REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 12 OF 2015

MICHAEL KIMANI.....1st APPELLANT

PATRICK MATHERI.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Ndungu H N Senior Principal Magistrate

dated 27th April 2010 in Nanyuki Chief Magistrate's Court Criminal Case No. 127 of 2007)

JUDGMENT

1. The 1st appellant, Michael Kimani, and 2nd Appellant, Patrick Matheri, were jointly charge with the offence of attempted murder **contrary to Section 220 of the penal code.** They were convicted, by the trial court, as charged and both sentenced to **ten years imprisonment.**

2. The 1st appellant has filed this appeal against his conviction and sentence. The 2nd appellant withdrew his appeal against conviction and proceeded with his appeal only against sentence.

3. This is the first appellant court. They duty of this court was discussed in the case :

NYANDO MUKUTA MWAMBANGA v REPUBLIC [2008] eKLR as follows:

> "*This court as the first appellant court has a duty to re-appraise the evidence and come to its independent finding. In doing so we have to appreciate that we do not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that* ***Soki-v Republic*** *[2004] 2KLR 21;* ***Kimeu v Republic*** *[2002] 1 KLR 756. moreover, we are guided by the principle that the first appellant court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court are erroneous in law (****Republic v Oyier****[1985] 2 KLR 353;* ***Burn v Republic*** *[2005] 2 KLR 533."*

4. 1st appellant by his petition of appeal raised five grounds of appeal. These grounds raised showed that the prosecution had failed to prove the case against 1st appellant on criminal standard of proof; that the prosecution's evidence was inconsistent, the trial court relied on hearsay evidence to convict 1st appellant,

the trial court erred in holding that the 1st appellant had been identified; and that the trial court failed to consider 1st appellant's defence.

5. The Learned Counsel for 1st apellant Mr. Nganga in his submissions in support of the appeal submitted only on three grounds. He submitted that the 1st appellant had not been identified as having committed the offence; that the prosecution failed to meet the burden of proof; and that the trial court did not accord the 1st appellant natural justice.

6. The state, represented by the prosecution counsel Miss Kinyanjui, opposed the appeal on the ground that the prosecution proved its case beyond reasonable doubt.

7. V M K (PW 1) the complainant who was 18 years old as at 8th December, 2006, left his mother's home in the company of the 2nd appellant. P W 1's mother K E K (P W 2) testified that 2nd appellant prior to the evening of 8th December, 2006, when he went with P W 1, was a frequent visitor to the home of P W 2. He often, according to P W 2, went to her home for dinner.

8. On 8th December, 2006 at about 4p.m. 2nd appellant, who previously also did casual jobs for P W 2, went to P W 2's home and invited P W 1 to a party of a young man who had recently been circumcised. P W 2 did not know the identity of the boy who had been circumcised but she allowed P W 1 to go to the party with the 2nd appellant on condition P W 1 did not stay out too long. By 9 am the following day P W 1 had not returned home and since P W 2 was anxious she went to the Nanyuki police station to check whether he had been arrested. P W 2 found P W 1 unconscious in an isolated cell at that police station. She saw that P W 1's head was swollen. P W 1 was taken to Nanyuki District Hospital where upon he was admitted. He was found to have severe skull fracture.

9. By the time P W 1 testified before trial court, on 16th March, 2009, his health was said to have so deteriorated that his testimony was reduced to just a few sentences. His testimony was as follows;

> *"I was at Majengo and I was beaten there. I was hit on the head with a metal bar. I was beaten by the 2nd accused (2nd appellant) and Nderitu. Also one Barrack. I do not know what happened thereafter."*

10. The Learned Trial Magistrate in respect to P W 1's evidence stated in her judgment:

> *"At the time (of the offence) he (P W 1) was taken to hospital he had swollen head, incoherent speech and was restless and semi-conscious. His condition has never improved. I saw him (P W 1) in court and we had to hurriedly take down his evidence because we were informed that his condition was deteriorating and further delay meant he would never be able to give evidence."*

11. According to the Clinical Officers evidence P W 1 was seen in the hospital on 9th December, 2006 with a history of having been attacked on 8th December, 2006. He was found to have sustained injuries to the head. He was seen at the hospital with a swollen head with incoherent speech, restless and semi-conscious. On being examined he was found to have depressed fracture on the left side of the skull and another depressed fracture on right frontal side of the skull which was associated with brain swelling. The injury was termed as grievious harm.

