REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 110 OF 2011

GERALD WATHIU KIRAGU……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal against the conviction and sentence in Othaya Senior Resident Magistrates' Court Criminal Case No. 532 of 2010 (Hon. F.W. Macharia (SRM)) delievered on 13th June, 2011)

JUDGMENT

The appellant was charged with two counts of the offence of attempted murder contrary to **section 220(a)** of the **Penal Code** and one count of the offence of grievous harm contrary to **section 234** of the **Penal Code**. In the latter count, it was alleged that on the night of 20th October, 2010 at [particulars withheld] village within Nyeri County, the appellant unlawfully did grievous harm to Anthony Gakuru Warui. As for particulars of the attempted murder charges, it was alleged that on the night of 20th October, 2010 at [particulars withheld] village, [particulars withheld] location within Nyeri County, the appellant jointly with others not before court attempted unlawfully to cause the death of S W by occasioning injury on the head of the said S W G. The particulars of the third count were similar to those in the second count only that this time round the appellant is alleged to have attempted to unlawfully cause the death of W W by occasioning injury to his head.

The appellant was convicted of the offence of grievous harm for which he was fined Kshs 20,000/= and in default to serve three months imprisonment and one count of attempted murder and sentenced to serve fifteen years imprisonment. He appealed against the conviction and sentence and in his petition of appeal which is neither dated nor stamped by the court stamp, he raised the following grounds against the lower court's decision:-

1. The learned magistrate erred in law and in fact and misdirected herself by holding that identification by recognition was conclusive yet the conditions for identification were unfavourable;
2. The learned magistrate erred in law and in fact in relying on the evidence of identification to convict the appellant without considering the report made, apparently to the police before the appellant was arrested.
3. The learned magistrate erred in both law and fact in failing to consider the evidence that there was long-standing grudge between the complainant and the appellant and his family.
4. The learned magistrate erred in law in relying upon the evidence of witnesses who had not recorded their statements before the appellant's arrest.
5. The appellant's defence was not given any due weight and consideration but was dismissed without any reason.

When the appeal came up for hearing counsel for the appellant argued that the appeal boils down to the second count alone and in his view the degree of injury which ought to have been indicated was not indicated in the P3 form in which the injuries allegedly sustained by the complainant were represented and that in the absence of any evidence of injury the appeal ought to be allowed. In any event, counsel submitted that the P3 form itself was not produced by its maker or the doctor who filled it.

The state counsel opposed the appeal and refuted the appellant's counsel's claims. Counsel urged that contrary to the submissions by the counsel for the appellant, the injuries were laid out in the P3 form and that the appellant's intention was not just to injure the complainant but to kill her as well; in this submission counsel relied on **section 206** of the **Penal Code** on malice aforethought and which in its pertinent parts states:-

> ***206. Malice aforethought Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances—***
>
> ***(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> ***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
>
> ***(c) an intent to commit a felony;***
>
> ***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

The malice aforethought referred to here is the criminal intent or mens rea to murder or cause death as defined under **section 203** of the Penal Code. Counsel submitted that the act of hitting the complainant was in itself sufficient and the degree of harm caused does not matter. As for the production of the P3 form counsel urged that it was properly admitted in evidence under **section 77** of the **Evidence Act, Cap 80** Laws of Kenya in circumstances where the maker was not available.

In response counsel for the appellant submitted that **section 206** of the **Penal Code** did not apply to appellant's case because it only deals with murder or manslaughter offences.

Inorder to appreciate the merits or lack thereof of the appellant's appeal, counsel's arguments and, more importantly, for this court to determine whether the magistrates' court's decision should be sustained or overturned, it is important to set out the evidence at the trial; this being the first appeal, it is also incumbent upon this court to evaluate the evidence at the trial afresh and come to its own conclusion as to whether the lower court came to the right decision but bearing in mind that much as the decision of this court may vary from that of the lower court, it is only the latter court that had the advantage of hearing and seeing the witnesses and thus was in a position to appreciate such aspects of the evidence as their demeanour, their disposition et cetera. (**See Okeno versus Republic (1972) EA 32 at page 36).**

The complainant in the first count **A G W (PW1)**, testified that on 20th October, 2010 at around 9.30 pm, he was with his family in their family house watching television when he heard his dog bark outside; he ventured out to check why the dog was barking but just then he was accosted by men one of whom had been hiding behind a water tank. This particular man hit him. The complainant ran back to his house but his attacker pursued him into the house demanding money.

