

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL 196 OF 2003
(From original conviction and sentence of the Senior Resident
Magistrate's Court at Molo in Criminal Case No. 1073 of 2002
– P.C. BIWOTT)

JAMES NTACHIO ABUYAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, James Nyachio Abuya, was 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 29th of April 2002 at Central Farm Kuresoi, Nakuru District, the appellant attempted to unlawfully cause the death of Gerald Kimemia Chege by cutting him with a panga on the head, neck, right elbow and the palm of the hand. The appellant pleaded not guilty to the charge. After a full trial, the appellant was found guilty as charged. He was sentenced to serve ten years imprisonment. The appellant was aggrieved by this conviction and sentence and duly appealed to this court

In his petition of appeal, the appellant raised six grounds of appeal. He faulted the trial magistrate for convicting him on the offence charged yet no exhibit had been produced to connect him with the assault on the complainant. He was aggrieved that the trial magistrate had considered the evidence of the prosecutions witnesses who had not seen the assault and therefore could not safely connect him with the assault of the appellant. He faulted the trial magistrate for convicting him based on contradictory evidence of the prosecution witnesses. He was aggrieved that his defence had not been considered by the trial magistrate before reaching the said decision convicting him. Finally, the appellant was aggrieved that he had been sentenced to serve a harsh custodial sentence. At the hearing of the appeal, I heard the submissions made by Mr Cheche, Learned Counsel for the appellant and Mr Koech on behalf of the State. Whereas Mr Cheche urged this court to allow the appeal and quash the conviction of the appellant, Mr Koech submitted that the conviction and the sentence imposed on the appellant ought to be upheld. I shall consider the arguments made on this appeal after briefly setting out the facts of this case.

PW1, Leonard Kimemia Chege (*the complainant*) was at his house on the 29th of April 2002 at about 6.00 a.m. He was woken up by the appellants co-accused in the lower court (*who was acquitted of the charge*). He opened the door of the house. He testified that the appellant entered the house and started cutting him with a panga. The appellant was cut on the head and right arm. The three fingers of his right arm were severed. After the appellant had cut the complainant, he ran out of the house. The complainant fell to the floor of his house while screaming. The complainant testified that he did not have any grudge against the appellant although he recalled that the cattle of the appellant had entered his farm and grazed on his crops. PW2 Jane Moraa Onchuka was walking nearby when she heard the complainant scream. She went to investigate. She saw the complainant bleeding profusely from the injuries that he had sustained on his head and hands. The complainant told PW2 that he had been cut with a panga by the appellant.

PW3 Abraham Nganga Mwangi had been sent on an errand by his mother on the material day. As he was walking past the house of the complainant he heard screams emanating therefrom. He then saw the appellant emerge from the house of the complainant. The appellant had a club and a stick. PW3 then saw the complainant. The complainant told PW3 that he had been cut on his head and hands. PW4 Jairus Nyakaka likewise heard the complainant screaming. The complainant was running away from his house. He was bleeding from a cut which he had sustained on his right arm. The complainant told PW4 that he had been cut by the appellant. PW4 assisted the complainant to secure a motor vehicle to take him to

hospital. PW4 made a report to the police.

PW5 Joseph Makori, the chief of the area upon receiving the information that the complainant had been assaulted by the appellant assisted the police in arresting the appellant. He testified that a blood stained panga was recovered from the house of the complainant. He also saw a lot of blood in the house of the complainant. PW6 Corporal Stanley Punko investigated the matter and established that it was the appellant who had committed the offence and consequently charged him. PW8 Inspector Samuel Nduna Ndung'u recorded the charge and cautionary statement from the appellants coaccused. The said appellant's co-accused implicated the appellant for committing the offence. The charge and cautionary statement was admitted in evidence.

PW9 Yego Kirwa, a clinical officer attached to Kericho District Hospital, testified that he examined the complainant and saw that he had sustained injuries which resulted in permanent scars on the complainant's head and right ear. The complainant had also lost his right third, fourth and 5th fingers. The complainant also had a scar on his right elbow joint. He testified that the complainant had been admitted at Kericho District Hospital after the assault where he was treated and was later discharged. He assessed the degree of injuries sustained by the complainant to be grievous harm. The duly filled P3 form was produced is evidence as an exhibit.

When the appellant was put on his defence he denied that he had assaulted the complainant. He however admitted that he was in the general area where the complainant was assaulted. He denied having met his co-accused in the lower court who implicated him in the offence on the material day. He stated that he had no reason whatsoever to assault the complainant.

This is a first appeal. As the first appellate court in criminal cases, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrates court and reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court has to put in mind that it neither saw nor heard the witnesses as they testified. (see **Okeno –versus Republic [1972] E.A 32**). In the instant appeal, the issue for determination by this court is whether the prosecution did establish its case against the appellant for the offence charged to the required standard of beyond reasonable doubt.

The evidence that was adduced by the prosecution is both direct and circumstantial evidence. PW1, the complainant testified that he was assaulted with a panga by the appellant at about 6.00 p.m in the morning. He testified that the appellant cut him on the head and right hand for no apparent reason. It was his testimony that he did not have any doubt as to the identity of his assailant. The assault occurred at the time when there was sufficient light to enable the complainant positively identify the appellant. The complainant knew the appellant prior to the assault. The appellant was his neighbour. The complainant's evidence was corroborated by the evidence of PW3 who saw the appellant emerge from the house of the complainant. At that time, the complainant was screaming. When PW2, PW3 and PW4 went to the scene after they had responded to the cry for help by the complainant, the complainant told them that he had been assaulted by the appellant. The complainant identified the appellant by name. When the police arrested the complainant with his co-accused in the lower court, Fredrick O. Morema, a charge and charge and cautionary statement was recorded by PW 8. In the said statement the said Fredrick Morema testified that he saw the appellant cut the complainant with a panga. The charge and cautionary statement was admitted in evidence by the trial Magistrate. PW9, a clinical officer produced the P3 which showed that the complainant had sustained permanent injuries on his head and right hand. The complainant lost three fingers in the said attack.

Having re-evaluated and reconsidered the evidence adduced by the prosecution and also having considered the submissions made by the Learned Counsel for the appellant and Mr Koech on behalf of the State, I do find that the prosecution established its case against the appellant to the required standard of beyond reasonable doubt. The appellant assaulted the complainant on the head and on his right hand. I suppose the panga blow that was directed at the head of the complainant could have been fatal had the complainant not used his right hand to cushion the blow. The appellant still achieved his aim by cutting the complainant on the head. The blow was so strong that it severed three fingers of the right hand of the

complainant. There was sufficient light which enabled the complainant to identify the appellant. The complainant knew the appellant prior to the assault. The complainant and the appellant were neighbours. A case of mistaken identity could not therefore arise. The complainant's evidence was corroborated by the evidence of the appellant's co-accused in the lower court, who saw the appellant assault the complainant. The three witnesses who responded to the screams of distress by the complainant (i.e PW2, PW3 and PW4) all testified that they heard the complainant say that he had been assaulted by the appellant.

PW3 saw the appellant emerge from the complainant's house at the same time that the complainant was screaming in distress. The appellant was armed with a club and a stick. The panga that was used in the assault was later recovered from the house of the complainant. It had blood stains but had been washed. All the evidence adduced by the prosecution clearly show that it is the appellant who assaulted the complainant with a panga. The motive of the assault was provided by the appellants co-accused who stated that the appellant was peeved that a report had been made to the complainant that the appellant's cattle had grazed on the complainant's crops.

There was no contradiction in the evidence adduced by the prosecution. The minor contradictions can be explained by the fact that the said prosecution witnesses were testifying from their own point of view, which from the evidence on record clearly corroborate each other as each of the critical witnesses (i.e PW2, PW3, and PW4) responded at different times to the screams for help by the complainant. I find no merit whatsoever in the appellant's contention that the prosecution's evidence was contradictory. The defence put forward by the appellant is a sham. It was rightly rejected by the trial magistrate. It was evasive and is ultimately a futile attempt by the appellant to exonerate himself from the offence which he clearly committed. It consists of mere denials. I similarly reject it. For the reasons stated, the appeal against conviction is hereby dismissed.

On sentence, the maximum sentence provided under Section 220 of the Penal Code is life imprisonment. The appellant was sentenced to serve ten (10) years imprisonment. In my considered view, the said sentence was appropriate in the circumstances of this case. The appellants attack on the complainant was premeditated. It was vicious. It was meant to cause a loss of life. If the complainant had not obtained medical attention in time, he could have died from his injuries. I therefore find no merit in the ground of appeal put forward by the appellant that his sentence be reviewed. The custodial sentence imposed is neither harsh nor excessive. The appeal on sentence is therefore dismissed.

The appeal against conviction and sentence having been dismissed, this court confirms the conviction and the sentence of the trial magistrate. The appellant shall serve the sentence as ordered by the trial magistrate.

DATED at NAKURU this 26th day of October 2005.

L. KIMARU

JUDGE