IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 338 OF 2007

BETWEEN

DAVID KARIUKI WACHIRA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi

(Lesiit, J) dated 29th June, 2006

in

H. C. CR. A. No. 515 of 2004)

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JUDGMENT OF THE COURT

This is a second and final appeal by ***David Kariuki Wachira***, the appellant, who was convicted on 28th October, 2003 by the Makadara Principal Magistrate, Mrs. R. N. Kimingi, for the offence of grievous harm contrary to ***section 234*** of the Penal Code and sentenced to imprisonment for 25 years. He had originally been charged with the offence of attempted murder contrary to ***section 220 (a)*** of the Penal Code. However, after a full trial the learned Principal Magistrate came to the conclusion that the facts established before her proved the offence of grievous harm contrary to ***section 234*** of the Penal Code and proceeded to substitute the same, and imposed the aforesaid sentence of 25 years imprisonment.

His first appeal to the superior court (Lesiit, J) was dismissed. However, in dismissing the same, the learned Judge came to the conclusion that the sentence of 25 years imprisonment imposed by the trial court was insufficient and enhanced the same to life imprisonment.

The concurrent facts established by the two courts below were that the appellant and the complainant ***Margaret Wangui Kago*** (PW 1) (Margaret) began cohabiting as husband and wife in 1994. In the year 1997, the appellant left Margaret for another woman. However, in the year 2000 he returned to Margaret, cohabiting with her intermittently, as and when he pleased. Clearly, the relationship during that period was not harmonious, and they continued quarrelling with each other, until it became acrimonious enough for Margaret to report the appellant to the Central Police Station. At one point, the appellant had poured paraffin on Margaret, and had threatened to set her ablaze. On another occasion, he

had locked her inside the house, and had taken off with the keys. She had discussed these problems with her relatives, including her brother, Nelson Kanyi Kago (PW 2) (Nelson), who suggested a brief separation period. Although initially averse to the idea of a separation, the appellant eventually agreed, and on the fateful day of 24th June, 2002, Nelson went to pick her sister Margaret from her home. As Nelson waited outside, Margaret continued to make trips into the house, bringing her personal items which Nelson loaded into his motor vehicle. She had no idea where the appellant was all this time. Then, when she went back into the house for her final trip, the appellant emerged from nowhere, held her from behind, and poured a substance over her head, face and body, and then proceeded out of the house. Nelson saw him come out, go to a tap, and wash his hands. He said nothing to Nelson and just left. Minutes later, Margaret came out of the house running, writhing in pain and screaming, and her head, face and body literally burning. He and the neighbours, who had by then gathered at the house, took Margaret to Mwiki Police Station and then to Kenyatta National Hospital where she was admitted and treated. She was hospitalized for almost one year, and never really recovered. According to Dr. Kamau (PW 8), a substantial part of her body was disfigured permanently, the right ear was completely burnt and skin grafted in parts of the body. According to his testimony, the burns were a result of a corrosive substance poured on the body.

The appellant was arrested the same day, and charged with the offence stated earlier. A bottle containing a substance, which was later identified as sulphuric acid, was also recovered from the appellant's house.

When the appellant was put on his defence he denied the offence in an unsworn statement and alleged that Margaret had poured acid on herself in an attempt to commit suicide, and in the process had also splashed some on his hands.

The trial court fully appreciated that there was no eye witness to the offence charged and that the case rested on the credibility of the complainant, the medical evidence adduced in corroboration, and the evidence of Nelson, the brother, who saw the appellant come out of the house and wash his hands immediately before Margaret came running out, screaming and writhing in pain. In her judgment delivered on 28th October, 2003 the learned Principal Magistrate stated, inter alia:

"The court has carefully considered the evidence adduced in support of the prosecution case and the arguments advanced by the accused in support of his case. The court find *(sic)* that there are no material contradictions in the prosecution evidence. The court find *(sic)* that PW 1's evidence that she is the one who sought PW 2's assistance in resolving her problem with the accused is corroborated by the evidence of PW 2 and PW 4 with whom she confided. PW 2 is her brother and PW 4 her sister. The court find *(sic)* the prosecution evidence convincing and find the defence by the accused that the complainant did not want to be taken away by PW 2 for *(sic)* fetched and without merit. The court find *(sic)* the complainant to be a reliable witness and her evidence reliable evidence and the court accept *(sic)* her evidence as evidence of truth and reject the defence by the accused. It is clear from the defence case that the accused did not approve of PW 1 involving her relatives PW 2 especially in what he considered to be personal between him and the complainant and did not approve of the intervention by PW 2 on the material date. The court accept *(sic)* the prosecution evidence of PW 1 and reject *(sic)* the defence case. The court is convinced and find *(sic)* that the accused is the one who poured the corrosive substance on the complainant at the material *(sic)* thus conflicting *(sic)* the injuries sustained by the complainant on the complainant."

The superior court similarly accepted Margaret's evidence, and all the other evidence in support, thus rendering the appellant's defence false and useless. Here is how the learned Judge rendered herself, in part:

"Taking that into consideration and considering the Complainant's evidence that the Appellant held her from behind and poured the corrosive liquid over her head down to her legs as against the Appellant's evidence that the Complainant poured it over herself and split some to *(sic)* him, which story is more logical and plausible? Certainly the Appellant had conducted himself as some

insecure being who was ready to lock up the Complainant in her own house for a week to ensure she stuck with him. He had also been violent prior to this. What befell the Complainant is more consistent with her evidence that the Appellant poured the liquid on her. The act in question, of pouring corrosive substance on the Complainant was in tandem with is *(sic)* conduct so far.

Could it be that the Appellant was telling the truth? Considering that the Complainant had summoned her brother to intervene in her relationship with the Appellant, and taking into account that she packed her clothes to leave the Appellant that morning. Taking all these factors into consideration, it would beat reason to imagine that the Complainant poured the liquid on herself. She wanted to leave the Appellant and was entering and leaving her house to carry her belongings to PW 2's car. That frame of mind is inconsistent with a person with an intention to commit suicide as the Appellant alleged."

Being aggrieved by that decision, the appellant is here for his second and final appeal. That being so, by dint of ***section 361 (1) (a)*** of the Criminal Procedure Code, only issues of law (and not facts) can be addressed at this stage. In a supplementary memorandum of appeal filed on behalf of the appellant by his learned counsel, Mr. S. O. Nyaberi, the appellant outlined eight grounds of appeal, relating both to facts and law. However, Mr. Nyaberi chose to combine and argue them broadly. He argued that according to the record the language in which the plea was taken is not indicated, and that the trial was conducted in a language that the appellant did not understand contrary to ***section 198*** of the Criminal Procedure Code; that the superior court failed to analyze and evaluate the evidence and come to its own conclusions; that the findings were against the weight of the evidence which was conflicting in material respects; that the superior court did not allow the appellant to engage a counsel of his choice; and finally that the enhanced sentence of life imprisonment imposed by the superior court was harsh and unlawful.

Mr. O'Mirera, the learned Senior Principal State Counsel, for the State, while conceding that the sentence imposed by the superior court was unlawful, argued that the conviction was safe and based on credible evidence of Margaret, corroborated by her brother Nelson, and Dr. Kamau. With regard to the complaint that the appellant had not been allowed the opportunity to engage a counsel of his choice, Mr. O'Mirera submitted that indeed the appellant was given the opportunity, but opted to proceed with the case to avoid further delays.

We have examined the record and confirmed that indeed the trial court did not record the language used when the appellant first appeared in court for plea on 30th June, 2000. The appellant, however, pleaded **not guilty** to the charges and his trial was set after his release on bond. It was desirable, as the law requires it, that the language used in taking the plea be shown on record, but here the appellant pleaded **not guilty**, as the record shows. There was no prejudice caused by that omission because the appellant had an opportunity to contest the charges in a full trial.

With regard to the other grounds of appeal that complain about the superior court's failure to analyse and re-evaluate the evidence, and about the findings being against the weight of the evidence, we find absolutely no merit in this argument. In view of the concurrent findings of fact by the two courts below, which we have no reason to disturb, those complaints cannot avail the appellant. Not unlike the two courts below, we find his "suicide theory" ridiculous and completely untenable, given that Margaret had made up her mind to leave the appellant, that she was doing her last trip to carry away her personal belongings to the waiting motor vehicle, that she would suddenly stop, pour acid on herself, and splash some on the appellant! That, as we have said, is ridiculous, absurd and unbelievable.

