IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO, & M'INOTI, JJ.A.)

CRIMINAL APPEAL NOS. 8, 13 & 14 OF 2015 (CONSOLIDATED)

BETWEEN

ABDALLA KIRAO MKARE WANJE.....1ST APPELLANT

ALI KIRAO MKARE WANJE.....2ND APPELLANT

EMMANUEL MLEWA MKARE.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa

(Muya, J.) dated 9th May 2014

in

H.C.CR.A. No. 21 of 2013)

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JUDGMENT OF THE COURT

The appellants, ***Abdalla Kiarao Mkare Wanje (1st appellant), Ali Kirao Mkare Wanje (2nd appellant)*** and ***Emmanuel Mlewa Mkare (third appellant)*** bring this second appeal against the dismissal of their appeal by the High Court at Mombasa, ***(Muya, J.).*** On 9th May 2014 the learned judge held that their appeal, which was challenging their conviction for the offence of attempted murder and malicious damage to property and sentences of imprisonment of 15 and 2 years respectively (to run concurrently), had no merit, thus precipitating this appeal.

The 1st and 2nd appellants are brothers while the 3rd appellant is their neighbour at ***Ziwani, Ganda Location, Malindi,*** and was at the material time a village elder. The background to this appeal is the events that took place at that Location on 27th February 2006, triggered by a dispute over a property known as ***Plot No. 120 Malindi,*** measuring 359.91 acres. That property was at the material time registered in the names of ***Abdallah Salim Bakhshuwein*** and his two sons, ***Salim Abdallah Bakhshuwein*** and ***Ali Abdallah Bakhshuwein***. An incorporated family company called ***Barani Farm***

Ltd in which ***Said Abdallah Bakhshuwein (PW1),*** another son of Abdallah Salim Bakshuwein, was a shareholder and director was responsible for farming the property. The 1st and 2nd appellants were squatters on the property and together with the 3rd appellant were well known to PW1 and his workers. Indeed for a considerable period of time the appellants and PW1 were involved in protracted litigation in the High Court at Mombasa over the property.

The evidence, accepted by the trial court and the first appellate court, was that on the material day, at approximately 9.00 a.m., PW1 went to fence the property in the company of his 10 workers. To get to the property, he drove in his Vehicle, a Toyota Land Cruizer ***Registration No. KAG 899V***, which he parked on a road near the property. As PW1 and his workers started taking measurements and digging holes to erect fencing posts, the 2nd appellant passed by riding a bicycle. Shortly, he returned on foot armed with a piece of wood in the company of the 1st appellant, who was armed with a spear. The two requested the workers to leave the property, stating that they wanted to deal with PW1. In a short while, the 3rd appellant joined them. Fearing for their own security, the workers retreated to a distance of about 10 meters.

Suddenly the 2nd appellant attacked PW1 with the piece of wood while the 1st appellant wrestled him to the ground. All the while the 3rd appellant was urging the other two to kill PW1. The 1st appellant hit PW 1 on the stomach and lower abdomen with the spear, before taking PW1's knife and cell phone, which he threw to the 3rd appellant. Sensing danger, PW1 made a beeline for his vehicle, hoping to flee for dear life. He got into the vehicle all right, but before he could start the engine, the three appellants caught up with him and started struggling with him in the cabin. The 1st appellant struck PW1 on the nose with the spear, splitting it and drawing a lot of blood. He then ordered his wife to bring petrol to burn PW1, which was brought shortly in a plastic bottle. The 1st appellant then doused PW1 and the vehicle's cabin and set it on fire with a matchstick.

As PW1 burned in the vehicle, the 1st and 2nd appellants prevented bystanders from going to his rescue. When PW1 struggled to alight from the burning vehicle, the 3rd appellant prevented him from getting out. ***Pascal,*** PW1's watchman ultimately managed to get him out of the burning vehicle. The watchman helped him to the road where a Good Samaritan made to stop his car to help them. That was not to be for the 3rd appellant and a group of other people started stoning the vehicle, forcing the Good Samaritan to flee, minus PW1 who was still on fire.

