



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

CRIMINAL APPEAL NO. 210B OF 2011

N W K.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Arising from the judgment of Hon. M. Nyakundi Senior Resident

Magistrate, Nyeri in Criminal Case No.85 of 2011)

JUDGMENT

1. The appellant NWK was charged with the offence of attempted murder contrary to section 220(a) of the Penal Code the particulars of which were that on 19th day of January 2011 at 2100 hours at Mbogoini village Munyu sub location within Nyeri County attempted unlawfully to cause the death of C.W. a child aged 3 years by throwing her into a water dam.
2. On count two she faced the charge of attempted murder contrary to section 220(a) of the Penal Code the particulars of which were that on 19th day of January 2011 attempted unlawfully to cause the death of C.K. a child aged 3 months by throwing him into a water dam.
3. On count three she faced the charge of attempted suicide contrary to section 226 as read with section 36 of the Penal Code the particulars of which were that on 19th day of January 2011 attempted to kill herself by jumping into the water dam.
4. She pleaded not guilty to the charges, was tried convicted and sentenced to life imprisonment on count one and two and to eighteen months imprisonment with the sentence running concurrently.
5. Being aggrieved with the said conviction and sentence the appellant filed this appeal and in her home grown grounds of appeal raised the following grounds:
 - a) *The trial magistrate did not consider that she was sick during the whole trial process.*
 - b) *the trial magistrate did not consider her defence that she committed the offence out of stress.*
 - c) *the sentence was harsh considering that she was a first offender.*
6. The appellant on 4th October 2013 filed amended grounds of appeal and written submissions and on 5th December 2013 Miss Mwai Advocate was put on record for the appellant by the court since the court

was of the opinion that the appellant might suffer substantial injustice if she proceeded with the appeal without legal representation.

SUBMISSION

7. At the hearing herein Miss Mwai for the appellant submitted that the circumstances leading to the charge comprised the facts as the charge of manslaughter in High Court Criminal Case No. 14 of 2011 and therefore the appellant ought not to be charged twice.

8. She submitted that the main offence of attempted murder should have been let to go having been charged with murder which was subsequently reduced to manslaughter since it was the same mental status. She further submitted that the appellant was sentenced to two life sentences whereas she could only serve one life sentence. She therefore submitted that the appellant should only serve the sentence for manslaughter.

9. Miss Kitoto for the state submitted that section 138 of the CPC provides that a person convicted and or acquitted should not be treated for the same offence. She submitted that the appellant was charged with three capital offences as provided for under section 139. She submitted that though the appellant was depressed she was not insane at the time of the commission of the offence.

10. From the submissions herein the only issue for the courts determination are as follows:

a) Whether the appellant was prejudiced having been charged with three counts in the case appealed against being CRIMINAL CASE NO. 85 of 2011 and murder No. 14 of 2011.

b) Whether the sentence passed against the appellant was harsh and excessive.

11. This being a first appeal the court is required to reassess the evidence tendered before the lower court and to come to its own conclusion though taking into account the fact that it did not have the advantage as the trial court of hearing and seeing witnesses.

12. The prosecution case was that on 19th January 2011 P.W CHARLES KANYUA NJOGU followed his daughter and son towards the said dam she then found the appellant partially submerged into the water to the neck level. His son Njogu rescued the two victims who were taken to Warazo hospital. He further stated that the appellant had been having domestic quarrels with her husband.

13. P.W.2 GRACE WARUGURU NJOKI and P.W.3 GLADYS WANGARI both corroborated the evidence of P.W.1. P.W. 7 PETER OGOLLA in his evidence stated that he interrogated the accused who told him that she had some domestic quarrels with her husband who had brought another woman and that is what provoked her into committing suicide together with her children.

14. At the close of the prosecution case the appellant stated that she had been married for seven years and that her husband was not responsible. He used to bring women into their matrimonial home and that depressed her.

15. From the proceedings it is clear that the appellant was provoked beyond the limit which any woman can bear. It is not disputed that the evidence tendered by the appellant that her husband would bring women into the matrimonial home was not challenged.

16. From the judgment of the trial court it is clear that the same treated the appellant defence very casually. This was a case which required probation report before passing sentence on the accused person having in her defence stated that she committed the offence while she was sick.

17. It is also clear that the appellant was a first offender and therefore on the authority of CHARO NGUMBAO GUGUDU v R. NAIROBI CRIMINAL APPEAL NO. 3581/2008 maximum sentence should only be given to the worst of offenders. From the said evidence tendered before the trial court the

appellant was not in that category since she was extremely desperate and therefore decided to take her life as well as that of her children. I therefore find that the sentence of life was excessive in the circumstances and would therefore allow the appeal on sentence set aside the same and substitute it with a prison term of eighteen months from the date of the judgment of the lower court.

18. The appellant having served the said sentence should therefore be released forthwith unless otherwise lawfully held.

19. As I had stated in the case of R. v MERCY NYAMBURA WANJIKU NYERI HIGH COURT CRIMINAL CASE NO. 6 OF 2011 the husband of the appellant ought to take responsibility of his children. I therefore direct the children officer in charge of Nyeri to cause the husband of the appellant to be arrested to as to pay child support to the children herein.

Dated, signed and delivered at Nyeri this 6th June 2014.

J. WAKIAGA

JUDGE

Miss Mwai for the appellant.

Mr. Njue for the state.

Court: Judgment read in open court in the presence of Miss Mwai and Mr. Njue. I further direct the children officer in charge of Nyeri to arrest the husband of the appellant to be charged with support of his children.

J. WAKIAGA

JUDGE