REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL NO. 94 OF 2015

G M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an *appeal against the conviction and sentence of Hon. L. Simiyu (SRM) in Machakos Chief Magistrates' Courts Criminal Case No. 2884 of 2009 delivered on 27th October, 2014.*)

JUDGEMENT

1. The appellant was charged with attempted murder contrary to section 220 (a) of the Penal Code. The particulars were that the appellant on 1st November, 2009 at Utithini Sub-Location Mui Location in Mwala District within Eastern Province unlawfully attempted to cause death of N M by cutting her on the head with a panga. He was convicted of the charge and sentenced to thirty (30) years imprisonment.

2. Aggrieved by the said conviction and sentence, he appealed on grounds summarized as follows:

a) The sentence of thirty (30) years was prejudicial.

b) The evidence on record was not properly considered.

3. This being a first appeal, this court is minded that it ought to re-consider and re-evaluate the evidence afresh and arrive at its own independent determination.

4. The facts on record are that J N (PW1) who was an employee of Benda Kimeu was on 1st November, 2009 at about 6.00 am in the kitchen making tea when the appellant came in. He told PW1 that he wanted her to be his lover. PW1 declined to the request and the appellant suddenly cut her on the head four (4) times and three (3) times on her left hand. She fell and passed out. Before that, she screamed and Benda together with her sister came to the scene. When the two inquired what had happened, the appellant told them to ask PW1. The Police later came and took away the appellant and PW1. PW1 was taken to Machakos Level 5 for treatment and later referred to Kenyatta National Hospital where she was admitted for a month.

5. Benda Kimeu (PW2) who was the employer of both the complainant and appellant heard a loud thud and voice and rushed out. She found the appellant at the door and when asked as to what was happening, he went to the house and came back with a book and claimed that he could not be injured by somebody yet he was sick. PW2 opened the kitchen door and found PW1 seated on the floor with a machete penetrated on her hand near her palm. She had also been cut on the top of her head and near her eyes. She was not able to speak at the time. PW2 indicated that she had heard PW1 and the appellant's voices before she rushed out and that PW1 had no ailment or deformation prior to the incident. She stated that the appellant indicated to her that the book he had was from hospital. That the doctor had confirmed that he was sick and that it was PW1 who had infected her with a sexually transmitted disease.

6. P N K (PW3) who was PW2's daughter heard somebody scream and rushed out and went towards the kitchen. She saw the appellant at the kitchen door. He was talking. She halted and saw him stop inside the kitchen. She heard a louder scream and her siblings woke up. Everything went quiet and the appellant walked out of the kitchen. PW2 came out and enquired as to who was screaming and went to the kitchen to check. She too screamed and came out dazed. PW3's brother held her and took her to the main house. PW3 went and peeped into the kitchen and saw PW1 in a sitting position in a pool of blood with a machete stuck in her arm.

7. Ibrahim Gedi (PW4), an officer attached to Muthethini AP Post in Masii received PW1 and the appellant on 2nd November, 2009 from civilians. He stated that PW1 had a head injury and a machete stuck on her hand. She was unconscious and was taken to hospital. He arrested the appellant. PW1 was later referred to Kenyatta National Hospital. He collected the machete (P. Exhibit 4) after the doctor dislodged it from PW1's hand.

8. Dr. Muia Janet (PW5) from Machakos Level 5 Hospital who had worked with Dr. Ndeda who filled PW1's P3 was called to produce the p3 form. The p3 form was produced as P. Exhibit 3.

9. The trial court considered the said facts and put the appellant to his defence whereupon he gave unsworn evidence. The appellant denied having committed the offence and termed it as malice stating that the p3 form was filed late. His evidence was essentially a mitigation. He stated that he has a young wife and baby and his siblings depended on him. He sought forgiveness and stated that he was visited by several people while in custody indicating that he had not committed the offence and was thus a clean man.

10. In his submissions, the appellant took issue with the fact that he was initially charged with the offence of assault causing actual bodily harm which was changed to attempted murder and submitted that the charge of murder ought not to have been admitted by court. He took issue with the fact that the maker of the p3 form did not attend court. He stated that PW1 was not hospitalized yet adjournments were severally granted at her instance. That the police file was on the 29th May, 2012 not brought to court. That the said adjournment's occasioned by the prosecution prejudiced him.

11. The learned counsel for the respondent on the other hand submitted that PW1's evidence was corroborated by PW3 who confirmed that she saw the appellant at the kitchen door and heard a loud scream. That PW5 testified that PW1 had deep cuts on the head and other deep cuts on the left hand and a P3 form was produced to that effect. That the appellant's evidence did not explain or challenge the prosecution's case. On the sentence, it was submitted that the trial court exercised its discretion and that the same was not excessive since the maximum sentence for the offence the appellant faced is imprisonment to life. In this regard, the respondent cited **Arthur Muya Muriuki v. Republic [2015] eKLR**. On the alleged contradictions, it was submitted that the existence of material contradictions, inconsistencies and discrepancies in the prosecution evidence are centered on the appellant's health condition. That the appellant submitted that the prosecution adduced false allegations saying that PW1 underwent amputation. It was submitted that the said contradiction, if any, does not affect the prosecution's evidence or prejudice the appellant in any manner. It was submitted that the appellant's evidence did not challenge the prosecution's evidence. The weapon identified coincided with the evidence of PW5 that the probable weapon was sharp. On failure to call witnesses, reliance was placed on section 143 of the Evidence Act, **Julius Kalewa Mutunga v. Republic Criminal Appeal No. 31 of 2015** and **Bukenya & others v. Uganda [1972] EA 549** and submitted that the prosecution is not obliged to call a particular number of witnesses. It was finally submitted that the appellant was positively identified by PW1, PW2 and PW3 and further that PW5 was qualified to be called as a witness having been familiar with Dr. Ndeda's handwriting.

12. I have given due consideration to the evidence on record and the submissions tendered herein. The appellant contended that the charge of attempted murder ought not have stood. It is noteworthy that the law provides for amendment of a charge sheet where investigations have been done and there is need to so amend. It is further noted that the appellant did not raise an objection during the trial as required and participated in the trial to conclusion. In any event the prosecution was at liberty to amend the charge if the circumstances so permit. The Appellant suffered no prejudice as he duly cross-examined the witnesses.

13. On the contention that the maker of the P3 form did not attend court, Section 77 of the Evidence Act as correctly submitted by the respondent allows an expert witness to give evidence on behalf of another whose handwriting he/ she is familiar with. It emerged from PW5's evidence that she had worked with Dr. Ndeda and was familiar with his handwriting. She was therefore qualified to give evidence on his behalf.

14. The Appellant faced the offence of attempted murder contrary to Section 220(a) of the Penal Code. It is therefore important to examine whether or not the prosecution established the ingredients of the said offence. In so doing, I find guidance in the pronouncement of Lord Goddard C.J., in **R v. Whybrow (1951) 35 CR APP REP, 141** where he stated as follows:

> ***"... if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime."***

Similarly Madan JA, as he then was stated as follows in **Cheruiyot v. Republic (1976 - 1985) EA 47**:-

> ***"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."***

Further, the Court of Appeal in **Abdi Ali Bare v. Republic (2015) eKLR** had the following to say:-

> ***"...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:***

15. It emerged from the evidence that PW1 was cut on the head and hand and that the machete was in fact found lodged in her hand. Further, PW2 and PW.3's uncontroverted evidence was that the appellant was seen at the kitchen at the material time and that he had claimed that PW1 had infected him with HIV, a fact that the appellant did not controvert. The circumstances therein place the appellant at the scene of crime which fact he did not offer an explanation so as to exonerate himself. Bearing in mind the claim that he had been infected by PW1 and the gravity of the injury he inflicted on PW1 as confirmed by PW5, an inference is drawn that the Appellant had an intention to murder the complainant. Again the appellant did not refute having been on the scene at the material time and did not give an account of what transpired. The circumstantial evidence on record therefore points to him as the complainant's assailant. It follows therefore that the prosecution proved the charge beyond reasonable doubt. The Appellant's defence did not shake the evidence of the Prosecution. The Appellant had a motive to attack the complainant because he had blamed her for infecting him with HIV. The nature of injuries inflicted upon the complainant left no doubt that the Appellant intended to murder the complainant. Indeed the complai-nant had to be hospitalized for a long period as the injuries were life threatening.

16. The Appellant was sentenced to serve 30 years imprison-ment. He has challenged the said sentence arguing that it is excessive. It is trite that sentencing is a discretion of the trial court and that an appellate court would not normally interfere with the same unless it is shown that it is illegal or harsh and excessive as to amount to a miscarriage of justice. It is noted that the Appellant had been charged with the offence of attempted murder contrary to Section 220 (a) of the Penal Code. The same provides that any person who attempts to unlawfully cause the death of another is guilty of a felony and is liable to imprisonment for life. The trial court did consider the Appellant's mitigation and handed a sentence of 30 years imprisonment. I find the sentence to be minimum and I see no reason to disturb the same.

17. In the result, it is the finding of this court that the Appellant's appeal lacks merit. The same is dismissed. The conviction and sentence of the trial court is upheld.

Orders accordingly.

Dated and delivered at Machakos this 16th day of May, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Nagwere for Mutua Mboya - for the Appellant

Machogu - for the Respondent

Kituva - Court Assistant