Finally, with regard to sentence, Mr. O'Mirera was right in conceding the appeal on sentence. Ordinarily, on a second appeal, such as here, this Court would have no jurisdiction to re-examine a lawful sentence on the complaint of an appellant that it was harsh and excessive. That is the import of ***section 361 (1) (a)*** of the Criminal Procedure Code which declares sentence a matter of fact. Nevertheless, where the legality of the sentence is open to challenge this Court will have the jurisdiction to re-open the matter. Sub-section (b) of that section provides the jurisdictional basis for that intervention.

Here the learned Judge of the superior court having come to the conclusion that there was no merit in the appeal, decided on her own, rather arbitrarily, and without any reference to the Senior Principal State Counsel, who had not applied for the enhancement of the sentence, or to the counsel for the appellant, who was not given an opportunity to address the court on the issue of sentence, to enhance the sentence from 25 years imprisonment to **life** imprisonment. This was clearly wrong, as were her reasons, which are stated in the Judgment as follows:

"On the sentence the Appellant was sentenced to 25 years imprisonment. The Appellant submits that it was excessive, and manifestly harsh. Mr. Makura did not agree with the Appellant. The learned counsel submitted that considering the seriousness of the injury the Complainant suffered and the fact that she was completely disfigured and considering that the learned magistrate took all these into account and fact that the offence carried a maximum sentence of life imprisonment that the sentence was reasonable and should be upheld.

It is true that part of what should be considered to determine an appropriate sentence in a case of personal injury includes the nature and extent of injury caused. Considering the injury caused to the Complainant from the Doctor's finding in the P3 form, the Complainant's life was completely changed. She had a burnt head, face, chest, hands, thighs and legs with evidence of grafting in various parts of the body. She lost her right ear and part of her eye-lid was turned outwards. That is a frightful sight especially considering that she was a woman at the prime of her life. The Complainant suffered pain. She was hospitalized twice, at one time for over a year. She has undergone surgical operations as part of her treatment and rehabilitation. One year and five months after the incident PW 8 still found that the Complainant still had healing wounds. Those injuries are very serious indeed and the learned trial magistrate noted that the Complainant was left permanently disfigured as a result cannot be faulted.

That is all the learned trial magistrate considered. She overlooked a very important factor which is the total lack of remorse on the part of the Appellant for what he had done. The Appellant is not remorseful at all for what he did in this case. I do find that he behaved inhumanely, permanently destroying the Complainant's life and that without remorse. The sentence given of 25 years is not sufficient punishment to the Appellant considering all these factors. I believe the maximum sentence is called for in this case. The Appellant is a dangerous person who needs to be kept away from right thinking members of the society. I will set aside the sentence of 25 years and in substitution thereof sentence the Appellant to life imprisonment subject to the substitution the Appellant's appeal is dismissed."

With respect, we are of the view that the learned Judge erred in her judgment on the sentence and we must interfere with the same. We are also of the view that the learned trial Magistrate erred in substituting the charge of attempted murder contrary to ***section 220 (a)*** of the Penal Code to grievous harm contrary to ***section 234*** of the Penal Code. The evidence before the trial Magistrate established clearly the offence of attempted murder contrary to ***section 220 (a)*** of the Penal Code and there was indeed no reason to substitute the same with the offence of grievous harm contrary to ***section 234*** of the Penal Code. While the offence of grievous bodily harm under ***section 234*** of the Penal Code may be cognate to that of attempted murder under ***section 220*** of the Code, both carry the same sentence, namely life imprisonment and none of the two can be described as minor to the other – see ***section 179*** of the Criminal Procedure Code which allows conviction for a minor offence where a more serious one is charged but is not proved. We therefore restore the original charge of attempted murder contrary to ***section 220 (a)*** of the Penal Code, and set aside the sentence of life imprisonment imposed by the Judge and restore the sentence of 25 years imprisonment imposed by the trial Magistrate. To that extent only, appeal against sentence succeeds, but is otherwise dismissed as regards conviction.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of July, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

…….……

JUDGE OF APPEAL

ALNASHIR VISRAM

…….…..……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR