REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.127 OF 2013

BETWEEN

DORIS BOCHERE NYANCHONGI……APPELLANT

AND

REPUBLIC……RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Ogola Ogembo, Ag. CM, dated and delivered on 6th November 2013 in the original Ogembo SPMCRC No.647 of 2012)

JUDGMENT

1. The appellant was arraigned before the Ogembo Principal Magistrate's court on one count of attempted murder contrary to **Section 220 (b)** of the **Penal Code**, the particulars being that on the 2nd day of April 2012 at Emesa sub location in Kenyenya District within Kisii County jointly with others not before the court, with intent to unlawfully cause the death of Thomas Nyambari Manyansa, hired thugs to kill the said Thomas Nyambari Manyansa.

2. When the appellant appeared on 10th April 2012, she pleaded not guilty to the charge and the case went to trial during which the prosecution called 4 witnesses. The appellant was eventually found guilty as charged, convicted and sentenced to three (3) years imprisonment.

3. Being aggrieved by both conviction and sentence, the appellant appealed. The petition of appeal dated 8th November 2013 and filed in court on 12th November 2013 sets out the following 14 grounds of appeal:-

1. *The Learned Trial Magistrate erred in Law in finding and holding that the Prosecution herein had laid before the Honourable Court and/or tendered Sufficient Evidence to warrant a Conviction of the Appellant on and/or in respect of the offence charged.*
2. *The Learned Trial Magistrate erred in Law in evaluating and analyzing of the prosecution's case, separately and independent of the defence case, forming an opinion thereon and finding the prosecution case (sic) merited, prior to considering the defence case and thereby occasioning a miscarriage of justice.*
3. *The Learned Trial Magistrate erred in Law in evaluating and/or analyzing the defence case, long after finding the appellant herein guilty and/or culpable of the offence charged, contrary to the established Principles of Criminal Law. Consequently, the purported analysis of the defence case, was a charade, façade and an afterthought.*
4. *Having found the appellant guilty of the offence charged prior to considering and/or taking into*

account the defence case (Evidence and submissions); the Learned Trial Magistrate placed the obligation on the appellant to prove his innocence and thereby shifting the incidence and burden of proof unto the appellant.

5. *Though the Learned Trial Magistrate appreciated the Standard of Proof required in Criminal Prosecution, same misconceived, misapprehended and/or mis-applied the Standard of proof and thereby convicted the appellant on the basis of Unsubstantiated Evidence, riddled with apparent and material contradictions.*
6. *The Learned Trial Magistrate erred in Law in admitting, considering and acting upon Hearsay evidence (sic) tendered by **PW2**, without taking into account the legal prejudice, attendant to the admission and application of such Hearsay evidence.*
7. *The Learned Trial Magistrate erred in Law in ignoring, failing to take into account and/or disregarding material discrepancies, apparent and discernable in the Prosecution's case, more particularly, the evidence of **PW1, PW2 & PW3** and consequently, failed to appreciate the salient features of the complaint and the charge laid against the appellant.*
8. *The Learned Trial Magistrate failed to cumulatively evaluate and/or analyze the totality of the evidence tendered and consequently, the Learned Trial Magistrate reached and/or arrived at an erroneous conclusion, contrary to the weight of evidence on record.*
9. *The Learned Trial Magistrate erred in Law in failing to Suitably and/or Objectively, consider and appraise the evidence tendered by and/or on behalf of the appellant herein, including the uncontroverted evidence of a long standing and existing grudge between the appellant and the complainant. Consequently, the Learned Trial Magistrate misapprehended the appellant's defence.*
10. *The Learned Trial Magistrate erred in Law in adopting and applying a higher standard of proof in respect of the appellant's defence whilst on the other hand, lowering the standard of proof when considering the prosecution case. Consequently, the entire judgment and the attendant conviction are vitiated.*
11. *The Learned Trial Magistrate erred in Law in disregarding and/or ignoring the submissions rendered by the appellant's advocates and only reverting to same long after finding the appellant guilty of (sic) the offence charged and thereby rendering an unbalanced, biased and defective judgment.*
12. *The judgment of the Learned Trial Magistrate is perfunctory, wrought with and/or fraught of material contradictions. Consequently, the judgment under reference is manifestly unsafe and/or unreasonable.*
13. *The judgment by the Learned trial Magistrate is contrary to and in contravention of the provisions of **Sections 169 of Criminal Procedure Act, Chapter 75, Laws of Kenya**.*
14. *The Learned Trial Magistrate erred in Law in failing to properly consider and/or take into account the mitigation by the appellant. Consequently, the sentence meted out against the appellant, in any event, is manifestly excessive and/or harsh.*

