



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NUMBER E040 OF 2021

BETWEEN

NANCY KANANA M'MTWAMARI.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against conviction and sentence in Nkubu Principal Magistrate's Court Criminal No. 548 of 2020 by Hon. E.M.Ayuka (SRM) on 03.02.2021)

JUDGMENT

The Trial

1. NANCY KANANA M'MTWAMARI (*Appellant*) has filed this appeal against conviction and sentence on a charge of grievous harm contrary to section 234 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence were that:

On 17th August, 2020 at Dafur Market, Ndamene Locatio in Imenti South Sub-County within Meru County unlawfully did grievous harm to Maricella Nchugune

Prosecution case

2. The prosecution called a total of five (5) witnesses in support of their case. PW1, **Maricella Nchugune**, the complainant recalled that on 17.08.2020, she found her grandchild in a certain house and as she was pleading with her to go with her, Appellant pounced on her, strangled and punched her on the after which she armed herself with a panga and a metal rod with which she attacked her causing her bodily injuries and also bit her on the right ear and right thumb. **PW2 Janard Guantai** was attracted to the scene by screams and he stated he saw Appellant cut complainant on the right hand with a panga. Complainant was treated and examined by **Moses Baiyenia (PW3)** a clinical officer who found her with a 3cm deep cut on the forehead, 6 cm deep cut with tendon involvement on right arm tender, thigh and bruises on the knee laceration on right side of face, swollen, tender and dark eyes, human bite on right ear and upper lip was swollen with an open wound on the inner aspect. The witness prepared the P3 form **PEXH. 1** in which he assessed the degree of injury as grievous harm. **Francis Nkando** arrived at the scene to find complainant who was bleeding from the head being attacked by Appellant. Upon receiving complainant's report, **CPL Raymond Ndege (PW4)** commenced investigations and subsequently arrested Appellant and caused her to be charged.

Defence case

3. In her defence, complainant denied the offence. She stated that complainant went to her bar in company of a man with whom they got drunk. It was her evidence that complainant asked the man to give her Kshs. 500/- and he declined and beat her up.

4. By a judgment dated 03rd February, 2021, Appellant was convicted and sentenced to serve 7 years' imprisonment.

The appeal

5. Aggrieved by the conviction and sentence, Appellant appealed and raised 8 grounds which I have summarized into two grounds that:

1. The prosecution case was not proved

2. The defence was not given due consideration

Analysis and determination

6. This is the first appellate court; I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

3. The legal onus is always on the prosecution to prove its case beyond reasonable doubt (See **Ramanlal Trambakal Bhatt V Republic (1957) EA 332**). I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions on behalf of both the state and the Respondent.

4. Whereas the complainant and her witnesses maintained throughout their evidence in chief and cross-examination that it was Appellant that attacked and injured the Complainant, the Respondent did raise the issue that Complainant was injured by another man until at the time of giving her defence.

5. I have considered the analysis of the prosecution case *vis a vis* the defence. A defence such as the one raised by the Appellant ought to have been raised at the earliest opportunity to enable the prosecution test it and not at the tail end when the complainant and her witnesses would have no opportunity to respond to it. The trial magistrate rightly appreciated that fact and rightly found, that the defence denied the prosecution witnesses an opportunity to respond to it thereby greatly weakening the credibility of the defence.

6. From the totality of the evidence., I am persuaded as was the trial magistrate that the complainant’s evidence that it was the Appellant that assaulted her was well corroborated and the defence therefore rightly rejected.

7. As to whether the prosecution proved the charge of grievous harm, I have considered the provisions of Section 4 of the Penal Code which defines grievous harm as any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.

8. The extent of the injuries inflicted on the complainant which included a 3cm deep cut on the forehead and a 6 cm deep cut with tendon involvement on right arm among others leave no doubt in the mind of the court that the prosecution indeed proved that complainant suffered serious injuries to her external organs and that the trial magistrate rightly found her guilty of causing grievous harm to the complainant.

9. Concerning the sentence, Section 234 of *the Act* provides that:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

10. Whereas there is no dispute that complainant was seriously injured, Appellant is a first offender. Generally, where a person is said to be a **first time offender**, the court usually imposes a lesser **sentence** as opposed to if the accused was a repeat offender. This view is subject to the discretion of the court as other factors such as aggravating circumstances are put into consideration in deciding the appropriate sentence in the circumstances of each case.

11. The trial court in its discretion imposed a lawful 7-year sentence. Complainant in mitigation offered an apology and commitment not to commit the offence again. Consequently, I confirm the conviction but substitute the 7-year imprisonment term with a **2-year imprisonment term** from date of conviction. It is so ordered.

DATED THIS 25TH DAY OF NOVEMBER,2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Appellant - Present

For the Appellant - Ms. Maore Advocate

For the State - Ms. Mwaniki