REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.49 OF 2014

ZAKARY MURERWA MWENDA.....APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From the original conviction and sentence in Criminal Case No.498 of 2012 of the Principal Magistrate's Court at Nkubu by C.N.Ndubi – Ag. Principal Magistrate)

JUDGMENT

The appellant, **ZAKARY MURERWA MWENDA,** was Charged with an offence of attempted murder contrary to section 220 (a) of the penal code.

The particulars of the offence were that on 6th March 2012 at Kawampungu market Kathera sub location in Imenti South District within Meru County, the appellant, attempted to unlawfully cause the death of No.223923 adminstration police constable **Kyalo Ithau** by stabbing him three times with a knife in the chest and the abdomen.

The appellant was found guilty of the offence and sentenced to serve ten years imprisonment. He now appeals against both conviction and sentence.

From the grounds listed by the appellant, I have been able to distill the following three grounds:

1.That the learned magistrate erred in law and in fact by failing to make a finding that no eye witness was called by the prosecution.

2. That the learned magistrate erred in law by failing to consider the appellant's defence.

3.That the learned trial magistrate erred in law and in fact in convicting and sentencing him without sufficient and independent evidence.

The state opposed the appeal through Mr. Kariuki, the learned counsel.

The facts of the case were briefly as follows:

At about 5.30 pm, the complainant was at Kawampungu market. While he was waiting for one **Simon Koome** at a corridor, the appellant whom he had known before entered the corridor and suddenly stabbed

him thrice.

In his defence the appellant contended that he was arrested for failure to disclose the whereabouts of one **Kipepeo**, his fellow workmate.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

One of the issues the appellant raised was that no eye witness was called by the prosecution. It is not possible in all cases to call an eye witness for some incidents are perpetrated away from the glare of the public. This complaint can be legitimately raised if indeed there was such an independent witness but the prosecution failed to call him or her without offering any reasonable explanation. In the instant case the evidence on record does not suggest the existence of such a witness. The only witness who went to the scene soon after the stabbing was **Simon Koome.** He was called as **PW3**. This ground of appeal lacks basis.

The appellant claimed that the learned trial magistrate did not consider his defence in reaching at the conclusion that he was guilty. My reading of the judgment however, does not support this contention. The learned trial magistrate did consider the defence of the appellant before dismissing it.

The complainant testified that after he was stabbed, he raised an alarm and **Koome (PW3)** who had gone to fetch some change money for him returned as the appellant was fleeing. **Simon Koome (PW3)** testified that when he returned where the complainant was, he saw the appellant running away.

This incident took place where there was sufficient day light. The evidence on record is that the appellant and the complainant knew each other before the incident and there was no suggestion that **Koome** did not know him. There is no evidence on record that can support the contention by the appellant that he was implicated for failure to disclose the whereabouts of one **Kipepeo.**

An attempt to commit a crime is defined in the **Oxford Concise Law Dictionary (2nd Edition)** as;

"Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime".

For an offence to be construed to be an attempt, it must pass the "but for" test. In the instant case, the acts of the Appellant went beyond mere preparation; it amounted to an attempt.

I therefore find that the learned trial magistrate had sufficient evidence at her disposal to convict the appellant, as she did.

From the foregoing analysis of evidence, I find that the appeal lacks merit. The same is dismissed. The appellant shall serve the sentence meted out by the learned magistrate.

DATED at Meru this 10th day of May, 2016

KIARIE WAWERU KIARIE

JUDGE