



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO.40 OF 2017**

*(Consolidated with Criminal Appeal No. 41 of 2017)*

*(BEING AN APPEAL FROM THE JUDGEMENT OF M. I. G. MORANGA (PM) IN CRIMINAL CASE NO.1927 OF 2015)*

MARTIN GABRIEL KIZITO.....1<sup>ST</sup> APPELLANT

JAMAL SAMAL BOMA.....2<sup>ND</sup> APPELLANT

VERSES

STATE.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

MARTIN GABRIEL KIZITO.....3<sup>RD</sup> ACCUSED

JAMAL SAMAL BOMA.....4<sup>TH</sup> ACCUSED

**JUDGEMENT**

1. The Appellants and 2 others had been 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 11<sup>th</sup> day of April, 2015 at Chepchoina Settlement Scheme Kwanza Sub-County within Trans-Nzoia County jointly with others not before court Attempted to Murder SIWA CHESANG by discharging arrows which seriously wounded him.**
2. The second count of attempted murder was that **on the 11<sup>th</sup> day of April, 2015 at Chepchoina Settlement Scheme within Trans-Nzoia County jointly within others not before court Attempted to Murder JULIUS MASAI by discharging arrows which seriously wounded him.**
3. The 3<sup>rd</sup> count was equally **Attempted Murder in which the particulars were similar and the affected complainant was DAVID KIBE.**
4. The 2<sup>nd</sup> Appellant faced the 4<sup>th</sup> count of **Malicious damage to property contrary to Section 339(1) of the Penal Code**. The particulars of the offence were that **on the 11<sup>th</sup> day of April, 2015 at Chepchoina Settlement Scheme Kwanza Sub-County Trans-Nzoia County jointly with others not before court unlawfully and wilfully damaged Tractor Registration number KSD 661 Massey Ferguson valued at Kshs. 600,000 the property of SIWA CHESANG.**
5. The Appellants co accused were acquitted after full trial while the Appellants were equally acquitted in all other counts except count 2. They were then each jailed for 5 years and they have appealed against the said decision. For purposes of this appeal the court has consolidated the two appeals.
6. Before looking at the merits or otherwise of the same it shall be worthwhile to summarise the evidence as presented during trial.
7. **PW1 ABRAHAM SIWA CHESANG** testified that he owned Tractor Registration number KSB 661 Massey Ferguson and that on the

11/4/2015 he had sent his driver to till land at Chepchoina. He was called by the driver PETER NAMASWA NDEGE and told that the same had been burned by some people and had been taken to the GSU camp. He said that he had purchased the tractor for a sum of kshs. 600,000 from his relatives. He identified the photographs of the tractor which had been taken by the police. He did not know those who had burned the said Tractor.

8. **PW2 JULIUS MASAI ANDIEMA** testified that on the material day at around 10.00 am he was at his farm and he was waiting for the tractor to complete ploughing that of his neighbour so that it could come to his. They then heard some noise and he saw many people who were armed numbering about 100. They were armed with bows, arrows and rungun.

9. He saw them attack the driver of the Tractor and he raised alarm and told them to stop. The said mob then turned and attacked him. He said that he sustained several arrow shots which caused him to bleed profusely. He managed to escape while in great pain and he was rescued and taken to the hospital. In the melee he managed to identify the 1<sup>st</sup> and the 2<sup>nd</sup> Appellants clearly as they were people known to him.

10 . **PW3 PETER NAMASWA NDEGE** testified that he was driving pw1 tractor on the material day and ploughing the shamba of one Wafula Chakeri. As he was going on he realised that he had been surrounded by over 50 people who were armed with arrows and rungun. He was chased and he run away and lucky enough he was not armed by any of the arrows. He run away and when he came back after about one hour he found that the tractor had been burned and he was helped by some people to put off the fire.

11 . In the process he was able to identify the Appellants positively. He said in cross examination though that he got confused but he managed to identify the Appellants.

12 . **PW4 PETER WAFULA JUMA** testified that he was at Chepchoina on the material day and he had engaged a tractor driven by PW3 to plough his shamba. While with others he saw about 50 people who were armed with pangas, rungun and arrows. He managed to identify the appellants among the group as they were people he had known.

13 . He said that he told the Tractor driver to park the Tractor at the ADC farm as he run away from the flying arrows. He was lucky not to have been hit and he rushed to get police reservist who managed to shoot in the air and rescued PW2. One GEOFREY KIBET was also injured and the Tractor burned. He said that the genesis of the problem was that the appellants were against them ploughing the land.

14 . **PW 5 PC BENJAMIN KOONO** from CID Kitale produced the photographs of the burned tractor as part of the prosecutions exhibits.

