



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**HC. CRIMINAL APPEAL NO.84 OF 2009**

**JACKSON MAINA WACHIRA .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal against both conviction and sentence of S. Okato the Learned Principal Magistrate of Kangundo in Cr. Case No.62 of 2008 dated 14<sup>th</sup> November, 2008)**

**JUDGMENT**

The Appellant, **Jackson Maina Wachira** was charged in count 1 with attempted murder contrary to section 220 (a) of the Penal Code particulars being that on the 15<sup>th</sup> day of February, 2008 at Tala Township in Kangundo District he attempted unlawfully to cause the death of **John Masyuko Matolo** by pressing the hydraulic switch of motor vehicle registration No. KAY 289F Isuzu lorry tipper, causing the said **John Masyuko Matolo** to fall off from the back of the said motor vehicle and sustained serious injuries.

In count II the appellant was charged with malicious damage to property contrary to section 339 (1) of the Penal Code particulars being that on the very day and place, he willfully and unlawfully damaged a commercial building (plot No.351) valued at KShs.30,000/- the property of **George Maundu Mutua**. All this was before the Principal Magistrate's Court at Kangundo. The appellant denied both charges and he was in the fullness of time tried.

PW.1, **John Masyuko Matolo**, the complainant in count I testified that on the 15<sup>th</sup> February, 2008 he was at Benda stage and boarded motor vehicle registration No. KAY 289F make Isuzu tipper, hereinafter "**the lorry**" after paying the turn boy KShs.20/- for the journey. While on board the driver, who is the appellant emerged from Benda club entered the vehicle and drove it away. In the process he engaged the hydraulic switch and the tipper got raised. He drove for 100 m and disengaged the hydraulic switch and stopped the vehicle abruptly. He again lifted the tipper and a wheel spanner pipe stabbed the complainant in the stomach causing his intestines to come out. The appellant then carried him into the driver's cabin and drove the lorry away for about 500m and then stopped. He ordered the complainant to either alight or be thrown out. Members of the public present, however prevailed upon him to take the complainant to hospital. The appellant reversed the vehicle and drove to Tala Police Post instead where he dumped the complainant. Luckily the complainant's employer contacted him, sent a taxi which took him to hospital at

Kangundo where he was given first aid and thereafter transferred to Machakos District hospital. He was admitted thereat for about one month. He was later issued with a P3 form which was filled by a Clinical officer, **Ludwig Muinde**. He classified the injuries sustained by the complainant as maim.

PW.2 **Bernard Kioko Mutuku** was among the passengers in the lorry. He too was injured on the chest and legs. Apparently, the lorry hit an electric post which in turn hit a shop causing extensive damage to it. PW.3 **Ezekiel Gitu Muiruri** the Land valuer was instructed by **George Maundu Mutua** the owner of the shop and complainant in count II to assess the damage caused to his building by the lorry, for purposes of count II and ascertained the damage to be to the tune of KShs.30,000/-. He prepared a report which he tendered in evidence.

PW.4 **George Maundu Mutua**, on 15<sup>th</sup> February, 2008 at about 8.30 p.m. received information that his commercial building at Tala market, had been damaged by a lorry. He reported the matter to the police and visited the scene. The damage was eventually assessed at KShs.30,000/- by PW.3. PW.6 Corporal **Shem Ondiek Mogaka** the Scene of Crime Officer visited the premises as well and also, and also Tala Police where the lorry was parked. He took photographs of the lorry and the damaged building. Those photographs were also tendered in evidence.

Finally, **P.C Jotham Muriithi** was a Police Officer then stationed at Tala Police Post. On 15<sup>th</sup> February, 2008 at about 8.00 p.m. the appellant drove the lorry into the post and reported that some passengers had fallen down from it near Brenda Bar. He claimed that he had engaged the hydraulic switch which caused the tipper to go up. As the appellant's statement was being recorded, the complainant in count I was carried into the post with a deep cut on the right abdomen which was bleeding. He had been among the passengers who had boarded the lorry. He referred the complainant to Kangundo District Hospital having issued him with a P3 and arrested the appellant.

Put on his defence, the appellant in a sworn statement stated that on 15<sup>th</sup> February, 2008, he drove the lorry to Tala Market and parked it near Caltex Petrol Station. He went shopping and when he returned he found some people having boarded the same but since he was not authorised to carry passengers he asked them to alight. They refused and picked a quarrel with him and indeed pushed him. When they refused to disembark he decided to drive lorry to Tala Police Post. He started the lorry and drove ahead so that he could reverse. As he was reversing he saw the complainant in count I on the ground injured. He helped him into the vehicle and drove him to Tala Police Post. He was told that the complainant was among the people who had boarded the lorry. Members of public followed him up to the post. He denied pressing the hydraulic switch adding that there were no metal bars on the carrier. He denied damaging anything.

The learned magistrate having carefully evaluated the evidence on record, reached the verdict that the appellant was guilty as charged. He convicted him on both counts and sentenced him to five (5) years imprisonment in respect of count I and a fine of KShs.5000/- in default, three (3) months imprisonment in respect of Count II. He ordered that the two sentences run concurrently.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal through **Messrs Wandungi and Company Advocates**. He faulted the learned Magistrate for convicting and sentencing him on the grounds that, the conviction was against the weight of evidence, his Constitutional rights to a fair trial were breached, the trial was nullity, there was no sufficient evidence to convict him on both counts and that during the trial, the court shifted the burden of proof to him thereby violating his fundamental rights to a fair trial and presumption of innocence.

When the appeal came up for plenary hearing before me on 17<sup>th</sup> November, 2011, the appellant elected to abandon the appeal on conviction but elected to prosecute the appeal on sentence instead. He had in the meantime dispensed with the services of his counsel. In support thereof, he submitted that the sentences imposed were manifestly harsh and excessive.

**Mr. Mwenda**, learned State counsel opposed the appeal. He submitted that the 1<sup>st</sup> count attracted a

maximum sentence of life imprisonment. A sentence of 5 years that was imposed was in the circumstances lenient. The complainant was seriously injured. Similarly a fine of KShs.5000/- on 2<sup>nd</sup> count cannot be said to have been excessive. He therefore prayed that the sentences imposed as aforesaid be maintained.

In the case of **Republic -Vs- Jagani & Another (2001) KLR 590**, the court held that an appellate court could only interfere with a sentence imposed by the trial court in the exercise of its discretion where such sentence is against legal principles or when relevant factors were not considered or irrelevant or extraneous matters considered or normally where the sentence is manifestly excessive in the circumstances of the case.

The offence of attempted murder attracts a maximum sentence of life imprisonment whereas malicious damage to property attracts a prison term of 5 years. In this case, the appellant was sentenced to 5 years imprisonment in respect of the 1<sup>st</sup> count and a fine of KShs.5,000/- in respect of the 2<sup>nd</sup> count. Both sentences were thus lawful. In imposing the sentence, the learned magistrate considered that the appellant was a first offender. That was a worthy consideration. He also considered generally mitigation tendered on behalf of the appellant. I do not discern any abuse of legal principles or discretion by the learned magistrate in imposing the sentence aforesaid. Neither was their consideration of irrelevant or extraneous matters.

Taking into account all the facts and the circumstances of the case, I am of the firm view that the sentences imposed by the trial court were neither harsh nor manifestly excessive. They were indeed well merited and appropriate. There are therefore no grounds for interfering with them. This appeal on sentence is ordered dismissed.

**Dated and delivered at Machakos, this 30<sup>th</sup> day of November, 2011.**

**ASIKE-MAKHANDIA**

**JUDGE**