Shortly, a Red Cross vehicle that happened by the road, with its lights on and siren blaring rescued PW1 and took him to Star Hospital in Malindi, where he was taken to the theatre, his nose stitched, and admitted for a period of 35 days. His vehicle, Seiko wristwatch, a bunch of keys and clothes were extensively burned and damaged. At the hospital, PW1 informed the police that the appellants were his assailants and the appellants, together with three others were arrested.

On 2nd March 2006 all six were charged before the Chief Magistrates Court Malindi, with one count of attempted murder contrary to ***section 220 (a)*** of the ***Penal Code***; one count of malicious damage to property contrary to ***section 339(1)*** of the Penal Code; and the 3rd appellant was charged alone with one count of stealing contrary to ***section 275*** of the Penal Code, the allegedly stolen property being PW1's cell phone and knife.

As regards the events on the property, PW1 and two of his workers, ***Kahindi Charo (PW2)*** and ***Charo Chome Kiponda (PW3)*** who had respectively worked for him for 15 years and 40 years adduced the prosecution evidence along the lines we have set out above. All of them were at the scene and were well known to the appellants. ***Ibrahim Abdullahi (PW4),*** a medical practitioner at Malindi Hospital adduced medical evidence on behalf of ***Dr. Ali Hassan*** who attended to PW1 and filled the P3 Form. According to the latter, PW1 suffered a cut wound on the right side of the nose which was probably inflicted by a sharp object; third degree burns in the thorax and abdomen on the right side of the chest; and second to third degree burns on the lower limbs. The Doctor classified the injuries as grievous harm.

When put on their defence, the appellants gave sworn evidence and called four witnesses. The 1st appellant's defence was that he had known PW1 for a long time; that he lived on the disputed property; that it was registered in the name of PW1; that on the material day PW1 and his workers went to his home and started cutting his trees and demolishing his house without permission; that PW1 drew his knife as if to stab him; that he screamed for help and a large crowd responded; that it was that crowd which attacked PW1 and set his vehicle on fire. The 1st appellant was categorical that he did not know any of the people who had come to his rescue; that he did not see who set PW1 and his vehicle on fire and that he did not see any of the other appellants at the scene.

As for the 2nd appellant, his defence was that on the material day he was en route to work on his bicycle; that when he got near the disputed property he heard screams; that he saw a large crowd which could not tell him what was happening; that all those people were strangers who he never knew; that he was shortly arrested by the police; that he found PW's vehicle on fire; that he did not see PW1 who he knows very well at the scene; that he never saw the other appellants at the scene and that he used to live on the property but had moved out.

Lastly the 3rd appellant's defence was that on the material day, he heard noise emanating from the 1st appellant's home and went to check what was happening. Upon getting to 1st appellant's home he found a crowd of people. He then rode to the police station and made a report. When he went back, he found a crowd of people, all strangers to him, and PW1's vehicle burning. According to him he did not see PW1, whom he knows very well, at the scene. Later, one ***Abdalla Katana Karisa Tsuma*** brought to him PW'1 knife and cell phone. When he went to check on PW1 at the hospital, PW1 pointed him out to the police, after which he was arrested.

The trial court convicted the appellants and two of their co-accused of attempted murder and malicious damage to property as earlier stated, while one of their co-accused was acquitted. The 3rd appellant was also acquitted of the charge of stealing. In the first appeal, the High Court quashed the conviction of the other two co-accused, set aside their sentence and set them at liberty. It therefore fell on the three appellants herein to pursue this second appeal in which their separate appeals, namely ***Criminal Appeal Nos. 8, 13 and 14 of 2015*** were consolidated. The 1st and 2nd Appellants elected to urge their appeal through written submissions while ***Mr. Ngumbau***, learned counsel for the 3rd appellant made oral submissions.

According to the 1st appellant, the prosecution did not prove that the property in dispute belonged to PW1, that there was no evidence that he was a squatter on the property; that it was PW1 who violated the 1st appellant's constitutional right to property; that important witnesses such as PW1's watchman and Red Cross officers were not called by the prosecution; that no explanation was given why such witnesses were not called; that important exhibits were not produced; that the first appellate court failed in its duty to analyze and re-evaluate the evidence; that the prosecution evidence did not prove the offence of attempted murder; that the prosecution case was full of contradictions; and that the trial and the first appellate courts erred by ignoring his defence of self defence and defence of property.

On his part, the 2nd appellant submitted that the prosecution evidence from PW1's employees was not independent and reliable and ought not to have been acted upon; that he was not involved in the property dispute; and that the sentence imposed upon him was illegal because the offence he was charged with was an attempt to commit a felony which by dint of ***section 389*** of the ***Penal Code*** attracts imprisonment for a term not exceeding 7 years. For that proposition he relied upon ***Evanson Murithi Gichane v. Republic, Cr. App. No. 277 of 2007.***

For the 3rd appellant ***Mr. Ngumbau,*** learned counsel, submitted that the offence of attempted murder was not proved against him. Counsel urged that the prosecution was obliged to prove a specific intention by the 3rd appellant to cause the death of PW1 and that it was not enough in a charge of attempted murder to merely prove that the offence would have been murder if death had ensued. In the same vein, counsel contended that an intent to cause grievous harm, while capable of supporting a

conviction for murder, is not sufficient to support a conviction for attempted murder. Counsel added that positive intention to unlawfully cause death must be proved, which was not the case in this appeal because there was no evidence that it was the 3rd appellant who set or ordered the motor vehicle to be set on fire. At most, it was submitted, the 3rd appellant was a mere cheerleader. In support of those propositions, counsel relied upon ***Cheruiyot v. Republic [1976-1985] EA 47; R. v. Luseru Wandera s/o Wandera [1948] 15 EACA 106; Mustafa Daga s/o Andu v R. [1950] 17 EACA 140*** and ***R. v. Gwempazi s/o Mukhonzho [1943] 10 EACA 101***.

Learned counsel further faulted the 1st appellate court for failure to reappraise the evidence exhaustively as it was duty bound. It was submitted that had the High Court properly re-evaluated the evidence, it would have found that common intention between the three appellants was not proved; that the 3rd appellant merely stumbled on a fight and tried to stop it; that he was not armed; that he was not the one who doused PW1 and his car with petrol and set them on fire; that he had no intention to kill PW1; and that there was no evidence of a prior meeting between the appellants to plan the unlawful killing of PW1. As regards common intention counsel relied on ***David Ciayu Njogu v. Republic, Cr. App. No. 69 of 2004*** and ***Eunice Musenya Ndui v. Republic, Cr. App. No. 534 of 2010***.

Lastly Mr. Ngumbau submitted that the two courts below did not consider the 3rd appellant's defence that there existed a property dispute between him and PW1 and hence a grudge. On the basis of the above grounds, we were urged to allow the appeal, quash the conviction and set aside the sentence imposed on the 3rd appellant.

Mr. Monda, learned Assistant Director of Public Prosecutions opposed the appeal contending that all the ingredients of the offence of attempted murder and common intention between the three appellants were proved to the required standard. It was submitted that all the three appellants intended to unlawfully cause the death of PW1 and they all acted in concert. They all placed themselves at the scene at the material time, it was contended. Counsel discounted the submission that the 3rd appellant was an innocent by stander, submitting that he was actively involved because he asked the 1st appellant to attack PW1; he was actively cheering the other appellants as they attacked PW1; he knew what was happening; he was actively restraining PW1 from leaving the burning vehicle and that he was also preventing other people from assisting him.

By using a spear to attack PW1; setting the vehicle on fire using petrol when PW1 was inside; and preventing PW1 from getting out of the burning vehicle; it was submitted, was clear evidence of intention on the part of the appellants to unlawfully cause his death.

This is a second appeal, which by virtue of ***section 361*** of the Criminal Procedure Code is restricted to consideration of matters of law only. We are obliged to pay homage however, to the concurrent findings of fact by the two courts below and will not differ from such findings unless we are satisfied that on the evidence on record, no reasonable tribunal could have made those findings. (See ***Chemagong v. Republic (1984) KLR 213.***

Failure to call a witness by itself is not a basis for interfering with findings of fact by the two courts below. This is because under ***section 143*** of the ***Evidence Act***, in the absence of a provision of law requiring a specific number of witnesses, no particular number is required to prove any fact. The approach of the Court on this issue was articulated as follows in ***Donald Majiwa Achilwa & 2 Others v. Republic, Cr. App. No 34 of 2006:***

> ***"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549)."***

We are satisfied that the evidence of PW1's watchman and the Red Cross officers would have been a repetition of the evidence of PW1, Pw2 and PW3 and in those circumstances no adverse inference can be made regarding the prosecution's failure to call them. In any event, this is really not a case where the adduced evidence barely establishes the prosecution case.

The same case applies to the complaint regarding non-production of some exhibits, in particular the spear. In ***Ekai v. Republic*** ***[1981] KLR 569*** this Court, in a charge of murder rejected the argument that failure to produce the murder weapon as an exhibit by itself rendered a conviction fatal. And in ***Karani v. Republic*** ***[2010] 1 KLR 73*** this Court reiterated that an offence may be proved even if the dangerous weapon is not produced as an exhibit so long as the court believes, on the evidence before it that such a weapon existed at the time of the offence.

The contention that the first appellate court failed to discharge its duty of re-evaluating and reappraising the evidence has no basis. At page 2 of the judgment the court started by quoting ***Okeno v. Republic*** ***[1972] EA 32*** and reminding itself of its duty to evaluate and reappraise the evidence before the trial court. It then set out and analyzed the evidence adduced by the prosecution and the defence and at the end of that exercise concluded that the conviction of the other two persons who had lodged the appeal with the appellants had no basis, and set aside their conviction and quashed the sentences. We are satisfied that the first appellate court considered the evidence on record meticulously as expected of it and that there is no substance in the claim of dereliction of duty.

The same position applies as regards the claim that the appellants' defences were not considered. We have stated that the first appellate court duly considered the evidence adduced for the prosecution and for the defence. In particular the 1st appellant's defence of self defence and defence of property could not stand after the two courts below found that the family of PW1 were the registered owners of the disputed property. The courts also rejected, on the basis of the evidence adduced, the assertion that it was PW1 who attacked the 1st appellant and that PW1 had cut down the 1st appellant's trees and demolished his house.

The real issue in this appeal is whether the prosecution proved beyond reasonable doubt the offence of attempted murder against the appellants. ***Section 388*** of the Penal Code defines "attempt" as follows:

> ***"388. (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.***
>
> ***(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.***
>
> ***(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."***

Specifically as relates to attempted murder, ***section 220*** of the Penal Code provides thus:

> ***"220. 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 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."***

We agree with the appellants that as far as the offence of attempted murder is concerned, the prosecution is obliged to prove that they had a positive intention to unlawfully cause the death of PW1 and that it is not enough that they could have been guilty of murder if the death of PW1 had ensued. There are many authorities on this point, that we need not mention more than ***Cheruiyot v. Republic (supra); Abdi Ali bare v. Republic, Cr. App. No. 588 of 2010*** and ***James Masomo Mbatha v. Republic, Cr. App. 164 of 2013.***

