REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.118 OF 2015

(An Appeal arising out of the conviction and sentence of W. NGUMI – SRM delivered on 8th May 2015 in Githunguri SPM. CR. Case No.37 of 2014)

KIBE WANJOHI KAMAU……..……
APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Kibe Wanjohi Kamau was charged with the offence of **attempted murder** contrary to **Section 220(a)** of the **Penal Code**. The particulars of the offence were that on 14th January 2014 at Githunguri Township in Kiambu County, the Appellant attempted to unlawfully cause the death of Johnson Muthamia Mberia (the complainant) by cutting him with a panga twice on the head and once on the lower back. He was further charged with the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant unlawfully did grievous harm to Johnson Muthamia Mberia. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on both counts. In respect of the first count, he was sentenced to serve twenty (20) years imprisonment. In respect of the second count, he was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of unsatisfactory and unreliable evidence. He was aggrieved that the trial magistrate had convicted him on the basis of insufficient evidence that fell below the threshold of proving the case to the required standard of proof. He took issue with the fact that the trial court had not properly evaluated the evidence and therefore reached the erroneous determination convicting him. He faulted the trial magistrate for convicting him on the basis of a duplex charge sheet. He was aggrieved that his defence had not been taken into account. He was of the view that if the defence had been taken into consideration, the court would have reached the finding that he lacked the requisite *mens rea* to commit the crime. For the above reasons, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his

appeal. Ms. Nyauncho for the State made oral submission urging the court to dismiss the appeal. She was of the view that the prosecution had adduced sufficient culpatory evidence to secure the conviction of the Appellant. This court shall revert to the arguments made after briefly setting out the facts of this case.

The Appellant is the brother in-law of the complainant. According to the evidence adduced during trial, the complainant married the step-sister of the Appellant. It was apparent from the evidence that there existed bad blood between the Appellant and the complainant. The disagreement arose from an inheritance dispute. The father of the Appellant, before his death, wrote a Will in which he bequeathed part of his parcel of land to the complainant. This did not go down well with the Appellant. From the evidence adduced, it was apparent that attempts had been made to mediate and resolve the dispute. It appears that the mediation had not resolved the dispute to the satisfaction of the Appellant. Despite of this simmering dispute, no case has been referred to the court for determination.

According to the complainant, the Appellant had previously attacked him in 2010. He hit him on his hip. The Appellant was arrested. However, he was not charged because the complainant heeded to the plea by his mother in-law not to further escalate the matter. With a view to reconciling with the Appellant, the complainant withdrew the complainant from the police. The complainant testified that on 14th January 2014 at about 2.20 p.m., he took his motor vehicle to a garage at Githunguri for it to be repaired. While at the garage, he was informed that the spare parts that were to be replaced in the motor vehicle were being procured from Nairobi. He decided to wait. He was with a mechanic PW2 Stephen Kamau Njenga and PW5 John Ng'ang'a Thuo, a lorry driver. He passed time with them while chatting.

According to the complainant, without any warning, the Appellant cut him on the head with a panga. The complainant did not see him come to where he was. He also cut him on the back. PW2 and PW5 saw the Appellant cut the complainant. They testified that the Appellant attacked the complainant without any provocation. The Appellant did not say anything. PW2 and PW5 raised alarm and went to the rescue of the complainant. They were assisted by PW3 Charles Waweru Gathoni, a butcher and PW4 Mungai Kagwe, a farmer who were in the vicinity at the time. The four witnesses testified that after the Appellant had cut the complainant, the members of the public wanted to lynch him. The Appellant took off and ran to Githunguri Police Station where he was arrested and detained by the police. PW2 and PW5 reiterated that the attack on the complainant by the Appellant was completely unprovoked. PW2 and PW5 testified that they knew the Appellant prior to the attack. The Appellant used to sell sugarcane within Githunguri Township.

After the attack, the complainant was rushed to Beta Care Hospital where his wounds were stitched and dressed. He was taken to MP Shah Hospital where a CT scan reviewed that he had sustained a skull fracture. PW6 IP Geoffrey Mogere, the then Deputy OCS of Githunguri Police Station, testified that upon the arrest of the Appellant, he commenced investigations. He went to Beta Care Hospital where he found the complainant being attended to. He had photographs taken of the injuries that the complainant had sustained. The photographs were produced as exhibits in the case. PW6 testified that upon conclusion of investigations, he decided to charge the Appellant with the offences for which he was convicted.

