



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 80 OF 2017

FREDRICK MUNENEMURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal arising from the Judgment of the Senior Principal Magistrate court at Wang'uru by P.M. Kiama
Criminal Case no. 464 of 2016 on 3rd November, 2017)*

JUDGMENT

The appellant Fredrick Munene Muriuki was charged before the Principal Magistrate's Court at Wang'uru in Criminal Case No. 464/2016 with the offence of Attempted Murder Contrary to Section 220 (a) of the Penal Code.

The appellant pleaded not guilty and a full trial was conducted after which he was found guilty, convicted and sentenced to serve seven years imprisonment. He was aggrieved by the conviction and sentence and filed this appeal which raised the following grounds:-

That the trial magistrate failed to consider that the charge arises out of a land dispute and PW1 Gregory Njogu failed to seek amicable solution.

- ***Failure by the prosecution to prove the charge beyond any reasonable doubts.***
- ***The failure by the trial magistrate to consider his defence without giving cogent reasons.***
- ***That the trial magistrate erred in law by failing to consider the gross contradiction in the testimony by prosecution witnesses and shifting the burden of proof.***
- ***Sentence.***

The appellants pray that the appeal be allowed, and conviction be quashed, sentence be set aside and the appellant be set at liberty.

The facts of the case are that on 4.8.16 the complainant Joseph Njogu Kiragu was met by two men one by name Njenga who informed him that he was sent by a person he had a land dispute with by name Munene Kabutu to kill him so that his family could abandon those plots. He decided he could not kill but would report to the police. They exchanged phone numbers. After two days Njenga called him and they met at the police station. A trap was laid for the suspect. The complainant was told to go near a river and splash himself with a blood from chicken.

The suspect who was the appellant was called and informed that Njogu had been killed. The appellant was then arrested while relaying the contract money Kshs 25,000/= to PW-2- who he expected to have killed the complainant. He was then charged. The appellant who was the suspect had offered to pay Kshs

25,000/- to PW-2- so that he could kill the complainant (PW-2-).

This is a 1st appeal and this court has duty as it was held in a binding authority in **Okeno -v- R (1972) E.A 32**, to analyse the evidence and come up with its own independent finding but leave room for the fact that it had no opportunity to see the witnesses and assess their demeanor. This had been reiterated by the Court of Appeal in the case of **John Oketch Abonyo -v-R (2000) eKLR** where the court in dismissing the appeal stated:

“The duty of a 1st appellate court in regard to the evidence and facts is now settled in law. It is required to subject the evidence to fresh and independent analysis and in appropriate circumstances, even to make its own independent findings and conclusion. In doing so however, the appellate court must bear in mind that it has only the record and has not enjoyed the advantage of seeing and observing witnesses under testimony.....”

The evidence before the trial court was tendered by three witnesses.

PW 1 testified how PW 2 informed him that the appellant had hired PW 2 to kill him. Thereafter they went to the police and a trap was laid to catch the appellant. He was told to slaughter a chicken and smear his clothes with blood.

PW 2 was contracted by the appellant to kill PW 1 because of a land dispute at a cost of Kshs.25,000/=. He reported the matter to the police and when he met with the appellant, the police arrested the appellant and he was found with the said Kshs.25,000/= in his pocket. This was confirmed by PW 3 who stated that PW 2 went to the police station to inform them of the plot.

The appellant on the other hand denied knowing PW 2 and that he was arrested where he had gone to withdraw money.

Looking at the evidence adduced, PW 2 evidence was corroborated by PW 1 and PW 3. A trap was laid and the appellant unaware of the same fell for the same when he proceeded to meet with PW 2 and had Kshs.25,000/= which he was to pay him. On the other hand, the evidence of the appellant was mere denial.

The appellant was charged with the offence of Attempted Murder under **Section 220 (a) of the Penal Code**. The section provides:-

“Any person who attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life.”

The appellant was sentenced to seven years imprisonment. Sentencing is the discretion of the trial magistrate. The appellate court will not normally interfere with the exercise of that discretion unless it is proved that the trial magistrate considered irrelevant matters, was wrong in principle, the sentence was manifestly excessive and unlawful. Where this is proved, the appellate court reduce or enhance the sentence.

Section 354(3)(ii) provides:-

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

The appellant was sentenced to serve seven years imprisonment. The sentence was lawful.

Having considered and evaluated the evidence tendered before the trial court as required of the 1st

appellate court. I find that it is clear that the appellant committed the offence, Gregory NjoguKiragu (PW-1-) is named as the complainant on the charge sheet. There was no contradiction as to who was the complainant. PW-2 – is the one who reported to the police. PW-1 is the one who was to be killed. The action by the appellant to pay PW-2- to kill PW-1- was unlawful.

That is why PW-1 in cross-examination stated that he was called as a witness.

The word complainant refers to either the Republic or the person who filed the complaint. **Section 202 of the Criminal Procedure Code** provides:

“If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.”

The word complainant means Republic in whose name the criminal prosecutions are brought and not the victim of crime who merely the chief witness on behalf of the Republic. This is the interpretation given by the Court of Appeal in **Roy Richard Elirema&Another -v – R CR. Appeal No. 6/2002.**

The circumstances of this case are clear that PW-2- reported but the victim was PW-1. It is therefore not true to say that the case had no complainant.

On the issue of the phone number, failure to produce the call data does not vitiate the conviction as the facts were proved by the testimony of PW-2.

The testimony by PW-2 was confirmed as the appellant had Kshs.25,000/= upon his arrest which he had agreed to pay PW-2 for the job of eliminating PW-1. He could not have known that the appellant had that money. I find that the prosecution tendered sufficient evidence which proved the charge against the appellant beyond any reasonable doubts.

The conviction was proper in the circumstances and the sentence was lawful.

Conclusion

The appeal is without merits.

I dismiss the appeal.

Dated at Kerugoya this 8th day of November 2018.

L.W. GITARI

JUDGE