The complainant testified that his house was well lit with electricity light and when his daughter (PW2) saw the intruder she shouted out his name as she knew him. This man hit her on the head with a metal bar he was armed with; he also hit the complainant's brother who was with him in the house at the material time. The complainant testified that he recognised the attacker as he had known him all his life and that

he was in fact his neighbour.

The second complainant, **S W (PW2)** was a minor, and was the first complainant's daughter who had been hit on the head when she called out the appellant's name. She said that she saw the appellant enter the house and started beating them. The witness testified that she was hit with an iron bar when she called out the appellant's name. She also said that she had known the appellant before because he was their neighbour and that on the material night there was sufficient electricity light and therefore she was able to recognise him.

The third prosecution witness was also a minor; he was **F M W (PW3)** who testified that he was in the complainant's house together with his father **W W**, his **uncle (PW1), S W (PW2)** and several other family members at the material time. According to his testimony, he saw someone hit his uncle (PW1) as soon as he opened the door to check why the dog was barking. His uncle rushed back to the house followed by his attacker who was then demanding money. He also hit his father W W on the head and **S W (PW2)** when she called out his name. His uncle alerted the neighbours who started screaming and it is then that the assailant escaped. The minor testified that she knew the appellant well because he was a neighbour.

Yet another minor testified against the appellant as the fourth prosecution witness; this was **P W (PW4)** who testified she was together with the rest of the **A G W's (PW1's)** family members when they were attacked. According to her, the appellant was right behind **A G W (PW1)** when he retreated to the house; he saw him beat her father W W and **S W (PW2).** Her uncle screamed and alerted the neighbours. Like the first three prosecution witnesses she said that she knew the appellant because he was a neighbour; she also recognised his voice when he demanded for money.

A G W's (PW1's)son **N N (PW5),**also a minor testified that he saw the appellant hit his father and **S W (PW2).** He saw and recognised the appellant because, as he testified, he was their neighbour. According to this witness, they would have been harmed were it not for the neighbours' response to their distress call.

Dr Moses Ndege Njuki (PW6) presented the medical examination reports in respect of **A G W's (PW1), S W (PW2) and W W** though the latter did not testify. According to his testimony, **A G W (PW1)** was examined on the 11th November, 2010. He had a plaster of Paris on his left arm; he had also sustained bruises on the upper outer part of the right arm. The approximate age of the injuries was one week and the probable type of weapon used was blunt. An x-ray showed a fracture of the left wrist bone. The degree of the injury was assessed as 'harm'.

S W (PW2)was also examined on 11th November, 2010; according to the doctor's findings, she sustained a 4cm cut wound on the head which had been stitched and was healing. She also sustained a 2cm cut wound on the forehead which was healing as well. The probable weapon used to injure her was thought to be blunt. No fractures were noted but the degree of the injury was not specified.

As far as **W W** is concerned, he was examined on 18th November, 2010; he sustained deep cuts on the backside of the head measuring 10 to 15 centimetres. The approximate age of the injuries was said to be four weeks and the probable type of weapon used was blunt; the degree of injury was assessed to be 'harm'. For some unspecified reason, W W did not testify and for this reason the appellant was acquitted in respect of the third count which related to attempted murder of this particular witness.

The Dr who examined the complainants was Dr Mbuthia but was said to have been transferred to Nairobi; because of his unavailability, this witness produced the medical reports; he testified that he was conversant with Dr Mbuthia's handwriting.

The appellant offered a defence of alibi on oath; he testified that on 20th October, 2010, at 9.30 am he was at home with his wife and children but that on 10th November, 2010 he travelled to Kirinyaga where he owns land. He proceeded to the assistant chief's office to report that his property was stolen; it is then that

he was arrested on the strength of the warrants of arrest issued against him apparently in respect of the complainants' reports to the police on their attack on the night of 20th October, 2010.

He denied the charges and alleged that there was a grudge between him and the prosecution witnesses whom he alleged to be his neighbours and also distant relatives; the source of this grudge, so he testified, was that the complainants burnt his house on 27th September, 2010 and that he was framed up because he reported them to the police.

The appellant's mother, **Florence Nyawira Kiragu (DW2),** testified on his behalf. It was her evidence that her son was framed up because of an existing grudge and that his son was hated because he was financially stable. She also testified that their house was burnt on 2nd October, 2010 and that she now lived in Nyeri. She alleged that the complainants are family members and that the children who testified against her son had been couched to do so.

