



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (Milimani Law Courts)

Criminal Appeal 515 of 2004

DAVID KARIUKI WACHIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal case No. 12874 of 2000 of the Chief Magistrate's Court at Makadara (R.N. Kimingi – PM.)

J U D G M E N T

The Appellant was charged with **ATTEMPTED MURDER** contrary to **Section 220(a)** of the **Penal Code**. It is alleged that on 24th June 2002 at Mwiki Estate Nairobi attempted unlawfully to cause death to Margaret Wangui Kago by pouring on her face Sulphuric Acid. After hearing the entire case, the learned trial magistrate, Mrs. R. N. Kimingi SPM convicted the Appellant for the offence of **GRIEVOUS HARM** contrary to **Section 234** of the **Penal Code** and proceeded to sentence him to imprisonment for 25 years. It is against the conviction and the sentence that the Appellant now appeals before this court.

The Appellant argued his supplementary amended petition of appeal in which he raised 10 grounds. The grounds are argumentative and may be summarized as follows: -

That the evidence against the Appellant was that a single witness who was the Complainant in the case and therefore unreliable.

That the evidence of PW2 and PW5 was hearsay and therefore unreliable.

That the evidence of bad character given by the Complainant and PW5 was not proved.

That the Appellant's defence was not given due consideration.

That the trial magistrate misdirected herself when she found that the Appellant was punishing the Complainant for involving her family in her problems with the Appellant.

That the sentence was manifestly harsh and excessive.

The appeal was opposed by the State through its Counsel **Mr. Makura**.

The facts of the case were that the Complainant in the case had lived with the Appellant as man and wife. The relationship begun in 1994 when they cohabited until 1997 when the Appellant left the Complainant for another woman. In January 2000 they resumed their cohabitation but it was not continuance. The Appellant would go to live in the Complainant's house at certain times as he wished. During that period the two parties had problems in their relationship as a result of which the Complainant reported to Central Police Station. At one time prior to the incident in issue, the Appellant had poured paraffin on the Complainant and had threatened to set her ablaze. At another occasion the Complainant was locked inside her house and the Appellant went away with the key. The Complainant discussed this problem with her relatives including her brother PW2. PW2 took a step to discuss with the Appellant and suggested to him that the two of them should separate to see whether they could resolve their problems. The Appellant flatly refused to that suggestion and instead insisted that he should be left to discuss the issue with his wife. It was then agreed between PW2, the Complainant and the Appellant that the latter two were to discuss the issue and that if they were unable to agree, then the Complainant would move back to her parents home. That agreement was reached on a Friday preceding the date of the incident. The next morning, PW2 went to the Complainant's place to pick her and her things in a small vehicle in order to escort her back to her parents home. The Complainant managed to collect and pack some of her clothes. The Appellant refused with others which he claimed he had bought for her. The Complainant carried them to the vehicle outside. The Complainant did not know exactly where the Appellant was. She went back to the bedroom to pick other items and that is when the Appellant held her from behind and poured a substance over her head, face and body. The Complainant felt so much pain and she ran out immediately the Appellant released her. It was the Appellant who went out of the house ahead of her and PW2 saw him go to a tap and wash his hands. PW2 then saw the Complainant come out screaming in pain with a substance burning her head, face and body. PW2 and neighbours who heard her poured water over the Complainant before taking her to Mwiki Police Station and later Kenyatta National Hospital. The Complainant was admitted in hospital for one year.

PW2 and PW3 **IP CHACHA** testified that PW3 visited the house of the Complainant the same day and recovered a bottle with a substance. The bottle was exhibit 3 and still had liquid recovered in it. **IP CHACHA** produced a T-shirt, Exhibit 4, which the Complainant was wearing at the time of this attack. PW4 a journalist with the People Newspaper produced the Complainant's photo exhibit 2 which he took of her while receiving treatment at Kenyatta National Hospital. The Complainant identified it. PW1 PC Maiya produced the Government Chemists Report exhibit 7.

PW5 was the Complainant's sister and she told court that four days prior to the date in question, she found the Complainant locked inside her house with slight injuries on her head and hand. It was as a result of that finding that PW5 reported to their brother PW2. PW2 on receiving the report then tried to intervene. Part of the intervention was one day before the incident and on the morning of the incident as already discussed.

PW8 **Dr. Kamau** produced the P3 form exhibit 1 in which he assessed the degree of injuries on the Complainant as disfigurement to the extent that the right ear was completely burnt, skin grafted on parts of the body. Healed and healing burns on face, head, chest, hands and thighs and shoulder. PW8 said that the injuries were caused by a corrosive substance. He examined the Complainant 1 year and 8 months after the assault.

The Appellant in his unsworn statement denied the charge and stated that in fact the Complainant poured the acid on herself and also splashed some on his hands. The Appellant said that the Complainant was trying to commit suicide because she could not bear leaving him.

I have carefully considered this appeal, the evidence that was adduced before the trial court and have analyzed and evaluated it afresh as expected of a first appellate court. See **GABRIEL KAMAU NJOROGE vs. REPUBLIC (1982-88) 1 KAR.**

The Appellant argued five grounds of his appeal together in his written submission. The Appellant challenged the conviction on the basis of the evidence of the Complainant alone. The Appellant submitted that indeed PW2 was waiting for his sister the Complainant outside the house where she lived

and therefore did not witness the incident. PW2 only found after both the Complainant and Appellant had received burns. The Appellant argued that since the evidence of who caused the Complainant's word, then injuries was his word against the Complainant's her evidence ought to be regarded with caution. That since the account of the incident as given by the Complainant was materially different from that given by the Appellant, then it was impossible to resolve the case either way.

A fact may be proved by the testimony of a single evidence. That was the ruling of **Nyarangi JA, Pratt and Gachuhi Ag. JJA** in **KARANI vs. REPUBLIC (1985) KLR 290**. That notwithstanding, whenever the evidence upon which a charge is brought is that of a single witness, the court must first treat such evidence with caution and subject it to tests to rule out the possibility of error or mistake. The second thing a court ought to do is to caution itself of the danger of relying on such evidence of a single witness and can only convict if satisfied that the witness was telling the truth and that the evidence standing on its own is strong enough to sustain a conviction. See **RORIA vs. REPUBLIC 1961 EA 583, MAKHOHA vs. REPUBLIC 1989 KLR 238**.

These tests are of application particularly to issues of identification except the following one which applies to all cases generally. The other factor to consider in the case of evidence of a single witness was propounded by **Madan, Miller and Potter JJA**. in the case of **Ndungu Kimanyi vs. Republic KLR 1979**. In that case the learned justices held: -

“The witnesses 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 straight forward 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.”

The issue is whether indeed the evidence against the Appellant was that of a single witness? **Mr. Makura** learned counsel for the State submitted that the Complainant's evidence was corroborated by that of his brother PW2 a fact that the Appellant failed to agree with. In my view, the evidence adduced in this case has to be considered as a whole before deciding whether or not the Complainant's evidence was corroborated.

As I analyze the evidence, the other issues raised by the Appellant concerning corroboration of the evidence by the Prosecution generally, and the issues of hearsay evidence especially in regard to evidence of PW2 and PW5 will also be considered.

The Complainant's evidence was that due to the events which had occurred within a week to the date of the incident in issue, she had called in her elder brother, PW2, to assist her get the Appellant out of her house and out of her life. PW2 corroborated that fact. It was PW5 who seems to have discovered a serious problem because after failing to get her sister, the Complainant, at her place of work on two subsequent days and on learning that she had not gone to work for one week to that date she decided to check her out in her house. Indeed on checking on the Complainant PW5 found her locked inside the house. She had been locked in by the Appellant for a week. It was as a result of that act of the Appellant that the Complainant sent her sister PW5, to inform PW2 about it. PW2 came into the scene just one day before the incident and after considering the matter and discussing it between the Complainant and the Appellant, PW2 asked the two to discuss and decide what they wanted concerning the issue of living together. PW2 did not hesitate to give them his view that he felt that they should discontinue their cohabitation. Both the Complainant and the Appellant corroborate those facts and the evidence of PW2. PW2 left the Appellant and the Complainant that day and informed them that he would visit them the next day to learn from them what they had decided. The next day was the day of the incident in issue in this case.

The next morning at 6.30 a.m., PW2 was back and with a vehicle. Both the Complainant and PW2 in their evidence corroborated each other that the Appellant was insisting on the Complainant continuing to live with him but that the Complainant had decided against it. So when PW2, after hearing from the two that each had a different opinion concerning their relationship, decided that the Complainant must leave her house with the Appellant and return to her parents. The Complainant started packing. It was at the

point of going in and out of the house to carry things to the vehicle that the incident occurred.

The Appellant submitted that the evidence concerning his character before the incident and the bad manner in which he treated the Complainant was hearsay and inadmissible. However the evidence is not hearsay nor is it inadmissible. The evidence was relevant to the case being *Res Gestae*. It was evidence surrounding the evidence of *actus reus* of the Appellant that is in issue in this case. That surrounding evidence helps to create a pattern of events as they unfolded just before the incident. They are relevant to *mensrea* of the Appellant. His frame of mind prior to the incident and are very relevant and important in determining who between the Appellant and the Complainant was telling the truth. I must add however that even without taking them into account the case could still be determined. From the *Res Gestae*, I find that the Appellant had been possessive of the Complainant, locking her inside the house. The Appellant had lived continuously with the appellant in the past. However, the year 2000 seems to have been different in the sense that the Appellant had gone back to the Complainant after an absence of three years. It is clear from the evidence of the Complainant and PW2 that the Appellant was not consistent in terms of living with the Complainant. He was apparently a lodger. The Complainant shifted houses in an attempt to shake him off but unsuccessfully. However on 24th May 2000, the Complainant was keen on leaving the Appellant and was ready to move out of her house to achieve it. That is what the Complainant was in the process of doing, with her elder brother present to facilitate it at her request.

Taking that into consideration and considering the Complainant's evidence that the Appellant held her from behind and poured the corrosive liquid over her head down to her legs as against the Appellant's evidence that the Complainant poured it over herself and spilt some to him, which story is more logical and plausible? Certainly the Appellant had conducted himself as some insecure being who was ready to lock up the Complainant in her own house for a week to ensure she stuck with him. He had also been violent prior to this. What befell the Complainant is more consistent with her evidence that the Appellant poured the liquid on her. The act in question, of pouring corrosive substance on the Complainant was in tandem with his conduct so far.

Could it be that the Appellant was telling the truth? Considering that the Complainant had summoned her brother to intervene in her relationship with the Appellant, and taking into account that she packed her clothes to leave the Appellant that morning. Taking all these factors into consideration, it would be reasonable to imagine that the Complainant poured the liquid on herself. She wanted to leave the Appellant and was entering and leaving her house to carry her belongings to PW2's car. That frame of mind is inconsistent with a person with an intention to commit suicide as the Appellant alleged.

Even taking into account just the events of the morning in question quite separately from all the other evidence of the Appellant's previous conduct and bad relationship with the Complainant, it still would be inconsistent with the Complainant's conduct that morning to find that she poured the substance on herself.

I find that whether looking at the events leading to the incident in question or at the events of the fateful morning, the conclusion that one should arrive at in the different sets of facts is the same that the Complainant was telling the truth and that her testimony must be believed. The Complainant's evidence that she was burnt by the Appellant tallies with the evidence of PW2 that the Appellant soon after inflicting the injury on the Complainant ran out of the house, washed his hands which apparently also got some of the substance and afterwards ran away without caring to know the Complainant's fate. The Appellant's conduct after the incident is consistent with the finding that it was him and not the Complainant who poured the substance on the Complainant. It was the conduct of a guilty mind.

I find that the Complainant's evidence that the Appellant poured the substance on her is supported strongly by the appellant's conduct of escaping from the scene.

The evidence of PW2 supports the finding further in that he saw the Appellant leave the house immediately as the Complainant came out screaming in pain due to the effect of the substance on her body. There is sufficient corroboration of the Complainant's evidence both in the evidence of PW2 of the events before, during and after the incident on the material day and from the conduct of the Appellant to

escape from the scene soon after the Complainant was burnt.

The Appellant challenged the admission of the Ribena Bottle and its substance exhibit 3. The Appellant submitted that the recovery of the bottle from the Complainant's house was not conclusive in that it was not clear who opened the house for PW3 and PW2. According to the Appellant PW2 said the landlord opened the house while PW3 said it was PW2 who did. I do not consider that variation material since it is a minor detail and it does not go to the substance of the charge. I am also satisfied that the Appellant was not prejudiced by it. I find that even without the Ribena bottle and its substance, exhibit 3, there was other evidence which the court could consider to conclude on the issue of the nature of the substance which was used to inflict the injuries on the Complainant. The Complainant's T-shirt which she was wearing at the time of attack and which was exhibit 4 was retrieved by PW3 and was also tested along with the contents of the Ribena bottle and found to be Sulphuric Acid, a corrosive substance. The Government analyst's report was exhibit 7. The Doctor's evidence, PW8 also found that the injuries on the Appellant were caused by burning consistent with an acid burn.

The Appellant also submitted that the woman who informed PW5 that the Complainant was under house arrest was not called to testify and therefore that evidence was hearsay. After PW5 was told that the Complainant was locked inside the house, she went up to the house and called the Complainant by her name. That is when the Complainant answered and spoke to PW5 through the window. Even though the information to PW5 by the woman was hearsay, PW5 confirmed it to be true immediately thereafter. Even if the information to PW5 was disregarded, PW5's evidence that she found the Complainant locked in the house was a fact, direct evidence and therefore admissible.

The Appellant submitted that his defence was not given due consideration. **Mr. Makura** disagreed with this and submitted that it was only rejected after due consideration and then only due to the overwhelming evidence of the prosecution. I agree with **Mr. Makura's** submission that the Appellant's defence was fully considered. I have considered it afresh and find that the learned trial magistrate finding on the credibility, demeanour and truthfulness of the Complainant and on the Appellant's defence cannot be faulted. Having considered the Appellant's appeal against conviction, I am fully satisfied that it lacks in merit and I therefore dismiss it.

On the sentence the Appellant was sentenced to 25 years imprisonment. The Appellant submits that it was excessive, and manifestly harsh. **Mr. Makura** did not agree with the Appellant. The learned counsel submitted that considering the seriousness of the injury the Complainant suffered and the fact that she was completely disfigured and considering that the learned magistrate took all these into account and fact that the offence carried a maximum sentence of life imprisonment that the sentence was reasonable and should be upheld.

It is true that part of what should be considered to determine an appropriate sentence in a case of personal injury includes the nature and extent of injury caused. Considering the injury caused to the Complainant from the Doctor's finding in the P3 form, the Complainant's life was completely changed. She had a burnt head, face, chest, hands, thighs and legs with evidence of grafting in various parts of the body. She lost her right ear and part of her eye-lid was turned outwards. That is a frightful sight especially considering that she was a woman at the prime of her life. The Complainant suffered pain. She was hospitalized twice, at one time for over a year. She has undergone surgical operations as part of her treatment and rehabilitation. One year and five months after the incident PW8 still found that the Complainant still had healing wounds. Those injuries are very serious indeed and the learned trial magistrate noted that the Complainant was left permanently disfigured as a result cannot be faulted.

That is all the learned trial magistrate considered. She overlooked a very important factor which is the total lack of remorse on the part of the Appellant for what he had done. The Appellant is not remorseful at all for what he did in this case. I do find that he behaved inhumanely, permanently destroying the Complainant's life and that without remorse. The sentence given of 25 years is not sufficient punishment to the Appellant considering all these factors. I believe the maximum sentence is called for in this case. The Appellant is a dangerous person who needs to be kept away from right thinking members of the society. I will set aside the sentence of 25 years and in substitution thereof sentence the Appellant to life

imprisonment subject to the substitution the Appellant's appeal is dismissed.

Dated at Nairobi this 29th day of June 2006.

LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant in person

Mr. Makura for State

CC: Tabitha

LESIT, J.

JUDGE