REPUBLIC OF KENYA

IN THE HIGH COURT AT MILIMANI

CRIMINAL DIVISION

CR. APPEAL NUMBER 173 OF 2017

BETWEEN

JARED ONGUTI NYANTIKA.........APPELLANT

AND

REPUBLIC......................................RESPONDENT

(**An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No.4016 of 2014 delivered by Hon. S. Jalang'o SRM on 17th November 2017).**

JUDGMENT

Background

1. The Appellant was charged with attempted murder contrary to **Section 220 of the Penal Code**. The particulars were that on 25th of August, 2014 at Grapevine Hope Center Matopeni in Kayole Estate Embakasi District within Nairobi County, attempted unlawfully to cause the death of Catherine Anindo Shisia by stabbing her three times on her chest, one time on the neck and multiple times on her hands with a knife. He pleaded not guilty to the charge. On conviction he was found guilty of the charge and sentenced to serve 10 years imprisonment.

2. Dissatisfied with both the conviction and sentence he preferred the instant appeal. He framed five grounds of appeal namely; (i) that the court erred in failing to find that the language that the plea and the trial were conducted in was not chosen by the appellant (ii) that the court erred in failing to notify the appellant of the right to legal representation (iii) that the court failed to find that malice aforethought was not established; (iv) that the court failed to find that the injuries on the charge sheet were not proved; (v) that the court failed to find that the coram was not noted on the day the judgement was delivered.

SUBMISSIONS

3. The Appellant was represented by learned counsel Nyamberi. The Appellant prepared written submissions dated 20th December, 2017 and highlighted them. The Respondent was represented by Miss Sigei who also presented written arguments and highlighted the same in court.

4. The Appellant submitted on five issues. Firstly, that the court failed to note that the plea and consequent witness testimonies were narrated in a language that was unknown to him. The reason for this was that there was no attempt to record the language that was used in trial. counsel noted that this was a mistake that subverted the provisions of **Section 198 of the Criminal Procedure Code(CPC)**.

5. Secondly, it was submitted that the Appellant was not notified of his right to legal representation as provisioned under **Article 50 of the Constitution** yet he faced a serious charge that carried a life sentence. Appellant cited the case of **Macharia V R HCCRA 12 of 2012, (2014) eKLR** where the Court of Appeal stated that an accused person has a right to legal representation in cases where they face a capital offence.

6. Thirdly, Mr. Nyamberi submitted that a vital element of the offence charged, namely malice aforethought was not established. Counsel submitted that only an assertion had been made as to threats made over an alleged phone call conversation that were never substantiated. This is because no mobile phone call records were presented before court.

7. Fourthly, counsel added that the injuries complained of were not proved. Counsel noted that there were inconsistencies between the particulars in the charge sheet and the evidence tendered by PW4. Counsel also noted that the no witness from Mama Lucy Hospital testified.

8. Fifthly, counsel submitted that a coram was not recorded on the day of judgment. Counsel stated that the failure to do so suggests that the Appellant may not have been present on the date that the judgment was delivered. Counsel urged the court to find that the conviction and sentence was therefore not safe.

9. Miss Sigei for the Respondent submitted that the conviction and sentence was safe. She argued that the Appellant was properly identified by way of recognition. She dismissed the assertion that malice aforethought had not been demonstrated. She submitted that the Appellant removed a knife from his jacket and stabbed PW1 severally and did not stop even when she attempted to defend herself. Counsel further argued that the trial court had an opportunity to observe the scars consistent with the injuries reported. Miss Sigei hence refuted the claim that the injuries complained of had not been proved. She added that the language of the court was understood by the Appellant as he responded in a clear manner throughout the trial as well as ably cross examining the witnesses.

10. She argued that all the essential witnesses were called. She singled out the evidence of PW2 which she said attested that the Appellant was identified as the perpetrator. She therefore urged that the appeal be dismissed.

