



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO 78 OF 2023**

**ESTHER KAARIO .....APPELLANT**

**VERSUS**

**REPUBLIC .....  
RESPONDENT**

**J U D G M E N T**

**ESTHER KARIO**, the Appellant herein was charged in the lower Court with the offence of attempted murder, contrary to ***Section 220 (a) of the Penal Code.***

The particulars of this offence are that on the 19<sup>th</sup> day of November, 2021 at Akoleni Village, in Kirindara Sub-Location, in Ntunene Location, in Igembe North Sub-County within Meru County, the accused unlawfully attempted to murder Victoriano M'Itabari Meme.

The Prosecution case is that the victim who offered evidence as PW-1, and the appellant got married in 1994. They had four

children together by the time of the alleged offence. Two of them were at the University, one in boarding school, and the last born (PW4) who was aged 6 years was living with them as she was in class 2. Before getting married to the appellant the victim had another wife with whom they had a son.

The victim and his family were living in an inherited land from his father where he had planted Miraa as a source of income. The appellant wanted the victim to subdivide the said land to his sons and the victim declined as the land was the only source of income he had for the entire family and some children were still in school. The appellant seemed not happy with the victim's position. Before the incident in this case the appellant had attacked and injured the victim but prayed for forgiveness to which the victim conceded.

On 19/11/2021 at about 3:00 am the appellant and the victim were in bed asleep. PW-4 was also with them in another bed. Suddenly, the appellant attacked the victim while armed with a kitchen knife and a panga. She struck him with the panga several times on the head. He woke up naked as he had slept, and felt dizzy. He asked her why she was attacking him and she said she

will kill him. He fell at a corner in the room. She got a kitchen knife and cut one side of testicles, severing it. The victim screamed for help. There was a chemical in the house for using on plants and she tried to force it through his throat. PW-4 tried also to scream for help. The appellant hit her, ordering her to shut up. She however went outside and screamed saying, “ father is being killed! Come and help! Neighbours heard the distress cry and responded. One of them is PW-2 who at the time was guarding his Miraa farm. He went for assistance. When he arrived he found other neighbours, had also arrived. The door was crossed from inside. They broke it and entered.

The victim was with the appellant. The appellant had a panga and the victim was naked and injured. PW-2 had a C-line panga. He ordered the appellant not to interfere. He got the victim. They dressed him up and rushed him to a hospital in Maua. He had cut wounds on the head, neck and back. At the hospital they noted part of his genital organs had been severed. The hospital at Maua could not manage his condition and he was transferred to Cotollengo Mission Hospital Chaaria where he was admitted.

PW-6 investigated the case. He visited the scene on 19/11/2021 at about 7:00am in company of Sgt Baraza and Cpl Kimathi. PW4 led them to the bedroom where the incident took place. There was blood all over. They recovered a panga and a knife. At a far end they got the severed part of the testicles. They rushed it to Nyambene Hospital where the victim had been rushed to. They handed the piece of testicles to the doctor. The victim was in great pain. He was later transferred to Chaaria Mission Hospital where he was admitted. He was discharged on 30/11/2021. His statement was recorded. He was later issued with a PW-3 form which was filled at Nyambene Hospital. The degree of injury was opined as grievous harm.

The assailant had been arrested the same day on 19/11/2021 by members of the public and taken to the station. After investigations were through she was charged with the offence carried in the charge sheet. The recovered panga, knife and the filled P.3 form were produced in court as exhibits.

The appellant in her defence gave a brief unsworn testimony and called no witness. She alleged she could not recall the date of the incident as she was sick. She said she was on medication which

she had taken and later found herself in custody. When she asked why she was there she was told she had done a bad thing as she had cut her husband. She claimed not to have been aware of what she was doing. She urged the court to forgive her as well as her husband, alleging it was her first time to attack him and she was mentally ill.

The trial court evaluated the evidence and found her guilty of the offence. She was consequently convicted and sentenced to serve 15 years imprisonment.

Dissatisfied with the said conviction and sentence she appealed to this court on the grounds that:-

- 1) She was not availed an Advocate to represent her pursuant to *Article 50(2) (h)*, bearing in mind the severity of the offence and her mental status.**
- 2) PW4 who was a minor aged then 10 years was not subjected to *voire dire* which is a breach of the tenets of law under section 125(1) of the Evidence Act, and *Section 19(1) of the Oaths and Statutory Declarations Act*.**

**3) She was convicted and sentenced without considering that she was mentally ill (schizophrenic) and was on drugs.**

**4) She was convicted and sentenced on balance of probabilities and not beyond reasonable doubt, which would have accorded her the benefit of doubt.**

The appeal was canvassed by way of written submissions and both sides filed their respective submissions.

As a first Appellate Court, I need to re-evaluate the entire evidence, re-analyze it and draw my own independent conclusions, while bearing in mind that I do not have the benefit of having seen or heard the witnesses firsthand.

The appellant in this case does not deny having caused the victim grievous harm as alleged in the charge sheet and revealed by the prosecution witnesses. Her defence is that she was mentally ill, and incapable of knowing what she was doing.

The issue which stands out for determination in this appeal, is whether at the time of committing the act, the appellant was suffering from such a disease of the mind as to render her

incapable of knowing the nature and quality of the act or of knowing that the act was wrong.

**Section 11 of the Penal Code** provides that “Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved”

The above stated presumption of sanity is however, rebuttable if credible evidence is adduced to show that the accused was laboring under a mental disease that negated the mental element required for the offence. Such evidence can be availed by those who knows the accused, or a psychiatric.

In this case those who very well know the appellant, who are her husband, daughter and two neighbours who gave evidence as PW2 and PW5 did not reveal of her being a mental patient or known of having a mental problem. The trial court had also given her a chance to be escorted to hospital to avail treatment records but were not availed. Apart from her claim that she suffers from a mental illness, there is no other evidence which corroborates the claim. The legal burden was on her to establish the same on the balance of probabilities, of which she did not.

Considering how the offence was committed, it was premeditated. She had weapons and attacked at the dead of the night when help could hardly be available. She hit the head with a panga, and used a convenient weapon to sever part of his genitals, a kitchen knife. She knew what she wanted to achieve as she told him that she will kill him. There is also motive as she wanted the land subdivided to their sons of which the victim declined to.

The circumstances does not portray her as someone who was not conscious of what she was doing.

She caused grievous harm to the victim. She told him she was out to kill him and tried to prevent their daughter from calling for help. The facts shows that she intended to kill him and in a painful way.

The defence of mental illness or insanity does not meet the legal threshold and was therefore rightly dismissed.

In the circumstances under which the offence was committed 15 years' imprisonment is neither harsh nor excessive and there is no cause to interfere with the same.

The upshot is that the appeal lacks merit and is hereby dismissed.

**DATED AND DELIVERED AT MERU THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2025**

**S.M. GITHINJI**  
**JUDGE**

**APPEARANCE:-**

Presence of Appellant.

Ms. Adhi for the state.