



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 16 OF 2016

L M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi

Senior Resident Magistrate's Court Criminal Case No. 473 of 2014

by K. Sambu P M on 25/02/16)

J U D G M E N T

1. **L M K**, the Appellant, was charged with the offence of **Attempted Murder** contrary to **Section 220(a)** of the **Penal Code**. Particulars of the offence were that on the **6th** day of **August, 2013** in **Kitui County**, attempted unlawfully to cause the death of **Dorcus Musili** by cutting her with a knife on her neck.

2. On being arraigned before Court she denied the charge. She was subjected to full trial. The trial Court found her guilty of the offence as charged and made a finding that she was insane at the time of commission of the offence. The learned trial Magistrate reported the matter for the Order of the President to give direction. In the meantime the Appellant was detained at **Kitui Women's Prison Special wing**.

3. Aggrieved by the decision of the Court, the Appellant appealed on grounds that the learned Magistrate erred in:

- Not considering that she was very sick during the time of committing the offence.
- Failing to consider that she was taken for special treatment at **Mathari Hospital** where she was admitted for three months.
- Not considering that she did not intend to commit the offence.
- Failing to consider her mitigation.

4. At the hearing of the Appeal the Appellant stated that when she injured the child she was ailing. She regained consciousness to find herself at **Mathari Hospital**. She denied having intended to injure the child. She sought the Court's leniency and added that her two (2) children who remained with her

husband now reside with her elderly mother.

5. In response, the Respondent/State through **Mr. Wanjala**, learned State Counsel submitted that the finding made by the trial Magistrate was pursuant to **Section 166** of the **Criminal Procedure Code** after the Appellant was treated and certified under **Section 163** of the **Criminal Procedure Code** to be capable of making a defence. Citing the case of **M. M. vs. Republic 2016 eKLR** and **Criminal Appeal No. 112 of 2014 Leonard Mwangemi Munyasia vs. Republic**, he argued that the procedure was followed in finding that the Appellant was legally insane and the findings thereafter were proper.

6. As a first Appellate Court I am duty bound to re-evaluate evidence adduced at trial and come to my own conclusion bearing in mind the fact that I neither saw nor heard witnesses who testified. (**See Okeno vs. Republic (1973) EA 32**).

7. This is a matter where the Appellant even at the Appellate stage reiterated what she stated in the Lower Court that she did not comprehend what transpired. In actual sense she put up a defence of insanity. Ordinarily a person would not be criminally responsible for an act if at the time of doing it he/she is incapable of understanding what is being done. (**See Section 12 of the Penal Code**).

8. The offence herein was committed on the **6th** day of **August, 2013**. PW7 No. **56883 Corporal Simon Luponya** the Investigation Officer in the matter on receipt of the report acted on the **7th August, 2013** by recording statements from Prosecution witnesses and also obtained an order to have the Appellant escorted to **Mathari Mental Hospital** for treatment. The Appellant was not produced in Court for trial until the **5th August, 2014**. Exhibit 3 adduced in evidence was a certificate of capability to make a defence pursuant to **Section 163(1)** of the **Criminal Procedure Code** by **Dr. Ngugi Gatere**, the Medical Superintendent In charge of **Mathari Hospital**. **Section 163(1)** of the **Penal Code** provides thus:

“(1) If a person detained in a mental hospital or other place of custody under section 162 or section 280 is found by the medical officer in charge of the mental hospital or place to be capable of making his defence, the medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions.”

9. Following the Order of the Court with the report from the Doctor in mind, the case proceeded. The Appellant participated in the trial and even defended herself. The trial Magistrate retired to draft the Judgment. In his decision he analyzed evidence adduced and found that the Appellant was not mentally sound at the time of committing the offence. He made a special finding to that effect and complied with **Section 166** of the **Criminal Procedure Code**.

The alluded to provision of the law provides thus:

“166 (1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

166 (2) When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.”

10. In the cited case of **Leonard Mwangemi Munyasia (Supra)** the Court of Appeal emphasized the need and duty of the Court to be satisfied through evidence that the Accused person did the act accused of while insane. This was a case where the Court evaluated evidence adduced by the Complainant which was corroborated by some other evidence prevailing and therefore formed the opinion that the Accused in acting as she did was legally insane. In her Appeal she does not dispute having slit the throat of the

Complainant whereby she sustained a deep cut wound on the neck. Surgical exploration had to be done.

11. The learned Magistrate having appreciated that fact, reached a finding of guilty but insane. He followed the law as provided by statute and reported the case to the President for Directions. The special finding made by the trial Court was in accordance with the law and cannot be faulted. It therefore behoves the President to act as provided by the Law. In the result, I find the Appeal lacking merit. Accordingly, it is dismissed in its entirety.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 26th day of April, 2017.

L. N. MUTENDE

JUDGE