



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.98 OF 2013**

*(An Appeal arising out of the conviction and sentence of HON. B.M. NZAYO – AG.PM delivered on 5<sup>th</sup> June 2013 in Githunguri PM. CR. Case No.1208 of 2010)*

**JOHN NJUGUNA**

**GATHOGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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**JUDGMENT**

The Appellant, John Njuguna Gathogo was charged with the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 10<sup>th</sup> August 2010 at about 7.00 a.m. at Mutuya Village in Kiambu County, the Appellant unlawfully did grievous harm to Ann Nduta Wanjiru (the complainant). The Appellant was further charged with **attempted suicide** contrary to **Section 226** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant attempted to commit suicide by ingesting a herbicide (Roundup 200ml). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted of both charges. In respect of the 1<sup>st</sup> count, he was sentenced to serve life imprisonment. In respect of the 2<sup>nd</sup> count, he was sentenced to serve two (2) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He had filed an appeal to this court.

In his petition of appeal, the Appellant filed several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof. In particular, he faulted the trial magistrate for drawing adverse inference and giving more weight to the evidence of the injuries that the complainant allegedly sustained. He was aggrieved that the trial court had not exhaustively evaluated the evidence adduced by the Appellant in his defence to the effect that in fact it was the complainant who had poisoned him and not that he had attempted to commit suicide. The Appellant faulted the trial magistrate for failing to take into consideration the fact that no finger prints were lifted from the knife and the container containing the herbicide that were found at the scene where the Appellant was found unconscious. He took issue with the fact that the trial court had not taken into account the fact that no handwriting expert had been called to analyze the alleged suicide notes with a view to establishing if indeed it was the Appellant who had written the same. The Appellant complained that the trial court had shifted the burden of proof and thereby convicted him. He was finally aggrieved that he had been sentenced to serve a sentence that was harsh and excessive in the circumstances. In the premises therefore, the Appellant urged the court to

allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Njau for the Appellant and Ms. Aluda for the State. Prior thereto, counsels had filed written submission in support of their opposing positions. Mr. Njau submitted that the trial court did not investigate the allegation made by the Appellant to the effect that he had been poisoned. He stated that there was no evidence to prove that the Appellant handled the container that contained the herbicide. It was not established that the Appellant's finger prints were found on the container. He submitted that the trial court did not consider the fact that the container was found in the complainant's bedroom. As regard the alleged suicide notes, learned counsel submitted that the alleged suicide notes were not sent to a handwriting expert to confirm that indeed it was the Appellant who wrote the said suicide notes. He urged the court to take into consideration the fact that there was discrepancy between the medical evidence adduced by the doctor and the evidence in regard to the injuries that the complainant allegedly sustained as testified to by the complainant. He was of the view that the injuries sustained by the complainant were less serious than the charges brought against him. The Appellant should have been charged with the lesser offence of **assault causing actual bodily harm**. He submitted that the sentence meted against the Appellant did not fit the crime. He urged the court to reconsider it upon allowing the Appellant's appeal.

Ms. Aluda for the State opposed the appeal. She submitted that the evidence adduced by the prosecution witnesses was tangible, consistent and corroborated each other in all material respect. She stated that the complainant was stabbed severally with a knife by the Appellant as a result of a domestic dispute. The assault resulted in the complainant being hospitalized for more than two months. After he had stabbed the complainant, the Appellant attempted to commit suicide by poisoning himself. He was however rescued and rushed to hospital. Learned counsel submitted that the evidence adduced by the prosecution witnesses established to the required standard of proof the charges brought against the Appellant. She reiterated that the sentence imposed on the Appellant was lawful and proper in the circumstances of the case. She urged the court to dismiss the appeal.

Before giving reasons for its decision, it is imperative that the facts of this case be set out, albeit briefly. The complainant and the Appellant were husband and wife. They lived together for two years before their marriage broke down. The complainant attributed the breakdown of their marriage to the Appellant's promiscuity and drunkenness. The marriage was blessed with one child, a boy. At the time of the incident, the Appellant and the complainant had been separated for a period of eight (8) months. After the separation, the complainant returned to her parents' home. According to the complainant, on 10<sup>th</sup> August 2010 at about 7.00 p.m. as she was preparing to go to college, she saw the Appellant at their home. She welcomed the Appellant to the sitting room. The Appellant started playing with their son. The complainant told the Appellant that she wished to go to college. The Appellant said nothing. The complainant saw that the Appellant was armed with a knife. When she attempted to leave the room, the Appellant held her by her hand and stabbed her eleven (11) times using a knife. She screamed for help. He screams alerted PW2 Margaret Murugi, PW3 Harrison Chege Kiruku and PW5 John Njenga Kiarie. They came to the rescue of the complainant. They found the complainant bleeding profusely on the floor of the sitting room. Her clothes were bloodstained. Her mother PW4 Teresia Wanjiru Chege was informed. The complainant was rushed to Kiambu District Hospital for treatment. She was later transferred to Kenyatta National Hospital where she was admitted for 2?2 months before she was discharged. The bloodstained clothes that the complainant wore on the particular day including a sweater, a blouse and a bra were produced into evidence.

