REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 38 OF 2013

MERCY CHEPKOECH KIRUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Resident Magistrate at Sotik court (Hon. N. Barasa) in Sotik Principal Magistrate's court Criminal Case No.566 of 2013 on 14/08/2013)

JUDGMENT

The appellant herein, **Mercy Chepkoech Kirui**, was convicted on her own plea of guilty for the offence of attempted murder contrary to **Section 220(a)** of the **Penal Code**. The particulars of the offence were that on the 11th day of August 2013, at Tebes Village in Bureti District, within Kericho County, the appellant attempted to unlawfully cause the death of **Enock Kiplangat** by dumping him into a 35 feet deep borehole. Upon conviction, the appellant was sentenced to serve three (3) years imprisonment. Being aggrieved the appellant preferred this appeal.

On appeal the appellant put forward the following grounds in her petition:

1. **THAT the learned Trial Magistrate erred in law and in fact by failing to take into consideration that she did not have the jurisdiction to record plea, pass a conviction and sentence against the appellant herein.**

2. **THAT the learned Trial Magistrate erred in law and in fact by imposing a sentence against the Appellant which is inordinately harsh and excessive in the entire circumstances.**

3. **THAT the learned Trial Magistrate erred in law and in fact in that she failed to ascertain that the facts were well stated to the appellant and the appellant given an opportunity to dispute, explain or to add any relevant facts. If the appellant did agree to the facts she would have raised any questions for her guilty and her reply ought to have been recorded.**

4. **THAT the learned Trial Magistrate erred in law and in fact in failing to satisfy that the plea was totally unequivocal and that the appellant understood the elements of the offence and its penalty.**

5. **THAT the appellant herein did not have the benefit of a legal counsel while taking plea.**

Miss Muthee conceded the appeal on the ground that the trial learned Resident Magistrate did not have jurisdiction to hear and determine the case. The learned State Counsel further pressed for a retrial.

Mr. Kirui, learned advocate for the appellant did not oppose the request for a retrial. I have considered the ground of concession and I have no doubt that Miss. Muthee properly conceded the appeal. Under the first schedule of the Criminal Procedure Code, the offence of attempted murder can only be heard and determined by a Magistrate's court of the rank of Senior Resident Magistrate and above. The appellant herein was tried before Hon. N. Barasa learned Resident Magistrate. It is obvious the learned Resident Magistrate did not have jurisdiction to hear and determine the case. The facts outlined before the trial court shows that the appellant had a quarrel with her husband on 11th August 2013 which attracted the attention of the neighbourhood. The good neighbours rushed to the appellant's homestead prompting the appellant to chase them away while armed with a panga. As they ran for their dear lives, the appellant is said to have dropped the panga, grabbed her eight months old baby and had him dropped into a borehole. Members of the public pursued and caught up with the appellant who attempted to flee the scene. The baby was retrieved and rushed to Roret Health Centre for treatment. The appellant was taken to custody at Roret Police Station where she was later arraigned before the Resident Magistrate's court for attempted murder.

The question which I must grapple with is whether or not I should make an order for retrial. I think the guiding principles were restated by the Court of Appeal in **Fatehali Manji =Vs= R (1966) EA 343** as follows:

> ***"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;"***

In the appeal before this court it is not suggested that witnesses will not be available or that the prosecution will fill in the gaps in its evidence at the trial court. Another very important consideration to be taken into account is that if the appellate court is of the opinion that on a proper consideration of the admissible evidence, a conviction might result. I have already set out the facts of the case. It is clear in my mind that the factual basis of the case outlined before the trial court shows that the evidence appear, ***prima facie***, to be capable of sustaining a conviction. After considering all the circumstances of this case I think an order for retrial is the fairest order to make.

In the end, I allow the appeal by quashing the conviction and set aside the order on sentence. The appellant to be retried a fresh before another Magistrate of competent jurisdiction sitting at Sotik Senior Principal Magistrate's court. The case to be heard on priority basis. The same to be mentioned before the Sotik Senior Principal Magistrate's Court on 10th March 2014 for further orders and directions on the trial.

Dated, signed and delivered in open court this 7th day of March, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Miss. Kivali for Director of Public Prosecution

Miss. Maritim holding brief for Mr. Matwere for Appellant