REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 95 OF 2012

VINCENT ODHIAMBO OWINO……..……...…...1st APPELLANT

C A M…….……...2ND APPELLANT

VERSUS

REPUBLIC ……....RESPONDENT

(Being an appeal from the original conviction and sentence in the Kibera Chief Magistrate's Court, Criminal Case No. 171 of 2009 by Hon. F.Nyakundi PM on 1/3/2012)

JUDGMENT

Introduction

1. **VINCENT ODHIAMBO OWINO** and **C A M,** hereinafter referred to as "*the first and second appellant*" respectively, were tried for the offence of attempted murder contrary to **Section 220(b)** of the **Penal Code**. It had been alleged that on the 31st December 2008 at around 1 p.m. at Karen plains in Nairobi province, jointly and with intent they unlawfully stabbed Arnold Otieno a child under their care, in such a manner as to endanger his life. They were convicted and each sentenced to serve 30 years imprisonment.

Grounds of Appeal

2. They appealed against conviction and sentence attacking the weight of the prosecution evidence and the manner in which the learned trial magistrate evaluated the entire evidence. I considered the grounds together for purposes of my judgment.

Respondent's Reply

3. Senior State Counsel, Mr. V. I. Kabaka opposed the appeal on behalf of the state and filed written submissions in which he stated that the Prosecution had sufficiently dispensed with the burden of proving its case beyond reasonable doubt. He stated further that the elements of the charge were adequately demonstrated through the testimony of the prosecution witnesses and that the evidence that led to the conviction of the appellants was direct and not hearsay as had been alleged by the appellants.

Summary of The Case

4. A summary of the prosecution case is that **PW3**, the complainant's mother learnt of the ignoble

deed on the fateful day of 31st December 2008, when the second appellant called and informed her that the dogs had bitten her child. She called **PW4** her brother-in-law who was at home and instructed him to call the emergency number 911 for help, and also dispatched a taxi home. The child was taken to Karen Hospital for emergency treatment.

5. **PW1** the father to the complainant arrived at the hospital upon receiving the report and found 5 doctors attending to the child. They described his condition as near death. He testified that upon returning home he checked the dog's area and did not find any traces of blood. He reported the incident to the police who visited the scene and during their investigations, they recovered some items in a Nakumatt labeled paper bag. The recovered items included a blue t-shirt with a yellow whitish band on the shoulder, a kitchen knife, a red and black jumper whose collar was cut on the side and human hair in the bag. The investigations led to the arrest and arraignment of the two appellants.

Defence Statements

6. The **first Appellant** raised an alibi defence in a sworn statement and called no witnesses. He stated that he worked in **PW1'**s residence as a gardener, but that when the incident occurred he was not in the compound as he had gone out to buy dog food with his employer's knowledge. He testified that whenever he left the compound it was a known fact that he would release the dogs from the kennels for security purposes. That it was **PW4** who opened the gate to let him out and closed it after him. He was therefore surprised when he returned at about 12:15 p.m. and found the gate wide open, and the dogs were surrounding something.

7. On rushing to where the dogs were, he found the child who had very serious injuries on the head, stomach and ears and was unconscious. He rescued the child from the dogs, locked the dogs in their kennels and called **PW4** who was in the house to inform him of what had happened. **PW4** responded in a harsh manner and warned him to keep quiet or risk suffering the same fate as the child. Fearing for his life and apprehensive that **PW1** would not give him a hearing, he fled and sought refuge at a friend's place at Yaya Centre.

8. The first appellant testified further that the following day he informed **PW1** through the telephone of what had happened. **PW1** assured him that all was alright but showed up a day later with police officers who arrested the first appellant. He was taken to Karen police station and forced to sign documents whose contents he did not know. He denied the offence.

9. The **second Appellant** also gave unsworn evidence and did not call any witnesses. She confirmed that she was an employee of **PW1** and that on the fateful day she was at work discharging her routine household chores which included taking care of the 3 children of the family as usual. That she was upstairs with one child while the first appellant was downstairs with the other 2 children. That she went outside when **PW4** called her and found him holding **PW2** who had been injured.

10. She denied attempting to kill the child and pointed out that it was she who called and informed her employer of the attack and that she stayed at the home for two more weeks after the incident, carrying out her chores as usual.

Analysis

11. This being the first appellate court, it has a duty to re-evaluate the evidence adduced in the lower court, to arrive at its own conclusions and to draw its own inferences. See -***Njoroge versus Republic [1987] KLR 19.***

12. Mr. Swaka learned counsel for the appellant has urged that the evidence was inconsistent, contradictory and uncorroborated. As an example, he submitted first, that **PW1** testified that he owned five (5) dogs while **PW4** and **PW3** testified that there were three (3) dogs in total. Second,

that it was the evidence of **PW2** during examination-in-chief that the first appellant was at the front door cooking for the dogs, when the incident occurred, but in cross-examination, he stated that he did not know where the first appellant was. Third, that **PW2** stated during examination-in-chief that no one helped him when he was being bitten by the dogs, while during cross-examination he testified that it is **PW4** who rescued him from the dogs.

