



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 70 OF 2014

ROMANO KARINGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No.2581 of 2004 of the Senior Principal Magistrate's Court at Nkubu by Hon. S.M Githinji – Senior Principal Magistrate)

JUDGMENT

The appellant, **ROMANO KARINGA**, was Charged with an offence of attempted murder contrary to section 220 (a) of the penal code.

The particulars of the offence were that on 21st November 2004 at Mwitumura village Ruiga sub location Meru Central District of Eastern Province jointly with others attempted to cause the death of **JENNIFER MUKIRI MUNGANIA** by assaulting her with crude weapons and burning her body with fire.

The appellant was found guilty of the offence and sentenced to serve 12 years imprisonment.

He now appeals against both conviction and sentence.

The appellant was represented by J.Nelima, learned counsel who raised seven grounds of appeal in the petition of appeal and five other grounds on the supplementary petition of appeal and which can be summarized as follows:

1. The learned trial magistrate erred in law and in facts by finding that the appellant had been properly identified.
2. That the learned trial magistrate erred in law and in facts by relying on a P3 form that was not properly admitted in evidence.
3. That the learned magistrate erred in law and in fact by convicting the appellant against the weight of evidence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the case were briefly as follows:

In most African communities if not all, any sickness that could not be explained or understood was quickly attributed to witchcraft. A scapegoat was found in old haggard men and women or a relative or a neighbour with whom one did not relate well with. Unfortunately this belief in witchcraft has refused to die off in spite of modernity and Christianity. This is the unfortunate scenario that gave rise to this case.

After the complainant was accused of being responsible for her neighbour's child's sickness through witchcraft, she was arrested, beaten and set on fire before she was taken to hospital where she was hospitalized with 30 percent degree burns. The appellant was arrested and charged with others for the offence.

In his defence the appellant pleaded an alibi. He contended that he had stood surety for the 1st and the 3rd accused persons before he was arrested and subsequently charged.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

When an unruly mob is involved in an offence, such as in this case, care must be taken to avoid a generalized condemnation. The appellant pleaded an alibi and it did not matter that his co accused persons also pleaded a similar defence. The five people the complainant mentioned to the Reverend Abel Mutuma M'Kiambati (PW2) did not include the appellant. At this point in time one can appreciate that the complainant was in great pain and could not possibly be in a position to mention all the culprits. I however would have expected the investigating officer to record a further statement from her once she stabilized. This did not happen.

It is not certain how many names the complainant gave to the Reverend (PW2). In her evidence in chief she said she gave him seven names while he (PW2) said she gave him five. It is worth noting that the appellants name was not one of the names given.

The first time she mentioned the appellant is when the 9th accused was cross examining her. This is what she said:

"It was the ninth accused who gave Romano Kerosene to burn me."

This is if we assume that by Romano she was referring to the appellant.

Reverend Abel Mutuma M'Kiambati (PW2) testified that when he was about 30 meters from the scene, he saw the appellant whom he later identified. During cross examination he said he had never seen the appellant prior to that day. Since the complainant's assailants ran away on seeing him, I make a finding that there is no evidence on record to support his claim that he identified the appellant.

The other witness who claimed to have seen the appellant at the scene and witnessed his participation in the offence is Fridah Kinyamu Mungania (PW3). She is the complainant's daughter. This witness cannot be taken as a truthful witness. Whereas in her evidence in chief she claimed to have seen the appellant and also described the events as they unfolded, her statement to the police contradicted her evidence in court. In her statement to the police she said as she went to church is when she met with the young men she testified in court to have gone to their home screaming and thereafter chased her mother before apprehending her. the court of appeal in the case of **NDUNGU KIMANYI -V- REPUBLIC [1979] KLR 283**, held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

This witness is not credible and the learned trial magistrate ought not to have placed any reliance in her evidence.

It would appear that there were doubts over the involvement of the appellant in the offence. The record indicates that he was available and had indeed stood surety for the 1st and the 3rd accused persons before he was later arrested and became their co accused in the case where he was convicted and gave rise to this appeal.

Although the appellant's counsel had an issue with the P3 form, my perusal of the record indicate that the clinical officer who produced it adequately identified himself. I make a finding that it was properly tendered in evidence.

After making a finding on the issue of the appellant's identification as a participant in the offence, it follows that there was no sufficient evidence to convict him.

I accordingly quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru this 19th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE