REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 295 OF 2017

REUBEN KIVUVA MUTYANZAA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate Honourable G.M. Mutiso dated 06/12/2017 in Makindu PMCR No. 12 of 2015.)

JUDGMENT

1. **Reuben Kivuva Mutyanzaa** the Appellant herein was charged with the offence of attempted murder contrary to Section 220 (a) of the Penal Code.

The particulars being that the Appellant on the 13th day of December 2015, at Emali township in Nzaui District within Makueni County, attempted unlawfully to cause the death of one **Judith Mwendi Mutava** by inflicting a deep cut on her head, chopping off her right arm at the wrist, inflicting deep cuts on her left arm and both legs using a panga where the left arm and right leg had to be amputated as a result of the injuries sustained.

2. He pleaded not guilty to the charge and the case proceeded to hearing with the prosecution calling seven witnesses. The Appellant gave a sworn defence without calling any witnesses. He was finally convicted and sentenced to life imprisonment. Under Section 26 of the Victim Protection Act it was ordered that his motorbike be confiscated and given to her use in terms of transport; he is also to foot her medical bills limited to Kshs.7 million.

3. Aggrieved by this judgment, the Appellant filed this appeal through Mwangangi and Associates who later withdrew from acting for him. The following are the grounds:

i. The learned magistrate erred in both law and fact when he convicted the Appellant despite having material inconsistencies in the evidence tendered by the prosecution witnesses.

ii. The learned magistrate erred in both law and fact when he went ahead and convicted the Appellant on account of documentary evidence which was vague, inaccurate and was to some extent contradictory.

iii. The learned magistrate erred in both law and fact when he went ahead and convicted the Appellant on account of evidence that does not meet the threshold of unreasonable doubts.

iv. The learned magistrate erred in both law and fact when he went ahead and meted a custodial sentence of life imprisonment without considering that the accused is a family man with an epileptic wife as well as three young children whose hope solely vests in him and that he is responsible for the medical attention and care of his diabetic mother.

v. The learned magistrate erred in both law and fat when he went ahead and ordered that the Appellant's assets be attached and auctioned as if it is a civil debt without taking into consideration the family status of the accused being the sole bread winner of an epileptic wife, three young children and a diabetic mother and condemning him to pay for medical expenses to the tune of Kshs.7 million well knowing that the accused cannot afford.

vi. The learned magistrate erred in both law and fact when he convicted the Appellant on a charge based on a section of law that does not define the punishment and/ or penalty as it is required in the criminal justice system.

vii. The sentence is harsh and excessive in the circumstances of the case.

4. A summary of the prosecution case is that Pw1 and the Appellant were living together at Emali as a married couple. Their relationship hit the rock when she learnt that the Appellant had a wife and the wife was suffering. She learnt of this through his sisters. She informed him about it and he was furious. This was on 10th December, 2015. He came to the house on 11th December, 2015 and told her he would kill her if he found her with another man.

5. She was so worried that she spent the following night with her friend Anita. On 13th December 2015, she was at her stall at 6:00 am. While there, the Appellant came on his motorbike and demanded that she picks keys for him from the house. He carried her on his motorbike and stopped it outside the plot.

She opened the door and got into the toilet. As she left the toilet, the Appellant who was armed with a panga landed on her and seriously cut her hands, legs wrist and then covered her with a blanket and left.

6. Her groans attracted **Pw4 Patricia Nduku, Pw5 Stephanie Mutuku** who are neighbors. Pw4 saw the Appellant leave Pw1's house and his shoes were blood stained. Pw5 also saw the Appellant leave Pw1's house with a blood stained trouser and clothes. They entered Pw1's house and found her in a pool of blood while covered with a blanket. Many people responded to Pw1's cries and her relatives (**Pw1Judy Mueni Mutava and Pw2 Regina Wayua Mutua)** were informed. The matter was reported to the police as she was rushed to hospital.

7. **Pw6 Doctor Makau Douglas** examined Pw1 at Makindu sub county hospital on 16th May, 2016. He also used file No. IP38400/15 to do his assessment. Findings were as follows: -

- ***Was unable to stand because of the amputated limbs.***
- ***Both fore arms amputated at wrist joint.***
- ***Right leg amputated below the knee.***
- ***Deep cut wound on the left leg.***
- ***She was given multiple surgical operations, amputations, and skin grafting.***
- ***Injury assessed as grievous harm. He produced the treatment nots (EXB2), P3 form (EXB 3)***

8. **Pw7 No. 80975 corporal Edward Mwaura** was the Investigating Officer. He visited the scene upon receipt of the report from members of the public. He confirmed the evidence of Pw1, Pw4 and Pw5. The officers found the weapon used to assault Pw1 in the house. It was a panga which he produced as EXB1. The Appellant whose names they had been given was arrested on 14th December, 2015 from a bus at Makindu, and was later charged.

9. The Appellant gave a sworn defence calling no witnesses. He said he previously worked as a butcher. He stated that on 13th December, 2015, at 7:00 am he was at Kiunduani and later travelled to Voi where he slept and went to the stage the next morning, where he met Pw3. He reported to him that his wife (Pw1) had been injured. He accompanied Pw3 to Makindu, and when they reached Makindu traffic road block, he was arrested and charged. He denied having been in Emali on 13th December, 2015.

10. He also denied threatening Pw1 on 10th and 11th December, 2015, and all that Pw4 stated about the 13th December, 2015. He claimed that the officer (Pw7) had a grudge against him. In cross examination, he said he did not know if the blood on his clothes belonged to a goat. He admitted that his trousers and the panga had blood stains.

11. The Appellant filed written submissions which he entirely relied on. He has submitted that the trial court should not have accepted written submissions in the first instance at the close of the prosecution and the defence cases.

12. He further submitted that the charge sheet was defective since Pw1's names are Judy Mueni Mutava while the charge sheet showed her names as Judith Muendi Mutava. To buttress his argument, he cited the cases of **Lazaro Okwayo Omollo & Another –vs- R Cr. Appeal No. 16 of 2013 and Isaac Owakia V-Cr. Appeal NO. 47 of 1995** where it was held: -

> ***"Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."***

13. He contended that there was no attempt to correct the defect under Section 214 or Section 382 Criminal Procedure Code yet the error on the issue of the names was prejudicial to him.

14. The Appellant claims that he was temporarily insane at the time the alleged offence took place. He has referred this court to the proceedings at page 5 in respect to the psychiatrist's report. That the court had asked for a 2nd mental assessment but his counsel on record withdrew it.

15. He challenged the production of the panga yet the finger prints had not been taken, and also the blood on his clothes had not been examined. He asked the court to set aside the conviction and the sentence and make other appropriate orders.

16. The Respondent opposed the appeal through learned counsel Mrs. Owenga, who submitted that the trial was free from error. That the trial court had satisfied itself on the required ingredients. She further stated that the Appellant was of sound mind and at no time did he conduct himself as not being of sound mind, nor in need of legal representation. Counsel argued that the Appellant's defence was considered by the court. He called on the court to dismiss the appeal.

17. In a rejoinder the Appellant submitted that had he been okay the lawyer would not have done the case for him. That he was not well and he was not taken for treatment as ordered by the court.

Determination

18. This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence on record and arrive at its own conclusion. The court must also bear in mind that it did not see or hear the witnesses and should give an allowance for that; See **Kiilu and Anor –vs- R (2005) 1KLR 174** where it was said that:

> ***1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.***

19. I have considered the evidence on record, grounds of appeal, the rival submissions and Appellant's authorities. ***The issue I find falling for determination is whether the case against the Appellant was proved beyond reasonable doubt.*** I will therefore deal with each of the grounds raised by the Appellant.

Ground 1

That, the learned trial magistrate erred in law and fact by accepting and adopting final written submissions in contravention to the provisions of Sections 213 and 310 of the Criminal Procedure code.

20. The record shows that at the close of the prosecution case and the defence case, Mr. Mwangangi filed written submissions which were not highlighted. At the same time the prosecution at both stages of the case elected not to file any written submissions and relied entirely on the evidence on record. Relying on Sections 213 and 310 Criminal Procedure Code, the Appellant faults the learned trial magistrate for accepting and adopting the said submissions.

21. Section 213 Criminal Procedure Code provides that: -

> "***The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as in a trial under this code before the High Court".***

Section 310 Criminal Procedure Code provides that: -

> ***"If the accused, or any one of several accused persons adduces any evidence, the advocate for the prosecution shall, subject to the provisions of section 161, be entitled to reply".***

The Appellant has not clearly pointed out how he was prejudiced by the written submissions filed by **his own advocate.** Secondly I have read through the judgment and have failed to find any reference to the said submissions. In any event, it is the Appellant's counsel who filed submissions with the full participation of the Appellant. The prosecution did not file or make any oral submissions. I therefore find no merit in this ground.

22. He submitted that the charge sheet indicated the complaint's name as Judith Muendi Mutava yet the person who testified as Pw1 was Judy Mutava. He cited several cases which dealt with the issue of a defective charge sheet. Particulars of a charge sheet are an integral part of a charge and Section 134 of the Criminal Procedure code provides that: -

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charge."***

23. In the case of **Lazaro Okwayo Omollo & Anor –vs- R Cr. Appeal No. 16 of 2013** cited by the Appellant can be clearly distinguished from the present case. In that case the names of the complainant in the charge sheet were Musila Jonathan Igara while the complainant in his evidence gave his names as Musunda Jonathan Ingoro. In the present case, the names are the same save for Judith and Judy. There is no dispute that Judy is the pet name for Judith. The person who testified as Judy was Pw1's wife and he is not disputing that. I also find no merit in this ground.

Grounds 3 and 4

Ground 3: That the trial court, before recording the plea did not satisfy itself that at the time the plea was entered into, the Appellant was competent and of sound mine.

Ground 4: That the Appellant, who would have wished to raise the defence of insanity under Section 12 of the Penal Code at the trial, could not do so as his counsel, without consulting him abandoned the request for a second opinion of his mental status.

24. Three reports were filed in court by **Dr. Edgar Munga** of the Ministry of health.

i. The first is dated 3rd February, 2016. It showed that the Appellant was not fit to plead to the charge.

ii. The second report is dated 17th February, 2016 and it shows that the Appellant was still not fit to plead and the doctor needed to do a neurological test known as EEG (Electroencephalogram) before making a more comprehensive report.

iii. The third report dated 17th March, 2016, the EEG test had been done and the results given. The doctor assessed the Appellant and found him fit to plead, and follow proceedings and even give his counsel advice.

25. It is true that when plea was first taken on 28th December 2015, the Appellant's mental capacity was unknown. The record shows that on 21st March, 2016 after the doctor confirmed that the Appellant was fit to take plea, a fresh plea was taken. I therefore find no anomaly there.

26. On 4th April 2016, Mr. Mwangangi requested for a second medical opinion from a different doctor in respect to the Appellant's mental status and the request was granted by the court. However, on 4th May 2016 the defence changed its mind. Mr. Mwangangi told the court the following: -

"I am ready to proceed. However, for now I have no objection to adjournment. The accused is sick. I apply that he be taken to hospital. ***<u>We have abandoned the request for second mental assessment</u>****. (Emphasis added)"*

27.Nobody stopped the Appellant from going for the 2nd mental assessment. He had sought the voluntarily abandoned request. Secondly, after the plea taken on 4th April, 2016 the matter proceeded on well without any hitches or negative observations by the court. These grounds have no basis.

<u>Ground 5-7</u>

Ground 5: That the learned trial magistrate erred in both law and facts in failing to find that no forensic evidence was obtained from the scene to connect the Appellant with the offence.

Ground 6: That the learned trial magistrate erred and misdirected himself in law and fact by evaluating and analyzing the respective cases of the prosecution and the defence in a speculative, skewed, slanted and unfair manner against the Appellant.

Ground 7: That the lower court failed to consider the Appellant's defense of alibi and failed to advance any cogent reasons for not believing the alibi which on the totality of evidence raised a reasonable doubt.

28. These three grounds will be dealt with together as they all go to the weight of the evidence. First of all, the Appellant and Pw1 had been cohabiting as husband and wife for close to five (5) years. Trouble between them started when on 10/12/2015 when the Appellant's sisters informed Pw1 of the man's wife and how she was suffering. He became serious and even issued threats to her on 11th December, 2015.

29. The incident occurred in broad daylight. Pw4 and Pw5 who were the couple's neighbors at Emali saw the Appellant leaving Pw1's house that morning. In her evidence Pw4 at page 24 of the Record of Appeal at lines 15 to 21 states: -

"Pw1 led the way into the house and was followed by the accused. Shortly thereafter, I heard screams coming from the centre room where the accused and Pw1 used to stay. I went to the room. It was closed. After a few minutes, the accused went out, closing the door behind him. We saw there was blood when he stepped out and his shoes were blood stained.

We later heard pw1 screaming (wuui nakufa"). We opened the door we found Pw1 lying on the ground having been wrapped with a blanket".

Further in cross examination at page 25 lines 3-6 she states: -

"The accused's house was in the same plot as mine. The accused was not carrying any weapon while leaving his house. Pw1 did not tell me that it is the accused who was cutting her. They were just two in their room so it must be the accused who cut her. His shoes were bloodied".

30. Pw5 another neighbor gave similar evidence. He stated as follows at page 25 lines 15-20 of the Record of appeal.

"I heard a motor cycle approaching. I saw the accused carrying Pw1 on the motorcycle (accused identified). After a short while,

I heard a woman screaming. We went out. After a short while, the accused came out of his house. His trouser and clothes were bloodied. He went away on his motorcycle. After a short while Pw1 cried saying she would die. We entered her house. We found the room full of blood".

31. Pw2 and Pw3 who are the mother and brother of the Appellant knew the Appellant very well. They received separate reports on the happenings of 13/12/2015 and they knew it was the Appellant who had done it as he was Pw1's known boyfriend. Pw3 was in a bus on 14th December, 2015 in Voi when he saw the Appellant pass in front of the bus. This is his evidence captured at page 22 lines 9 to 18.

> ***"On the following early in the morning, boarded a chania bus. When we reached Voi town, I saw Kivuva (accused identified) passing in front of the bus. I alighted and went to where the accused was. We greeted each other. When the accused saw me, he sat down on the ground and looked down. He called me "brother" I answered. He told me there was a problem. I told him I had been told. I told him that we had to board the bus so that we could see my sister. The accused told me he had no fare. I agreed to pay his fare.***
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> ***When we arrived at Makindu, the bus was stopped by traffic police officers. I saw my mother and many police officers. Police arrested the accused. I went to the hospital and found Pw1 without one hand all her limbs were heavily bandaged".***

32. It is the neighbors to the couple who called the police and reported what had happened. Pw7 and other officers went to the scene and confirmed finding Pw1 lying in a pool of blood and covered with a blanket that was also soaked in blood. The officer recovered a panga from the scene and got the names of the culprit from the neighbors. He was arrested the next day.

33. In his sworn defence the Appellant denied being at the scene saying he was in Kiundani on the morning of 13th December, 2015 when the incident is said to have occurred. He further stated that he had met Pw3 on 14th December 2015 and its him who informed him about Pw1's injury. Apparently, all this was never put to Pw3 in cross examination when he testified. The Appellant also alleged that corporal Edward Mwaura Pw7 had a grudge against him in respect to his selling of diesel. Again this was never put to Pw7 when he testified.

34. The learned trial magistrate while relying on the Court of Appeal case of **Mwendwa Mulinge –vs- R (2014) eKLR** very well considered the alibi defence of the Appellant. The said defence could not dislodge the evidence of pw1, Pw4 and Pw5. These three (3) witnesses who had no grudge against the Appellant clearly and squarely placed him at the scene of incident. The court did not require any forensic evidence to connect the Appellant with this offence. He is the one who caused all the stated injuries to Pw1. The lady bled until the blanket covering her was soaked in blood. I find the conviction to be safe and I have no reason to make me interfere with it.

35. **Section 220 (b)** of the Penal Code provides for the offence of attempted murder plus the sentence. It states that:

Any person who –

> **"with intent unlawfully to cause the death of another does any act or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life".**

The word used is *"liable"* and not *"shall"*. Therefore, the life imprisonment is not mandatory. The trial court called for the victim impact report which was filed. The Appellant's mitigation was also considered by the court. The trial court saw pw1 and the suffering she was going through because of what the Appellant did to her. These are permanent injuries unless God comes through for her.

36. After due consideration of the sentence and the fact that the Appellant was a 1st offender, I will reduce the sentence but the other orders will remain.

37. The result is that the appeal on conviction is dismissed.

i. The life imprisonment sentence is set aside and substituted with a sentence of 30 years' imprisonment.

ii. The orders under Section 26 of the Victim Protection Act are upheld. That is: -

a) The Appellant's motorcycle to be confiscated and given to Pw1.

b) The Appellant to pay Pw1's medical bill to the tune of Kshs.7,000,000/=. This amount if not paid to be treated as a civil debt and an enforceable decree issued for it.

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 16TH DAY OF JULY 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE