



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 23 OF 2016

*From original conviction and sentence in Criminal Case No. 397 of 2014 of the PM's court at Mwingi
– M. W. Murage –Ag.SRM)*

PETER MWANTHA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the magistrate's court at Mwingi with attempted murder contrary to Section 220 (a) of the Penal Code. The particulars of the offence were that on 21st June 2014 at Mwingi Township within Mwingi Central County attempted unlawfully to cause the death of Kawira Kilonzo by poisoning her food and maize flour with red cat rodenticide. He denied the offence. After a full trial he was convicted of the offence and sentenced to life imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial petition of appeal on 5th August 2012. Before the appeal was heard however, he filed amended petition of appeal as well as written submissions. His grounds of appeal in the amended petition of appeal are as follows:-

1. That the charge sheet and the charges preferred against him were defective.
2. The magistrate erred in convicting him without considering that the Government Analyst report was not done professionally and the one who produced it in court was not an expert in the field.
3. The prosecution did not prove the case beyond reasonable doubt as there was bad blood between him and the complainant who was his previous girlfriend.
4. That the complainant being a bar maid might have offered prosecution witnesses free beer to influence their evidence.
5. That the sentence was harsh and excessive.

The appellant also filed written submissions to the appeal which I have perused and considered.

At the hearing of the appeal, the appellant relied on his written submissions. He stated that he wanted to marry the complainant but one by the name Musili took her away and differences thus erupted.

The learned Prosecuting Counsel Mr. Okemwa submitted that the prosecution called 4 witnesses at the trial, who clearly testified that the appellant was previously in a relationship with the complainant and was annoyed because the complainant told him that she did not want to have anything to do with the appellant. The appellant not being happy that PW2 Paul Musili could become the boyfriend of the complainant thus purchased chips, laced the same with poison which was confirmed by the Government Analyst. Counsel emphasized that the appellant did not even cross examine the complainant and Musili on the issue. As such, the appellant had intended to kill the complainant. According to counsel, there was more than mere preparation to commit the offence of attempted murder, as the appellant thought that indeed the complainant would consume the poison through the food. The offence of attempted murder had thus been proved.

In response to the submissions of the prosecuting counsel, the appellant stated that the complainant and Musili wanted to poison him and push him out of Mwingi town.

In brief the prosecution evidence was that the appellant and the complainant PWI Kawira Kilonzo, were lovers and lived together for about 8 months. However they later disagreed, and the appellant was not happy with the separation and on 21st June 2014 in the afternoon, went to the single room used by the complainant and they talked for a while. He then left behind some maize flour in a packet and, after a short while, came back with chips and placed them on a plate of the complainant and left.

On checking, the complainant noticed some black marks and decided to go to work without taking the chips. Later the complainant was informed by one Musili PW2 that the appellant had stated that he had put poison in the chips. The matter was then reported to the police and the appellant was arrested. The samples of the chips and the maize flour were taken to the Government Analyst who made a report stating that they contained zinc phosphate which could cause harm if ingested. The appellant was thus charged.

When put on his defence, the appellant gave sworn testimony. He stated that they were lovers with the complainant later separated. He stated that the complainant later started inviting him to her house but he refused. However on the day he was arrested at 8.00 Pm, a lady and three young men went to his house and started beating him on allegations that he had poisoned the complainant's food.

He called one defence witness DW2 Muteti Peter, who stated that he knew that the appellant had put poison in the complainant's food.

This being a first appeal, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences – see the case of *Okeno -vs- Republic (1972) EA 32*.

I have re-evaluated the evidence on record. The appellant has raised a number of issues on appeal. He stated firstly that the charge was defective. I have perused the charge sheet and I find no defect in the charge sheet. It was a charge for the offence of attempted murder and all the ingredients of the offence were stated clearly. I find no defect in the charge.

The appellant has complained that the complainant and Musili were against him and wanted him to get out of Mwingi Town. I find no indication that the complainant and Musili had ganged up to harm the complainant or that they wanted him to get out of town. It is not also not true that the complainant and Musili tried to poison the appellant. I dismiss that complaint.

The evidence of the prosecution is quite clear. PWI clearly says that the appellant went to her house twice that afternoon. The first time he left maize flour. Shortly thereafter he brought chips. The chips had black marks and she was suspicious. When she went for work at the club somebody informed her that the appellant had said that he had put poison in the maize flour and chips. She reported the incident to the police. The samples of the maize flour and the chips were taken to the Government Analyst who found that they were laced with zinc phosphate which could cause harm if ingested.

The appellant's witness DW2 Peter Muteti said that he knew that the appellant had poisoned the complainant's food. In effect the appellant was the culprit and attempted to harm the complainant through

food poisoning.

However in my view the charge of attempted murder was not proved to the required standards. In my view what was proved by the prosecution beyond reasonable doubt was attempted poisoning contrary to Section 236 of the Penal Code, since the Government Analyst report merely stated that harm would be occasioned if the items were consumed.

The report did not say that death would occur or that death was likely to occur if the chips or flour were ingested. As such I find that the offence proved by the prosecution was that of attempted poisoning, not attempted murder. I will thus quash the conviction of the trial court and substitute the same with the conviction for attempted poisoning.

The appellant was sentenced to serve life imprisonment. The maximum sentence for attempted poisoning is 14 years imprisonment. I will thus also set aside the sentence and substitute it with an appropriate sentence.

Consequently, I quash the conviction for attempted murder and substitute therefore a conviction for the offence of attempted poisoning contrary to section 236 of the Penal Code. I also set aside the sentence imposed by the trial court and order that the appellant will serve imprisonment for a period of 5 years from the date on which he was sentenced by the trial court. It is so ordered.

Dated and delivered at Garissa this 12th October 2016.

GEORGE DULU

JUDGE