Guya v Republic (Criminal Appeal 76 of 2018)
[2023] KEHC 2312 (KLR) (24 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2312 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 76 OF 2018

PJO OTIENO, J

MARCH 24, 2023

BETWEEN

MELISA GUYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. W.K Cheruiyot (RM) in Vihiga Criminal Case No. 479 of 2017)

JUDGMENT

1. The Appellant was arraigned before the Resident Magistrate at Vihiga in Criminal Case No 479 of 2017 charged with the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. The particulars of the charge were that on the 26th day of April, 2017 at Kegoye sub location in Vihiga County, the appellant assaulted VM, a minor, thereby occasioning her actual bodily harm.

2. The accused person pleaded not guilty and the matter was set down for hearing with the prosecution calling a total of five (5) witnesses. When put on his defence, the appellant elected to give sworn evidence without calling further evidence.

3. PW1 was the complainant whom upon being subjected to *voire dire* examination, satisfied the trial court on her intelligence and ability to tell the truth, testified on affirmation that she was a class three pupil at [Particulars Withheld] and that on 26/4/2017 at about 6 PM, she was at home when the accused person came and started beating her all over her body using a stick and stepping on her saying there was nothing she would do to her. She screamed and PW3 came to her rescue telling the accused to leave her alone and report any mistake done by her to her parents. She stated that she went to school with the appellant's children who constantly abused her and that the 5th time they abused her she suffered a broken leg and was bleeding and used a white piece of cloth to wipe the blood which cloth she produced as exhibit. She was then taken by her mother to Vihiga Health Center for treatment.

4. On cross examination she stated that she did not know the reason why she was assaulted by the appellant and that the appellant left with the weapon of assault.

5. PW2, EW, the mother to the victim, testified that on 26/4/2017 she returned home at 6:30PM from church when she saw people in her compound including village elders and her brother in law. On arrival she heard PW1 shout that she was being killed. PW1 informed her that she was assaulted by their neighbor for no reason. She took the victim to the county referral hospital the next day and on November 28, 2017, she reported the incident at Mbale police station. She produced the treatment book and outpatient records from the hospital as well as a P3 form duly filled.

6. On cross examination she admitted that her differences with the appellant began from the disagreement between the children and that she did not take the child to hospital that evening due to lack of money.

7. PW3, RA gave evidence that on 26/4/2017 at 6PM she was at her home while her children and PW1 were playing near the church when she heard noises and saw the children running and passing by the home of PW1. She then saw the appellant who was a neighbor chasing the children armed with a stick. The appellant then went to PW1's home and started assaulting her claiming she had abused her. The witness' request to the appellant to wait for the complainant's mother for a discussion on the behavior of the complainant landed on deaf ears. She added that she gave the complainant a cloth, exhibit MF12, which she used to wipe blood. She observed that the complainant's legs were swollen and that she was in pain. On being cross-examined she repeated having pleaded with the accused not to assault PW1 but the accused did not heed and that the accused went away with the stick he used to assault the victim.

8. PW4, Bethsheba Jenipher Wanjalu, a clinical officer at Wanguli dispensary, testified that on 27/4/2017 she treated the complainant who had soft tissue injuries. Her clothes were muddy and she noted tenderness on her chest, abdomen and back and on the muscles behind the leg with mild swelling. The complainant also had a cut on the right index toe and the age of injuries was one day with the probable weapon being a blunt object. She defined the degree of injuries to be harm.

9. On cross examination she stated that the complainant had a bleeding toe when she went to the hospital and was treated as an outpatient.

10. PW5, No xxx PC Evans Rotich, of Mbale police station, and the investigating officer testified that on 28/4/2017, he received PW2 and PW1 at the station who reported that PW1 had been assaulted by the appellant on 26/4/2017. He proceeded to arrest the appellant and collected evidence namely the muddy skirt the complainant had worn and a white piece of cloth.

11. On cross examination he stated that he did not recover the *rungu* that was used to beat the complainant, that the child had a healed wound on the leg and was treated as an outpatient.

