



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**HIGH COURT CRIMINAL APPEAL NO. 305 OF 2013**

**MARTIN NJOROGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against sentence and conviction in the Thika Magistrates Court Criminal Case No. 2509 of 2009 (Hon. B.A. Owino) in a judgment delivered on 30<sup>th</sup> November, 2010)**

**JUDGMENT**

The appellant was charged with the offence of attempted murder contrary to **section 220(a)** of the **Penal Code**. According to the particulars of the offence, on the 20<sup>th</sup> day of May, 2009 at Juja farm area in Thika District, the appellant unlawfully attempted to cause the death of Joseph Gaiko Kamau by assaulting and burning him with paraffin.

At the trial, the complainant, **Joseph Gaiko Kamau** testified that as of 19<sup>th</sup> May, 2009 he was living at Juja farm area in a single-roomed house that he shared with his four colleagues whom he named as Murira, Kairu, Miri and Muchungu; the single roomed house had been rented from the appellant at a monthly rent of Kshs 400/=.

On the 19<sup>th</sup> May, 2009, according to his evidence, the five of them differed on who should move out of the house in view of its limited space; as a result of these differences, one of them, namely, Murira who was the recognised tenant stormed out of the house and spent the night elsewhere. He only came back the following morning.

The witness testified that on that same morning of 20<sup>th</sup> May, 2009, the appellant told them to vacate his house; he specifically addressed the complainant whom he threatened to teach a lesson if he did not leave.

The complainant and his colleagues went to work as usual until evening when they regrouped at a drinking spot; they drank together and according to the testimony of this witness, the appellant joined them and that he even bought him a drink.

When they left for their house at about 7.30 pm, so the complainant testified, the complainant was behind following them; however, somewhere along the way, his housemates went to look for food while the complainant proceeded to the house. He did not enter the house though; he waited his friends from outside.

As the complainant was waiting, apparently lying on the a grass patch outside their house, the appellant is said to have come close and lit a matchstick as if to check who it was that was sleeping on the grass. He

then went to his house and came back armed with a panga with which he struck the complainant on his face. According to the complainant, he used the flat side of the panga to hit him.

The complainant got up and asked the appellant why he was attacking him; the appellant responded that he was going to finish him if he was not going to leave his plot. The complainant is then alleged to have fallen down after the appellant hit him on the right thigh; while still on the ground, the appellant ran to his house and came back with a container of paraffin which he splashed on the complainant and set him on fire before he walked away.

The complainant testified that he fought off the flames but soon lost consciousness; he was awoken by his colleagues, Murira and Miri who took him to Gatundu District hospital the following morning. The complainant is said to have been admitted in the hospital for five months.

The complainant was interrogated by the police while still in hospital; he was given a P3 form which was duly filled by the doctor who attended to him and was admitted in evidence in the trial against the appellant.

The medical officer who attended to the complainant was **Dr Irene Ng'ang'a (PW2)**. Dr Ng'ang'a testified that on 10<sup>th</sup> February, 2010, she was based at Gatundu District hospital when the complainant came for examination with a history of assault by a person known to him. The complainant had burns on his neck, on the face, on the lower limbs and on the scrotum. She categorised the injuries as "harm" though she told the court that the injuries should have been categorised as "grievous harm" in view of how they had turned out to be as at the time of she testified.

Though the complainant had a history of having been assaulted by a person known to him, the medical officer testified that the complainant told her that he had fallen from a height and lost consciousness. Besides having attended to the complainant, this witness relied on the complainant's discharge summary to come up with the medical examination report which was contained in the P3 form; she produced the two documents as evidence in support of her testimony.

The complainant's colleague, Stanley Murira, testified as the third prosecution witness. This witness testified that he lived and worked together with the complainant together with one Muchira, one James and one Mirii. On 20<sup>th</sup> May, 2009, they came from work together as usual and went to buy food before they went to drink; however, in cross-examination, the witness said that they went to drink before they went to buy food. He also said that the appellant drunk with them though briefly. The complainant is said to have gone to the house. When they later went to the house, this witness said that they found the complainant lying on the grass; they thought he was drunk but when he went to check on him he found that the complainant had been burned.

According to this witness' testimony, the complainant told him that he had been burned by the appellant. It is then that he went to the appellant's house which apparently was within the same plot where their house was, to enquire what had happened between him and the complainant. The appellant denied any knowledge of what could have happened to the complainant. This witness said that they took the complainant to the hospital the following day but that they reported the matter to the police four days after the incident.

The investigations officer police constable **James Wangai (PW4)** testified that on 25<sup>th</sup> May, 2009, while he was on duty at Juja Police station, members of the public brought the appellant to the station as a suspect who was alleged to have grievously harmed the complainant. This witness booked the report on the material day and detained the appellant in custody. As part of his investigations he visited the complainant in hospital and took his statement. According to him, the complainant told him that he had been burned by the appellant and based on this information and the doctor's report this witness concluded that the appellant should be charged with the offence for which he was ultimately convicted.

In his unsworn statement, the appellant defended himself and testified that he was in his house on the night of 20<sup>th</sup> May, 2009 when he was awoken by **Murira (PW3)**. Murira is said to have asked for a torch

which the appellant gave him. As he was going back to his house, he saw Murira talking to someone lying on the grass; he apparently also checked and confirmed that it was the complainant. Murira is alleged to have asked the appellant to accompany him to where the complainant had been drinking and make enquiries on what could have happened to him while he was there.

The appellant testified that he assisted in looking for a vehicle to take the complainant to hospital; although they could not get one that night, they managed to take the complainant to the hospital the following day. On 25<sup>th</sup> May, 2009, the appellant was arrested by members of the public who attacked and frogmarched him to Juja police station on allegations of having assaulted the complainant. He was later charged and convicted.

This is the evidence that was proffered at the trial; the learned magistrate was persuaded that with this evidence, the state had proved its case beyond reasonable doubt that the appellant was guilty of the charge of attempted murder contrary to **section 220(a)** of the **Penal Code**. He so held in his judgment and convicted the appellant accordingly; the appellant was sentenced to seven (7) years imprisonment.

The appellant was dissatisfied with the decision of the trial court; he appealed to this court and amongst the grounds he raised in his petition of appeal, the appellant argued that the prosecution evidence was made up of contradictions and hearsay which could not be said to prove the case against him beyond reasonable doubt. The learned magistrate was also faulted for ignoring the defence case and that in any event the sentence meted out against the appellant was excessive.

When the appeal came up for hearing, the state represented by Ms Kathambi notified the appellant that she would seek for enhancement of the sentence on the basis that **section 220(a)** of the **Penal Code** under which the appellant was charged provides for a life sentence upon conviction.

The appellant ably argued his appeal in person and referred the court to several parts in the proceedings and judgment which, in his view, demonstrated the weakness in the prosecution case and the learned magistrate's failure to appreciate them. Firstly, he took issue with the prosecution's failure to call the relevant witnesses; I gather the witnesses he was referring to in this regard were the people the complainant was living with at the time he was attacked. Of the four complainant's housemates, only one testified.

On identification, while the complainant testified that the appellant lit a match stick to identify the complainant, the learned magistrate in his judgment held that the complainant identified the appellant with the help of the moonlight and the flames that erupted when the complainant was set on fire.

The appellant also pointed out the contradictions between the evidence of the medical officer and that of the complainant on the cause of the complainant's injuries; the medical officer told the court that the complainant told him that he had fallen from a height while the complainant himself said that he was burned by the appellant.

Counsel for the state opposed the appeal and reiterated that there was overwhelming evidence that the appellant committed the offence with which he was charged. She said that the appellant was properly identified by recognition as both the complainant and the appellant were familiar with each other and more so, there was a conversation between them when the complainant was attacked. Counsel also argued that the motive of the attack was evident from the complainant's evidence that the appellant threatened to kill him because he had declined to move out of his plot.

I have considered submissions by the appellant and the respondent.

**Section 220 (a)** of the **Penal Code** states:

**220. Any person who-**

**(a) attempts unlawfully to cause the death of another is guilty of a felony and is liable for**

## **imprisonment for life.**

It is apparent from this provision that the sentence for life is a maximum rather than a mandatory sentence; it must be pointed out at the outset, therefore, that the basis for the argument by the state for enhancement of the sentence is misconceived. The learned magistrate had the discretion to impose any sentence of up to life imprisonment. There is no evidence, assuming that the appellant was properly convicted, that the learned magistrate did not exercise his discretion in accordance with the law.

It is manifest that there was sufficient evidence at trial that the complainant sustained severe burns and was grievously injured; he was, as a result, admitted in hospital for five months. The medical officer who testified for the state confirmed that the complainant sustained burns on several parts of the body which included the neck, the face, the lower limbs and the scrotum. The P3 form which was admitted in evidence shows that the complainant also sustained injuries on his penis.

The only question that concerns this court is whether the prosecution proved beyond reasonable doubt that the appellant was the person behind the complainant's brutal attack and whether his intention was to cause the complainant's death and in order to answer this question this court is enjoined to evaluate the entire evidence afresh and come to its own conclusions bearing in mind that it is only the trial court that had the advantage of seeing and hearing the witnesses.

From the evidence on record, it is apparent that the complainant was one of the occupants of a house rented out by the appellant to one of his colleagues who had taken him in together with three other persons. At one point differences arose between them as to who should give way in the face of the limited accommodation space in the single roomed house. As a result of these differences, **Sylvester Murira (PW3)** who apparently was the tenant recognised by the appellant stormed out of the house only to return the following morning.

The complainant and his friends rejoined on the morning of 20<sup>th</sup> May, 2009 when, according to the complainant's evidence, the appellant threatened him with dire consequences if he did not leave his house. It is noted that in his evidence, Sylvester Murira (PW3), neither made any reference to any differences between them nor his storming out of the house on the night of 19<sup>th</sup> May, 2009. The witness never testified on his reunion with his colleagues on the morning of 20<sup>th</sup> May, 2009 and neither did he make any reference to the alleged threats targeted at the complainant by the appellant that particular morning.

Although the complainant testified that they all went to work as usual on 20<sup>th</sup> May, 2009, no other witness including **Sylvester Murira (PW3)** talked of their itinerary that morning. According to Murira, they came from work together on the evening of 20<sup>th</sup> May, 2009; they went to buy food and then went to drink. The complainant is said to have gone home. In cross-examination, this witness said that they went to buy food only after they had taken their drink. Whatever the case, when they finally returned home they discovered that the complainant had been assaulted.

The complainant himself told the court that they went to drink together and parted ways while going back to the house after their drinking session and that it was while he was waiting outside the house that he was attacked. It is not clear from the evidence why the complainant decided to wait outside instead of entering the house where he would have been more secure. Considering the circumstances under which he was attacked, a more plausible explanation was necessary to dispel any doubt as to the possibility of the complainant having been deliberately set up and exposed to the attack that was eventually visited upon him.

The complainant said that he was attacked on 20<sup>th</sup> May, 2009 and that his colleagues took him to hospital the following day which was 21<sup>st</sup> May, 2009. His colleague, Stanley Murira (PW3) was not so clear as to whether the complainant was attacked on 20<sup>th</sup> or 21<sup>st</sup> May, 2009.

The appellant complained of the prosecution's failure to call the relevant witnesses and in my view his

argument appears merited. While it is within the discretion of the state to decide on the number of witnesses it may call and testify on its behalf, it is obligated to call the witnesses who are likely to shed light on the issue at hand. In this regard, it is noted that the complainant had been in the company of four of his colleagues all day long and it appears that he had been attacked within the short period he was isolated from them. No reason was given as to why the prosecution summoned only one of the four potential witnesses who would have gone a long way in corroborating the evidence of the complainant and that of Stanley Murira.

What is more intriguing in the prosecution case is the complainant's colleagues' reaction to the complainant's misfortune. They found the complainant burned yet they could not take him to hospital on the material night until the following day. Although Stanley Murira (PW3) said that they could not find a vehicle that night, there is no evidence that they made any attempts to report the case to the police who could possibly have taken the complainant to hospital.

Apart from seeking the assistance of the police, the complainant's colleagues were under duty to report the crime perpetrated against the complainant to the police. Although Stanley Murira (PW3) testified that the complainant told him that he had been set on fire by the appellant, this witness did not take any step to inform the police; indeed from the evidence available, no report whatsoever was made to the police by any of the complainant's colleagues about this incident.

According to the evidence of the investigating officer, were it not for the members of the public who frogmarched the appellant to the police station five days after the incident, the police would not have known of it. The complainant's colleague's inertia casts doubt on their motive and whether they may have played any part in the complainant's misfortune.

The investigating officer himself never went beyond booking the report by members of the public and taking the statement of the complainant who was then admitted in hospital. There is no evidence that he visited the scene of crime or took statements from persons who could possibly have been within the vicinity of the scene of crime or even from any of the members of the public who brought the appellant to the station. No search was ever conducted in the appellant's house to, at least, confirm whether some of the instruments or weapons alleged to have been used in attacking the complainant were in his custody.

On his part the medical officer treated and examined the complainant for purposes of filling the P3 form; it is indicated in that form that the complainant's injuries were occasioned by the complainant falling from a height as a result of which he lost consciousness. The doctor testified that he was given this information by the complainant himself. With the doctor's evidence it is not clear whether the complainant was injured by the appellant or somehow his injuries were occasioned by falling from a height.

Apart from the weaknesses apparent in the prosecution case, the learned magistrate seems to have misdirected himself on evidence. In his judgment, the learned magistrate stated that the complainant and his colleagues had differed over payment of rent; there was no evidence on record to support this finding.

On identification of the appellant on the fateful night, the learned magistrate held, contrary to the available evidence, that the complainant identified the appellant with the help of the moonlight and the flames apparently from the complainant's burning attire. Here, the learned magistrate misdirected himself again because his findings are not supported by any evidence on record.

The misdirection must have influenced the learned magistrate to make erroneous conclusions.

With all the inconsistencies in the prosecution case, the omissions by the prosecutor and the investigating officer, the suspicious conduct of the potential prosecution witnesses and the misdirection by the learned magistrate, it cannot be concluded with any certainty that the prosecution proved its case beyond reasonable doubt. For this reason I find that the appellant's appeal is merited and it is hereby allowed. The appellant is set at liberty forthwith unless he is lawfully held.

**Dated, signed and delivered in open court this 5<sup>th</sup> day of May, 2014**

Ngaah Jairus

**JUDGE**