12. P W 2 in his evidence stated that P W 1 left her home in the company of 2nd appellant going to a party of a boy recently circumcised. Since P W 1 did not return home on the night of 8th December, 2006 P W 2 she went to check on him at Nanyuki police station. For reasons that were not explained by the prosecution. P W 1 was placed in an isolated cell, at Nanyuki police station, even though seemingly having suffered very horrific injuries to his head. P W 2 said she found him unconscious in that cell. She took him to hospital.

13. P W 2 in her evidence stated that when P W 1 was admitted in the hospital, 1st appellant was also

admitted in that same hospital. This is how P W 2 narrated what occurred at the hospital.

> *" While at the ward on the first occasion we took complainant (P W 1) to Nanyuki (hospital) we found accused 1 Michael Kimani (1st appellant) admitted in [the]ward and on seeing the complainant (P W 1) he (1st appellant) sat up in bed and began to speak saying that he too was beaten on Friday 8th (December 2006) and that he was stabbed with a knife. I (P W 2) became suspicious of him (1st appellant) as one of those who attacked the complainant (P W 1) because of the timing and he was also talking agitated generally."*

14. P W 2 reported her suspicion to the police and 1st appellant was arrested.

15. Before the health of P W 1 deteriorated P W 2 questioned him on what happened to him on the fateful night. P W 1, who according to P W 2 was more coherent at that time than when he testified, stated that on the night of 8th December, 2006, he in the company of 2nd appellant went to watch video show and later went to a party. Thereafter they went to 2nd appellant's house. The 1st appellant was also with them. Both 1st and 2nd appellant lived in one plot. At that plot 1st and 2nd appellants together with someone called Barrack entered the house while P W 1 went to the toilet. While he relieved himself 1st appellant came to him (P W 1) and asked him (P W 1) who he was. P W 1 told P W 2 that he thought 1st appellant was joking since they both knew each other, so he did not respond to 1st appellant's question. P W 1 then said that 1st appellant went into the house and called out 2nd appellant and Barrack. They all three, that is 1st and 2nd appellant and Barrack, pulled out P W 1 to a door-way where there was light and they began to beat him with metal bar.

P W 1 said 1st apellant hit him while 2nd appellant said, *"finish him",* where upon he was hit again on the head.

16. P W 2 stated that since his attack P W 1's health had been deteriorating.

17. On being cross-examined by 1st appellant P W 2 sated that she heard 1st appellant say at the hospital ward that he (1st appellant) had been stabbed by someone whom he pulled out of the toilet.

18. 1st appellant in his defence said that on 8th December 2006 he left his place of work and went home at 11pm. He then stated;-

> *"I went home. I went for a short call. I found someone standing at the urinal. I asked who it was. He stabbed (me) with a knife.*

19. The court noted that the 1st appellant had a small scar at his back.

20. 1st apellant said that after that incident he found himself in hospital where he was arrested for the offence of attempted murder. He denied that he knew either 2nd appellant or the accused.

21. 1st appellant's witness John Mwangi when he testified confirmed that he had sat in court while the 1st appellant testified in his defence. That witness further said that on the date in question he was at home when at 11pm he heard screams. When he, with another un-named person, went out they found *"him"* bleeding. He did not in examination in chief identify the person who was bleeding but on being cross examined he said that he took 1st appellant to hospital. Other than that he said he did not know anything else about the case.

