REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 170 OF 2013

MORINE SYOKAU..................................…….....………..APPELLANT

VERSUS

REPUBLIC ………………........……………….…………… RESPONDENT

(Being an appeal from the original conviction and sentence in Kangundo Senior Principal Magistrate's Court Criminal Case No. 10 of 2011 by Hon. M. K. N. Nyakundi Ag. S P M on 18/07/13)

J U D G M E N T

1. **Morine Syokau,** "the appellant" was charged with the offence of **Administering Poison with intent to harm** contrary to **Section 206** of the **Penal Code.** Particulars of the offence were that on the **5th** day of **January, 2011** at ***[particulars withheld]*** **Nursery School,** in **Matungulu District** within **Machakos County** with intent to injure **J W** a child aged **4 years,** unlawfully attempted to administer Rat rat Poison to be taken by the said **J W** endangering her life.
2. She was tried, found guilty, convicted of the offence and sentenced to **four (4) years imprisonment.**
3. Being dissatisfied with the conviction and sentence appealed on grounds that:

   - Evidence of the accused and prosecution witnesses on existence of a family dispute and vendetta between the Complainant, accused and their husband was not considered.

   - Identification by PW2 which was uncorroborated failed to meet the threshold of identification.

   - PW2 should have been the accused person if not a co-accused.

   - Evidence of witnesses was unreliable and could not stand test of time.

   - Samples submitted for analysis were not fully analyzed, a fact admitted by the government analyst.

4. Facts of the case were that PW1 **N W M** was married to **S W** and they had a five (5) years old daughter, **J W** who was a pupil at ***[particulars withheld]*** **Kindergaten.** The Appellant on the other hand was an acknowledged girlfriend of her husband.
5. On the **5th** day of **January, 2011** the Appellant sent PW2 **Raymond Kimeu Manthi,** a bodaboda operator to take to a minor some juice and cake purporting to be her mother. He complied. At the school he met PW3 **A N N** the school teacher who rang PW1 to enquire if indeed he had been sent. She denied. The matter was reported to the police who escorted PW2 to where he identified

the Appellant as the person who sent him to deliver the items. She was arrested.

6. The liquid and cake were submitted to the government chemist for analysis. PW5 **Catherine Serah Murambi,** a Government Analyst, who did the analysis found them to contain zinc phosphide (Rat poison) which is highly toxic and may cause harm to humans if ingested.
7. When put on her defence the Appellant stated that she was at her place of work when she saw PW1 with three (3) other people, **P C Wamalwa** being one of them. PW1 identified her and she was arrested. She alluded to having stayed with the child for six (6) months when her mother abandoned her at the age of one and a half years. stating that she was not in good terms with PW1 because of their rivalry; she testified that the alleged school was five (5) kilometers away from her place of work. She denied having sent the boda boda operator as alleged and alluded to the vendetta that existed between her and PW1 as having prompted her to fix her.
8. The learned trial magistrate considered evidence adduced and found that indeed a bad relationship existed between PW1 and the Appellant which would lead to suspicion that was confirmed by PW3. She reached a finding that the case was proved to the required standard.
9. This being a first appeal, I am duty bound to re-consider the evidence, re-evaluate it and come to my own conclusion bearing in mind that I had no opportunity of seeing or hearing witnesses testify. **(See Okeno vs. Republic (1972) EA 32).**
10. To prove the case the prosecution had a duty of proving beyond any reasonable doubt that the Appellant either caused the poison to be administered to the child maliciously thereby endangering her life and the act must have been done unlawfully with the intent to harm.
11. Looking at the particulars of the offence it is stated that the Appellant unlawfully attempted to administer ratrat poison to be taken by the said child, endangering her life.
12. The particulars of the offence are at variance with the statement of the offence.
13. That notwithstanding, the prosecution called evidence that PW2 was sent to take to **J W,** a child a cake and some juice. The liquid and cake were subjected to forensic examination and confirmed to contain rat rat poison. If ingested it could cause harm to an individual.
14. PW3, the child's teacher confirmed that PW2 took to school the liquid and cake claiming to have been sent by the child's mother, an act that prompted her to enquire from PW1 who denied the allegation. When the police were called PW2 went to identify the person who sent him to school. In his examination in chief he stated that he had not known the Appellant previously but could identify her as the person who paid him **Kshs. 20/=** to deliver the items to school. On cross examination, however, he alleged that he used to see the Appellant at **Tala Market.**
15. The witness contradicted himself as to whether or not he knew the Appellant previously. This is therefore a case of identification/recognition by a single witness. In the case of **Kiilu & Another vs. Republic (2005)1 KLR 174** the Court of Appeal stated thus:

> ***"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from probability of error."***

16. In another case **– Maitanyi vs. Republic (1986) KLR 201** the court stated:

> ***"......The strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are not known because they were not inquired into."***

17. This is a case where PW2 just pointed out the Appellant as the person who sent him. In her decision the trial magistrate stated thus:

> ***"from evidence of PW2 it is clear when he pointed her (accused) to the police who then arrested her was enough evidence that PW2 knew the accused had sent him."***

Having contradicted himself, it would have been important for the court to test with greatest care if indeed the witness was telling the truth. This was not done which would have called upon the court to consider whether there was some other evidence to support the allegation. It is therefore possible that the Appellant could have sent PW2 or not. This perse was a doubt that should have been resolved in favour of the Appellant.

18. The incident is alleged to have occurred at **8.00 a.m.** in broad daylight. The Appellant purportedly found PW2 at his place of operation. It may be unlikely that he was the only bodaboda operator working. Evidence of other operators would have been of great importance to collaborate the evidence of PW2 regarding the allegation. This evidence was not called. What made the witness identify the Appellant was also not considered. It was not enough for him to point out the Appellant as the offender. He should have given some description of the person who sent him prior to ultimately identifying him.
19. Having re-considered evidence adduced I find that it was not safe to convict the Appellant. In the result, the conviction is quashed and sentence set aside. The Appellant shall be set free forthwith unless otherwise lawfully held.
20. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **4th** day of **February,** 20**16.**

L. N. MUTENDE

JUDGE