4. Briefly, the facts of this case are that on 2nd April 2013, the complainant herein, Thomas Nyambari Manyansa (PW1) was at a hotel in Riobonyo when he met 2 men one of whom was Abel Makae, PW2. Makae told the complainant that he (Makae) had been looking for him the previous day. During the said meeting Makae telephoned somebody who from the phone audio, was a lady and the complainant heard the lady telling Makae that she wanted him to fell down a tree that day and that the lady's husband was aware of the plan. The complainant also heard Makae telling the lady that the money offered for the job was not enough to which the lady said money was not her problem and that she could up it to Kshs.10,000/= and that Makae could pick the money at 4.00 p.m. on the same day.

5. The complainant and Makae then proceeded to the DCIO's office at Ogembo and made a report. While the 2 were at the DCIO's office at Ogembo, the lady again called Makae and asked him why he was so long in coming to accomplish the job.

6. A plan was then hatched by the police in which 3 police officers, one of whom was a Kisii proceeded to the appellant's home in the company of both the complainant and Makae. From the evidence, the appellant is a sister in-law of the complainant.

7. On arrival at the appellant's home, one of the police officers remained in the car which was parked on the road while the complainant, Makae and the other 2 police officers walked to the appellant's home. The complainant remained outside the gate to the appellant's compound as Makae and the 2 police officers entered the compound. At the gate, Makae informed the appellant that he had arrived, with the guests and so the appellant went to the gate.

8. At the gate, Makae told the appellant that he had brought the guests and that in the meantime 3 others were guarding the target at a bar in Magena. Makae informed the appellant that he had now come to collect the money so that they could proceed to accomplish the job. The appellant made a call and spoke to somebody and during the conversation, she mentioned the name Ombati which is the name of one of the complainant's younger brothers staying in Nairobi, after which the appellant told Makae that Ombati would be sending Kshs.9000/= the following day since she had only Kshs.1000/= on her. The appellant handed over the Kshs.1000/= to the officer who was in Makae's company before the two left the compound

9. A little while later, Makae and the officer went back to the appellant's compound and told her that the guests guarding the target at Magena had complained that the money was too little. At that point, the officer who had accompanied Makae identified himself to the appellant who pleaded with the officer not to kill her. The appellant's daughter screamed telling neighbours that thugs had invaded them. The appellant ran and locked herself in the house. On the following day, the appellant presented herself to the police. The complainant was arrested but after interrogation, he was released. The appellant was thereafter arrested and charged.

10. Makae told the court that he was a nephew to the complainant. He also said the appellant was his aunt and that on 2nd April 2012 at about 1.44 p.m., he received a telephone call from the appellant informing him that she wanted her brother in-law by the name Tom killed. On the following day Makae reported the matter to the complainant and thereafter they proceeded to the office of the DCIO Ogembo and a trap was laid for the appellant but at the appellant's home, they found the gate secured with a rope and only spoke to her from outside the gate. Makae denied that he was part of the plot to kill the complainant.

11. PW3, Number 70949 Police Constable Kephar Nyarangi Simba was asked by the DCIO to lay a trap for the appellant who had hatched a plan to kill the complainant. At the appellant's home, PW3, Makae and 2 other officers went to the appellant's fence, though it was Makae who was discussing the matter of killing the complainant and the charges for the job with the appellant. PW3 was introduced as the man from Nyamache to carry out the appellant's assignment of killing the complainant. PW3 also stated that he talked to the appellant's brother in-law who told him that he had to carry out the assignment before he could be paid. He was paid Kshs.1000/= being S/N CJ 9499153. After PW3 and the appellant disagreed over the payment amount, PW3 and his team went back for a while then returned to the appellant's gate and reported to the appellant that the money being offered to kill someone was too little.

12. Thereafter PW3 identified himself to the appellant and got hold of her hands. The appellant then started screaming, asking not to be killed as PW3 also screamed. The appellant broke off and ran into her house. PW3 and his colleagues went back to the station and booked the report. PW3 stated that the appellant paid him Kshs.1000/= and promised to avail the balance of Kshs.9000/= the following day.

13. PW4, Number 88931 Police Constable Mohammed Baya testified that on 2nd April 2012 at about 6.00 p.m., he received a report of a plot to kill the complainant. After recording statements, PW4 referred the complainant to the OCS, Ogembo police station. Some other officers, among them PW3, were assigned to lay an ambush. When the officers returned, they handed in a 1000/= note. The appellant was arrested by police officers from Nyangusu police station and later taken to Ogembo police station. PW4 stated that during investigations, he established that the appellant had reported the same case at Nyangusu police station. PW4 also told the court that the arresting officers did not tell him why they had not recovered the appellant's phone to establish whether indeed the appellant had talked to the person who was to remit the Kshs.9000/= for payment to the complainant's killers.

14. The appellant gave sworn evidence; her evidence being that on 2nd April 2012 at about 10.00 p.m.,

while she was asleep in her house, she heard her door being kicked and voices of people saying they were police officers. The people entered the house but they soon left and ran towards the gate. She called her husband and informed him that she had been attacked by thieves; that the appellant's husband's brother was among the thieves.

15. On the following day, the appellant's husband came home. The appellant went to hospital for treatment and also reported the incident to Magena and Nyangusu police stations. She was issued with a P3 form which was filled. On 6th April 2012, the appellant had the complainant arrested on the orders of Nyangusu police station. Later, the appellant was released before she was taken to Ogembo police station where she was charged. She produced the P3 form as **D. Exhibit 1**.

16. The appellant denied the prosecution's allegations that she wanted to kill the complainant. It was her contention that the complainant was one of the thieves who had attacked her on the night of 2nd April 2012. The appellant also stated there is a family feud between her family (appellant's husband is elder brother to complainant) and that of the complainant for over 17 years; that the complainant is always abusing the appellant's husband by calling him uncircumcised. She told the court that she had no grudge with the complainant's wife, though the appellant's husband has problems with his mother.

17. The appellant also told the court that the complainant was a witch, having bewitched his own first wife who died as a result; and that he had vowed to bewitch her (appellant) for allegedly stealing his mother's money. She also told the court that comparatively her family was more well off than the complainant's family. She denied giving out Kshs.1000/= to PW3.

18. DW2 was Johnson Nyanchongi Koyeye who works as a guard at Sameta and is husband to appellant and elder brother to the complainant. He stated that on 2nd April 2012 at about 10.30 p.m., he received a telephone call from the appellant informing him that thieves had entered their house and were killing her, although the thieves had run away. DW2 also stated that the appellant informed him that she had identified one of the thieves, namely the complainant in this case. On the following day, DW2 went home and escorted the appellant to Magena police post and later to Nyangusu police station where she wrote her statement. DW2 also escorted the appellant to the dispensary for treatment after the police issued her with a P3 form; and thereafter the complainant was arrested and placed in cells but later released. DW2 maintained that there was bad blood between the complainant and his (DW2's) family over land issues.

19. After a careful consideration of all the above evidence, and also after carefully considering the defence by the appellant, the learned trial magistrate reached the conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt and proceeded to find the appellant guilty as charged. She was convicted and sentenced to three (3) years imprisonment.

20. The appellant was aggrieved by both conviction and sentence, hence this appeal.

This is a first appeal and as expected of this court, I am required to reconsider and evaluate the evidence afresh with a view to making my own conclusions in the matter, only remembering that I do not have the opportunity of seeing and hearing the witnesses. I am under a duty in equal measure to carefully consider and weigh the judgment of the learned trial magistrate with a view to establishing whether the conclusions reached by the court were well founded. See generally **Okeno –vs- Republic [1972] EA 32**; **Mwangi –vs- Republic [2004] 2 KLR 28**. In the **Mwangi case**, the Court of Appeal held, *inter alia*, that *"it is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness."*

I have now carefully carried out my duty of reconsidering and evaluating the evidence afresh. I have also carefully considered and weighed the judgment of the learned trial magistrate. From all the above, the issue that arises for determination is whether the evidence that was placed before the learned trial court

proved the charge against the appellant to the required standard.

During the submissions at the hearing of this appeal on 6th February 2014, Mr. Oguttu-Mboya, learned counsel for the appellant submitted:-

- *On grounds 1, 8 and 9 that the evidence tendered by the prosecution did not prove the essential ingredients of the offence captured under **Section 220 (b)** of the **Penal Code**, namely that it was not proved that the appellant, owed the complainant a duty which she failed to carry out or that she did that duty in a manner that was prejudicial to the complainant's life or that the appellant failed or omitted to do such a duty as a result of which the complainant's life was endangered.*
- *That the appellant owed no such a duty to the complainant and consequently the charge against her ought to have been dismissed as the whole of the evidence on record was at variance with the offence charged. That if the prosecution wanted, the charge sheet should have been amended so as to charge the appellant under **Section 220 (a)** of the **Penal Code**, but no such amendment was sought and/or made.*
- *On grounds 2, 3, 4, 5, 7, 10 and 11, counsel argued that the evidence on record did not meet the threshold of the standard of proof required in criminal cases, which is proof beyond any reasonable doubt. Counsel submitted that contrary to the learned trial court's finding, the prosecution evidence especially that of PW1 and PW2 was so contradictory that the same should not have been relied upon. Counsel contended that if indeed the appellant had hired hit men to kill the complainant, it was incumbent upon the prosecution to provide the names of such persons and that failure to do so meant the evidence by both PW1 and PW2 was mere speculation.*
- *That the learned trial court reached a conclusive and deliberate finding of guilt before he had analyzed the evidence on record and without considering appellant's defence as required by law.*
- *That the learned trial magistrate shifted the burden of proof to the appellant contrary to established principles and rules of criminal procedure. Further that the learned trial court, apart from shifting the burden of proof to the appellant also raised the bar for the appellant much higher than the one placed on the prosecution.*
- *That considering that appellant is a sister-in-law to the complainant, and admitted grudges between the two families, the trial court ought to have considered that this fact played a crucial part in the whole case against the appellant.*
- *Under ground 6, counsel submitted that the learned trial magistrate believed the evidence of PW2 without basis because it was clear that PW2 did not name the alleged hit man.*
- *On grounds 12, 13 and 14, counsel submitted that the judgment of the learned trial court does not comply with the provisions of Section 169 of the Criminal Procedure Code nor does it analyze the salient points of the submissions made before the trial court.*

24. In summary, counsel submitted that there was no sufficient evidence to prove the charge of attempted murder against the appellant to the required standard. He urged the court to allow the appeal as prayed.

25. In response to the appellant's submissions, Mr. P.O. Ochieng, learned counsel for the respondent submitted as follows:-

- *That counsel for the appellant has misapprehended the provisions of Section 220 (b) of the Penal Code since the issue of duty only arises when somebody omits to do an act.*
- *The appellant herein did an act and therefore she was properly charged under Section 220 (b) of the Penal Code.*
- *The evidence tendered by the prosecution was sufficient and proved the charge against the appellant beyond any reasonable doubt, which evidence was consistent, corroborated and remained unshaken throughout the trial.*
- *The defence did not adduce any evidence to rebut the prosecution's case as required by Section 108 of the Evidence Act, Cap.80 Laws of Kenya; since it was the appellant to lose if she said nothing about the allegations made against her by the prosecution.*
- *There was no hearsay evidence tendered by the prosecution as alleged by the appellant since the entire testimony of PW2 was direct evidence and as such cannot be termed hearsay.*

