



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 47 OF 2016

JOHN NTHIGA MUNYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal case No.925 of 2015 of the Chief Magistrate's Court at Embu)

JUDGEMENT

The appellant was charged with the offence of administering poison with intent to harm Contrary to Section 236 of the Penal Code. The particulars of the offence are that the appellant on the 30TH day of December, 2014 at Njoguri village in Kairuri sub-location, within Embu County, with intent to injure MARGARET MUTHONI, unlawfully sprayed DIAZION a poison to vegetables (spinach) to be taken by the said MARGARET MUTHONI thereby endangering her life.

The trial Court convicted the appellant and sentenced him to ten (10) years imprisonment. The grounds of appeal are that:-

- 1. The appellant pleaded not guilty***
- 2. The trial Court erred in law and fact by failing to consider that the sprayed chemical which was taken to the government analyst for tests was not the one that had been recovered from the appellant.***
- 3. The conviction is based on single evidence from family members and is inconsistent.***
- 4. The trial court failed to consider that there was a long standing family feud between the appellant and the complainant as the appellant was a witness in a case against the complainant.***
- 5. The trial court rejected the appellant's defence on weak grounds.***

The appellant submit that there was a land dispute between himself and the complainant. DW5 was the appellant's employee and testified on that issue. PW3 is a brother to DW5. The appellant could not have sprayed the poison during the day. PW2 is PW3's son. If PW1 and PW2 saw the appellant spraying the poison, why then didn't they scream for neighbours to respond. The village elder was not informed. None of the neighbours was called to witness the appellant spraying the poison.

The appellant maintain that the case is a frame up. There was delay in making a report to the Police. The report was made six (6) months after the alledged incident. The investigation officer visited the scene on 2.1.2015 but did not arrest the appellant on the same day. PW5 did not find any crime having been committed for him to have arrested the appellant. The evidence was that the appellant was hired by DW5 who is the complainant's brother to spray the grass in DW5's compound.

The appellant also submit that the alledged chemical found on his compound was labeled "wipe out" and is not the one that was taken to the government analyst. PW4 testified that what was sent to him was DIAZINON Psynophesphete. PW4's evidence is that Diazinon is a pesticide and is never used on vegetables.

It is further submitted that the trial Court did not consider the appellant's alibi sworn defence. There was also enmity between PW3 and her brother DW5 based on land issues. The appellant was summoned to the Police. He went there on 2.1.2015 but was not arrested. He was arrested six months later.

The state opposed the appeal. It is submitted that the issue of grudge between PW3 and DW5 did not arise during the trial. The appellant did not even raise that issue during cross examination. PW1 saw the appellant spraying some chemical onto the spinach. When the appellant saw PW2 he ran away from the scene. This shows that the appellant was guilty of the offence.

PW3 reported the matter to the Police the following day at Ngimari Police station. The Police conducted their investigations and it took long before the appellant was arrested. The report from the government analyst took long to be processed. The chemical taken to the Government analyst was found on the appellant's compound. The exhibit memo shows what exhibit was taken to the Government analyst. The chemical was confirmed to be diazinon which kill instantly by stopping the functions of the heart. The appellant's unsworn defence was considered.

This is a first appeal and the Court has to evaluate the evidence afresh and make its own conclusion. **PW1 RAMSEY MUNENE** testified that he was a form one student. On 30.12.2014 he was at home. He went to fetch water from his grandmother's house when he saw the appellant spraying his grandmother's spinach with poison. The appellant was using a pump. It was about 10.00am. PW1 informed his father who came out of their house. The appellant left hurriedly. The appellant is their neighbour with a fence separating them. When his grandmother went home, she was informed. The spinach withered after a few days.

PW2 PETERSON NJIRU MBUGUA is PW1's father. On 30.12.2014 he was asleep. At about 10.00am his son woke him up. He works as a watchman at Embu CDF offices. When he came out of the house he saw the appellant spraying chemical on his mother's spinach. The appellant had a yellow pump. He felt the stench of chemical. The following day his mother reported the incident. The spinach later withered. The appellant is their neighbour. They used to be good neighbours.

PW3 MARGARET MUTHONI MBUGUA is the mother of PW2 and grandmother to PW1. On 30.12.2015 she arrived home at about 8.00pm. PW1 told her not to harvest the spinach because the appellant had sprayed it with chemical. She reported the matter in the morning at Ngimari Police station. On 2.1.2015 the appellant appeared at the Police station. The appellant went with the Police to his home and he gave them the chemical. Samples were taken for examination. The vegetables and grass dried up. The samples were of the vegetable, grass and soil.

PW4 DENNIS ONYANGO is a Government analyst. On 9.1.2015 he received samples of soil, spinach, and some chemical. He analysed the samples and found that there was diazinon Psynophospete in them. The chemical can cause death if taken by human. A certain quantity of the chemical is allowed for use so that it does not affect human. The chemical is never sprayed on vegetables.

