REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

CRIMINAL APPEAL NO. 356 OF 2001

BETWEEN

JAMES KABERIA M'ITOBU ……. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(From original conviction and sentence in criminal case No. 690 of 2000 before the Senior Resident Magistrate at Maua (M.N. Gicheru) dated 31.7.2000)

JUDGMENT OF THE COURT

The appellant herein James Kaberia M'Itobu was charged with one count of attempted murder contrary to section 220 (a) of the Penal Code. The particulars of the offence are that on the 2nd day of April 2000 at about 5.00pm at Gitura Village in Meru North District within Eastern Province attempted unlawfully to cause the death of John Murungi Mugwika by chopping off his left hand palm and by inflicting panga cuts on the head.

In the alternative, the appellant was charged with causing grievous harm contrary to section 234 of the Penal Code. He is alleged to have unlawfully done grievous harm to John Murungi Mugwika on the 2nd day of April 2000 at Gitura Village in Meru North District. The appellant denied the charges.

Briefly, the facts of the case are that **on 2.4.2000, the complainant, one John Murungi Mugwika (PW2), the assistant chief of Gitura sub-location went to the home of the appellant at about 5.00pm. PW2 was accompanied by other people, among them Moses Mungathia (PW3) and David Kauwi Mwithimbu (PW4) among others. PW2 was going to execute a warrant for the arrest of the appellant. On seeing PW2, the appellant came out of his house armed with a panga and arrows and without saying anything, appellant cut off PW2's left hand palm and the fingers on the right hand. The appellant also cut PW2 on the head. The warrant for the arrest of the appellant was in connection with an allegation that the appellant had threatened to kill his own father.**

After PW2 was thus cut by the appellant, he fell down unconscious and only regained consciousness three weeks thereafter while at Maua Methodist Hospital. The appellant also chased those who had accompanied the complainant. A report was made to Maua Police Station, leading to the arrest of the appellant and his subsequent arraignment in court with the present offences.

According to the evidence of PWI, Dr Benjamin Kanake of Maua Methodist Hospital who examined PWI on 6.4.2000, PWI suffered a deep cut on his left parietal region and other lacerations. PW2 also had a

complete amputation of the left hand at the wrist joint and severe injury on the ring and small finger. The injury on the head was a compound fracture measuring approximately 20cm long, 3cm deep and 2cm wide and a laceration on the forehead measuring 3x3x1cm. The P3 form produced by Dr. Kanake showed PWI suffered grievous harm.

After committing the offence, the appellant disappeared for about one week but was later arrested by Corporal Stephen Meme (PW6). The appellant denied the allegations against him and gave an unsworn statement and called one witness, his mother Tabitha Kabaka. He stated that he did not cut the complainant. That the complainant together with twenty five others broke into his (appellant's) house and he only learnt later that the complainant had been assaulted. DW2, Tabitha Kabaka said that on 2.4.2000 police officers went to the appellant's home at about 9.00am asking for him but the appellant was not at home. Then the complainant went to the appellant's home at about 5.00pm, accompanied by some 25 people. The complainant and others entered the appellant's place and she asked complainant why they had come. She then heard screams and she too ran to the canteen screaming. That the people broke into the appellant's house and that they were all armed. After she came back from the canteen, she found the complainant lying down with blood on the head. She then went away.

In cross-examination, DW2 denied any knowledge of a dispute between the appellant and his father. She also denied the part of her statement recorded on 4.4.2000 in which she had stated that she saw the appellant armed with a panga, but that as soon as the complainant got to the appellant's home she saw people scattering in all directions though she could not say why. The appellant was tried by the Senior Resident Magistrate (M.N. Gicheru) and found guilty of attempted murder as charged and sentenced to life imprisonment. The appellant has appealed against both the conviction and sentence. In his home-made petition of appeal, the appellant has listed four main grounds of appeal:

1. That the learned trial magistrate erred in law by failing to find that the prosecution had not proved their case beyond all reasonable doubt thus:-

(i) The four witnesses had contradicted themselves on vital issues pertaining to the commission of the offence.

(ii) There wasn't any independent corroboration implicating the appellant with the offence.

2. that the trial court erred in law by failing to find that the appellant had denied in defence that he did not assault/cause injuries to the sub-chief.

3. That the trial court erred in law by failing to consider the appellant's mitigation.

4. That the trial court's imprisonment sentence is quite excessive without any due consideration.

The appellant put in his written submissions and relied on the four grounds of appeal. The appellant's written submissions amounted to evidence which he would have given in the trial court, so I will only deal with the four grounds of appeal as reproduced elsewhere in this judgment. The appellant however submitted in reply to the submissions on behalf of the respondent which I shall deal with shortly. He submitted that he had to cut the complainant because the complainant was charging at him and because the complainant and others had destroyed his (appellant's) house. Mr. Olouch for the respondent submitted that the case against the appellant was established beyond any reasonable doubt and that the learned trial magistrate was justified in convicting the appellant of the offence of attempted murder as charged. On sentence, Mr. Oluoch submitted that the appellant deserved the life imprisonment term imposed upon him especially in view of the fact that prior to committing the offence for which he was sentenced, the appellant had attempted to kill his own father. As the first appellate court my duty is to evaluate and reconsider the evidence before me and to be able to make my own independent finding as to whether the conclusions released by the learned trial magistrate were based on sound legal principles see **OKENO V REPUBLIC (1972) EA 32.**

I have myself evaluated afresh the evidence that was adduced by the prosecution before the trial court. I have also carefully considered the defence case both from the appellant's own unsworn statement and the evidence given by the appellant's mother, one Tabitha Kabaka. After carefully considering all that evidence and the case in its entirety, I am satisfied that the learned trial magistrate's conclusions as to the guilt of the appellant were soundly made.

