



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 113 OF 2010

JOHN MITHIKAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case No.1149 Of 2009 of the Principal Magistrate's Court at Maua)

J U D G M E N T

The appellant JOHN MITHIKA was charged with an offence of attempted murder contrary to Section 220(b) of the Penal Code.

The appellant pleaded not guilty to the main charge. That upon hearing the trial court convicted the appellant and sentenced him to life imprisonment.

The appellant being aggrieved by the sentence preferred this appeal. The appellant's appeal dated 22/6/2010 has four grounds of appeal being as follows:-

1. ***That the learned trial Magistrate erred in law and facts in failing to find that the provisions of Section 72(3) of the Constitution was flouted.***
2. ***That the learned trial Magistrate erred in law and facts in failing to observe that the alleged identification and or recognition was not free from possibility of error.***
3. ***That the learned trial Magistrate erred in law and facts in failing to find that the prosecution failed to avail vital witnesses for a just decision to be reached.***
4. ***that the learned trial Magistrate erred in law and facts in taking into account extraneous matters which led him to make a wrongful decision.***

When the appeal came up for hearing Mr. Riungu appearing for the appellant relied on the grounds of appeal in the petition drawn by the appellant. He did not challenge the conviction but the sentence only. He urged the court to invoke the powers vested upon the court by Section 354(3) (a)(ii) of the Criminal Procedure Code and reduce the sentence imposed upon the appellant. He submitted that the court's hands are not tied and if that was the intention the legislative would have made it so clear. He contended the court has power to review the sentence. He further submitted that the appellant has since reformed and is remorseful.

Miss Muriithi, learned State Counsel opposed the appeal against sentence because according to her the law prescribes life imprisonment. She further submitted that the lower court noted that the appellant was not remorseful. Consequently she prayed for the sentence not to be interfered with.

Section 220 (a) and (b) of the Penal Code provides:-

220. Any person who -

(a) attempts unlawfully to cause the death of another; or

(b) with intent unlawfully to cause the death of another does

any act, or omits to do any act which it is his duty to do,

such act or omission being of such a nature as to be likely

to endanger human life,

is guilty of a felony and is liable to imprisonment for life.

Section 220(b) of the Penal Code simply states that on one being found guilty is liable to imprisonment for life. The life sentence is not mandatory as the word “shall” is not used but states on conviction one is liable to imprisonment for life, meaning the court has discretion to impose appropriate sentence as it deems fit based on facts of each case.

Section 354(3) (a) (ii) of the Criminal Procedure Code provides;

(3) The court may then, if it considers that there is no sufficient

ground for interfering, dismiss the appeal or may -

(a) in an appeal from a conviction -

(i) reverse the finding and sentence, and acquit or discharge the

accused, or order him to be tried by a court of competent jurisdiction;

or

(ii) alter the finding, maintaining the sentence, or, with or without

altering the finding, reduce or increase the sentence; or.....”

Having considered the offence of attempted murder and the type of weapon used by the appellant to inflict injuries to the complainant which was shooting her in the head using a pistol and the serious injuries which the complainant sustained which was grievous harm in the P3 Form, and the fact that the appellant is now found to be remorseful, I am satisfied the sentence can be reduced. I therefore reduce the life imprisonment to 20 years imprisonment. The appellant shall therefore serve 20 years imprisonment from the date of conviction.

In view of this foregoing the appellant’s appeal succeeds on the sentence to that extent.

Right of Appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 28th DAY OF OCTOBER, 2013.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:-

1. Appellant in person

2. Miss Muriithi for the State

J. A. MAKAU

JUDGE