PW5 PC TIMOTHY NDIWA was stationed at Manyatta Police station. He investigated the case. He visited the scene on 2.1.2015 in the company of PW3 and the appellant. A foul smell could be felt. The appellant told him that he had been hired by PW3's brother to spray the chemical known as wipe out on the grass in the compound of PW3's brother. PW5 observed that the grass was about 20 metres from the vegetables. He took the chemical from the appellant's compound, took the samples and forwarded them to the Government Analyst. The appellant was later charged with the offence. It is his further evidence that PW3 has a land dispute with her brother.

In his unsworn defence, the appellant testified that he could not have sprayed the complainant's spinach during the day. He was working on PW3's brother's place. If he intended any harm, he wouldn't have given the chemical to the Police. PW3 has a case with her brother in the High Court.

DW2 CATHERINE MUCHOKI NJERU is the appellant's wife. It is her evidence that the chemicals were prepared in her presence. The appellant went to spray at the compound of Zephania Mukutu (DW 5). The case was due to enmity. The appellant sprayed the grass around the house. **DW3 STELLA NTHIGA** is the appellant's daughter. It is her evidence that she saw her father preparing the chemical and went to spray at DW5's compound. Her father was arrested after six months.

DW4 JAMES NYGAGAH testified that on 30.12.2014 he found the appellant spraying grass with chemical around the house of Zephania Kathuri. DW3 had gone to collect a jiko manufactured by the appellant's group project.

DW5 ZEPHANIA MUKHUTU is a retired teacher. The appellant is his neighbour. His evidence is that he is the one who employed the appellant to spray chemical on his compound. The appellant was to spray on the grass around his house. He does not stay at his compound and the grass had grown. DW5 is the one who bought the chemical known as "wipe out". He heard that the appellant had been arrested and was found spraying maize and spinach. He went to the scene and found grass had withered. The Police decided to take spinach as samples as well as soil. The chemical was also given to the Police. It is his evidence that he is not related to PW3, the complainant. DW5's further evidence is that the appellant used the wipe out chemical and not diazinon.

The prosecution case is to the effect that the appellant did administer poison on the complainant's vegetables. The effect of the appellant's action was to endanger the complainant's life. On his part, the appellant contends that he used the wipe out substance to spray grass around DW5's compound. His witnesses saw him spraying the grass on DW5's compound. There was no intention to endanger the complainant.

The totality of the prosecution evidence does confirm that indeed the complainant's vegetables were sprayed with a chemical. According to PW4, the chemical found on the vegetables could cause death and is harmful to human beings.

Although DW5 testified that he gave the appellant chemical known as Wipe Out which is used to clear weeds, it appears that the substance does contain harmful chemicals. There is no evidence that the appellant used a different chemical from the one given to him by DW5. His wife and daughter saw him mixing the chemical. DW4 saw the appellant spraying the grass using the chemicals. On the other hand, PW1 saw the appellant spraying his grandmother's vegetables. The vegetables withered after sometime and could not be consumed.

What I can deduce from the case is that indeed the appellant went ahead and sprayed the complainant's vegetables with the chemical that was meant to clear the grass. The appellant's action cannot be left unpunished. Had the appellant simply sprayed the grass without extending to the complainant's farm, he could not have been charged. The appellant went beyond DW5's instructions. The alledged misunderstandings

between the complainant and DW5 cannot be the source of the criminal case. The fact remains that the complainant's vegetables were sprayed with a chemical which endangered the complainant's life. I do find that the appeal on conviction lacks merit.

Section 236 of the Penal Code states as follows:

“Any person who unlawfully, and with intent to injure or annoy another, causes any poison or noxious thing to be administered to, or taken by, any person, and thereby endangers his life, or does him grievous harm, is guilty of a felony and is liable to imprisonment for fourteen years.

The appellant was sentenced on 14.11.2016 to serve 10 years imprisonment. He has now served almost one and a half years imprisonment. His mitigation is that he did not intend to cause harm to anybody. He is a neighbour to the complainant. He has a family. His wife and daughter testified in court. He was given the chemical by DW5 to spray DW5's compound. I do find that the circumstances of the case does not call for a prison sentence. The loss suffered by the complainant was not quantified. However, PW3 could not utilize her vegetables.

Having served over one year in prison and taking the circumstance of the case into account, I do find that the ten (10) years imprisonment imposed by the trial court is excessive. The appellant has suffered enough punishment.

In the end, the appeal on conviction is hereby disallowed. The ten (10) years imprisonment imposed by the trial court is set aside and replaced with the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and Signed at Marsabit this Day of March 2018

SAID CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 18th day of April, 2018

F. MUCHEMI

JUDGE