



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. E077 OF 2021**

**MICHAEL SAWENJA WANGILA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgement and sentence of Hon.*

*M. Munyekenye, SPM, dated 29<sup>th</sup> June, 2021 in the SPM's Court at*

*Webuye, in Criminal No.751 of 2019, Republic vs Michael Sawenja Wangila)*

**JUDGEMENT**

The appellant has appealed against his conviction and sentence of three (3) years imprisonment in respect of the offences of assault contrary to section 251 of the Penal Code (Cap 63) Laws of Kenya.

In this court the appellant has raised five (5) grounds of appeal in his petition of appeal.

For convenience, I will first summarize both the evidence of the prosecution and the defence. The evidence of the complainant namely Everlyne Sawenja (Pw 1) was that the appellant is her husband. Pw 1 continued to testify as follows. On 30/10/2019 at 10.00 pm she had gone to the kitchen to prepare food. The kitchen is separate from the main house. When she returned to the main house, she knocked but the appellant did not open. She then went to the main door and the appellant went to open the door. The appellant had a wooden club in his hands. He suddenly started to hit the complainant with the club. She fell down. The appellant then who had a knife in his hands now proceeded to kick the complainant as well as using blows. She was pregnant and these kicks and blows affected the baby.

Pw 1 was injured in the right hand where she was hit with a club. The appellant held her head and knocked it on the ground. She screamed. Nathan Nyongesa, who was the village elder (Pw 2) and a neighbour went to her rescue. Pw 2 successfully rescued her. She went and slept in the house of Pw 2.

The complainant was taken to Webuye district hospital where she was examined by John Wambulwa, a clinical officer on 1/11/2019. John Wambulwa upon examination made the following findings. Pw 1 was aged 27 years. She had an injury on the lips, frontal part of the stomach and on the upper part of her hand. The degree of harm was classified as harm. A blunt object was used. The report of the examination was produced by Dr. Edward Vilembwa (Pw 4). Pw 4 testified that John Wambulwa was transferred from Webuye district hospital and that he worked with him and was familiar with his handwriting and signature. Pw 4 then produced the P3 form as P exhibit 2 and the treatment notes as P exhibit 1; without any objection by the appellant.

In addition to the foregoing witnesses, the prosecution called Nathan Nyongesa (Pw 2), who went to the rescue of the complainant. Pw 2 found the appellant hitting the complainant outside their house. It was dark but their house had electricity and Pw 4 had a torch. The appellant was hitting the complainant and was threatening to cut whoever went near him. Upon arrival there the appellant stopped hitting the complainant and as a result the complainant ran towards Pw 2.

In cross examination Pw 2 testified that it was not the first time that the appellant was assaulting his wives. Pw 2 further testified that he had adjudicated several cases concerning the appellant.

No. 230452 Cpl Rose Miti was the investigating officer (Pw 3); who after recording statements from the witnesses charged the appellant with the offence of assault.

In his sworn evidence the appellant did not call any witnesses in his defence. He testified that the complainant was his wife; who on the material day prepared food which she did not eat since they had quarreled. He did not ask her where she had gone. After returning she

knocked the bedroom window and one window pane got broken. When she opened the door, the complainant got hold of his shirt and tore it. The appellant showed the court the torn shirt. In self defence, she hit the complainant with a slap. The appellant continued to testify that the complainant went back to the home of village elder. She stayed there for five days.

On 2/11/2019 the appellant was arrested as he was going to church.

In cross examination he admitted that he did not cross examine the complainant on the issue of the torn shirt and broken window.

In his submissions counsel for the appellant (Messrs BS LLP, advocates) has submitted in support of ground 1 that the appellant was convicted on contradictory evidence. In this regard, the evidence of the complainant was that the village elder was chased by the appellant and he ran away. The village elder denied running away but proceeded to rescue the complainant. I find that there is a contradiction in the evidence of Pw 1 and Pw 2 in that regard. However, I find that it is not a material contradiction; for it does not go to the root of the case.

Counsel also submitted that there was a contradiction in respect of the injuries sustained by the complainant. Pw 1 testified that she sustained injuries on the left side of her stomach, right hand and the baby was affected; whereas the clinical officer who examined her found injuries in the lips, frontal part of the stomach and on the upper part of her hand. I have re-assessed this evidence and I find that these are minor contradictions and are of no consequence. This submission lacks merit and I hereby dismiss it.

Counsel further submitted that the complainant did not identify the assault weapon that was used. I find that the weapon used was produced as exhibit Pexh 3. Pw 1 called it a club while Pw 3 called it a stick, which she produced as exhibit Pexh. 3. The court described it as a big stick. The production of the assault weapon in court cured all the defects in the manner in which Pw 1 and Pw 3 described it. I find no merit in this submission and I dismiss it.

Counsel also submitted there was a contradiction on the date when the complainant was assaulted. According to the complainant and the village elder the assault was on 30/10/2019 while Pw 3 and Pw 4 testified that the assault was on 31/10/2019. I find that the assault took place on 30/10/2019 and not 31/10/2019. I further find that this was not a material fact as it does not go to the root of the case. This submission lacks merit and is hereby dismissed.

Counsel has also submitted that the report of examination of the complainant popularly known as the P3 form was not produced by the maker namely John Wambulwa, a clinical officer. Instead it was produced by a colleague Pw 4. I find as persuasive the decision of this court (Ngaah Jairus, J) in J.M.K. V Republic (2017) e-KLR, which is on all fours with the instant appeal. I find that it is a condition precedent that the prosecution have to lay a foundation as to why the maker is unable to testify in terms of section 63 (1) of the Evidence Act, (Cap 80) Laws of Kenya. In the premises, I uphold this ground of appeal and I hereby sustain it with the result that the P3 form is hereby ruled inadmissible.

Furthermore, I find that the guards who were at the mask ought to have been called as witnesses including the son of the village elder (Pw 2), who accompanied Pw 2 to the scene of crime. I have drawn an adverse inference in that regard.

On sentence, the trial court found that the appellant was a habitual wife beater and proceeded to punish him because of the increment of domestic violence within the jurisdiction of the court.

I find that the appellant was a first offender and the admission of the evidence by the trial court in view of the fact that the appellant was unrepresented was not proper. I therefore rule as inadmissible that the appellant was a wife beater.

In the circumstances, I find that the offence proved is common assault with the result that the conviction for the offence of assault and the resulting sentence are hereby quashed.

In its place I convict the appellant of common assault contrary to section 250 of the Penal Code (Cap 63) Laws of Kenya; since it is a minor and cognate offence to assault contrary to section 251 of the Penal Code.

In the premises, I hereby impose a sentence of six months imprisonment and since he has been in custody for over that period, he is hereby ordered released unless he is held on other lawful warrants.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE THIS 28<sup>TH</sup> DAY OF JANUARY 2022.**

**J M BWONWONG'A**

**JUDGE**

In the presence of:-

Mr. Kinyua: Court Assistant

The appellant absent

Mr. Ayiekha for the Respondent