22. The Learned Trial Magistrate in her considered judgment made the following assumption.

> *"This evidence in my view leads to a conclusion that a confrontation of some kind must have arisen*

*between the complainant (V) (P W 1) and accused 1 (1st appellant) so that Victor probably stabbed accused 1 (1st appellant). In retaliation accused 1 (1st appellant) must have come with a group of others including accused 2 (2nd appellant) just as told to **(sic)** V mother by V and they all attacked him injuring him greviously . I believe the two accused and others not before court unlawfully attempted to murder V M K."*

23. Section 119 of the Evidence Act, Cap 80 permits the court to presume likely facts. That section is in the following terms.

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

24. This court therefore accepts the presumption of facts made by the trial court as stated above. This court accepts that presumption bearing in mind that the trial court had the opportunity to hear and see the witnesses that testified in evidence and thereby test their demeanor.

25. Further, even though the evidence of P W 2 was essentially hearsay evidence in respect to what 1st appellant narrated to her (P W 2) it is the view of this court that that evidence fell within the exception to the hearsay rule.

26. In the case **KINYATTI-V- REPUBLIC [1984] eKLR** the Court of Appeal considered exception to the hearsay rule and stated:

"*from the authorities reviewed it is apparent that a statement made by an observer or participant is admissible as evidence in criminal proceedings if made on an approximately contemporaneous occasion so at to exclude any possibility of its having been concocted or contrived illegal to the makers advantage regardless of whether or not he testifies at the trial . Such a statement may be proved as original evidence when the fact that it was made, as distinct from its truth (a) is in issue, i.e. whether or not it was made; (b) is relevant to an issue (regardless of whether it is true or false) or (c) affects the credit of a witness by either enhancing (as when he is consistent) or neutralizing it (when he is inconsistent).*

27. P W 1 was the victim of a crime perpetrated by 1st and 2nd appellant and P W 1 relayed the information of the involvement of the appellants on an approximately contemporaneous occasion which excluded any possibility of P W 1 concocting the evidence. That evidence placed 1st appeallant at the scene of the crime and indeed implicated 1st appeallant in the crime which evidence contradicted 1st appellant's defence.

28. Indeed the evidence of what P W 1 told his mother (P W 2) before his health deteriorated was a statement forming part of the *res gestae. That evidence* was so bound up with a particular transaction as to form an important part of the transaction. In other word that evidence has obvious relevance in relation to other evidence that it needed to be admitted in order to complete the picture. See the book "Principles of Evidence" by Alan Taylor.

29. The evidence of P W 2 therefore falls within exception to hear say rule and was admissible.

30. Having therefore reconsidered the evidence tendered at the trial court, I, just like the Learned Trial Magistrate, find that the prosecution met the appropriate standard of criminal trial that is the prosecution proved its case beyond reasonable doubt. The appellants were rightly convicted.

31. 2nd appellant abandoned his appeal against conviction and only proceeded with his appeal against sentence. The sentence set out is Section 220 of the Penal code is life imprisonment. The trial court sentenced both appellants to 10 years imprisonment. It ought to be noted that P W 1 was severely injured by the two appellant. His injuries led to deterioration of his health which by the time the trial commenced

16th March, 2009 had so deteriorated that P W 1 could only manage to testify a few sentence before court. The trial court found that it was clear from the evidence that the appellants intended to kill P W 1.

32. In the case **SHADRACK KIPCHOGE KOGO-vs- REPUBLIC** Criminal Appeal No. 253 of 2003 (Eldoret), the court of appeal stated thus when considering on appeal against sentence:

> "*Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be".*

33. The conditions of interfering with the sentence of the trial court, set out above, have not been met by either of the appellants. There is no evidence adduced that the trial court took into account any irrelevant factor or that it applied the wrong principle in passing the sentence against appellant.

34. Accordingly have re-evaluated the trial court's evidence I find no basis of interfering with the trial court's finding on conviction and sentence. **Both appellants'appeal are therefore dismissed. The trial Court's conviction is upheld and the sentence is confirmed.**

Dated and Delivered at Nanyuki this 14th April, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Njue

For state ……

For Appellant …….

Appellant …….

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE