



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 21 OF 2013

1. ABDALLA KIRAO MKARE WANJE 1ST APPELLANT
2. ALI KIRAO WANJE 2ND APPELLANT
3. EMMANUEL MLEWA MKARE 3RD APPELLANT
4. SIRIA NGUMBAO CHARO 4TH APPELLANT
5. LILIAN KAZUNGU 5TH APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 411 of 2006 of the Chief Magistrate's Court at Malindi – Hon. Shiundu - CM)

JUDGMENT

The five appellants herein above mentioned were Convicted and Sentenced to fifteen (15) years Imprisonment in respect to Count No. 1 and two (2) years Imprisonment in respect to Count No. 2. The Sentences were ordered to run concurrently.

In the first Count they had been charged with attempted murder contrary to Section 220 (a) of the Penal Code.

In the second Count they were charged with malicious damage to property contrary to section 339(1) of the Penal Code.

The particulars on the first Count were that:-

“On the 27th day of February, 2006 at Ziwa la Ferunzi village in Ganda Location within Malindi- Kilifi County, with others not before the Court, attempted unlawfully to cause the death of SAID ABDALLA BAKHSWENI by poring petrol into a vehicle setting it ablaze while the said SAID ABDALLA BAKHSWENI was inside”.

In the second Count the particulars are that:-

“On the same day and place with others not before the Court they willfully and unlawfully damaged one motor vehicle Registration number KAG 899 V Land cruiser, one wrist watch make Seikos. One shirt, one long trouser, office keys and one vest all valued at Ksh. 1,209,450/= the property of the said SAID ABDALLA BAKHSWENI”.

Being dissatisfied with decision of the learned trial magistrate the appellants filed this appeal whose grounds are principally that the learned trial magistrate erred in both law and facts by arriving at a wrong finding that the prosecution had established a case of attempted murder beyond all reasonable doubts which did not have an explanation.

Secondly, that the Sentence meted out on the appellants was harsh and excessive.

In the Court of Appeal Case of **Okeno –Vs- Republic 1972 EALR page 33**. It was held that,

“It is the duty of the first appellate Court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the Judgment of the trial Court should be upheld”.

I will at this juncture proceed to consider the facts of this case. There did exist a land dispute over plot Number 120 situated at Ziwa La Furunzi Malindi, between the Complainant and his family and some people including the 3rd Accused **EMMANUEL MLEWA MKARE** for a claim in adverse possession. The said dispute generated a case Miscellaneous Application Number 711 of 1989 High Court Mombasa which application was dismissed by Maraga Judge on 5th May, 2005.

It is with this background in mind that the events of 27th February, 2006 should be viewed.

On the above mentioned date at about 9:00 a.m. The Complainant who resides at Shella – Malindi visited their farm at Ziwa La Furunzi plot No. 120 for purposes of erecting a boundary fence. He met his workers in the farm who were numbering around ten. He had traveled to the farm which is about 5 kilometers away from his Malindi home, by means of a Toyota Land Cruiser Registration Number KAG 899V.

According to his testimony, upon arrival at the farm he readied his workers for the task of fencing the land. Accused Number 1 and number 2 proceeded to where the Complainant and his workers were and told the workers to go away and leave behind the Complainant so that they could deal with him. The 3rd Accused emerged from the house of one Kazungu. Two of his workers Furaha Gunga and Kahindi declined to go away as ordered. The other eight retreated to some safe distance. The first Accused threatened to finish the two who had remained behind and they backed away under the escort of 1st and 2nd Accused. The 3rd Accused remained with the Complainant. Upon returning to where the Complainant was the first and 2nd Accused confronted him with the 2nd Accused hitting him with a stick on the back.

The 3rd Accused told the first Accused to take the Complainant's mobile phone and gun. The first Accused did as instructed and took the Complainant's phone and threw it to the 3rd Accused. He proceeded to take the knife belonging to the Complainant.

The third Accused ordered the first and Second Accused to kill the Complainant. Accused number 2 hit the Complainant on the chest and lower abdomen with the spear he was carrying. He had taken it from the ground where the first Accused had dropped it when he was wrestling with the Complainant. He stabbed him twice with the spear and the Complainant decided to run to the safety of his vehicle. The 1st, 2nd and 3rd Accused followed him to the vehicle. Meanwhile his workers were observing the going on at a distance when the Complainant attempted to start the engine of his vehicle the first Accused called his wife and told her to fetch petrol. Meanwhile a crowd was gathering. Accused 6 (now the fifth Appellant) arrived at the scene and together with Accused number 3 proceeded to shout as the

Complainant struggled with the 1st and 2nd Accused. The first Accused was holding the Complainant's hands with a view to preventing him from starting the car and escaping. The second Accused proceeded to the passenger's seat and pierced the nose of the Complainant with a spear and blood splattered over his face.

Meanwhile the 3rd Accused was preventing people from joining in the fray. The wife of the first Accused took petrol in a container and gave it to the first Accused. He poured the petrol inside the vehicle near where the Complainant was seated. He then took a match box and lit a stick throwing it to where he had poured the petrol.

Fire engulfed the Complainant and his vehicle. A man called Jackson intervened and restrained the first Accused from injuring the Complainant further. The third Accused got hold of Jackson and both tumbled down and at this stage the Complainant got the chance of coming out of the burning vehicle. One of his workers got hold of him and took him to the main road. A pick up emerged stopped but was chased away amidst a hail of stones. A red cross vehicle later arrived and whisked him away to Hospital and safety. The Complainant had sustained injuries to the nose and burns on the right hand, right side of stomach and both legs.

His motor vehicle was burnt to a shell.

In his Judgment at page 139 3rd paragraph the learned trial magistrate had this observation,

“ The 4th Accused impressed me as a candid and truthful person. He shone light on what transpired during the incident”.

He then proceeded to find that there was no sufficient evidence pointing at him and proceeded to acquit him on both Counts. He was satisfied that the prosecution had proved its case beyond reasonable doubts as against the 1st, 2nd, 3rd, 5th and 6th Accused persons and Convicted them accordingly.

The sixth Accused in the lower court is now the 5th Appellant in this Appeal. Upon a careful evaluation of the evidence tendered by the Complainant there is nowhere where he has stated to have seen her at the scene. It is the Complainant's evidence that it is the wife of the first Appellant who upon instructions from her husband fetched petrol in a container and took it to him. At page 24 line 20 of the proceedings he had this to say,

“Accused No. 6 kept wailing. I am told she contributed, but I cannot remember. Wife of Accused one contributed in this incident but has not been charged. She escaped from the village”.

In his evidence PW 2 at page 72 line 1, stated,

“The others arrived after the 6th Accused started shouting. She was saying that PW 1 should be killed “ua huyo kabisa”.

The other mention of the 6th Accused is that by PW 3 at page 73 line 3 where he had this to say,

“The 6th and 5th Accused picked grass and threw it onto the vehicle to fuel the fire”.

I find the state's concession to the appeal on the conviction on the charge of attempted murder as against the 5th Appellant to be meritorious. The evidence before the Court falls far short of that required to find for a charge of attempted murder. As for the conviction for the offence of malicious damage to property I am satisfied that she was at the scene and she participated in the setting on fire of the complainant's motor vehicle by throwing dry plants on the vehicle which was already on fire.

The fourth Appellant is one **SIRISIE NGUMBAO CHERO**. He was the fifth Accused in the lower Court file.

At page 24 line 19 of the proceedings in the lower Court the Complainant did state.

“I did not see 4th and 5th Accused at the scene up to the moment I was taken away in the vehicle”.

According to the evidence of PW 2 the 5th Accused (4th Appellant) put dry grass into the vehicle to fuel the fire. PW 3 also testified that it was the 5th and 6th Accused who threw dry grass onto the vehicle.

The State concedes to the appeal on the Conviction for attempted murder. When he added dry grass and thereby stoked the fire on the Complainants vehicle the 4th Appellant did actively participate in maliciously damaging the Complainants vehicle by burning it hence the Conviction for the offence of malicious damage to property was safe. It has not been indicated whether at the time of adding dry grass so as to fuel the burning of the vehicle the Complainant was still inside so as to persuade the Court that he had the intention of setting the Complainant on fire. I do concur with Mr. Jami State Counsel that the Conviction of the 4th Appellant for the offence of attempted murder cannot stand. However, the Conviction for the offence of malicious damage to property was safe and is upheld.

The offence of attempted murder is defined under Section 220 of the penal Code thus,

“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 its 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”.

In the present case its is not in dispute that the Complainant did sustain a cut wound on the right side of the nose.

Third degree burn wounds on the thorax and abdomen, right side chest and 2nd to 3rd degree burns on the legs.

This incident took place in broad daylight (9:00 a.m.). The appellants were known to the Complainant and his Witnesses.

The Complainant did testify that the first Appellant was a squatter in his land, the 2nd Appellant was a brother to the first. The 3rd Appellant was also known to him as they had land disputes with him.

The Complainant also testified on the role of each of the 1st, 2nd and 3rd Appellant played. The 3rd Appellant denies to have been present at the scene of the attack but the Complainant at page 20 line 20 had this to say,

“Accused 1 was carrying a spear. Accused 2 was carrying a piece of wood Accused 3 came from Kazungus house where Accused 2 had come from..... Accused No. 3 was not armed. When Accused No. 1 and 2 came back to where I was. Accused 2 hit me with this wooden stick on the back. Accused 1 then held me from the front and I fell down with him on top. Accused 3 told the Accused No. 1 to take my mobile and gun. I do not have a gun. I had a Nokia 6230 in my trouser pocket. Accused 1 took my mobile phone and threw it to the 3rd Accused who took it Accused 3 then ordered them to kill me”.

At page 21 line 14,

“Accused 1 poured petrol inside the vehicle where I was seated. He then took a match box He lit a match stick then fire started burning on me and the motor vehicle simultaneously

I could not get out because Accused No. 1 and 3 prevented me. Accused 3 rushed onto Jackson. Jackson and Accused No. 1 fell down. I managed to get out of the vehicle. I was on fire and the vehicle was also on fire”.

The Complainants evidence was corroborated in material particulars by that of his workers PW 2 and PW 3.

I am satisfied that there was over whelming evidence to the effect that the first, 2nd and 3rd Appellants did unlawfully set the Complainant and his vehicle on fire in an attempt to cause his death. Were it not for the intervention of good Samaritans they would have completed the act causing death to him.

I do find that the Conviction of the 1st, 2nd and 3rd appellants on the Count of attempted murder and that of malicious damage to property was safe and there is no reason to interfere with same.

As regards the Sentence. The offence of murder carries a maximum Sentence of life imprisonment. I have looked at the photographs showing the degree of injuries on the Complainant and I find that this was a dastardly act and the Sentence of fifteen (15) years Imprisonment is Commensurate with the offence.

The upshot is that the appeal for the 1st, 2nd and 3rd appellant is found to be without merit and its dismissed. The appeal for the 4th and 5th Appellants is allowed on the first Count. The Convictions is quashed and Sentence set aside. In respect to the 2nd Count it is noted they have already served one year imprisonment. That is deemed to be enough punishment. The imprisonment on the 2nd Count is reduced to the term already served. They will be set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open Court this **9th** day of **May, 2014**.

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M. MUYA

JUDGE

9TH MAY, 2014

In the presence of:-

Mr. Otara for 1st, 2nd, 3rd and 4th Appellants holding brief Shimaka for the 5th Appellant.

M. MUYA

JUDGE

Mr. Otara: We wish to be supplied with the certified copies of the Judgment and proceedings.

Court: Parties to be supplied with certified copies of the proceedings and Judgment.

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M. MUYA

JUDGE

9TH MAY, 2014