



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 67 OF 2017**

**ZAKAYO KIPTOO MOSBEI.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the judgment of the Principal Magistrate's Court, Othaya (Hon.B.Ekhubi SRM) delivered on 19<sup>th</sup> October, 2017 in Criminal Case No. 275 of 2017)**

**JUDGMENT**

**INTRODUCTION**

1. The appellant, **Zakayo Kiptoo Mosei**, was charged with the offence of attempted murder contrary to **Section 220** of the **Penal Code**. The particulars of the charge were that on the 3<sup>rd</sup> of April, 2017 at Kamo-ini Village Nyeri South sub-County the appellant intentionally and unlawfully attempted to cause the death of Jane Wangare Karuri;

**FACTS**

2. The prosecution called a total of four (4) witnesses in support of its case; the matter proceeded for hearing and the complainant (**PW1**) testified that she was at home on the evening of the 3/04/2017 at about 7.00pm and was washing dishes when the appellant whom she had recently employed as a farm-hand walked into the kitchen and requested for tea without sugar; she gave him the tea and food and resumed her washing up; the appellant then struck her with a panga on the back of her head, on her forehead and on her left arm; when she screamed her husband together with the neighbors came to her rescue; the appellant ran away before her husband and the neighbors got there;

3. **PW2** was the husband of the complainant; his evidence was that he heard his wife's screams and rushed to the kitchen; and found her bleeding from the back of the neck, face and left arm; the complainant was taken to hospital for treatment for her life threatening injuries; and the matter was reported at Witima Police Station;

4. The appellant was arrested one month later and was charged with the offence; he was found guilty and sentenced to life imprisonment.

5. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and listed four (4) grounds of appeal which are summarized hereunder;

(i) The trial court convicted the appellant on the evidence of a single identifying witness;

(ii) The prosecution did not adequately prove its case that it was the appellant who assaulted **PW1**; and the evidence of **PW2** raised the issue of a grudge between the appellant and **PW1**;

(iii) Though the appellant was arrested after one and a half months there was no proof that he had gone underground after the alleged offence was committed;

(iv) The trial court rejected the appellants defence without considering that it displaced the prosecution's case;

6. At the hearing hereof the appellant was unrepresented and relied on his written submissions; whereas the State was represented by Learned Prosecuting Counsel Mrs. Gicheha who made oral submissions; hereunder are the rival submissions of the respective parties;

**APPELLANTS SUBMISSIONS**

7. The trial magistrate did not warn himself on the dangers of relying on the evidence of a single identifying witness; **PW2** did not witness the ordeal taking place that he never testified that he found the appellant in the act; the complainant wanted the court to believe that the appellant attempted to murder her; and none of the neighbors were called to testify as witnesses; the plausible question is whether the appellant was the perpetrator of the alleged offence;

8. The only evidence against the appellant was indirect or circumstantial; the weapons used that is the panga and the knife were found in the kitchen; none was dusted for finger prints; **PW4** recovered the weapons from the kitchen but did not establish who they belonged to; there was no exhibit was produced nor were any witnesses called to testify on the mode of his arrest; therefore the charges were not adequately proved and the prosecution failed in its duty;

9. The offence of attempted murder is established if the prosecution proves that the assault of the alleged the alleged victim was caused by an act of the accused person; and that he did the act or omitted to act with malice aforethought; that going by the evidence of **PW1** there was no evidence indicating that there was an intention of the appellant to cause bodily harm to her; that whether the appellant had the mental element was not proved;

10. The trial magistrate did not evaluate the whole adduced evidence with due caution as he was duty bound to; had he done so he would have found that it was tainted with doubts; which doubts ought to have favored the appellant; and the trial court rejected his defence which was not displaced by the prosecution evidence;

11. Reasons wherefore the appellant submitted that the whole evidence be analyzed and a different conclusion from that of the trial court; and prayed that the appeal be allowed in its totality.

### **RESPONDENTS SUBMISSIONS**

12. In response counsel submitted as follows;

(i) **On Identification;** the appellant was employed by **PW1** and **PW2** as a farm-hand; and had been in employment for only 20 days; he lived with his employers and was well known to the complainant and her husband **PW2**; this was not a case of mistaken identity; it was identification by recognition;

(ii) On 3/04/2017 at about 7.00pm **PW1** was in the kitchen cleaning dishes when the appellant entered and demanded for food and tea without sugar; she gave him and without provocation he cut her on the back of her neck; on her forehead and on her left arm; she screamed and her husband came to her rescue; but found that the appellant had already fled;

(iii) The evidence of **PW2** corroborated the evidence of **PW1**; that the appellant had gone to the house at almost the same time to where **PW2** was and asked **PW2** whether he had slaughtered a chicken for him; he left and headed to the kitchen shortly thereafter screams rang out from the kitchen; he rushed there to her rescue and found her with injuries and then rushed her to Outspan Hospital;

(iv) The appellant in his defence corroborates that at exactly the same time he went to the kitchen to ask for food and found **PW1** washing dishes; it is not in doubt that he was at the scene of crime; he even admitted to having ran way after the incident;

(v) The evidence of **PW1** and **PW2** was consistent as to what transpired on the material date; Counsel reiterated that the appellant was properly placed at the scene of the crime; and was positively identified; that there is no doubt as to the person who committed the offence;

(vi) **On proof to desired threshold;** the ingredients of attempted murder proved; the P3 Form was produced by **PW3**; the operations show the extent of the injuries inflicted were grievous and the complainant lost eye-sight in one eye;

(vii) **PW4** who was the Investigating Officer traced the appellant through his mobile phone which was still active; he was apprehended on the 16/05/2017 more than a month later and was found in Sagana; where he had gone to hide after committing the heinous act; the disappearance shows that the act was pre-meditated;

(viii) The prosecution proved its case beyond reasonable doubt;

(ix) **On rejection of appellants defence;** the defence tendered did not controvert the evidence of the prosecution; the appellant narrated how he was given food by **PW1**; that he later heard her scream and rushed to help and found her relatives assisting her; he ran away because the relatives said that he was the one who committed the crime; so he ran away to Chaka;

(x) Counsel submitted that the defence was a mere denial and the narrative did not convince the trial court; the defence did not displace the prosecution's case which was water-tight;

(xi) Counsel prayed that the appellants appeal be dismissed for lack of merit; and that the conviction and sentence be upheld;

### **REJOINDER**

13. In his rejoinder the appellant stated that he had to flee as he was confronted by the neighbours wrath; that the neighbors were mainly family members; that there was an existing grudge between him and **PW1** as she had refused to pay him for the casual work done; and had now proceeded to frame him;

14. He prayed for his appeal to be considered.

### **ISSUES FOR DETERMINATION**

15. After taking into consideration the respective submissions of the parties the following are the issues this court has framed for determination;

- (i) Whether the appellant's conviction on the evidence of a single identifying witness was safe; whether it was a case of mistaken identity; Whether the appellant was positively identified;
- (ii) Whether the ingredients of an attempted murder were proved to the desired;
- (iii) Whether the trial court failed to consider the appellant's defence.
- (iv) Whether the sentence imposed is legal.

### **ANALYSIS**

16. This being the first appeal it is the duty of this court to evaluate the evidence as a whole and subject it to an exhaustive examination and arrive at its own independent conclusion. Refer to the **Okeno vs R [1972] EA 32**.

**Whether the appellant's conviction on the evidence of a single identifying witness was safe; whether it was a case of mistaken identity; whether the appellant was positively identified;**

17. The appellant submitted that the trial court convicted him on the evidence of a single identifying witness that is **PW1** and that there was no corroboration of her evidence.

18. Upon perusal of the judgment on the issue of identification, an omission is noted in that the record reflects that the trial magistrate did not address the issue of identification at all; there is no finding by the trial court in its judgment on whether or not the appellant was positively identified by the complainant;

19. In the light of the above this court has re-analyzed the prosecution evidence on identification; it is not in dispute that the appellant was an employee of **PW1** and it is clear from the evidence of **PW1** that the appellant was a person well known to her; the attack took place in the kitchen and apart from the complainant and the assailant there was no other person present therein; therefore it is evident that the evidence of **PW1** was that of a single identifying witness and there was therefore need for the trial court to have examined such evidence carefully; this court makes reference to the case of **Wamunga vs R (1989) KLR** which held that ;

***“... A trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from any possibility of error before it can safely make it a basis of a conviction”***

20. The issue that then arises is whether the complainant's sole evidence on identification was reliable and whether the conviction was safe and free from any possibility of error; this court also makes reference to and is guided by the case of **Abdala bin Wendo and Anor vs R [1953] 20 EACA 166**; where it was held that;

***“other evidence whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, though based on the testimony of a single witness, can safely be accepted as free from the possibility of error”***

21. In this instance the other evidence that this court has considered that lends credence to the evidence of the complainant is that of **PW2** the husband of the complainant; he confirmed that the appellant entered into their house at 7.00pm and demanded for his chicken from him; this means that **PW2** actually saw the appellant and conversed with him; the appellant is said to have then left the room where **PW2** was and headed to the kitchen and within ten minutes **PW2** heard the screams of his wife; when he rushed there he found the complainant had cut wounds to the back of the neck face and arm;

22. Having carefully considered the other evidence of **PW2** which was presented with clarity and consistency; this court is satisfied that he was a lucid and credible witness; and finds that his evidence corroborated that of **PW1** on the time and place of the attack; the circumstances were such that **PW2** recognized the appellant and placed him at the locus in quo; his evidence is found to give credence to the assertion by **PW1** that the appellant was the assailant;

23. After re-evaluating the evidence on record this court is satisfied that the appellant was a person known to the complainant; that identification was that of recognition; that the evidence of this single witness on identification was corroborated and was reliable and free from error; this court is satisfied that the complainant positively identified the appellant as being the assailant.

24. This ground of appeal is without merit and is disallowed.

**Whether the charge was proved to the desired threshold;**

25. The appellant submitted that the prosecution failed to prove its case beyond reasonable doubt.

26. The appellant was charged with the offence of attempted murder contrary to Section 220 of the Penal Code; it is trite law that all the prosecution has to prove is an overt act that manifested the appellant's intentions to commit the offence; in this instance the record reflects that the trial court considered the two key ingredients of an attempt offence; which are;

(i) the '*mens rea*' that constitutes the intention

(ii) and the '*actus reus*' which constituted the overt act;

27. In considering the prosecution evidence on '*mens rea*' the trial court stated;

***" . . . . . It is common ground that after the incident the accused fled from the home taking all his belongings.***

***It is apparent that the act of fleeing the scene of a crime betrays the innocence of the accused person as he wants this court to believe. Moreover the act of taking with him of all his belongings just after the incident clearly demonstrates the mens rea. These establish the act of organization and intention."***

28. **PW4** who was the Investigating Officer confirmed that the appellant had packed all his belongings and had fled immediately after the incident; that with the aid of the mobile phone data tracking system they were able to track the appellant leading to his arrest;

29. Going by the evidence narrated by the complainant the actions of the appellant of fleeing go to demonstrate intention; this court finds no reason to interfere with the trial courts finding on intention;

30. As for actus reus; **PW1** stated that the appellant had a panga and used it to cut her on the back of the neck and also cut her on her forehead and on her arm; the P3 Form was produced by **PW3**; the operations show the extent of the injuries inflicted and confirm that they were indeed life threatening; indeed the appellants intention coupled with his actions was to cause death to **PW1**; it was by the grace of god that **PW2** was nearby and managed to rush her to hospital which action saved the complainants life.

31. The trial court it is noted from the record that in its judgment went further to draw a distinction between mere preparation to commit the offence and attempting to commit the offence; the distinction was whether the appellant had done more than mere preparatory acts and that the acts were sufficiently proximate to murder.

32. This court is satisfied with the findings of the trial court that the appellant done more than mere preparatory acts which acts were sufficiently proximate to murder; the prosecution is found to have proved its case to the desired threshold; in that the appellant had a positive intention to unlawfully cause death to the complainant;

33. This ground of appeal is found to be without merit and is disallowed.

**Whether the trial court failed to consider the appellant's defence.**

34. It is the duty of the trial court to look at the evidence as a whole and then consider whether or not the defence casts any doubt on the prosecution's case.

35. Upon perusal of the judgment it is noted that the trial court considered the defence raised by the appellant and made the following observation;

***"If he really feared for his life then the act of going to his room to pack and collect all his belongings would be the last thing on his mind considering that he had seen the complainant bleeding profusely with serious injuries."***

36. The trial court indeed considered the defence and made the following finding;

***"I find his defence to be merely an afterthought straddled with lies."***

37. It indeed defeats all logic that the appellant had stumbled upon the complainant after she was attacked and even upon seeing her with all the injuries he made no effort to call for help and assist in taking her to hospital; instead he ran to his room packed all his belongings and fled;

38. The only plausible and logical explanation to make is the appellant fled and went into hiding after committing the offence; this court is inclined to believe that the appellant had been in the vicinity of the house and was seen by the complainant and **PW2**.

39. Having perused the appellant's sworn statement of defence this court is satisfied that it does not in any way dislodge or controvert the evidence of the prosecution witnesses that places him at the scene on that material day; this court is satisfied that the trial court analyzed the appellant's statement of defence and weighed it against the evidence tendered by the prosecution which was overwhelming against his defence; and the trial court is found to have given good reasons for disregarding the defence as it did not cast any doubt on the prosecution's case.

40. This ground of appeal is found lacking in merit and is disallowed.

**Whether the sentence imposed is legal:**

41. The appellant's appeal was also against sentence; he was sentenced to life imprisonment; Section 220(a) of the Penal Code provides that any person who attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life; the sentence imposed by the trial court is the one provided by law and is therefore legal.

42. The ground of appeal on sentence has no merit and is disallowed.

**FINDINGS**

43. After re-evaluating the evidence on record this court makes the following findings;

(i) The appellant was positively identified by way of recognition by a single identifying witness; the conviction based on this evidence is found to be safe;

(ii) The prosecution proved its case to the desired threshold;

(iii) The trial magistrate considered the appellant's statement of defence and gave good reasons for rejecting it.

(iv) The sentence is found to be legal.

**DETERMINATION**

44. The appeal is found lacking in merit in its entirety and is hereby dismissed.

45. The conviction and the sentence are both hereby affirmed.

That is the Order of the Court.

**Dated, Signed and Delivered at Nyeri this 12<sup>th</sup> day of September, 2018.**

**HON .A. MSHILA**

**JUDGE**