15 . **PW6 LINUS LIGARE** from Kitale District hospital produced the P3 form on behalf of one MELSA CHEPKOECH in respect to the injuries sustained by JULIUS MASAI ANDIEMA (PW 2). She found that he had injuries to the chest, head, leg and back which were deep and there was paralysis of the fingers. She classified the nature of injuries as maim.

16 . **PW7 INSPECTOR PATRICK LUMUMBA** was the Investigation Officer. He said that they were at Endebbes Police station on the material day when they received the report of the incident and he went to the scene with his colleagues. They found the members of the public had arrested the Appellant's accomplices. They also saw the burned tractor and learned that the injured had been taken to the hospital. He took witness statements and preferred charges against the Appellants. He did not however participate in the arrest of the Appellants.

17 . The said witnesses produced the trousers, the shirts and the T- shirt worn by the complainants.

18 . When placed on their defences, the 1<sup>st</sup> Appellant gave unsworn testimony denying the charge. He went on to explain how he was arrested by the District Commissioner on the 5<sup>th</sup> May, 2015 as he attended a Public Barasa. He said that he was going to address the plight of their destroyed maize but instead he was arrested and later charged for an offence which he did not know.

19 . The 2<sup>nd</sup> Appellant also explained in his unsworn defence how he was arrested by police reservist on 28 May 2015 as he was weeding his maize. He was taken to the police station and later charges preferred against him which he continued to deny.

20 . **DW5 JAFRET NDUNDA MURUME** testified on behalf of the 1<sup>st</sup> Appellant. He said that he was a village elder and that he was present when the Appellant was arrested by the District Commissioner on the 5<sup>th</sup> May, 2015. When cross examined he said that he was not aware of the happenings of 11/4/2015.

21 . **DW6 MARTIN WABUKE WABWILE** testified on behalf of the 1<sup>st</sup> Appellant and dwelt majorly on how he was arrested on the 5<sup>th</sup> May, 2015. He said that he knew that the major complain they had was the destruction of their maize in 2014.

#### **ANALYSIS AND DETERMINATION**

22 . The court has carefully perused the evidence on record as well as the evidence produced by the Respondent. The court has also read the submissions of the parties and the attendant authorities. Clearly the grounds raised by the appellants cumulatively attacks the veracity of the evidence as presented by the Respondent.

23 . They have submitted that the same does not meet the threshold and as such the trial court should not have convicted them. They argue that there was no positive identification by the witnesses and that owing to the circumstances on the ground there was witch hunting.

24 . The duty of this court is to re-evaluate the evidence afresh and come up with an independent finding taking note of the fact that it did not have the benefit of seeing the witnesses and their demeanour unlike the trial court. (**See Okeno V. Rep (1972) EA 32**)

25 . The evidence essentially centered on the question of identification. The incident took place in broad daylight around 10.00 a.m. and thus barred by any circumstances it was not very difficult for the witnesses to have recognised the assailants. (See **RORIA V. REPUBLIC (1967) EA 583. (UNREPORTED)**)

26 . PW2 for instance said that it was the 2<sup>nd</sup> Respondent who removed one of the arrows from his back. He said that he did not know his name but he would meet him often and he was a son to a neighbour. He said that the 1<sup>st</sup> Appellant was known to him as he was wearing a green jacket. He went on to state when cross examined by the 2<sup>nd</sup> Appellant that he used to see him blow the whistle to gather people.

27 . PW4 evidence implicated the Appellants as he said that at the scene he saw the Appellants whom he knew. He said that he knew the 1<sup>st</sup> Appellant who operated a boda boda business and was staying at a rented house at Kapodo. He said that he was armed with a rungu and a panga.

28 . He said that he knew the 2<sup>nd</sup> Appellant as they schooled together and they had eaten and drunk together.

29 . This court is not persuaded by the unsworn evidence by the Appellants. The same is of no much probative value and they essentially major on how they were arrested.

30 . There is therefore no merit in the appeal. The eye witnesses evidence was satisfactory in the circumstances and though the area was a hot spot for land related violence I do not see any reason for the witnesses to have complained against the Appellants unfairly. The production of the P3 forms clearly exhibited the injuries suffered by the Complainanta. The appeal is otherwise dismissed.

31 . The court take notice of the period served by the Appellants in custody, namely from the time they were arraigned in court on 6<sup>th</sup> May, 2015. Thereafter the trial court convicted and sentence them to 5 years' imprisonment. Taking the totality of the same, this court hereby sets them free unless lawfully held.

32 . They shall however be subjected to a probation period for **six months** in their respective jurisdiction as shall be advised by the County Probation Officer.

33 . Orders accordingly.

**Dated, signed and delivered in open court this 4<sup>th</sup> day of March, 2020.**

**H. K. CHEMITEI**

**JUDGE**

**4/3/2020**

**In the presence of:-**

**Ms Kagali for the Respondent**

**Appellants - present**

**Court Assistant- Kirong**

**Judgement read in open court**