Also testifying on behalf of the appellant was his wife Faith Njeri (DW3); she said that on 20th October, 2010 at 9 pm her husband was with her at their home in Thika.

This was the evidence that the lower court was confronted with. As noted, counsel for the appellant narrowed is arguments on the appellant's conviction on the second count and though he did not state it expressly, he appears to have abandoned the grounds upon which the appeal was based and focused mainly on the aspect relating to the medical report produced by Dr Ndege Njuki (PW6).

The appellant's counsel urged that since the degree of the injury was not shown in the P3 form in respect of **S W (PW2)**then there was no evidence of injury and therefore the second count against the appellant was not proved. Counsel also belatedly urged that the P3 form was not produced by its maker and ought not to have been admitted in evidence; he raised this issue for the first time in response to state counsel's submissions and therefore I allowed the state counsel to respond to this particular issue.

It is clear that none of the grounds urged by the counsel for the appellant were encapsulated in his petition and therefore basically, they were fresh or new grounds for which he ought to have sought leave from this Court to amend the petition of appeal before adopting them; such leave is mandatory under **section 350. (2) (iv)** of the Criminal Procedure Code.

Be that as it may, **Dr Moses Ndege Njuki (PW6)** testified that **S W (PW2)**sustained a 4cm cut wound on the head and a 2cm cut wound on the forehead; the wound on the head was stitched but both wounds were said to healing at the time of examination. This information is contained in the P3 form that was admitted in evidence against the appellant; in that same P3 form the probable type of weapon causing the injury was said to be blunt. This evidence corroborates **S W's (PW2's)**evidence that she was hit on the head with a twisted iron bar.

In my humble view, this evidence was sufficient to prove that the complainant was injured and this evidence was neither controverted nor displaced; in fact no question was raised at the doctor's cross-examination on whether the complainant was injured or not. I suppose that failure to indicate the degree of the injury which the complainant sustained was not fatal to the prosecution case. The only question is whether the appellant was properly charged and convicted under **section 220 (a)** of the **Penal Code, Cap 63** solely because he injured the complainant. That section provides as follows:-

> ***220. Attempt to murder***
>
> ***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.

I understood counsel for the state to urge that the state need not even prove that some sort of injury was sustained by a victim of attempted murder, let alone the degree of injury, before it can mount a prosecution for this particular offence under **section 220(a)** of the **Penal Code**; and where an injury has been sustained, the degree of the injury sustained is not a necessary ingredient to sustain a charge under section 220(a) of the Code.

Counsel argued that, all that the prosecution needs to establish is malice aforethought on the part of the accused person. In the offence of murder, malice aforethought is taken to be the mental element or *mens rea* of the offence; ordinarily, it takes the form of an intention unlawfully to kill which is the express malice or an intention unlawfully to cause grievous bodily harm which is the implied malice.

The learned counsel was convinced, as much as the learned magistrate was, that when one hits a seven year old with a metal bar on the head, he is aware that either that act will probably cause death of the minor or cause her some grievous bodily harm; the appellant is assumed to have intended the death of the complainant or was reckless as to whether such death was inevitable.

Section 206 of the **Penal Code,** as noted**,** deals with attempted murder, and the operative word here is 'attempt'; in its technical sense, this word is defined in **section 388** of the **Penal Code** which states as follows:-

388. Attempt defined

(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.

(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.

The essence of the offence of attempted murder under section 220(a) of the Penal Code therefore is the intent to murder; intent is the principal ingredient of this crime. It appears that much as the submissions by counsel for the state appear logical and attractive, they are inconsistent with law on attempted murder as understood under **section 220(a)** of the **Penal Code**. Contrary to what the learned counsel suggested and what the learned magistrate held, inorder to sustain a conviction under this section it is not sufficient to demonstrate or to prove that the offence would have been murder if death had ensued; it must be proved that the appellant had a positive intention unlawfully to cause death.

The Court of Appeal for Eastern Africa had occasion to deal with this question in **Republic versus Luseru Wandera s/o Wandera (1948) EACA 105**. In that case the appellant went to fetch his wife from the house of her step-mother where she had stayed overnight, and as she declined to leave, he struck her. Soon after this, and without any provocation, the appellant struck one Dorosiya in the neck with his knife though there was evidence that on slapping his wife the appellant was seized by four other persons who began to beat him.

The appellant was convicted of attempting unlawfully to cause death contrary to section 208 (1) Penal Code of Uganda which is in pari materia with section 220 (a) of the Kenyan Penal Code, unlawful wounding with intent to do grievous harm contrary to section 220(1) of the Penal Code (U), and unlawful wounding contrary to section 226(1) of the Penal Code (U). He was sentenced to ten years' imprisonment

with hard labour on each of the first two counts and to three years in prison on the third count, all sentences being concurrent.

On appeal the court held that an intent merely to cause grievous harm, whilst sufficient to support a conviction for murder, it is not sufficient to support a conviction under **section 208(1)** of the Code for attempting unlawfully to cause death. The court was of the view that a conviction for this latter offence can only be supported by proof of a positive intention unlawfully to cause death.

In analysing the evidence at the trial, the court held that the circumstances may well have been that the appellant struck out wildly with the knife without any specific intent to kill or even to strike at any vital part of his assailants. The court held that the appellant was entitled to the benefit of any reasonable doubt in this respect and there was considerable doubt whether he used the knife with positive intent to cause death.

Coming back to the case at hand, there was sufficient evidence to support the fact that there was some overt act on the part of the appellant that resulted in the injury of the complaint; however, it was not proved that the injury in execution of the appellant's intention to murder her. The available evidence was that the appellant was demanding for money and that he struck the complainant when she called out his name. In the absence of proof of intent the conviction of the appellant under **section 220(a)** cannot be said to be safe. The learned magistrate misdirected herself on the law when she disregarded the need for proof of the very necessary ingredient of intent in an offence of attempted murder.

But the matter does not end there; there was, as noted, sufficient proof that the appellant wounded the complainant and the question is whether or not he ought to should be held responsible for his actions inspite of the fact that he cannot be held to account for the offence of attempted murder under **section 220(a)** of the **Code.**

Section

179. When offence proved is included in offence charged

> (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

The appellant was charged with a felony which attracted up to life imprisonment, if he was to be convicted of the offence; as a matter of fact he was sentenced to 15 years in prison but for reasons I have given he was improperly convicted of the offence of attempted murder. The facts disclosed he unlawfully wounded the complainant and would have been culpable of an offence under **section 237**(a) of the Penal Code; that section states:-

> ***237. Unlawful wounding or poisoning***
>
> ***Any person who—***
>
> ***(a) unlawfully wounds another; or***
>
> ***(b) unlawfully, and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered to, or taken by, any person, is guilty of a misdemeanour and is liable to imprisonment for five years***

The offence of unlawful wounding is no doubt a minor offence compared to the offence with which the

appellant was convicted and going by the provisions of **section 179(2)** of **Criminal Procedure Code,** the appellant would have been properly convicted for an offence under **section 237 (a)** of the Penal Code.

In **R versus Luseru Wandera s/o Wandera** (supra), the court held that though the attempt to murder was not proved against the appellant, the court was entitled to presume that the appellant knew and intended the natural and probable consequences of an assault committed by him with the knife and that those consequences were likely to cause grievous harm; the court thus sustained the conviction under section **220(1)** of the Code of wounding with intent to cause grievous harm. By parity of reasoning, the appellant ought to have been convicted for the offence of unlawful wounding rather than attempted murder.

The other question which the appellant raised was the production and admission of the evidence of the P3 form and the counsel's submission on this issue was that the form ought to have been produced by its maker and not **Dr Moses Ndege Njuki (PW6)**. Counsel for the state countered that the form was validly produced and admitted in evidence under **section 77** of the **Evidence Act**; this section provides as follows:-

> ***77. Reports by Government analysts and geologists***
>
> ***(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.***

The **P3 form** produced was filled and signed by a medical practitioner in the employment of the Government and therefore for purposes of **section 77 (1)** it was a report under the hand of a medical practitioner which could be admitted by the court on the presumption that the signature of its maker was genuine and that the maker held the office and the qualifications which he professed to hold at the time he signed the document.

The doctor who filled the document was said to have been transferred to a different station and **Dr Moses Ndege Njuki (PW6)**who produced it on his behalf said that he was conversant with his handwriting. In my humble view, the maker of the document who for all intents and purposes is a medical practitioner as understood under **section 77** of the **Evidence Act** need not have produced the document himself if circumstances were such that he could not produce it. In any event, it was not argued that the appellant suffered any prejudice because the P3 form was produced by someone other than its maker and no wonder he did not take any objection to the production of the document by **Dr Njuki (PW6).**

And even assuming it was an error procedurally to admit this particular document, **section 382** of the **Criminal Procedure Code** implies that such an error is not fatal to the criminal proceedings and the outcome thereof; it states:-

> ***382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings***
>
> ***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation,***

order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

It was not demonstrated on behalf of the appellant how the production of the P3 form could possibly have occasioned failure justice and in any event no objection was taken on the production of this document at the earliest opportunity possible.

It would have been appropriate to conclude this judgment at this juncture but I feel inclined to mention something about the grounds upon which the appeal was based though they were not argued; the first of these grounds is that of identification of the appellant. The offence was committed at night and therefore the question that normally arises in such circumstances is whether the conditions for identification were favourable.

It is apparent from the evidence that although the crime happened at night, the house in which this offence was committed was well lit with electricity light and at no time during the entire episode, which is said to have taken about five minutes, were the lights switched off. The appellant was recognised by the first five prosecution witnesses who were all in **A G W's (PW1's)** house when they were attacked. They were all consistent that the appellant was their neighbour and they recognised him as soon as he entered their house; in fact S **W (PW2)** was hit on the head when she called out his name.

I am aware the identification or recognition of a suspect is an aspect of evidence that the court must consider carefully before coming to any conclusion and in particular consider whether the conditions of identification or recognition were favourable. This point is emphasised in **Wamunga versus Republic (1989) KLR424 where** the Court of Appeal, held at page 426 that:-

"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

The learned magistrate accepted the evidence of the prosecution witnesses on the recognition of the appellant. She found the circumstances of recognition to have been favourable and free from any possibility of error. I have not found any clue on record to suggest that the learned magistrate misdirected herself on the evidence and that she should possibly have reached a different conclusion. I would uphold her finding that the appellant was properly recognised.

In the case of **M'Riungu versus Republic (1983) KLR455** the Court of Appeal had occasion to address this question of recognition; it held at page 461 of its judgment that where the accused persons were known by their victim before the crime, it was a case of whether the victim had recognised them and not whether he had identified them. In rejecting the appellant's appeal, the court held that though the robbery had taken place at night the circumstances for positive recognition were favourable especially as the robbers were persons previously known to their victim, more like in this case.

More pertinent to this case also, the court of appeal held at page 461 that a question of recognition is a question of fact and as noted there would be no basis for an appellate court to upset a finding of fact by the trial court unless it is clear on the evidence that no reasonable trial court could have reached that conclusion. The totality of the evidence of the prosecution shows that it was not unreasonable for the learned magistrate to come to the conclusion that the appellant was positively recognised.

The appellant also complained that the prosecution witnesses either testified without having recorded their statements with the police or they recorded their statements after the appellant had been arrested.

This allegation, however, did not come out during the hearing and no question in this respect was ever put to any of the prosecution witnesses. I would say that this particular ground had no foundation at all.

The appellant faulted the learned magistrate's decision on the ground that he did not consider his defence. His defence, as I understand it, was two-pronged; first, that there a standing feud between him and the complainants' family and therefore the charges against him were made up and second, he was not at the locus in quo at the time.

As for the grudge between the two families there was no evidence of such a grudge. The appellant simply alleged that the complainants' family had burnt his house and that he had made a report to the police but there was no evidence of such report having been made.

On his defence of alibi I am aware that where one raises such a defence, he has no obligation to explain it. In **Wangombe versus R (1980) KLR 119,** it was held that if an accused person raises an alibi as an answer to a charge against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution.

I agree with this general statement of the law; however, I am also aware that not every alibi displaces what is otherwise a water tight prosecution case that has been proved to the required standard. To displace the prosecution case, an alibi must create some doubt that the appellant was at the locus in quo. In this instance, I find no such doubt and I would dismiss the appellant's alibi just as the learned magistrate did.

For the foregoing reasons I allow the appeal to the extent that the conviction under section **220 (a)** of the **Penal Code** is quashed and the sentence of 15 years imprisonment set aside; I would substitute the conviction of attempted murder with that of unlawful wounding and substitute the sentence with five years' imprisonment. It is so ordered.

Signed, dated and delivered in open court this 8th April, 2016

Ngaah Jairus

JUDGE