In the circumstances of this appeal, we are however satisfied that the appellants' attack on PW1 was not a spur of the moment attack; it was one that was planned and specifically intended. The moment PW1 appeared on the property to oversee its fencing, the 1st appellant duly armed himself with a spear for purposes of dealing with PW1 and the 2nd appellant did likewise with a plank of wood. They calculatedly isolated PW1 from his workers, telling them to keep off because they wanted to deal with PW1, which from their subsequent conduct could only have meant that they intended to kill PW1. After assaulting PW1 with their weapons, he tried to run to his car and to drive off. At that point, even assuming the defence of self-defence was available to the appellants, which we have found discounted by the evidence, the retreating PW1 posed no danger to the appellants. The appellants however pursued him to his car and prevented him from starting it and driving off. In the car, the 1st appellant stabbed PW1 with the spear on the nose, before calling for petrol, dousing PW1 and the car, and setting them on fire. Even when PW1, himself aflame, made effort to alight from the burning car, the appellants prevented him from doing so and in addition kept away Good Samaritans who tried to assist him, to ensure that their intention of causing his unlawful death was realized. In these circumstances, we are satisfied that it cannot fall from the mouths of the appellants to claim that they had no positive intention to cause the death of PW1. Their conduct before, during and after setting PW1 on fire is indicative of a positive intent to cause his death.

The 3rd appellant valiantly tried to disassociate himself from the other appellants and assumed the mien and poise of an innocent bystander throughout the catastrophic incident. But the evidence accepted by the two courts below indicate that he was the one urging the other appellants on, telling them to kill PW1 and joining in preventing PW1 from getting out of the burning car and keeping off Good Samaritans coming to PW1's rescue.

Section 21 of the Penal Code provides as follows regarding common intention:

> ***"21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."***

In ***Wanjiro d/o Wamario v. R, 22 EACA 521*** the former Court of Appeal for Eastern African Court stated that although common intention generally implies a premeditated plan, that in itself does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with. And in ***Njoroge v. Republic [1983] KLR 197,*** this Court added, on a charge of murder, that if several persons combine for an unlawful purpose and one of them in the execution of that purpose kills a person, all are guilty of the murder, whether they aided or abetted or not. The Court stressed that the common intention of the appellants could be inferred from their presence at the deceased's home, their actions and the omission of either of them to disassociate himself from the assault. (See also ***Rex v. Tabulayenka s/o Kirya & 3 Others [1943] 10 EACA 51).***

In this appeal, we have set out in detail the involvement of the 3rd appellant in the attempt by the 1st and 2nd appellant to unlawfully cause the death of PW1. We are satisfied from the evidence on record that although it was not the 3rd appellant who assaulted, stabbed and set PW1 on fire, from his intimate involvement in the entire transaction, he had common intention with the 1st and 2nd appellants to cause the death of PW1.

The last question is on the legality of the sentence. Section 220 of the Penal Code constitutes attempted murder a felony and prescribes imprisonment for life as the maximum sentence. ***Section 389*** of the Penal

Code, which the 2nd appellant relies upon to claim that he should not have been sentenced to more than 7 years imprisonment provides as follows:

> ***"389. Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years."*** (Emphasis added).

While it is true that in ***Evanson Murithi Gichane v. Republic (supra)*** and ***Boniface Juma Khisa v. Republic, Cr. App. No. 286 of 2009*** it was held that section 389 of the Penal Code entitled a suspect charged with attempted robbery with violence to a sentence of imprisonment for seven years rather than to the sentence of death, this Court did subsequently clarify that the decision was *per incurium* and that where a sentence is specifically provided, section 389 has no application. (See ***Charles Mulandi Mbula v. Republic, Cr. App. No. 123 of 2010***; ***Dickens Odari Bige & Another v. Republic, Cr. App. No. 649 of 2010 (Kisumu)*** and ***Idd Mohammed Sairim & Another v. Republic, Cr App No 354 of 2011).***

For all the foregoing reasons, we have come to the conclusion that this appeal lacks merit and the same is hereby dismissed in its entirety. It is so ordered.

Dated and delivered at Malindi this 15th day of July, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR