



REPUBLIC OF KENYA



KENYA LAW
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**Munyasya v Republic (Criminal Appeal E078 of 2021)
[2023] KEHC 191 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E078 OF 2021
GMA DULU, J
JANUARY 24, 2023**

BETWEEN

LOISE NDONDE MUNYASYA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the original judgment of Hon E M Muiru in Kilungu Principal Magistrate's Court PM Criminal Case no E205 of 2021 pronounced on August 11, 2021)

JUDGMENT

1. The appellant with another was charged in the magistrate's court with grievous harm contrary to section 234 of the *Penal Code*. The particulars of offence were that with others not before court on May 16, 2021 at Kimutini Village, Kyaang'a Location, Makueni County jointly did grievous harm to Alfonse Kiendi Kithaka.
2. She denied the charge. After a full trial, she and the co- accused were convicted. Each was sentenced to five (5) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds:-
 1. That she pleaded not guilty to the charges.
 2. That the trial magistrate erred in shifting the burden of proof to the appellant and ignoring the compelling defence of the appellant without proper evaluation.
 3. The magistrate erred in failing to appreciate that the charge was bone out of malice and ill will due to the fact that the appellant denied to have sex with the complainant.



4. The trial magistrate failed to understand that the prosecution ought to prove its case beyond reasonable doubt and not beyond any shadow of doubt.
 5. The trial court erred in failing to note that the investigating officer did a shoddy job in that the circumstantial evidence adduced by him was insufficient, fabricated and lacked probative value to justify a conviction.
 6. That the prosecutor did not supply her with witness statements and other documents like P3 form for adequate preparation of her defence hence a violation of her constitutional rights to a fair trial under article 50(2) of the *the Constitution*.
 7. That she asks the court to reduce the conviction or grant a non-custodial sentence or slash the conviction or whichever the court may deem fit.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as submissions filed by the Director of Public Prosecutions.
 5. This being a first appeal, I have to start by reminding myself that I am required to examine the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno vs Republic* (1972) E.A 32.
 6. I note that at in proving their case herein, the prosecution called four (4) witnesses. The appellant who was 2nd accused on her part tendered sworn defence testimony and did not call additional witnesses.
 7. It is a charge of causing grievous harm. Indeed from the evidence on record tendered by the complainant Pw1 Alfonse Kiendi Kithaka, he was injured by others or by another. His evidence is supported by the testimony of his nephew Pw2 John Muema Kilokwe who saw the complainant in the bush the next morning May 17, 2021 at 7:00 a.m.
 8. The evidence on the injuries suffered by the complainant is also corroborated by the medical evidence tendered by Pw4 Eric Kasiamani the clinical officer who classified the injuries suffered as maim, and listed the said injuries in the medical report (P3 form) which he produced as an exhibit.
 9. I find that the prosecution proved beyond any reasonable doubt that the complainant herein sustained grievous harm.
 10. The second issue for consideration is the identity of the person or persons who caused the said injuries and whether the appellant was involved?
 11. The prosecution alleges so. The appellant denies causing the injuries, and said that she merely screamed and the other accused Muasya came to her house to separate her from the complainant, who was attempting to rape her.
 12. It is to be noted that a son of Loise Ndonde the appellant, by the name Masila alleged to have been involved in the incident was not brought to court.
 13. That said all the evidence both for the prosecution and the defence put the appellant at the scene of the assault on the complainant, but maybe in the house. Loise the appellant said that she did not witness the cutting as she was inside the house, and the others were outside. Her defence evidence is believable.
 14. I will thus give the benefit of the doubt to the appellant in line with the reasoning in the English case of *Miller vs Minister of Pensions* (1947) 2 ALL ER 372 in which the court stated that proof



beyond reasonable doubt does not mean proof beyond any shadow of doubt. In the present case, I find reasonable doubt with regard to proof that the appellant cut the complainant as alleged.

15. I find that the prosecution did not prove beyond any reasonable doubt that the appellant grievously injured the complainant. The appeal will thus succeed on that account.
16. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence imposed. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 24TH DAY OF JANUARY 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

