SALIM JUMA MWATUNDO …..…….. APPELLANT

VERSUS

REPUBLIC ……...…….……. RESPONDENT

****

JUDGEMENT

The Appellant herein **SALIM JUMA MWATONDO**, has filed this appeal challenging his conviction and sentence by **HON. OGEMBO**, the learned Senior Resident Magistrate sitting at Kwale Law Courts. On 16th October 2007, the Appellant was arraigned before the subordinate court and was charged with **ATTEMPTED MURDER CONTRARY TO SECTION 220(a) of the PENAL CODE**. The particulars of the offence were as follows:-

> ***"On the 11th day of October 2006 at Ziwani village in Kwale District within Coast Province, attempted unlawfully to cause the death of JUMA ATHUMANI MWATENGA by lacing his food with a poisonous substance."***

At the hearing of the trial the prosecution called a total of four (4) witnesses in support of their case. The brief facts of the prosecution case were that on 11th October 2006 at 11.00 A.M. the complainant ***'Juma Athumani Mwatenga'*** returned home from prayers during the month of Ramadhan. He was woken up at 11.00 p.m. to eat the evening meal by his children. He found a dish of ugali and meat had been prepared for him. The complainant examined his dish and became suspicious as it contained a blackish substance in it. He called his wife and pointed it out to her. His wife prepared a fresh dish for him. After a while the dish which had earlier been prepared for the complainant began to emit a foul smell. The accused who was the complainant's son said he had seen a packet amongst the utensils which packet he had thrown out. He went out and collected the packet. The complainant took the packet and kept it. The next day he took the accused to the police station and reported the matter. The packet was taken to the Government Chemist for analysis. The report indicated that it contained rat poison. The accused was later arrested and charged.

At the close of the prosecution case the court ruled that the accused had a case to answer and he was placed on his defence. The accused gave an unsworn defence and denied the charge. On 9th October 2007, the learned trial magistrate delivered his judgement in which he convicted the accused of the offence of Attempted Murder. After listening to mitigation the trial court convicted the Appellant to serve seven (7) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who was unrepresented at the hearing of his appeal chose to rely entirely on his written submissions which had duly been filed in court. **MR. ONSERIO**, learned State Counsel appeared for the Respondent State and opposed the appeal. As a court of first appeal I am guided by the decision in the case of **OKENO –VS- REPUBLIC [1972] E.A.L.R.** where it was held

> ***"It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld."***

I have carefully perused the written submissions of the Appellant and I note that he raised four (4) main grounds of appeal –

(1) Defective charge sheet

(2) Violation of his rights as guaranteed by S. 72(3) of the Constitution of Kenya

(3) Contravention of S. 77 of the Evidence Act

(4) Insufficiency of evidence

On the first ground the Appellant alleges that the charge sheet was neither stamped nor signed rendering the same invalid. Whilst it is true that the copy of the charge sheet annexed to the typed record was not signed nor stamped, this is not true of the original charge sheet attached to the original handwritten record. The original charge sheet is both signed by the magistrate and bears a stamp from Kwale Police Station. This ground of the appeal is therefore misleading. It has no merit and is therefore dismissed.

The second ground relied upon by the Appellant is that his constitutional rights guaranteed by S. 72(3) Constitution of Kenya were violated rendering his whole trial a nullity. The Appellant states that having been arrested on 12th October 2006, he was not produced in court until 16th October 2006 i.e. after a period of four (4) days. S. 220 of the Criminal Procedure Code provides that Attempted Murder is a felony offence and a person once convicted is liable to imprisonment for life. This offence does not bear the death penalty. S. 72(3) of the Constitution of Kenya provides that a suspect arrested upon reasonable suspicion of his having committed a criminal offence

"shall be brought before a court as soon as is reasonably practicable"

Or within 24 hours if he is charged with a non-capital offence. The Appellant having been arrested on suspicion of his having committed a non-capital offence ought as per the requirements of S. 72(3) to have been arraigned in court within 24 hours of his arrest. Instead he was kept in police custody for four days. Does this delay in bringing the accused to court render his subsequent trial a nullity? The courts have on several occasions considered this very question. The provision in S. 72(3) is that the Appellant be brought to court ***"as soon as is reasonably practical"***. In this case the exhibit needed to be taken to a Government Chemist for analysis. Was it practicable to have him arraigned in court within 24 hours? Probably not, given that he was being held at Kwale Police Station and the services for analysis are only available in a major city like

Mombasa which was far off. On this issue I find myself in agreement with the ruling of my learned senior brother Hon. Justice J.B. Ojwang in the case of **MICHAEL KIMANI KANIARU –**VS- REPUBLIC **Criminal Appeal 461 of 2007**, where he held that notwithstanding a failure to arraign a suspect before court within 24 hours as stipulated in S. 72(3), there is no obligation upon the courts to acquit a suspect on this basis alone. An acquittal ought only be rendered where evidence has been tested and found wanting, not on a mere technical point. Furthermore these trial rights of the Appellant are subject to the mother of all fundamental rights of all other members of Society. S. 70 of the Constitution of Kenya provides

"Whereas every person in Kenya is entitled to the fundamental rights and freedoms of an individual … but subject to respect for the rights and freedoms of others and for public interest"

As such I am persuaded that the Appellant's individual trial-rights are subject to the rights of the larger public and the public interest in ensuring that reported offences are prosecuted to their logical conclusion is paramount. The upshot is that the Appellant is not entitled to an automatic acquittal on this basis alone. The Appellant is not left without remedy. He is fully entitled to pursue a claim for compensation in the civil courts. This ground of the appeal fails and is dismissed.

Thirdly the Appellant claims that S. 77 of the Evidence Act was not complied with. He alleges that failure to summon the Government Chemist to testify and produce his report violated S. 77 of the Evidence Act. I am not in agreement with these submissions for two reasons. Firstly S. 77(1) provides –

"(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner, or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."

This sub-section merely authorizes or permits the use of such expert reports as evidence in criminal proceedings. S. 77(3) goes on to state that –

> ***"(3) Where any report is so used the court <u>may</u> [my emphasis] , if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner or geologist, as the case may be and examine him as to the subject matter thereof"***

Thus there is no mandatory requirement that such an expert be summoned to testify in court, and failure by such an expert to testify does not contravene S. 77. The court is given a discretion as indicated by the use of the word ***'may'*** in deciding whether or not to summon such an expert.

Secondly and more importantly the record indicates at page 13 that the Appellant raised no objection to the production of the report of the Government Chemist by **<u>PW4</u> PC Bongo**, who was the investigating officer. He is therefore estopped from raising this now as a ground of appeal. Based on the above I find no merit in this ground and the same is hereby dismissed.

Lastly the Appellant challenges his conviction on the basis that the evidence adduced against him was not sufficient. The standard of proof required in all criminal cases is proof beyond all reasonable doubt. This would be the standard required to have been met by the prosecution in the lower court.

<u>PW1</u> told the court that when his meal was served to him he noticed that it was blackish in colour. Later a packet containing a powder allegedly poured into that food was tested and found to contain rat poison. The report of the Government Chemist indicates that both the food tested and the satchet contained poison. It is therefore clear that poison was placed in the food of the complainant. The key question is whether it was the Appellant who put this poison in the food of **<u>PW1</u>**. There is no eye witness who saw the Appellant pour anything at all into this food. The evidence is that on that day the Appellant and his sister prepared the meal together. **<u>PW3</u> MWANAHARUSI JUMA MWATENGA,** is the Appellant's sister. She admits that they did prepare the meal together but at no time did she witness the Appellant pour any item into the food of **<u>PW1.</u>** The reason why suspicion fell on the Appellant is because it was he who retrieved the satchet of rat poison from where he had thrown it. **<u>PW1</u>** at page 10 line 23 states –

> ***"Then accused said he had seen a packet in the cupboard of utensils and he did not know it. He told me he had thrown it out ….. Accused agreed that he had thrown the packet outside"***

On her part **<u>PW3</u>** at page 12 line 21 states –

> ***"Then accused said he had seen a packet like Roiko in the cupboard which he threw out. He was told to look for it. He brought it and I saw it."***

