



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 11 OF 2013

ANDREW WAMBUA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. M.W Murage (CM) delivered on 29/01/2013 in Machakos Chief Magistrate's Court Criminal Case No. 1366 of 2012)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Andrew Wambua**, was charged with two counts as follows:-

Count I:- Attempted suicide contrary to **section 226** of the **Penal Code**.

The particulars of the charge were that “on the 29th day of August 2012 at **Makyau village, Mua Hill Location** in **Machakos District**, within **Eastern Province**, attempted to kill himself by hanging himself with a rope tied on top of his roof”.

Count II:- Attempted murder contrary to **section 220 (a)** of the **Penal Code**.

The particulars of the offence were that “on the 29th day of August 2012, **Makyau village, Mua Hill Location**, in **Machakos District** within **Eastern Province**, attempted unlawfully to cause the death of **Beatrice Kaswi** by setting fire in her bedroom while the said **Beatrice Kaswi** was asleep”.

2. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
3. In support of their case, the prosecution called a total of four witnesses. The prosecution case was that on the material day at about 4.00 a.m., PW1 **Beatrice Kaswi** was in her room sleeping. The Appellant who is her husband was sleeping in an adjacent room. PW1 felt like something had been poured on her face. She could sense the smell of paraffin. She saw the accused and asked him what was happening. The accused then ignited a fire and threw it over the roof into her room. PW1's beddings caught fire. PW1's door was bolted from outside. She started screaming. Her grandson, **Dennis Mutinda** (PW2) broke the door from outside and opened for her. The fire was put off. The Appellant was found in his room hanging on a rope from the roof. The rope was

- cut by PW3 **Bonface Nzomo** who is a son to the Appellant. The Appellant was taken to the hospital. The matter was reported to the village elders and to the police. After investigations the Appellant was charged with the offence herein.
4. In his defence, the accused stated that he had nothing to say. He further stated that he was grateful to God for being alive.
 5. The trial magistrate found the prosecution case proved in both Count I and II. The accused was sentenced to serve one year imprisonment in Count I and ten years imprisonment in Count II. The sentence runs concurrently.
 6. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the grounds that can be summarized as follows:-
 1. **That the plea was not taken in a language understood by the Appellant.**
 2. **That the facts were not read to the Appellant.**
 3. **That the Appellant was denied bail thereby violating his fundamental Constitutional rights.**
 4. **That the mental status of the Appellant was not evaluated before the trial commenced.**
 5. **That exhibits were produced irregularly.**
 6. **That the wife of the Appellant was not a competent witness.**
 7. **That the prosecution evidence was inconsistent.**
 8. **That the sentence meted out was excessive.**
 7. During the hearing of the appeal, both parties relied on written submissions. I have duly considered the same.
 8. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32.**
 9. PW1’s evidence that the Appellant who is her husband threw paraffin on her and tried to set her on fire is corroborated by that of their grandchild (PW2) and their son (PW3). The evidence of these three witnesses (PW1, PW2 and PW3) established that the Appellant was found hanging on a rope from the roof and was rescued by his son (PW3) and taken to hospital. The cross examination alluded to marital problems. The defence raised by the Appellant did not cast any reasonable doubts on the prosecution case. The Appellant in his defence expressed his gratitude to God that he was still alive.
 10. The Appellant pleaded not guilty. The case proceeded to a full trial. The reading of facts would have been necessary if the Appellant had pleaded guilty. The language of the trial court is reflected as **Kiswahili/Kikamba**. The Appellant fully participated in the trial. He cross-examined witnesses and gave his defence case. As stated by the Court of Appeal in **Said Hassan Nuno v Republic (2010) eKLR:-**

“We take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or a witness to the case.”
 11. On the question of bail, the record clearly shows the date of plea the Appellant was given a Kshs.100,000/= personal bond with one surety of a like sum.
 12. On the issue of evaluation of mental status, I agree with the submissions by the prosecution that under **section 11** of the **Penal Code** every person is presumed to be of sound mind until the contrary is proved.
 13. Under **Section 162 (1)** of the **Criminal Procedure Code** the inquiry by the court as to the soundness of mind of an accused person is made if there is reason to believe that the accused is a person of unsound mind. The record does not show any expression of any doubts by the trial court on the mental status of the Appellant.
 14. Turning to the question of whether the wife the Appellant was a competent witness, **section 127 (3)** of the **Evidence Act Cap 80 Laws of Kenya** provides as follows:-

“In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the

consent of such person, in any case where such person is charged –

(a)

(b)

(c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.”

The wife to the Appellant was a complainant and therefore a competent witness for the prosecution case.

15.The photographs of the scene were produced as exhibits by the Investigating Officer, PW4 **PC Maxwell Ogutu**. It is not clear from the evidence if the photographs were taken by a scenes of crime office. The person who took the photographs would have been the right witness to produce the same. However, the prosecution case would stand proved even without the photographs. The Appellant did not therefore suffer any prejudice.

16.Although the sentence meted out is within the law, I note that there was intervention before too much damage was caused. Consequently, I substitute the sentence of ten (10) years in count II with a sentence of five (5) years. Orders accordingly.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 27th day of November, 2014.

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B. THURANIRA JADEN

JUDGE