26. In reply, Mr. Oguttu submitted that:-

- *It was not the duty of the appellant to prove her innocence, and in any case, the appellant adduced evidence in her defence.*
- *PW2 gave hearsay evidence because the alleged hit man was never called to testify.*
- *PW2 never directly heard communication between the appellant and the alleged hit man and so PW2's evidence on the issue of the hit man remained hearsay.*
- *Section 108 of the Evidence Act does not apply in criminal cases since the burden of proof never shifts to an accused person.*
- *The evidence tendered to the trial court was at variance with the offence charged.*

27. Having now considered the rival submissions alongside the prosecution and defence cases, I have reached the considered opinion that the prosecution did not prove its case against the appellant beyond any reasonable doubt. First and foremost, there is evidence on record showing that the appellant and the complainant are family; that there was a long standing grudge between the two families though they are siblings. Although I do not think highly of the evidence adduced by the appellant in her defence, there is every likelihood that this case was motivated by the bad blood that exists between the two families.

28. From the record, it is clear that the learned trial court did not adequately consider the issue of the grudge. If he had done so, it would have been clear that there was something to the case that was more deep-rooted than what the prosecution had presented to the court.

29. Secondly, the evidence that was placed before the trial court did not prove the case against the appellant beyond any reasonable doubt. The evidence on record was to the effect that the appellant attempted to unlawfully cause the death of the complainant, which is an offence under **Section 220 (a)** of the **Penal Code**. It is my humble view that the evidence does not support the allegation made under **Section 220 (b)** of the **Penal Code**.

30. Could it, at this stage be said that despite the apparent discrepancy between the evidence and the charge sheet, there was sufficient evidence to prove an offence under **Section 220 (a)**? The answer is in the negative. I find that the evidence by both PW1 and PW2, and in particular the evidence by Pw2 does not establish the link between the appellant and the alleged hit man nor does it demonstrate to the required standard that PW2 was privy to the conversation between the appellant and the alleged hit man. There was no evidence from the telephone network to show that the appellant talked to Ombati, a younger brother to the complainant, who was to substantially fund the mission by contributing Kshs.9000/=.

31. It is also not clear from the evidence whether, when PW1, PW2 and PW3 went to the appellant's home, they entered the compound of the complainant's home or stood outside the gate, spoke to her from out there and also received the sum of Kshs.1000/= from the appellant while the appellant was inside the compound. I do find therefore that these discrepancies in the prosecution evidence meant that there was no truth in the prosecution's allegations against the appellant. PW2 could simply have been used by the complainant to add fuel to an already summering fire that was the grudge between the families of the complainant and that of the appellant.

32. Regarding the judgment of the learned trial magistrate, I find that his finding that the evidence of the 3 prosecution witnesses were exact versions and that the evidence was corroborative is not supported by the said evidence. I also find that his conclusion that a trap laid for the arrest of the appellant revealed that the appellant planned to kill the complainant is not anchored on the evidence that was adduced by the prosecution.

33. I also find and hold that the learned trial magistrate did not fully comply with the provisions of **Section 169 (1)** of the **Criminal Procedure Code** which reads:-

> **"169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the**

reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

34. After setting out the summary of both the prosecution and the defence case, the learned trial magistrate went on to make a finding that the appellant had not given any evidence at all on how she was attacked or how she managed to identify the complainant. The court went further say, "the court also noted that the accused had absolutely no specific defence to the allegations leveled against her particularly of talking to the 6 men, taking PW2's phone number to them, calling PW2 to ask if the 6 had called and also the events in her compound on the material night including the payment of the 1000/=." With respect to the learned trial court, it appears to me that the above finding seems to suggest that the appellant was a witness against the complainant which is not the case here. I would agree with the appellant's counsel's contention that the trial court shifted the burden of proof to the appellant and secondly that the judgment does not fully comply with the provisions of **Section 169 (1)** of the **Criminal Procedure Code**.

35. The upshot of what I have stated above is that this appeal is merited. The same is allowed on both conviction and sentence. The conviction is quashed and the sentence set aside.

36. Unless otherwise lawfully held, the appellant is to be released from prison custody forthwith.

Orders accordingly.

Dated and delivered at Kisii this 13th day of March, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. Kaburi for Oguttu-Mboya (present) for Appellant

Miss Cheruiyot (present) for Respondent

Mr. Bubu - Court Clerk