative of the 1st and 3rd accused who were charged in the Lower Court with the Appellant (2nd Accused at the trial). They had differences emanating from a land dispute or allegations of witchcraft, fairly common in this area, made against the complainant. The Appellant was a friend of the complainant.

6. On 31st March 2010, the complainant was roofing a *makuti* house when the Appellant approached him saying that a certain "Asian" needed to recruit a driver for his car. He offered to assist the complainant acquire another driving licence as his previous one was burnt in a recent fire at his home. The complainant abandoned his day's work upon hearing of this offer. It was 2.00pm. He was led by the Appellant to a waiting vehicle, a few metres from his home. In the vehicle were several men.

7. The complainant got inside the vehicle but the Appellant who shooed him in did not. That is the last thing complainant observed as no sooner did he get into the vehicle than he was apparently attacked. His body was spotted on the next day at 8.00am dumped in a culvert under a bridge several kilometres from Kilifi town. He was unconscious and had severe head injuries. He remained in that state for two weeks. His wife who had been frantically searching for him found him at Kilifi District Hospital. Several persons including the Appellant were arrested in connection with the assault.

8. In his unsworn defence statement the Appellant stated that on 31st March 2010 he was escorted to the chief's office by an elder. He remained there for a while. He was accused of attempting to kill the complainant. When he went to inquire at the local police station he was placed in custody and later arraigned in court over the present charges.

9. The record of the trial shows that the trial commenced before J. M. Gandani, PM who heard two witnesses, namely, the complainant (PW1) and his wife Sofia Eric (PW2). The remaining six witness were heard before R. K. Ondieki, SRM, although PW1 was also recalled at some point.

10. The Appellant's complaint that the latter trial magistrate failed to comply with Section 200(3) of the Criminal Procedure Code is justified. Section 200(3) is couched in mandatory terms states:

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

11. The record shows that the succeeding trial magistrate failed to comply with this requirement. This is an irregularity that is fatal to the prosecution case (See **Mudoola v R [1996] KLR 616 and Ndegwa v R [1985] KLR 534** The irregularity rendered the trial a mistrial under Section 200(4). The conviction therefore cannot stand and must be quashed.

12. The next issue to be considered is whether to order a retrial as urged by the State, citing the nature of the evidence at the trial and the case of **Frankline Kabugu & 2 Others v R (2005) eKLR**. The Court of Appeal stated in **Sumar v R (1964) EA** that the question of retrial depends on the particular facts and circumstances of each case but in principle a retrial should only be ordered where:

a) the interest of justice require it, and;

b) the Appellant will not suffer prejudice

13. In **Mwangi v R (1983) KLR 520,** the court, following the dicta in **Braganza v R [1957] EA 152 CCA)** and stated at page 538 that:

"...a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."

14. Having reviewed the evidence tendered at the trial I am satisfied that it is likely to result in a conviction. Although the Appellant has served a portion of his sentence since 23rd March 2012 the charge against him is serious. The rule of law can only be vindicated by requiring that persons charged with serious offences and where potentially strong evidence exists account for their actions. Otherwise the rule of law will fall into disrepute, especially in a region such as Kilifi County where murder of suspected witches or to resolve land disputes is rampant.

15. In the circumstances I order that a retrial be conducted before a different competent court in the Chief Magistrate's Court in Malindi. For this purpose, the Appellant will be produced before the said court on 10th December, 2013.

Delivered and signed at Malindi this **4th** day of **December, 2013** in the presence of the appellant, Miss Mathangani for the State.

Court Clerk – John

C. W. Meoli

JUDGE