The complainant was seen on 20th January 2014 by Susan Njeri, a Clinical Officer based at Githunguri Health Centre. She filled a P3 form. She noted that the complainant had sustained a cut injury from the right ear extending to the right parietal lobe and the neck. The cut injury was approximately 20 cm long. There was another deep cut wound on the occipital region measuring 10 cm in length. There was a cut on the lower back which was approximately 75 cm long. According to PW7, these injuries caused the complainant to bleed excessively. The CT scan of the head revealed that he had a fracture of the left occipital bone. In her assessment, the degree of injury that the complainant sustained was grievous harm. The P3 form and the initial medical treatment notes were produced as exhibits in the case.

When the Appellant was put on his defence, he told the court that he had a long standing dispute over land with the complainant. He testified that the complainant with his step-sister (the complainant's wife) had taken advantage of his father when he was sick to inherit a portion of land measuring 3.3 acres. He was given 1.8 acres. He was not happy with this turn of events. On the material day, he recalled that he met with the complainant. They had an altercation when he inquired why the complainant was trying to

deprive him of his land. He testified that the complainant called him *"pumbavu"* (stupid) which provoked him into cutting him with a panga. He told the court that he had no intention to injure the complainant. It was his testimony that he was severely provoked by the complainant when he called him stupid.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court so as to arrive at an independent determination whether or not to uphold the conviction of the trial court. In doing so, this court should be mindful of the fact that it neither saw nor heard the witnesses as they testified during trial and cannot therefore give an opinion as to the demeanour of the said witnesses (**see Okeno –vs-Republic [1972] EA 320**). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the charges brought against him to the required standard of proof.

This court has re-evaluated the evidence adduced before the trial court. It was clear from the evidence that the Appellant attacked the complainant due to an existing land dispute. From the nature of the injuries that the complainant sustained, it was evident that the Appellant intended to cause grievous harm to the complainant. It was by sheer luck that the complainant lived to tell his story. The Appellant testified that he was provoked by the complainant when he (the complainant) abused him. PW3 and PW5 who were with the complainant at the time of the attack, testified that the Appellant cut the complainant with a panga without uttering a word. He sneaked behind the complainant and cut him with the panga. The complainant had stayed with PW3 and PW5 for some time before the attack. If indeed the Appellant had earlier been provoked by the complainant, the Appellant had sufficient time to cool down. There was no evidence to suggest that the complainant had abused the Appellant as alleged by the Appellant. It was clear to this court that the Appellant attacked the complainant due to the land dispute that existed between them. The Appellant did not make any attempt to have the dispute resolved in court. He decided to take matters into his own hands. The Appellant did not dispute that he cut the complainant with the panga. This court holds that the prosecution proved to the required standard of proof beyond any reasonable doubt that the Appellant cut the complainant and caused him to sustain grievous harm. In that regard, this court finds no merit with the Appellant's contention that the prosecution had not proved its case to the required standard of proof.

As regard the Appellant's ground of appeal that he was charged with two offences which essentially arose from similar facts, the Appellant's complaint is valid. The facts supporting the charge of **attempted murder** contrary to **Section 220(a)** of the **Penal Code** and the facts supporting the facts of **causing grievous harm** contrary to **Section 234** of the **Penal Code** are essentially similar. In both instances, the prosecution was supposed to establish that the Appellant committed an act which either could have caused death of the complainant or caused the complainant to sustain grievous harm. In the present appeal, it was clear that the trial court should not have convicted the Appellant on both counts but should have convicted him on either charge that he formed the opinion the evidence adduced by the prosecution had established. In the assessment of this court, the trial court fell in error when it convicted the Appellant of both counts. In the premises therefore, this court finds merit with the Appellant's assertion that he was convicted on two charges that essentially required more or less similar facts to establish. This court shall therefore set aside the Appellant's conviction on the lesser but cognate offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. Instead, it shall uphold the Appellant's conviction on the charge of **attempted murder** contrary to **Section 220(a**) of the **Penal Code.** The prosecution proved that the Appellant intended to kill the complainant due to the land dispute that existed between them.

The upshot of the above reasons (other than what the court has observed above), is that the Appellant's appeal against conviction on the charge of **attempted murder** contrary to **Section 220(a)** of the **Penal Code** lacks merit and is hereby dismissed. The sentence of ten (10) years imprisonment imposed for the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code** is set aside. However, the sentence of twenty (20) years imprisonment imposed on the charge of **attempted murder** contrary to **Section 220(a)** of the **Penal Code** is upheld. It was legal. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF APRIL 2016

L. KIMARU

JUDGE