



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 294 OF 2010**

*(From original conviction and sentence in Criminal Case No. 201 of 2008 of the Principal Magistrate's Court at Narok - A. G. Kibiru (SRM))*

NANCY WANJA WAWERU.....  
APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

**JUDGMENT**

The appellant was charged with the offence of attempted murder contrary to Section 220(a) of the Penal Code (*Cap. 63, Laws of Kenya*).

The prosecution's case was that on 31<sup>st</sup> day of March 2008 at Lower Majengo Estate in Narok North District within Rift Valley Province, the appellant attempted unlawfully to cause the death of Sophia Moraa by pouring paraffin on her and setting her on fire.

Upon the evidence adduced in the lower court, the appellant was convicted and was sentenced to ten (10) years imprisonment. Aggrieved both with her conviction and sentence, the Appellant came to this court on appeal. Her grounds of appeal are -

***(1) that I was sentenced to serve 10 years imprisonment on 22.5.09 by PM's Court Narok for the offence of attempted murder under section 220(a) in Criminal Case Number 201 of 2008 before Hon. A. G. Kibiru, SRM.***

***(2) that I pleaded not guilty on trial.***

***(3) that I had family issues with the complainant as she was trying to break my family apart by snatching my husband but I did not commit the offence as it was alleged.***

***(4) that on that fateful day I had left the complainant in my house with other customers as her presence pained me.***

***(5) that as I was returning I got the news that the complainant had been badly burned and had been rushed to the hospital.***

***(6) that I was then arrested in connection with this as she implicated me.***

**(7) that she implicated me because of her hatred towards me as she wanted to take my husband.**

**(8) that the sentence imposed on me is too harsh.**

**(9) that I don't know the whereabouts of my children at the moment and this is disturbing me psychologically.**

**(10) that I plead with the learned judges to review my case set me free or give me a non custodial sentence.**

When the appellant appeared before me on 23<sup>rd</sup> March 2011, she prayed for a non-custodial sentence, that she is a single mother of three children, that her sentence is harsh, and it be reduced, that the evidence adduced against her was not credible it was all hearsay, that a vital witness was not called by the prosecution and that there was no proper investigation of the offence.

Mr. Omutelema, learned State Counsel did not oppose the appeal, counsel submitted that for proof of the offence of attempted murder, there must be specific intent to kill.

In this case the complainant found herself on fire while sleeping in the appellant's house. She saw the appellant pouring water on her to put off the fire. The complainant never saw who set fire on her. She was drunk. There was no direct evidence. The only incriminating evidence against the appellant was that the complainant was in the appellant's house. The person who locked the door must have been the one who intended to kill both the complainant and the appellant. For those reasons, counsel submitted, he was not opposing the appeal.

Even in cases where an appeal is not opposed or is conceded, it is the duty of this court as the first appellate court to examine and re-evaluate the evidence before the lower court, and make its own findings, and arrive at its own conclusions.

I have examined the evidence of the five prosecution witnesses, and found that of PW5, the Investigating Officer to be the only which implicates the appellant in the commission of the offence. PW5 testified that PW1 informed him that after taking one too many changaa, accused her to leave and she requested to rest as she was drunk. The accused then picked a paraffin container poured paraffin on PW1 and struck a match. The Accused then went out of the house and locked the house leaving to an unknown destination.

However PW1 in her evidence in chief did not mention this scenario. PW1 evidence was that after eating the left over ugali, she gave cash 200/= to the appellant and she slept, on the sofa and was woken up later suddenly while on fire, and she saw the accused pouring water on her. This evidence is contrary to what PW1 is supposed to have told PW5. If PW5 is what PW1 told him, surely, PW1 herself would told the same story, or given the same evidence?

Although the appellant gave an unsworn statement to which little evidential weight can be attached it would have been logical for PW1 to tell the investigation the same story as is consistent with her own evidence. I have a creeping suspicion that the investigating officer was trying to build a logical case, which was brought by the trial court, but the complainant refused to leave, and the Appellant after welcoming her decided to pour paraffin on her, and set her ablaze. If this was so, there was no evidence to prove it.

The evidence of PW2, a Clinical Officer related to the burns the complainant sustained in the fire. The evidence of PW3 that the appellant gave the keys to the locked house does not prove that the appellant is the person who dosed PW1 with paraffin and set fire on her. How could the appellant have had access to the house, and poured water on the burning complainant if the house had been locked by her?

In the circumstances, I would agree with learned State Counsel that no intent unlawfully to cause the death of another was proved in terms of Section 220(b) of the Penal Code. I would therefore quash the conviction, set aside the sentence and direct that the appellant be set free unless otherwise lawfully held.

There shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 3<sup>rd</sup> day of June 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**