The evidence is merely that the Appellant saw the satchet of rat poison and threw it away. There is no direct evidence to prove that the Appellant at any time poured the contents of this satchet into his father's food. The evidence against the Appellant is purely circumstantial. Circumstantial evidence is that which taking into account all other relevant factors points clearly at the guilt of the accused and is inconsistent with any other hypothesis. In the case of **JAMES MWANGI –VS- REPUBLIC [1983] KLR 331**, the Court of Appeal held that –

> ***"In a case depended on circumstantial evidence in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis is that of his guilt ….. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference"***

Have these standards or pre-requisites been met in this case? I think not. Both **PW1** and **PW3** tell the court that the Appellant said he found the packet and not knowing what it contained, he threw it out. The mere fact that the Appellant admitted to having handled the satchet of rat poison does not make him guilty. In her evidence **PW3** stated at page 12 line 24

> ***"It is me who cooked the meat as accused cooked the ugali"***

The poison was found in the meat stew which **PW3** had prepared. It is not clear why the prosecution excluded her as a suspect. **PW4** the investigating officer in his evidence attempts to suggest that the Appellant may have had a motive to be bitter with his father. At page 13 line 9

> ***"I interrogated accused. He said satan had misled him into trying to kill his father. He asked for forgiveness. I found that he was frustrated academically"***

Firstly this so called confession was not taken in conformity with S. 25A of the Evidence Act which provides that for a confession to be admissible as against an accused person, such confession must be made in court before a judge, a magistrate or a Chief Inspector of police. **PW4** is a Police Constable. He is not a Chief Inspector. Further, this ***'confession'*** was not made in court. As such it is inadmissible and cannot be deemed proof of the Appellant's guilt. Secondly the statement by **PW4** that the Appellant was ***"frustrated academically"*** has absolutely no basis. How did **PW4** reach this far-fetched conclusion? Did he interview the Appellant's teachers on this? No he did not. **PW1** the Appellant's father and **PW3** his sister made no mention of this at all. This was a home in which a family lived together. **PW1** told the court that he sat down to eat with his wife and children. Any one of the occupants of that house had equal access to the food of **PW1** and any one of them could have laced it with the poison. There is no evidence that the Appellant alone had exclusive access to this plate of stew. As stated earlier it was **PW3** who by her own admission prepared the stew and must obviously have had access to it. No evidence has been adduced to exclude the complainant's wife and other children as suspects yet they had equal access to his food. I am not satisfied that the circumstantial evidence points exclusively to the Appellant as the perpetrator of this crime.

In his judgement at page 18 line 17 the learned trial magistrate states as follows:-

> ***"I have otherwise considered the defence raised by the accused. With respect I do not believe the same. First, same was not made on oath and so was not subjected to any cross-examination. Secondly, accused did not call any witness and so his evidence did not have any form of corroboration."***

By making these observations the learned trial magistrate was effectively shifting the burden of proof to the Appellant. Firstly just like the

fact that a suspect elects to keep silent in his defence cannot be held against him as proof of guilt, the fact that the Appellant chose [as indeed he was entitled to by virtue of S. 211 Criminal Procedure Code] to give an unsworn defence ought not to have been held against him. Secondly, the fact that the Appellant failed to call witnesses in defence implies that he was expected to prove his innocence. This is contrary to the principles of criminal law. The onus **at all times** lies on the prosecution to prove its case beyond a reasonable doubt. At no time does the onus ever shift to require the accused to prove his innocence. I find that the learned trial magistrate erred in making such findings.

The upshot is that having re-evaluated the evidence on record, I am not satisfied that the prosecution in the lower court sufficiently discharged their burden of proof. The charge was not in my view conclusively proved against the Appellant. As such I do hereby allow this appeal and quash the Appellant's conviction for Attempted Murder. The attendant seven (7) year sentence obviously has no basis in light of the quashing of the conviction. The said sentence is hereby set aside. This present appeal succeeds. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 26th day of May 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Onserio for State

Appellant in person

M. ODERO

JUDGE

26/05/2010