REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL 86 OF 2010

GEORGE OTIENO AKETCH …….....…….....……..APPELLANT

VERSUS

REPUBLIC …….....……...…….RESPONDENT

[Appeal from Original Conviction and Sentence from SRM's Court Bondo: E S OLWANDE SRM

in Criminal Case No.102 of 2009.]

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J U D G E M E N T

This is an appeal arising from the Judgment of SRM Bondo in Criminal Case No.102 of 2009 where the appellant **GEORGE OTIENO AKETCH** alongside one other person who was acquitted by the trial court were charged with the Offence of Attempted Murder contrary to Section 220)a) of the Penal Code. The particulars of the offence were that on the night of the 7th & 8th of January, 2009 at Ndori Market in Bondo District attempted unlawfully to cause the death of **JOSEPH AGUTU MUMBE** by throwing the said **JOSEPH AGUTU MUMBE** into a deep pit. The appellant and his colleague pleaded not guilty. After a full trial the appellant was found guilty and sentenced to Life Imprisonment. The appellant being dissatisfied with the judgment preferred this appeal on grounds that; he was convicted on the uncorroborated evidence of a single witness; the circumstance prevailing at the time of the commission of the offence was not condusive to positive identification; the ingredients of the offence were not proved, crucial witnesses were left out and the prosecution failed to prove the case against the appellant to the required standard.

During hearing of the appeal the appellant's counsel confined himself to two arguments; (i) that the ingredients of the offence were not proved (ii) and the circumstances prevailing were not favourable to positive identification.

On its part the prosecution objected to the appeal and supported the conviction. As to the sentence the prosecution urged that since the same was an attempted felony the imprisonment for life was unlawful and therefore the court ought to revisit the same.

I have a duty to revisit the record, examine and analyse the evidence in order to arrive at an independent opinion.

The prosecution's evidence is that the appellant with other accomplices attempted to kill the

complainant, that they removed him from his home, having tied him with nylon rope and dumped him in a deep pit where he sustained injuries and was left to die only to be discovered by his brother and other villagers searching for him after two days.

The complainant **PW1 JOSEPH AGUTU MUMBE** recalled that on the 7th of January, 2009 at around 9 p.m. he arrived home from work, found two strangers in his house who grabbed him, tied him up and led him out of his house claiming they were Police Officers. On the way they met the appellant and one other person a co-accused in the lower court they took him to where there was a pit, took away his money and pushed him down the pit where his brother and villagers rescued him after two days. He received injuries to the right rib and left arm.

PW2 ANNE AWINO OGUTU wife to PW1 and previously married to the appellant. Her testimony was that on the 7th of January, 2009 two strangers came to their home asked for PW1, they were about to tie her up accusing her of failing to disclose the where about PW1, when PW1 walked in and they instead tied him the said persons having posed as police officers. They accused PW1 of having stolen a DVD and CD player and they left with PW1. The witness then reported the incident to PW1's employer, the village elder and the chief of the area. She testified that the appellant was previously married to her but chased her away. 10 months later she got together with PW1. she had suspected the appellant as the one behind the husband's kidnap and told the chief.

PW3 JOHN HUMPHREY AYIERE – PW1's employer learnt of the complainant's ordeal from PW2. PW4 is **ALPHONCE OMOLLO AYOMA** the chief of Central Asembo Location where PW2 reported the incident. It was his evidence that PW2 gave the name of the appellant as the suspect herein which led him to arrest the appellant and hand him over to Bondo CID for investigations. Later on 9th January, 2009 he learnt that PW1 was found in a deep hole. PW1 was taken to his office and had injuries, he took him to Ndori Dispensary where PW1 was referred to Bondo District hospital.

PW5 P.C. DAVID PAYAN recalled that on 12th January, 2009 that a suspect was taken to the police station with the allegations of having kidnapped PW1. He re-arrested him and he was later picked by the CID.

PW6 P.C. SAMSON MAINA – investigated the matter. On 8th January 2009 the DCIO instructed him to re-arrest a suspect which he did. The next day the missing person was taken to the police station having been found in a pit tied up. He directed that he be taken to hospital. Later PW1 wrote a statement and later the appellant was also arrested as the 2nd suspect. He later charged the appellant and his co-accused.

PW7 DR. SHADRACK TANUI of Bondo District Hospital. He examined PW1 and filled a P3 form. PW1 had a slight swelling on the neck, pain on the neck and abdomen, a healed scar on the left hand and shoulders. He had a history of being thrown into a 25 feet deep pit. He described injury as harm

The accused persons were put on their defence they opted for sworn statements where the appellant on his part stated that on the 8th of January 2009 he returned home at around 3.30 p.m when he was arrested by the assistant chief who told him that he was a suspect since his estranged 2nd wife had been married to PW1, he was initially taken to Ndori Police Post afterwards to Bondo. He was on the 20th of January, 2009 arraigned in court and charged with an offence he knows nothing about. He also claimed that his Constitutional rights were violated as he was kept in custody in several days.

The issue for consideration is whether the ingredients of attempted murder were proved and if the circumstances prevailing would have allowed positive identification.

From the evidence on record from PW1, PW4, PW6 and PW7 there is no doubt that PW1 sustained injuries, PW1 gave an account of how his brother and other villagers removed him from a deep pit where he had been thrown by the assailants and where he stayed for two days. In his evidence PW1 stated that he recognized the appellant who stood 80 meters away and who later came nearer where his kidnappers

had placed him and at that point the appellant pointed to where he was to be pushed. It was his evidence also that although it was dark there was moonlight and he was able to recognize the appellant as they knew each other and had a grudge over PW2.

The trial court made a finding that this was a case of recognition that PW1 and the appellant were close enough when the offence was executed to allow positive identification although complainant stated that he did not identity the other persons. The evidence of PW1 was uncorroborated this per se does not stop the court from relying on such evidence as the court exercises caution.

In **RORIA** vrs **REPUBLIC (1967) E.A.** the court stated in part:

"That danger is, of course greater when the only

evidence against an accused person is identified

by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

In the above case, the case of **ABDALLA BIN WENDO & ANOTHER VRS REPUBLIC 20 E.A.C.A. at P. 168** was made reference to where the court stated:

"Subject to certain well known exceptions it is trite

law that a fact may be proved by the testimony of

a single witness but this rule does not lessen the need

for testing with the greatest care the evidence

of a single witness respecting identification especially

when it is known that the conditions favouring

a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

Being guided by the above cases I do concur with the finding of the lower court that the distance between PW1 and the appellant in the circumstances of the case was near enough to give a good vision, secondly I find the evidence of PW1 and PW2 credible. There is evidence of the grudge between PW1 and the appellant which points to the guilty of the appellant. In this regard I would therefore uphold the conviction.

However I do concur with the learned state counsel that the penalty ought to have been less indeed the law provides for seven years jail term and as such the sentence imposed was unlawful.

I will in this regard set aside the life imprisonment and substitute the same with 7 years to run from the 26th of May, 2010.

DATED AND DELIVERED THIS 29TH DAY OF JUNE 2012

ALI-ARONI

J U D G E

In the presence of:

…….State counsel

……Counsel for Appellant