13. Mr. Swaka contended that the child told so many versions of the incident, at one stage stating that he did not know what had happened and that for that reason the court ought to find that his evidence was not credible and discard it. Further that the case had not been proved beyond reasonable doubt because some crucial witnesses such as the watchman were not called to testify.

14. From the record there was no dispute that at the time in question there were several dogs living on the compound where the offence occurred. **PW1**, **PW2**, **PW3** and **PW4** testified to that fact and the first appellant confirmed that there were dogs which he would let loose in the compound for security reasons, whenever he left the compound. I find therefore, that the inconsistency in the number of dogs was immaterial in the circumstances of this case.

15. The most compelling testimony however, was that of the child himself who was the victim of the attack. He was 5 years old when he took the stand to testify, as **PW2**, but had been aged slightly over 3 years at the time of the attack. The court examined him and found that he did not fully comprehend the importance of an oath. He gave an unsworn statement.

16. The child testified that on the fateful day, his aunt, the second appellant, cut him on the head using a knife. That she was in the company of people the child did not know when she did so and that at that time the first appellant was in front of the door cooking for the dogs. He also told the court that the second appellant locked the front and back doors of the house when he managed to run out of the house after she cut him and that it was the first appellant who took him to the dog house where the dogs started licking and biting him.

17. The child was consistent in his testimony as to who played what part in this gruesome undertaking. In his own words he said:

> **"In the year 2008 Auntie cut my head with people I do not know while Vincent was cooking for the dogs……Vincent was in front of the door cooking for the dogs……**
>
> **It is Vincent who took me behind the house where the dogs were …. I was cut by auntie using a knife"**

His statement that ***"I don't know where Vincent was at the time"*** should be taken in the context of the fact that the attack appears to have been protracted from the extent of the injuries, and he could not be expected to account for Vincent's whereabouts throughout that time.

18. The court noted quite a large scar which covered almost all of the child's head. It is also on record that the child looked visibly scared as he identified the knife used to cut him, and was too frightened to look at the appellants directly, as he pointed them out in court as his assailants. He showed the court the parts of his body which were bitten by the dogs. Other areas of injury that he pointed out to the court included expansive areas on both thighs and his scrotum where his testicles were removed.

19. The evidence of the two doctors shows that the child suffered very extensive injuries which must have taken some time to inflict. The child was categorical that none of the two appellants came to his rescue as the dogs bit him and that it was **PW4** who helped him later. This was in tandem with the evidence of **PW4**, himself.

20. On vital witnesses who were said not to have testified, it is trite that there is no specific number

of witnesses who are required to prove a case for the prosecution. The prosecution are entitled to call the witnesses whom they consider necessary to prove their case.

21. No one testified to the presence of a watchman in the compound at the time in question. In any case the drift of the evidence from the first appellant indicates that there was no watchman in the compound otherwise he would not need **PW2** to come out and open the gate for him and he would not need to release the dogs to guard the compound in his absence.

22. The prosecution evidence rested on the testimony of a single identifying witness. The court is aware that a fact may be proved by the testimony of a single witness although there remains the need to test with the greatest care the identification evidence of such a witness especially when it is shown that the conditions favouring correct identification were difficult. See - **Murube and Anor vs Republic [1986] KLR pg. 356**.

23. The court has therefore, warned itself of the dangers inherent in placing reliance on the evidence of a single witness. It evaluated the evidence of the identifying witness to ensure beyond all reasonable doubt that he was not only honest but unmistaken about his identification of the appellants. The court finds that the witness's evidence of identification by recognition left no doubt in the court's mind that he had recognized the appellants among the persons who caused him injury.

24. The facts under consideration were that first, the two appellants were persons well known to the child. Second, he had lived with the first appellant for 1½ years and with the second appellant for three months under the same roof before the attack. **PW1** testified that he sourced the second appellant from an employment bureau. Third, the attack occurred in broad day light. There is therefore, no question of mistaken identity in the evidence of identification by recognition by the child.

25. The record shows that the court made an order for DNA tests to be done on the black, Dalc T-shirt and the knife which were recovered. The results of the tests do not appear to have been brought to court. **PW3** however identified that knife as her kitchen knife and the second appellant confirmed it.

