REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 110 OF 2011

GERALD WATHIU KIRAGU……APPELLANT/APPLICANT

VERSUS

REPUBLIC…….RESPONDENT

RULING

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**. He 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.

The appellant appealed against the conviction and sentence and he has now filed a notice of motion dated 12th July, 2014 seeking to be admitted to bail pending the hearing and determination of his appeal. In the affidavit sworn in support of the application, the appellant's counsel has deposed that his client's appeal has high chances of success because there were doubts in the prosecution case which should have been resolved in the appellant's favour and that the learned magistrate erred in shifting the burden of proof to the appellant.

When the application came up for hearing on 8th December, 2014, the applicant did not prosecute it apparently because Mr Cheboi, counsel for the state, indicated that he did not intend to oppose the application. According to Mr Cheboi the offence of attempted murder was not proved beyond reasonable doubt and thus, in his view, the appellant's appeal has overwhelming chances of success.

I have had the opportunity to study the trial record to satisfy myself that there is merit in the appellant's application and more importantly whether it has overwhelming chances of success as suggested by the respective counsel for the appellant and the state.

The complainant in the first count **Anthony Gakuru Warui (PW1)**, testified that on 20th October, 2010 at around 9.30 pm, he was with his family at home watching television when he heard his dog bark outside; when he ventured out to check why the dog was barking, 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 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, **SW (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.

P3 forms showing the nature and extent of the injuries sustained by the complainants were produced and admitted in evidence. The forms indicated that the complainants had been assaulted by a person known to them and that they had suffered head injuries.

The appellant offered an alibi which the learned magistrate rejected; instead she held that the appellant was positively recognised as the conditions for such recognition were favourable. Relying on the decision in **Cheruiyot versus Republic (1985) KLR**, the learned magistrate held that by hitting a seven year old on the head with a metal bar, he must have had the intention of causing the death of the second complainant. She also found and held that the appellant had assaulted the complainant in the first count and caused him actual bodily harm contrary to **section 251** of the Penal Code.

It is not for this court to determine at this stage whether the learned magistrate was correct in her findings; neither is it the appropriate time to analyse the entire evidence presented at the trial and make any conclusive remarks on such analysis. All that the court is concerned with at the moment is to determine whether from the material presented before it, it can conclusively be said that the appeal has overwhelming chances of success such that it will not serve any useful purpose keeping the appellant in prison pending its determination.

In the Court of Appeal decision of **Dominic Karanja versus Republic (1986) KLR at page 612,** it was held that where an appeal has overwhelming chances of success, there was no justification for depriving the applicant of his liberty.

Again in the Court of Appeal decision of **Jivraj Shah versus Republic (1986) KLR 605,** the court was also of the view that if it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, then bail should be granted.

Looking at the material before me, I am unable to say with any conviction the chances of success of the appellant's appeal are that overwhelming; apart from the general comment by the counsel for the state that there was no evidence of the offence of attempted murder for which the appellant was convicted, nothing more was demonstrated to support this submission.

Section 220 (a) under which the appellant was charged and convicted states:-

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.

The little that I heard from counsel for the state has not persuaded me that it is obvious from the evidence at the trial that the ingredients of the offence of attempted murder as prescribed in **section 220(a)** of the **Penal Code** was not proved to the required standard and therefore the appellant's appeal is likely to

succeed. I am inclined therefore to dismiss the applicant's motion dated 12th day of July, 2014. It is so ordered.

Signed, dated and delivered in open court at Nyeri this 6th day of March, 2015.

Ngaah Jairus

JUDGE