REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 48 OF 2018

ALI MSUO ALI.....1ST APPELLANT

YASSIR OMAR BWANAADI…….2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal Case No. 171 of 2017 by Hon. Temba A. Sitati (SRM) dated 23rd July 2018)

JUDGEMENT

1. The Appellants were first separately charged in Principal Magistrate's Court Lamu Criminal Case No. 171 of 2017 and Criminal Case No. 27 of 2018 respectively. The two cases were consolidated in Criminal Case No. 171 of 2017 on 6th February 2018 with Ali Msuo Ali and Yassir Omar Bwanaadi being the 1st and 2nd Accused respectively.

2. They were charged with the offence of attempted murder contrary to section 220(a) of the Penal Code. The particulars of the offence were that on 30th April, 2017 at around 3:00pm at Gardeni Estate of Langoni location, in Lamu West Sub-County within Lamu County, the Appellants together with others not before the court, attempted unlawfully to cause the death of Robert Manasse by cutting him on the head, both hands and left fingers with a panga.

3. The prosecution called four witnesses in support of its case. The complainant, Robert Manasseh testified as PW4. He told the court how on the 30th April 2014 while he sat by the roadside with one Abubakar Mohammed Abdallah, the 1st Appellant greeted them as he walked by. He also saw the 2nd Appellant standing next to a shop. That after a few meters, the 1st Appellant turned back towards them and in an instant he was ambushed by the 1st Appellant together with other people who were all armed with pangas and emerged from the small paths next to where he (the complainant) was sitting. That they all surrounded him and started to cut him up. That he managed to run to a kiosk belonging to a person he described as a Meru and shut the door. However, his attackers chased after him and the 1st Appellant kicked down the door and went into the shop with two other people while the 2nd Appellant and another attacker remained outside the shop.

4. He stated that the 1st Appellant told him that "nitakuua leo!" (I will kill you today!) In order to save himself he threw a soda bottle towards them. The bottle broke and this prevented his assailants from approaching as they were bare footed. He then heard a lady say that the police were coming and his assailants ran away. After five minutes he stepped out of the kiosk while bleeding profusely. His friend Abdallah took him to the police station where he recorded his complaint and was referred to Langoni nursing home from where he was referred to King Fadh Hospital.

5. P.C Brian Kipyegon (PW1) was the arresting officer. He stated that on the 27th June, 2017, one Baraka came to the police station and complained that the 1st Appellant was threatening his life in Kijitoni. That the OCS directed him and another police officer and Administration Police to go and arrest the 1st Appellant. That the said Baraka led them to the 1st Appellant whom they managed to arrest after he threatened them with a knife. That they took him to the police station and booked him. They later learnt that the DCI officers were looking for the 1st Appellant in the current case.

6. Corporal David Odero (PW2) was the investigating officer. He stated that on 30th April, 2017 the complainant was brought to the police station on a stretcher while bleeding profusely. He noted that the complainant's clothes were soaked in blood and he had about six cuts, one his back, head, rights side of the chest, right upper arm, and left upper arm near the wrist. The complainant reported that he was ambushed by five people three of whom he knew by name as they grew up together. These were Ali Msuo, Abdalla and Yassir Omar. That the complainant was admitted at King Fadh hospital for two days but his condition got worse and he was transferred to Coast General Hospital.

7. PW2 informed the court that on 27th June, 2014 the 1st Appellant was arrested in relation to another crime and they preferred the current charges against him. That the 2nd Appellant was arrested on 19th January, 2018 and was charged separately before both cases were consolidated.

8. Nicholas Charo Lewa (PW3), the clinical officer at King Fadh hospital filed the P3 form (Exh 1) for the complainant from the treatment notes from Langoni Nursing Home. He informed the court that when the complainant was first treated he was bleeding from many parts of his body. That he had cut wounds on the skull, near the cervical bone near the base of the neck, on the right shoulder, on the left hand, the small finger, at the elbow joint and on the wrist. That the complainant was rushed to the theatre where they noted that his tendons on the little finger and right thumb were cut and that the metacarpal joint was broken. That the doctors could not repair the tendons and therefore they referred the complainant to a consultant in Mombasa for treatment. PW3 told the court that he classified the injuries as grievous harm because of the damage to the body.

9. The Appellants were put on their defence. The 1st Appellant denied the charge stating that it was a fabrication. He stated that on the 25th June, 2017 he was arrested by police officers who took him to the police station where the OCS told him he would ensure he goes to jail. He stated that he did not have confidence in the police and the court.