The first ground of appeal was that the prosecution witnesses contradicted each other and that the learned trial magistrate should therefore have found that as a fact and proceeded to acquit the appellant. I have considered the evidence of PW2, PW3, PW4 and PW5 and the only apparent discrepancy that I seem to see regards the time when the witnesses arrived at the appellant's home. I have considered this apparent inconsistency, but in my view the same does not go to the root of the prosecution's case against the appellant and was therefore not caused any prejudice to the appellant. The rest of the evidence against the appellant is consistent, namely that the appellant savagely attacked the complainant with a panga and chased away the other witnesses by shooting arrows at them. In particular PW3 said in part of his evidence:-

> **"The complainant's hand fell off at the scene. The accused person chased us with a bow and arrows. We left the assistant chief lying on the ground……."**

All the witnesses testified that the appellant cut the complainant four times once on the left hand severing off the hand from the wrist, twice on the head and once on the right hand. According to the evidence of PW4, David Kauwi Mwithimbu, there was real threat to the life of the complainant when the appellant cut the appellant those four times and that is when PW4 hit the appellant with a stone on the rib to scare him away so he could not kill the complainant. It was only after this intervention by PW4 that the appellant stopped cutting the complainant as he now charged at PW4 and the other witnesses. For these reasons, ground 1 of the appeal must fail.

The second ground of the appeal is that the learned trial magistrate failed to find that the appellant did not inflict the alleged injuries on the complainant. In his judgment, the learned trial magistrate addressed himself to the law and found that a person is deemed to intend the natural and probable consequences of his conduct, and that by cutting the complainant on the head and chopping off his hand with the ferocity that he did, the appellant intended to kill the complainant. The evidence on record goes beyond doubt in proving that it is the appellant who inflicted the injuries on the complainant. During the hearing of the appeal, the appellant stated that he had to cut the complainant in self defence. Such a defence was not raised when the appellant gave his unsworn evidence, nor did he put any questions to the complainant to suggest that the complainant charged at him and therefore he had to retaliate. The evidence against the appellant was overwhelming and the only logical conclusion that the learned trial magistrate could have reached was to convict the appellant which he rightly did. The second ground of the appeal therefore fails.

The third ground of appeal is that the learned trial magistrate erred in law in failing to consider the appellant's mitigation. Ground four also deals with sentence, which the appellant submitted was excessive.

It was the evidence of both the prosecution and the defence (DW2) that after the commission of the offence, the appellant disappeared and was only arrested on 9.4.2000, a week after the commission of the offence. The appellant stated the following in mitigation:-

> **"The complainant is my brother. I wish to settle the matter with him. My children have suffered. My children are in problems. I have suffered in custody."**

While sentencing the appellant the learned trial magistrate expressed himself thus:-

> **"I have considered that the accused is a first offender. I have also considered what he has said is mitigation. However, I find that the offence is very serious indeed. The complainant is disabled for life without one hand. The doctor said that his brain was cut into and he has developed some form of epilepsy. When the accused committed the offence he should have**

thought of his family. He should have thought of his responsibility towards them before cutting off the complainant's hand and also cutting off his fingers and again cutting him on the head. The complainant who was acting in execution of his duties has been disabled by the needless act of the accused……."

It was the view of the learned trial magistrate that the appellant deserved a severe sentence. I have myself considered the appellant's mitigation and find that the same is without merit. I have also found that the learned trial magistrate considered the said mitigation in detail. The same was coming too late. In any event, what settlement could there be between the appellant and the complainant who had lost part of a hand, fingers of another hand and severe disfigurement of the head and developed epileptic feats as a result of the needless acts of the appellant? The appellant's complaint that the learned trial magistrate did not consider the appellant's mitigation is without any basis whatsoever.

I have also considered the other circumstances surrounding the commission of the offence by the appellant. The complainant had gone to the appellant's home in execution of a warrant for the arrest of the appellant who had threatened to kill his own father. Although the appellant's father was not called as a witness, that fact was not denied by the appellant. In my own view, the appellant is a dangerous person who should be kept away from law abiding citizens for as long as possible. The appellant has threatened to kill his own father, and he nearly killed the complainant. The sentence of life imprisonment was therefore, in my view, merited. Grounds three and four of the appeal must therefore also fail.

In the result, this whole appeal fails and is dismissed in its entirety. I find no justification to interfere with the conviction and sentence of the learned trial magistrate.

Orders accordingly.

Dated and delivered at Meru this 21st day of April 2005.

RUTH N. SITATI

Ag JUDGE
21.4.2005