REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.14 'A' OF 2012

ISAIAH MWANIKI MATHENGE …....……1ST APPELLANT

PATRICK WACHIRA MWOBE ……2ND APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 195 of 2010 in the Senior Principal Magistrate's Court at Kerugoya HON. H.N. NDUNGU (SPM)

JUDGMENT

Isaiah Mwaniki Mathenge the 1st appellant herein and **Patrick Wachira Mwobe** the 2nd appellant were charged with two counts in the subordinate court and thereafter convicted over the same and sentenced to serve four years for the first count and 24 months for the second count. The first count facing the appellant as per the charge sheet was threatening to kill contrary to **Section 223(1)** of the **Penal Code** and the second count was attempted kidnapping Contrary to **Section 260** of the **Penal Code** as read with Section **389** of the **Penal Code**. The appellants were aggrieved by both the conviction and the sentence handed out to them and have appealed to this court and have both listed ten grounds of appeal each.

At the hearing of this appeal the state through of office of Director of Public prosecution indicated that they are not opposed to the appeal and that the conviction of the appellants was not sustainable in view of the evidence adduced at the trail.

This court does not in view of the sentiments of the state counsel consider necessary to consider all the grounds of appeal in detail but I will try and summarize them to safe on judicial time.

The court shall consider ground 3 and 7 contemporaneously since they relate to amendment of the charges that faced them at the trial. The appellants have faulted the intention by the prosecution to amend the charge sheet during the trial. This court has looked at the proceedings and the record finds that the charge facing the accused was amended by court only once on 4th March 2010. The court finds that the amendment was done regularly under **Section 214** of **Criminal Procedure Code** and the new amended charge was properly read over to the appellants as provided for by the law. However what is not clear is the particulars of the said amended charge sheet. I have looked at the record and though I find two charge sheets, both of them were signed on 19th February 2010 ,the date the appellants were arraigned in court. None of the two charge sheets indicates the word 'amendment'. The two charge sheets are the same in so far as the first count is concern. The only difference is in respect to count two where one shows the offence in count two as "attempted kidnapping" contrary to **Section 260** as read with **Section 389** of **Penal Code".** While the other reads "demanding property with menaces contrary to **Section 302** of the

Penal Code". It is not clear which one was amended but from the judgment of the Learned Magistrate , it is apparent that the conviction was on the basis of the former charge sheet which is the offence of attempted kidnapping contrary to **Section 260** as read with **Section 389** of the **Penal Code**. It is however unclear which charge sheet preceded the other and it is now a question of assumption as to which charge proceeded for trial. In such circumstances I find it unsafe to assume that the appellant were subjected to a fair trial pursuant to **Article 50** of the **Constitution.** An accused person should be tried for a specific offence, a charge sheet whether amended or not should contain sufficient detail to enable an accused person to adequately prepare and answer to it. I therefore find that the appellant's grounds of appeal in respect to amendments carried out by the state to have some merit. The learned magistrate appeared to have fell into error by failing to detect this anomaly.

This court has also called upon to determine whether the evidence adduced was sufficient to convict the appellant. The appellants contention that the L earned Magistrate convicted them on account of evidence of a single witness do not hold any water.

The record shows that at least four witnesses were eye witnesses in the case. We have PW1 who was the complainant in the first count. PW2 and PW3 who were employees of Quality Café where part of the incident took place and PW5 the police officer and the complainant in the second count. Learned Magistrate therefore did not rely on the evidence of a single witness. However I do find that the evidence tendered by the trial court in totality failed to meet the threshold or the standard required to convict the appellants. The state failed to adduce evidence of a crucial witness which in my view was the bar attender who witnessed the incident when it first began. I find the weight of evidence of PW2 and PW3 to be negated by the fact of employment and their relationship to be complainant in the first count. Such evidence requires corroboration and I find the corroboration provided by PW5 of little assistance to the prosecution case as it appears to contradict the evidence of PW1. PW5 states on page 21 of the proceedings that he saw PW1 ran towards him saying that the appellants whom he had apprehended wanted to rob him. They were robbers according to him but earlier PW1 had testified that the appellants had actually threatened to kill him and had done so in the bar and followed him to his hotel (Quality Café). The state has admitted that this clear contradiction was not noted by the trial court and hence the reason why he did not oppose this appeal. I also note that according to PW5, he arrested the appellants when he realized they were suspicious characters and the arrest attracted a huge crowd including PW1 who came and told him that the appellants were thugs wanting to rob him. The version given by PW1 however shows that PW5 and the appellants were having a chat when he ran over to where they were and asked PW5 who he knew to be a senior police officer to arrest them as he had threatened to kill him . These two versions are material because where two people give different versions of events and yet both claiming to be truthful, it is normally unsafe to find either version reliable. This court finds that the same should have in the very least created some doubts in the mind of the trial court and in criminal cases where doubts exists in the prosecution case, an accused person is entitled to the benefit of doubt. The trial court should have noted the doubts stated and given the benefit to the appellants.

I also find that the trial court was in error not to take judicial notice of the fact taxis operate normally from Total Petrol Station in Kerugoya Town and those taxis do not have any distinctive mark or colour. It is therefore perfectly normal and ordinary if a private car is mistaken for a taxi. The trial court never took into consideration this issue raised by the appellants in their defence. I do find that had the learned magistrate taken judicial notice of the said fact pursuant to **Section 59** of the **Evidence Act** he may have taken the evidence of PW5 in a different light and may not have placed so much weight on his opinion about how the appellants approached him in his car. By not so doing, the learned magistrate misdirected herself and thereby arrived at an erroneous conclusion.

The second appellant has raised an issue which I consider important. This is the fact of his mental state which he states was not taken into consideration. The trial magistrate disregarded the evidence by the second appellant on an erroneous pedestal. The production of a medical report as D exhibit 1 by the second appellant was relevant and ought to have been considered in light of what transpired particularly in the bar where the first incident took place. The exhibit by the second appellant appeared to have given some explanation to the unusual behavior of the second appellant in the company of 2nd appellant at the bar or even when they approached PW5 in his car. The learned magistrate observed

that there was something sinister on the medical report but having admitted it as evidence under **Section 48** of the **Evidence Act**, it was erroneous for her question the contents or its validity . If the court suspected any mischief in the report, it ought to have summoned the author who then be subjected to cross examination and be put to task on the medical records to support the report. Having admitted the document, it was prejudicial to the appellants to question the contents at a later stage. This court has looked at the exhibit and it shows the medical history of the 2nd appellant besides asking for any necessary assistance. It was advisable for the trial court to view it in an objective manner.

From the foregoing reasons I find that this appeal has merit. It is allowed. The conviction and sentence meted out against the appellants is reversed and set aside. They are set free unless lawfully held and the sureties are discharged and their securities be released to them.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 13TH DAY OF NOVEMBER 2014 in the presence of;-

The 1st appellant

The 2nd appellant

Mr Sitati for state

Mbogo Court Clerk