10. The 2nd Appellant also denied the charge and stated that he was crippled and was using crutches and was undergoing physiotherapy. He said that he therefore could not have cut up the complainant. He stated that on January 2018 he was attacked and taken to Lamu police station and charged.

11. At the conclusion of the trial, the Appellants were found guilty and sentenced to 25 years imprisonment each.

12. The Appellants were aggrieved by the conviction and sentence and consequently lodged their separate appeals. Appeal No. 48 of 2018 was filed by J.O. Magolo & Co Advocates for Yassir Omar on 1st August 2018; while Appeal No. 50 of 2018 was filed by Ogoti & Co Advocates for Ali Msuo on 3rd August 2018. The two appeals were subsequently consolidated for hearing on 19th February, 2019 with Criminal Appeal 48 of 2018 being the lead file and Ali Msuo Ali and Yassir Omar Bwanaadi being the 1st and 2nd Appellants respectively.

13. The 1st Appellant relied on seven grounds of appeal which were to the effect that the charge was not valid as there was no proper identification of the Appellant and that the evidence was speculative, contradictory and uncorroborated therefore defective. That *mens rea* was not proved as there was no grudge disclosed; that a crucial witness did not testify, and; that the trial magistrate failed to give the 1st Appellant the benefit of the doubt. His final ground was that the sentence was harsh and excessive.

14. The 2nd Appellant relied on ten grounds of appeal which were to the effect that the charge was defective and that the particulars of the charge had not been proved. That the trial magistrate erred when he held that the 2nd Appellant was a principal offender on the basis that his presence encouraged the assailants in their attack; that there was no *mens rea* and that the evidence did not lead to the conclusion that he was guilty. His other grounds were that the magistrate denied him the benefit of the doubt; and that the sentence was unlawful and harsh.

15. The appeal was disposed of by way of written submissions. The 1st Appellant's submissions are dated 15th April 2019. He submitted that the trial magistrate erred in relying on the evidence of one Abubakar Abdalla who was not recalled to testify afresh despite the order of the previous trial magistrate (Hon. Njeri Thuku) in Criminal Case 171 of 2017 after the two cases were consolidated, and; that occasioned a miscarriage of justice hence a mistrial. He submitted that the prosecution failed to call the shop owner who was a crucial witness as he would have been able to give evidence as to whether the incident really occurred in his shop as stated by the complainant. He finally submitted that his mitigation was not recorded and not taken into consideration when the court sentenced him contrary to section 329 of the CPC.

16. The 2nd Appellant filed his submissions dated 2nd April 2019. He submitted that his presence at the scene was not sufficient to conclude that he committed the offence or aided and abetted it. He further submitted that the judgment of the trial court contained findings that were not in the testimony of the witnesses such as the fact that the 2nd Appellant was armed with a dangerous weapon. He also faulted the trial court for failing to consider his testimony that he was disabled at the time and therefore could not have attacked the complainant. It was the 2nd Appellant's further submission that the prosecution failed to call the shop owner who was a crucial witness in the case. Finally, he submitted that the sentence was harsh and excessive and that his mitigation had not been considered when he was sentenced.

17. Mr. Kasyoka learned counsel for the Respondent filed written submissions dated 18th June 2019 opposed the appeal in its entirety. It was his submission that all the requisite elements of the offence had been proved and that the Appellants had been properly identified and placed at the scene.

18. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and I can only rely on the evidence that is on record. See **Okeno v R (1972) EA 32.** See also **Eric Onyango Odeng' v R [2014] eKLR.**

19. I have considered the grounds of appeal, the respective submissions, and the record. A preliminary issue in this case was whether the case was a mistrial. The other issue for determination is whether the prosecution proved its case beyond reasonable doubt and whether each Appellant was positively identified.

20. On whether the case was a mistrial, the 1st Appellant contended that the prosecution failed to recall Abubakar Mohamed Abdallah yet the trial magistrate relied on his evidence in his judgement which resulted to a mistrial.

21. I have looked at the trial record and it shows that when the two cases were consolidated, the learned magistrate ordered the case to start afresh. However, the prosecution failed to recall Abubakar Mohammed Abdallah as a witness despite applying for witness summons.

22. The court is alive to the provisions of section 143 of the Evidence Act which states that:-

> ***'No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

23. In the case of **Keter V Republic [2007] 1 EA 135** the court held inter alia that:-

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

24. It was upon the prosecution to elect the witnesses required to prove the case and even though Abubakar Mohammed Abdallah had initially testified before the two cases were consolidated, it was not essential that he was recalled as a witness. The only material question is whether the learned magistrate relied on Abubakar's evidence in his judgement.

25. I have read the judgment of the learned magistrate dated 23rd July, 2018. The only reference to Abubakar Mohammed Abdallah appears on page 13 of the judgement where he notes that Abubakar was not recalled as a witness after the two cases were consolidated. That the 1st Appellant had an opportunity to recall Abubakar under section 200(3) of the CPC when the magistrate took over the case from the previous magistrate but the 1st Appellant chose to proceed with the case from where it had reached. The magistrate goes on to note in his judgement that the 1st Appellant produced Abubakar's written statement as Dexh 1 arguing that there were material alterations. Finally, the magistrate commented that a cursory perusal of the written statement by Abubakar revealed that its contents were similar to the evidence tendered by the complainant and it did not create any doubt.

26. I am satisfied from my consideration of the trial court's judgement that the learned magistrate did not rely on the evidence of Abubakar Mohammed Abdallah in his judgement. He only made reference to it in the context of the Appellant's defence. In the premises, I find that the case in the lower court was not a mistrial.

27. With respect to the charge, Section 220 of the Penal Code defines the offence of attempt to murder thus:-

> **Any person who—**
>
> **(a) attempts unlawfully to cause the death of another; or**
>
> **(b) 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.**

28. **Section 388** of the Penal Code defines ***"attempt"*** as follows:-

> ***"(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.***
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> ***(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.***
>
> ***(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."***

29. In **Cheruiyot V. Republic (1976-1985) EA 47**, ***Madan, JA,*** as he then was, quoting with approval ***R. V. Gwempazi S/O Mukhonzo (1943) 10 EACA 101, R. V. Luseru Wandera (1948) 15 EACA 105*** and **Mustafa Daga S/O Andu V. R.** ***(1950) EACA 140***, stated as follows on the *mens rea* of attempted murder:-

> ***"In order to constitute an offence contrary to section 220, it must be shown that the accused had a positive intention unlawfully to cause death…The essence of the offence is the intention to murder as it is presented by the prosecution."***

30. In the case of **Abdi Ali Bare vs. Republic (2015) eKLR** the Court of Appeal pronounced itself thus:-

> ***'..... The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:….***

….In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In CROSS & JOINES' INTRODUCTION TO CRIMINAL LAW, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:

..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted....''

31. Being guided by the above precedents, I have analysed the evidence on record. The complainant (PW4) told the court how he was ambushed by five people, including the 1st Appellant, who were armed with pangas. That they started cutting him and when he tried to save his life by running and hiding in a nearby shop, the 1st Appellant followed him and told the complainant "*ntakuua leo" (I will kill you today).* It was only the intervention of the woman who said that police were coming that saved him from further attack.

32. Nicholas Charo Lewa (PW3), the clinical officer, told the court that the complainant had suffered cuts on his body as follows: a cut 4cm cut on the skull; a cut on his right shoulder about 4cms in diameter; a 12cm cut on the right elbow joint; a 6cm wound on his wrist; a 4cm cut near the base of his neck; the tendons on the little finger and right thumb were cut and that the metacarpal joint was broken. Further PW3's testimony was that the complainant had to be rushed to theatre for an emergency surgery and was later admitted at Coast General Hospital for 3 months. The attack left him with the inability to straighten or use his left little finger and scar marks.

33. It is clear from the above evidence that the attack on the complainant was premeditated and was intended to kill him. Further, from the injuries suffered and the fact that the complainant was admitted for three months, there is no doubt that the life of the complainant had been endangered and if it was not for the lady who yelled that the police were on their way, the complainant would have been hacked to death. I find that the offence of attempted murder was proved.

34. Having found that an attempt was made to murder the complainant, the only outstanding issue is the Appellants were positively identified.

35. There are clear guiding principles upon which the court must analyse evidence of identification. As a rule, the best evidence of identification is that of recognition. See **Francis Muchiri Joseph – V- Republic [2014] eKLR.**

36. Evidence of identification was given by the complainant. I have already set out the relevant evidence. He was attacked by a group of people. He knew three of those people. He told the court that he knew both the Appellants as they were in the same school and that he was in the same class as the 1st Appellant while the 2nd Appellant was in the lower class.

37. In **Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 KLR 424** the Court cautioned with respect to visual identification thus:-

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

38. In **R-V-Turnbull,(1976) 3 All ER 551,** it was held that:-

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... "

39. Guided by the principles enunciated in the authorities above, I have carefully examined the conditions under which the Appellants were identified. The attack on the complainant took place in broad daylight at around 1:00pm. He was attacked in the open and fled into a shop for refuge with the attackers in hot pursuit. His evidence that he knew both Appellants from their time in school was not controverted by the Appellants.

40. In addition, Corporal David Odero, the Investigating officer, told the court that when the complainant was brought to the station immediately after the attack he mentioned the names of three people being Ali Msuo, the 1st Appellant, Yassir Omar the 2nd Appellant and one Abdalla not before court.

41. The importance of a first report has been stated in the case of **Terekali & Another vs. Republic [1952] EA 259** where the Court of Appeal pronounced itself that:-

"Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has

been no time for consultation with others…"

42. Guided by the above case and based on the evidence I find that the conditions for identification were good and that the Appellants were positively identified by the complainant.

43. The other issue is whether the 2nd Appellant was aided and abetted the commission of the offence. It was the evidence of the complainant that he saw the 2nd Appellant standing next to a shop when he was attacked. He further said that when he hid in the shop that the 2nd Appellant was standing outside the shop. However, during cross-examination by the 2nd Appellant, he stated he did not know who chased him to the shop while in re-examination he told the court he never saw the 2nd Appellant running but he was walking. On his part, it was the 2nd Appellant's defence that he could not have taken part in the attack as he was disabled and was using crutches to walk.

44. I have analysed the evidence before me and as I found earlier in this judgement, the 2nd Appellant was properly identified and therefore he was present at the scene when the complainant was attacked. However, there is no evidence that he took part in or aided and abetted the attack. It was the complainant's evidence that he was ambushed by four people whom appeared from the smaller paths next to where he was sitting yet he saw the 2nd Appellant standing near a shop. In the complainant's own words, the 2nd Appellant just stood nearby and was not one of the persons who pursued him into the shop. He did not emerge from the paths that he (the complainant) spoke about.

45. Secondly, the complainant told the court when ran to the shop he could not see who chased him to the shop but he stated he said he only saw the 2nd Appellant walking. This raises doubts as to whether the 2nd Appellant participated in the attack as the complainant never stated whether the 2nd Appellant was walking to the shop or towards him when he was ambushed.

46. Lastly, from the evidence tendered, the complainant did not see the 2nd Appellant armed with a panga and therefore the trial magistrate misdirected himself when he found that the he was armed with a panga. Additionally, the trial magistrate reached the wrong conclusion that the 2nd Appellant stood by and watched giving moral support to his "friends". The evidence of the complainant was clear that a total of 5 people cut up the complainant. Furthermore, the complainant said that all five people followed him to the shop where three of them entered the shop and two remained outside. If indeed the 2nd Appellant was one of the attackers there would be a total of six people. The only reason the 2nd Appellant was linked to the attack was by the mere fact that he was standing near the shop and the complainant recognised him. The evidence that the 2nd Appellant was standing nearby raises deep suspicion that he was acting in concert with the attackers. There was no other corroborative evidence to prove that he was indeed one of them. It is my conclusion that the trial court erred in finding that the 2nd Appellant aided and abetted the offence. There was insufficient evidence to arrive as that finding.

47. The Appellants also argued that the trial magistrate failed to consider the mitigation as it was not recorded. On this contention, I have perused the trial court's record. I observe that there is a handwritten record of mitigation of both Appellants. The record also shows that the trial magistrate went on to further state the reasons for the sentences issued. The only issue then is that the mitigation and decision of the court was not properly captured in the typed proceedings. Therefore the ground that the mitigation was not recorded and considered is untrue and must fail.

48. On sentence, it was the 1st Appellant's contention that the sentence was too harsh. Section **220** of the Penal Code provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for life. In passing sentence, the trial magistrate took into account that the attack was premeditated, that the 1st Appellant was armed with a panga and was in the company of four other people. That the intention was to kill the complainant and that the 1st Appellant failed to show any remorse for his actions.

49. I am in agreement with the trial magistrate that the actions of the 1st Appellant and his conspirators were barbaric with only one single aim of ending the life of the complainant. The complainant just managed to escape imminent death by a whisker when a lady shouted that the police were on their way. Additionally, the 1st Appellant has failed to show any signs of remorse before this court. Considering the evidence and the circumstances of the case, I hold that the sentence as meted out was lawful and I uphold the same.

50. In conclusion, I have found no merit in the 1st Appellant's (Ali Msuo Ali) appeal. It is dismissed.

51. On the 2nd Appellant's appeal, I find that this appeal has merit. I would acquit him for insufficient evidence. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The 2nd Appellant (Yassir Omar Bwanaadi) is set at liberty forthwith unless otherwise lawfully held.

52. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 5th day of November, 2019.

R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The 1st Appellant in person

The 2nd Appellant in person

Mr. Gekanana holding brief for Mr. Katete for 2nd Appellant.

Mr. Mwangi for the Respondent

Mr. Mwangi for the Respondent