Determination

11. It is important to first address the legal issues raised. The main one was that **Article 50(2)(g) of the Constitution which provides for the right legal representation was violated. This provision requires that an accused is informed, allowed to choose and be represented by an advocate. This fundamental to trial process and to deny it, or failure to facilitate it is an injustice (see *Republic V Karisa Chengo and 2 Others (2017) eKLR)*. The test is whether a court informed the accused of this right. I single out a persuasive authority in the case of Joshua Njiri v Republic [2017] eKLR** in which the court noted the following;

> **"From the material filed before this court I take the following position: '...Fourthly, the right to legal representation is anchored under Article 50 (2) (g) and it is incumbent upon the trial court to inform the accused of that right promptly. In my view the onus to bring the resolution of this case within the ambit of Article 50 fell squarely on the learned trial magistrate."**

12. Further, in the case of Daniel Mpayo Ngoiyaya V Republic(2018) eKLR the High Court determined that where an accused is faced with a serious offence or a sentence that would materially prejudice the him the court is bound to inform An accused of this right. The court noted that the failure to do so is a miscarriage of justice.

13. In the case of **David Macharia Njoroge v. Republic** the Court of Appeal determined that the phrase substantive injustice meant that the accused faced a capital offence and for which the penalty was loss of life. The Supreme Court in **R V Karisa Chengo and 2 others** associated itself with the sentiments of the Court of Appeal decision of **Thomas Alugha Ndegwa v. Republic C.A No. 2 of 2014(2016)**. The court made a finding that an accused person who was accused of defilement and faced a sentence of life imprisonment also deserved to be afforded legal representation. The Supreme Court extended it to simply where the interests of justice so require.

14. In this case, the record shows that the Appellant was not represented. The Appellant submitted that he had difficulty conducting cross-examination. In educating this court on the weakness that attends an accused person during trial, Lord Denning in **Pett v. Greyhound Racing Association (1968) 2 All E.R 545, at 549** noted the following:

> **"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"**

15. Article 50(2)(g) of the Constitution states that a party shall be notified of his right at the earliest opportunity. The Appellant was not informed of this right and hence was denied a fair hearing. Article 25(c) of the Constitution states that the right to a fair trial shall not be limited. The offence was serious, the sentence was severe and the charge was complex in nature. The court hereby concludes that the trial did not accord the Appellant a fair hearing.

16. I equally hold that the Appellant's right to a fair trial was violated because the record does not show the language that the court used during the trial. This contravened Article 50(2)(b) of the Constitution which provides that every accused person has the right to a fair trial, which includes the right to be informed of the charge, with sufficient detail to answer it. Save for during plea taking when it was indicated that the language used was either English or Kiswahili, the language subsequently used was not indicated. It is not sufficient merely to submit that an accused understood the language of the court because he cross-examined the witnesses. In fact, at a glance of the proceedings, the Appellant asked very minimum questions yet he faced a very serious offence. This is indicative that he either he did not properly understand the charge or due to lack of representation, he was unable to properly defend himself. In this regard, I hold that this is a case ripe for a retrial.

17. For a retrial to be ordered, the court must be satisfied that the retrial will most likely result in a conviction, that it will not prejudice the accused and that it will not aid the prosecution to fill gaps in their case. On the whole, a retrial should be aimed at meeting the ends of justice. See Mwangi v Republic (1983) KLR,522.

18. I have had the advantage of reevaluating the evidence on record. With caution that the court should not preempt an intended retrial, I come to the conclusion that the evidence on record is compelling. This is a case in which there was direct evidence where, PW2, a sister to PW1 witnessed the Appellant attacking the complainant, PW1, using a knife. She stabbed her several times before she could be rescued and taken to hospital. The circumstances of the case disclosed a probable intention to kill. The oral evidence was supported by the medical evidence adduced. I am persuaded that if a retrial is ordered it is likely to result in a conviction.

19. I am equally persuaded that a retrial is unlikely to prejudice the Appellant. Firstly, the offence is serious and it demands that a fair trial be conducted so that ends of justice are met, not only for the Appellant but also for the complainant. Secondly, the penalty provided under the law if an accused is convicted for the offence of attempt to murder is life imprisonment. The Appellant was only convicted on 17th November, 2017 and has therefore served only about one year and four months of the sentence. He also was on bond during the trial. The short period he has been in custody is not sufficient sentence commensurate with the offence. It my view, a retrial will serve the interests of justice.

20. In the upshot, this appeal partially succeeds. I quash the conviction and set aside the sentence. I order that a retrial be conducted. The Appellant shall be escorted to Kayole Police Station for preparing him to be presented to Chief Magistrate's Court at Makadara for plea taking not later than the 19th March, 2019. The trial court file should be remitted back to Makadara Law Courts for this purpose

DATED and **DELIVERED** this 12th day of **March, 2019**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Nyamberi for the Appellant.

2. Miss Sigei for the Respondent.