According to PW3, when they reached the house of the complainant, he saw the Appellant rushed into the bedroom of the complainant. He locked himself inside the bedroom. PW3 and PW5 managed to break into the bedroom. They found the Appellant lying unconscious on the floor of the bedroom. Next to him was a Roundup pesticide container. PW3 realized that the Appellant had ingested the pesticide. They rushed him to Kiambu District Hospital. The knife that the Appellant used to stab the complainant was recovered and surrendered to the police. So too were two suicide notes written in Kikuyu language which were found on the table in the sitting room. The suicide notes were addressed to the complainant's mother. It was dated 7<sup>th</sup> August 2010. The time indicated on the letter was 2.45 a.m. In the suicide notes, the Appellant stated that he himself and the complainant were leaving the world because of the frustration

caused by the mother in-law in refusing to allow him to live with the complainant and their son.

After she was treated at Kenyatta National Hospital, the complainant was on 10<sup>th</sup> November 2010 seen by PW9 Dr. Zephania Kamau. He noted the following injuries: the complainant had a septic wound below the scapula, fluid was oozing out of a wound on the left side of the chest, there were two scars with stitch marks on the lower left hand and a scar with stitches on the upper left arm. The injuries were caused by a sharp object. He evaluated the injuries sustained by the complainant to be grievous harm. PW10 Catherine Murambi, a Government Analyst, analyzed the contents of the container that was found in the bedroom next to the unconscious Appellant. She formed the opinion that it contained a herbicide which is toxic and harmful to human beings.

The case was investigated by PW11 PC Robert Ochola of Githunguri Police Station. After concluding his investigations, he found a case had been established to charge the Appellant with the offences that he was convicted of. The Appellant was apprehended by PW6 Erick Ochieng Ogutu, a security guard at Kenyatta National Hospital when the Appellant attempted to see the complainant. This was on 25<sup>th</sup> November 2010. He was handed over to PW7 PC Margaret Chebunye of Kenyatta National Hospital Police Post.

When the Appellant was put on his defence, he denied committing the offences. He testified that on the material day, he went to see his wife and his child at his parent's in-laws home. On reaching there, he had a quarrel with the complainant. He accused his mother in-law for being the cause of their separation. Before the quarrel, the complainant had served him with tea. After taking the tea, he felt weak. He started a fight with the complainant. They wrestled on the ground. The complainant fell on a sharp object. He became unconscious. He regained consciousness in hospital. He denied carrying the knife or stabbing the complainant. He told the court that he loved his wife and could not harm her. He claimed that he was poisoned by the complainant.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.***

In the present appeal, the prosecution relied on direct evidence to secure the conviction of the Appellant on the charges brought against him. It was the prosecution's case that the Appellant hatched a plan whereby he would kill the complainant and then commit suicide. To put this plan in action, the Appellant on the material day of 10<sup>th</sup> August 2010, went to the home of the complainant. He stabbed her before ingesting a herbicide. The prosecution established that the Appellant was armed with a knife when he went to the complainant's home. The testimony of the complainant in regard to the stabbing was corroborated by the evidence of PW2 and PW3. On re-evaluation of the evidence, it was clear to this court that indeed the Appellant went to the complainant's home with intention to kill her. The Appellant was aggrieved that the complainant had refused to return to their matrimonial home despite his entreaties. This court was convinced to the required standard of proof beyond any reasonable doubt that indeed the Appellant stabbed the complainant and thereafter attempted to commit suicide. The suicide notes that were produced proved that the Appellant had the intention to kill the complainant by stabbing her to death. It was by providence that the complainant survived.

The Appellant raised several grounds of appeal challenging his conviction. The first ground of appeal was that the trial court failed to consider his testimony to the effect that he had been poisoned by the complainant. On re-evaluation of the evidence adduced, it was clear to this court that it was the Appellant who went to the home of the complainant while armed with a knife. He was also carrying a herbicide.

The suicide notes confirmed his intentions. The evidence adduced by prosecution witnesses debunks the Appellant's claim that he had been poisoned. The evidence established that he was the one who voluntarily took the poison. As regard whether or not the prosecution should have called a handwriting expert to establish whether it was the Appellant who authored the suicide notes, this court finds that such evidence was unnecessary in view of other overwhelming evidence that was adduced by the prosecution.

What was clear from the evidence that was adduced before the trial court is that the Appellant was not happy that he had been left by the complainant. The possibility that the Appellant would return to the matrimonial home became remote as the days went by. In his mind, the Appellant attributed the failure of his marriage to his mother-in-law. This was in reality a process of transference of blame. The Appellant was unwilling to accept the reality that it was his behaviour that caused the complainant to leave the matrimonial home. It was in that regard that he hatched a murder-suicide plan. He intended to kill the complainant and then commit suicide. That plan did not come to fruition. This court holds that the defence of the Appellant does not dent the otherwise strong evidence adduced against him by the prosecution.

The upshot of the above reasons is that the appeal filed by the Appellant on conviction lacks merit and is hereby dismissed. On sentence, this court is of the view that although the sentence of life imprisonment was legal, in the circumstances of this case, the same was harsh and excessive. It was clear to this court that the Appellant was emotionally and mentally disturbed at the time he committed the crime. With treatment and counselling, it is possible that the Appellant will regain his balance. The life sentence is consequently set aside and substituted by a sentence of this court. The Appellant is sentenced to serve ten (10) years imprisonment with effect from 17<sup>th</sup> June 2013 when he was convicted by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2015**

**L. KIMARU**

**JUDGE**