



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

HCCR APP NO 44 OF 2016

CR: CASE FILE NO. 1878 OF 2014

GEORGE MBUGUA MUREITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal on mitigation from the judgment dated 31/10/2016 in Naivasha

Criminal Case No 1874 of 2014 by Hon E. Kimilu- SRM)

JUDGMENT

1. The appellant filed a petition of appeal on 7th November, 2017, against the sentence of life imprisonment for the offence of attempted murder contrary to **section 220** of the **Penal Code**. The petition had six substantive grounds of appeal as shown below:

- a. That the trial magistrate erred in law and fact when she convicted the accused yet failed to find that a charge of attempted murder was proved as there was no motive disclosed.
- b. That the trial magistrate erred in law and fact when she convicted the accused yet failed to observe that vital and most crucial witnesses were not called upon.
- c. That the trial magistrate erred in law and fact when she convicted the accused yet failed to find that the incident was poorly investigated.
- d. That the trial magistrate erred in law and fact when she convicted the accused yet failed to find that the accused conduct was combatable with innocence.
- e. That the trial magistrate erred in law and fact yet failed to find that the accused's defence was plausible to secure an acquittal.
- f. That the accused prayed to be summoned before court and during the hearing of the appeal and further prays to be served with a true copy of the trial record to enable me raise more reasonable grounds.

The accused prayed that the appeal be allowed, the conviction quashed, sentence set aside and appellant set at liberty.

2. Before the hearing of the appeal the appellant however filed amended grounds of appeal which raised only grounds of mitigation. At the hearing, the appellant requested that his original substantive grounds of appeal be expunged. He asserted that he would be arguing only against what he considered the harsh sentence, relying on his grounds of mitigation. Those grounds are as follows:

- a. That the appellant pleaded not guilty to the charges.

b. That the imposed sentence is excessively harsh and unjust considering the circumstances that prevailed.

c. That the appellant was a young man aged only 26 years old, an orphan and a person who had a promising career thus prayed for pardon.

d. That after conviction and sentence the appellant joined the theological institution at the prison and attained a diploma in Bible studies and he can now spread the gospel and advise others to desist from any criminal activities.

e. That the appellant has also furthered his career in joining the rehabilitation technical section and attained grade III in motor vehicle mechanic and grade III in motor vehicle electrician.

f. That the appellant is very remorseful in what happened and promises never to indulge in any criminal activities and that he has learnt his lesson.

g. The appellant prays that the court considers his mitigation, reduce his sentence and substitute the remaining with a non-custodial sentence or a probation.

3. The question that has caused me some anxiety is whether what is before me is an appeal at all, given that the grounds are merely on mitigation. The **Criminal Procedure Code** requires an appeal to be filed by way of a petition of appeal. **Section 350(2) CPA** provides that:

“ A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served.....and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground other than those set out in the petition of appeal”

4. **Section 352** of the **CPC** allows for summary rejection of an appeal, if the court considers that: “there is no sufficient ground for interfering with the “ with the lower court’s decision. However, there is a proviso to sub-section (1) that summary rejection may not be effected in a case falling under subsection 2. **Sus-section 2** provides:

“Where the appeal is brought on the ground that the conviction is brought against the weight of the evidence, or that the sentence is excessive”

5. The only aspect of an appeal which is present in the present petition of appeal is the issue of excessive sentence set out in paragraph b of the petition as follows:

“b. That the imposed sentence is excessively harsh and unjust considering the circumstances that prevailed”.

6. I have carefully perused the proceedings of the lower court, and am satisfied that the appellant was properly convicted. The trial magistrate did also consider the mitigation of the appellant at the time and duly recorded the same. To that extent the new mitigation now proffered by the appellant is superfluous.

7. The sentence meted by the trial magistrate for the offence of attempted murder contrary to **section 220** of the **Penal Code** was imprisonment for life, which was wholly in accordance with that section.

8. The appellant’s only recourse is to plead for mercy under Article 133 of the Constitution through the Power of Mercy Advisory Committee in terms of **section 19** of the **Power of Mercy Act, No 21 of 2011**.

9. Accordingly, the appellant’s plea and appeal is hereby dismissed.

10. Orders accordingly.

Dated and Delivered at Naivasha this 13th Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. George Mbugua Mureithi - Appellant - present in person

2. Mr. Koima for the State

3. Court Clerk - Quinter Ogutu