26. The court was alive to the fact that the first appellant who raised an alibi defence was under no burden to prove the said alibi. - see **Kiarie v Republic [1984] KLR pg 740**, where the Court of Appeal held *inter alia* that:

> **An alibi raises a specific defence and an appellant who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

27. To corroborate the minor's evidence **PW4** testified that he was in the house watching TV when the first appellant called him and informed him that the child had been bitten by the dogs and was dead. It was his testimony that when he went out he found the child near the dogs' kennel badly injured and struggling to breathe. The child was naked and his scalp was completely removed. He had a deep cut in the armpit, and the hip area. There were lacerations on the neck and the abdomen and he was bleeding from his injuries. His genitals and legs were covered in blood. He then called **PW1**, **PW3** and 911 Emergency Services for help.

28. **PW5** and **PW6**, who work with 911 Emergency Response Services, confirmed that they were on duty when the distress call came in. They proceeded to the scene at Karen plains house number 2 where they found the gate open and **PW4** holding the child on the verandah. According to **PW5** the child was naked and was bleeding from the head, body and private parts. Together with **PW4** they took the child to Karen Hospital and later recorded their statements at Karen Police station. **PW5** identified the two appellants in court as people he used to see in the complainant's home

whenever he visited the residence on routine response duties.

29. **PW10** was on duty at Karen police station when he received a report through a telephone call that a child had suffered injuries that could be as result of being stabbed or dog bites. He visited the scene with **PW9** of Scenes of Crime Section and found that the child had already been rushed to hospital. He went to the hospital and found the child under treatment. **PW9** took photographs of the child to keep a record of the injuries.

30. Back at home **PW10** inquired about the child from the second appellant who was charged with his care and was informed that the child had clothes when he was taken away, yet he had noted that the child arrived at the hospital without any clothes. The recoveries made during investigations included a black T-shirt, small light blue T-shirt, and a kitchen knife. **PW10** observed that the small light blue T-shirt had multiple cuts or openings at the front, which corresponded with the size of the knife kitchen recovered together with it. As a result, **PW10** arrested and charged the two appellants with the present offence.

Medical Evidence

31. **PW7**, Dr. Zephaniah Kamau the Government Pathologist, examined the child on 27th April 2009 and found the following:

- extensive degloving injury on the head.
- stitch marks on the left side back of the neck
- Degloving injury to the pelvis
- Scars on the left side chest, lumber area, anal area, left buttock & in the anal canal

In his opinion the injuries were caused by both sharp and blunt objects. He assessed the degree of injury as grevious harm and produced a P3 form to that effect.

32. **PW8**, Dr. Joseph Kathuri of Karen Hospital performed the initial examination on the child on 31st December 2008. He observed that the child who was age 3½ years at the time had suffered a lot of injuries which included the following:

- 75% loss of the head skin.
- had lost a lot of blood
- the scalp was exposed
- skin missing on private parts
- had low blood pressure
- mouth was torn and had several injuries
- both testicles were missing
- both ears were torn with part missing
- cut wounds above right eye, right side neck and right shoulder
- long cuts on the abdomen towards his private parts
- several cuts on the thighs
- swelling in the area between the anus and genitals
- deep cut near the buttocks
- deep cut wound on the right leg
- urine was flowing inwards and he was passing blood instead.

It was his testimony that the child was admitted into the Intensive Care Unit at Karen Hospital and underwent surgery several times. His opinion as carried in his report was that the injuries on the child were occasioned using a knife and thereafter the child may have suffered dog bites.

33. This being a criminal trial the onus was not on any of the appellants to prove their innocence. They however elected to offer statements in defence and it was the duty of the court to assess those statements in the context of the rest of the evidence on record.

34. The first appellant testified that he fled the scene out of fear of repercussions from **PWI**, whom he said had a bad temper and would occasionally beat him up. He however called him the following day and explained what had happened. **PW3** did confirm that **PW1** was of harsh disposition and would quarrel if unhappy, but clarified that she had never at any one time, seen him beat the first appellant.

35. The evidence of **PW4** was that the dogs were not in their kennel when he came out of the house, but were roaming elsewhere in the compound. They were not surrounding the child neither did they attack him as he removed the child. He also told the court that although he looked for the first appellant, he did not find him within the compound at that moment.

36. The court observes that the demeanor of the first appellant after the fact bespeaks his guilt rather than his innocence. He stated that the child was mauled by dogs in his absence and that he had permission to release the dogs whenever he left the compound, yet he fled the scene. The analysis of the evidence shows that the first appellant's testimony that he resumed from the shops to find the child surrounded by the dogs and that he rescued him was not truthful, in view of the evidence of **PW4** that when he came out of the house in response to the first appellant's call the child was still next to the kennel gasping for breath and the first appellant was nowhere to be found.

37. Regarding the clothes and the knife, the trial court noted that there was no explanation as to how the clothes of **PW2** left his body and found themselves in a paper bag in the next compound that was fenced and disused. The court found that there was deliberate effort to conceal evidence and I respectively agree with this finding. There is therefore no doubt that the complainant suffered the injuries tabulated above at the hands of human beings to a great extent and that the dog bites were minor and subsequent to the main injuries. I am also satisfied that the prosecution proved that the two appellants were willing participants in the bizarre attack on the child.

The offence

38. The appellants were tried and convicted for the offence of attempted murder contrary to **Section 220(b)** of the **Penal Code**. Mr. Swaka argued that the appellants were wrongly convicted for the offence of attempted murder since the trial court's findings were not tight and cogent enough to sustain such convictions. The said section stipulates that:

> **"Any person who 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."**

For the offence of attempted murder under the said section to be proved therefore, it must be shown that:

i. **The appellants had intention to unlawfully cause the death of the complainant,**

ii. **They committed an act, or omitted to do an act which it was their duty to do,**

iii. **The said act or omission was of such a nature as to be likely to endanger human life.**

39. From the record the learned trial magistrate found that the evidence presented before her disclosed the offence of attempted murder and stated as follows:

> ***"In this particular case, the prosecution has proved the child PW2, was assaulted to the main extent and the injuries caused by the dogs were secondary and of a minor nature.***
>
> ***The first and 2nd accused persons assaulted PW2 with the knife and to cover it up, let him loose amongst the dogs to make it look like the dogs attacked the child" "……..the 1st accused was charged with the responsibility of taking care of PW2 but did not do so***

and a knife from the kitchen which she was in charge of, was used to assault the child. All these circumstances go to corroborate the testimony of the child himself….."

40. In the Court of Appeal case of **Cheruiyot v Republic, EALR [1976-1985] EA pg 47**, Madan, Miller and Potter JJA held that:

> **"An essential ingredient of an attempt to commit an offence is a specific intention to commit that offence, if a charge is one of attempted murder, the principal ingredient and the essence of the crime is the deliberate intent to murder as it is presented by the prosecution, and, therefore, it must be shown that the accused person had a positive intention unlawfully to cause death; in a prosecution under section 220 of the Penal Code it is not sufficient that it would have been a case of murder if death had ensued, or that the accused was indifferent as to what was likely to be the fate of the victim, or that he acted in a manner so rash as to endanger the life of another person or as to be likely to cause harm to him, and an intent merely to cause grievous harm is not sufficient to support a conviction under section 220 for attempting unlawfully to cause death; in addition to the requisite intent, there must be a manifestation of the positive intention by an overt act."**

41. The positive intentions of the two appellants manifested themselves in the second appellant's acts of degloving the child's head and inflicting so many life threatening wounds on him, and by the first appellant's act of taking him to the dogs in his bloodied state to entice them to maul him. The first appellant literally tried to feed the little boy to the dogs.
42. From the evidence of **PW4** that it was the first appellant who called him to inform him that the child had been injured by the dogs and was in fact dead, it would appear that the first appellant called **PW4** only after he presumed that the child had died.
43. The learned trial magistrate considered and discarded the defences of the two appellants. I have reconsidered and reevaluated their evidence alongside the rest of the evidence on record and I respectively agree with the learned trial magistrate. The two appellants were not only placed at the scene by the child, but he described what part each played in the assault on him.
44. In **Rex v Huebsch 1953(2) SA 561(AD)** pg 567 Schreiner JA referring to a statement in the judgment in **R V Sofianos 1945 AD 809**, by Watermeyer CJ, said:

> **"The statement shows that in order to support a conviction for attempted murder there need not be a purpose to kill proved as an actual fact.**

The language of the statement differs slightly from that which was used in **Rex v Thibani 1949(4) SA 720 (AD)** pg 729. Both however, convey the notion of an appreciation that there is some risk to life in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death. Lord Diplock in the **Director of Public Prosecutions v Stonehouse (1977) 2 All ER 909 (HL)** at p 917, said the following:

> **"The constituent elements of the inchoate crime of the attempt are a physical act by the offender sufficiently proximate to the complete offence and an intention on the part of the offender to commit the complete offence."**

46. The actions of the two appellants herein exposed the victim's life to risk and the recklessness of their actions can only have been intended to result in death. The victim's survival to tell his story was a miracle in view of the extensive injuries visited upon him. In my humble view the physical acts by the appellants were sufficiently proximate to the complete offence and exhibited an intention on their part to commit the complete offence.

47. Having given careful consideration to all the circumstances of this case, I am satisfied that the learned trial Magistrate properly convicted the appellants based on sound evidence. I therefore confirm the conviction and sentence and dismiss the appeal.

DATED, SIGNED and **DELIVERED** at **this 13th** day of **February 2014**.

L. A. ACHODE

JUDGE