12. In his defence, the appellant testified on oath and said that on 26/4/2017 she was at her compound when she heard children crying near the church and when she rushed there, she found her children, EW child and that of A who started running to their homes all of them crying after they had fought. Later in the day she was informed by the village elder that she had assaulted the complainant claims which she refuted. She claimed that she was not in good terms with the mother to the complainant but had no problem with the complainant.

13. Judgment was subsequently delivered and the accused person was convicted and sentenced to one (1) year imprisonment. That verdict aggrieved the appellant who then lodged a memorandum of appeal dated May 29, 2018 setting out the fault with the conviction and sentence to that; the learned trial magistrate; erred in law by convicting the appellant based on contradicting evidence from witnesses; by upholding that a minor of 10 years could be assaulted by an adult using blows and kicks and

fists but suffered minor injuries; by finding it was the appellant who assaulted the complainant when in essence the injuries sustained was as a result of a fight between children who were playing; by meeting a custodial sentence without an option of a fine and/or non-custodial sentence that promote a decongestion of penal institutes which sentence was otherwise harsh and lastly that the conviction was against the weight of evidence on record.

14. The appeal was directed to be canvassed by way of written submissions and the parties have filed their respective submissions. It is the submission of the appellant that none of the prosecution witnesses saw the appellant assaulting the complainant and that PW3 only informed the appellant to stop beating the complainant but did not state which part of the complainant's body the appellant was beating.

15. She further submits that the testimonies of the prosecution witnesses were marred with contradiction because PW1, PW2, PW3 and PW5 all testified that the complainant was wearing a flowered grey skirt whereas PW4 testified that the complainant had worn a blue skirt.

16. For the respondent, it is submitted that all the elements of the crime of assault as defined in the case of *William Kiprotich Cheruiyot v Republic* [2021] eKLR were proved beyond reasonable doubt. In that decision the ingredients were identified to be, assaulting the complainant and occasioning bodily harm. It was underscored that PW1 narrated how she was beaten and injured by the appellant, and witnessed by PW3, which injuries were corroborated by the clinical officer, PW4, as comprising tenderness of the chest, abdomen, neck, tenderness to the muscles behind the leg which had mild swelling.

17. On the sentencing, the respondent argues that the one year meted on the appellant was within the law and further state that for this court to interfere with the sentence, it must be shown that the trial court applied a wrong principle of law of failed to apply the appropriate principles. The decision in case of *Shadrack Kipchoge Kogo v Republic,* criminal appeal No 253 of 2003 was cited for the proposition that sentencing is a matter at the discretion of the trial court.

Issue, Analysis and Determination

18. Having considered the proceedings of the trial court, the memorandum of appeal and the submissions by the appellant and that by the respondent, the issues that arise for determination by this court are as follows: -

    a) Whether the offence of assault causing actual bodily harm was proved beyond reasonable doubt against the appellant

    b) Whether the evidence of the prosecution witnesses was marred with inconsistencies and contradictions not safe to sustain a conviction

    c) Whether the sentence meted against the appellant was harsh

Whether the offence of assault causing actual bodily harm was proved beyond reasonable doubt against the appellant

19. The offence of assault causing actual bodily harm is created by sections 250 and 251 of the *Penal Code*, to be committed when any person unlawfully assaults another thereby occasioning to such other actual bodily harm. If convicted, the guilty is liable to imprisonment for five years.

20. From the stipulations of the statute and *stare decisis*, the essential elements of the offence assault causing actual bodily harm remain the unlawful act of assault upon the complainant or victim and consequence of occasioning actual bodily harm to him[1].

[1] See *Ndaa v Republic* [1985] eKLR

21. On assault on the complainant, PW1 and 3, two different witnesses who knew the appellant very well, being a neighbor to both, narrated how the complainant was beaten by the appellant using a stick all over her body. PW3 witnessed the appellant beat up the complainant and that she even tried to stop the beating by asking the appellant to wait for the complainant's mother. The appellant asserts the position that it was the children who fought and refuted claims that she beat up the complainant. In comparing the prosecution's evidence and that of the defence, the court finds that, if indeed the children had fought, and the children included those of the appellant, then the appellant in order to cast the credibility as being truthful, would have called her children as her witnesses to corroborate her statement that there was a fight that day which resulted in the injuries suffered by the complainant. She did not do that and the court thus holds and finds that her evidence did not sufficiently controvert that by the prosecution to be able to upset the prima facie case established by the prosecution.

22. On whether the assault occasioned actual bodily harm, the expression actual bodily harm consists of three words of the English language that demand nor receive no elaboration, and in the ordinary course and speech, should not receive any. The word harm is a synonym for injury. The word actual indicates that the injury, although there is no need for it to be permanent, should not be so trivial as to be wholly insignificant[2], while, bodily must only meant the physical human body as opposed to other attributes like reputation or soul. [3]

23. It was the testimony of PW4, a clinical officer who examined the complainant that the complainant had tenderness on her chest, abdomen and back and on the muscles behind the leg with mild swelling. The complainant also had a cut on the right index toe and the age of injuries was one day with the probable weapon being a blunt object. She assessed the injuries as harm. That evidence was never meaningfully challenged or shaken even upon cross examination with the consequence that no reasonable doubt is evident from the record as to the nature of the injury inflicted.

24. The court, therefore, finds that the offence of assault causing actual bodily harm was proved by the prosecution beyond reasonable doubt as against the appellant.

Whether the evidence of the prosecution witnesses was marred with inconsistencies and contradictions not safe to sustain a conviction

25. The appellant argues that PW1, PW2, PW3 and PW5 all testified that the complainant was wearing a flowered grey skirt whereas PW4 testified that the complainant had worn a 'bluish skirt'. It is worth noting that all the witnesses stated that the skirt was soiled with mud. It is therefore possible in this instant for PW4 to have found the dress to be bluish. By stating bluish one can tell she was unable to tell the color of the skirt with certainty. To cure this inconsistency, the skirt was tendered as evidence in court and all the witnesses identified it as the skirt the complainant had worn. It is to court a triviality that impacts not into the otherwise the totality of the cogent evidence by the prosecution. Only material contradictions may vitiate a conviction. Not just any inconsistency even one is flimsy. It is thus the finding of the court that the cited inconsistency on the color of the skirt worn by the complainant on the material day was cured by its production as an exhibit.

Whether the sentence meted against the appellant was harsh

26. Sentencing is the discretion of the trial court and the only time an appellate court would interfere with the sentence imposed by the trial court is if the sentence imposed is not legal or is so harsh to amount

2 Section 4, *Penal Code*, definition of harm

3 *R v Chan-Fook* [1994] 2 All ER 557

to miscarriage of justice. This was the holding of the court of appeal in *Shadrack Kipchoge Kogo vs Republic*, Eldoret Criminal Appeal No 253 of 2003 (quoted in *Arthur Muya Muriuki vs ~Republic* (2015) eKLR), where it was observed as follows: -

> " Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred."

27. Section 251 of the *Penal Code* provides that a person found guilty of the offence of assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years. The appellant was sentenced to one-year imprisonment which is within the sentencing prescribed under section 251. The court appreciates that the sentence cannot be termed excessive nor too harsh as to demand interference by this court.

28. However, it is a consideration under the sentencing policy that, where appropriate, custodial sentence can give way to alternatives. To this court, misdemeanors should as of necessity attract the available non-custodial sentences and the provisions of section 28 of the *Penal Code*, point that position of the law.

29. In this matter however, the trial court gave a reason for the sentence to be the rampancy of the offence in the area, the detestable conduct of the appellant against a hapless minor, the interests of the child and a norm and value of the law and considered imprisonment the option best to serve the object of deterrence. For the reason that the trial court gave a reason for its choice of the appropriate sentence, the court discerns no justification to interfere. In any event, the term imposed has since lapsed and no just course would be served with giving an alternative sentence. The court thus finds no reason to interfere with the sentence imposed by the trial court.

30. Accordingly, for the reasons set out above, it is the courts ultimate finding that this appeal lacks merit and thus fails and is dismissed. The conviction and sentencing of the appellant is hereby upheld and the bond pending appeal granted to the Appellant is hereby cancelled.

31. Accused to be taken back to Prison to conclude her sentence. She is committed at Kakamega Women Prison.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 24TH DAY OF MARCH 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Appellant in person

Ms. Chala for the Respondent

Court Assistant: Polycap