



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO 22 OF 2020

RUTH NYANCHAMA ONCHARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 853 of 2017 by the Senior Resident Magistrate – Hon. S.K. Onjoro delivered on 14th February, 2020 at Kisii)

JUDGMENT

- 1. Ruth Nyanchama Onchari**, the appellant herein was convicted and sentenced to 18 months' imprisonment for the offence of assault causing actual bodily harm contrary to **section 251 of the Penal Code**. The particulars being that on 17th April 2017 at Darajambili Market, Kisii Central District, within Kisii County willfully and unlawfully assaulted MARY NYAKUNDI thereby occasioning her actual bodily harm.
- The appellant aggrieved by the said sentence moved to this court challenging both the conviction and sentence.
- This being the first appellate court, it is my duty to evaluate and reconsider afresh the evidence on record so as to arrive at my own conclusion while taking cognizance of the fact that I did not have the opportunity to see the demeanor of the witnesses (**see: *Okeno v Republic [1972] EA 32***).
- Mary Kwamboka Nyakundi**, (Pw1) testified that on the material day she went to Darajambili where she sells jikos and metal boxes and found that the appellant had put her goods at her place of business. She asked the appellant why her goods were placed on the said area and the appellant's daughter and husband suddenly surrounded her and accused her of being a witch. When she insisted that the items be removed, the appellant took a stone and hit her on the side of her head. She testified that she was rescued and taken to the hospital.
- Vincent Nyangoto Saboke** (Pw2) testified that on 17th April 2017 he saw Pw1 and the appellant arguing. The appellant hit Pw1's head with a stone and he intervened by pulling Pw1 away.
- Daniel Nyameino** (Pw3) examined Pw1 on the 17.4.2017 and filled her P3 form. He concluded after examining Pw1 that the injury was harm.
- Olivia Oluoch** (Pw4) told court that he is stationed at Kisii Police station. He testified that a report by Pw1 was made to the station. Pw1 alleged that the appellant had displayed her goods by her door thereby denying Pw1 space to display her own goods. The appellant, her husband and her daughter engaged in a tussle with Pw1 that led to the appellant hitting Pw1 with a stone. Pw4 visited the scene and confirmed that their businesses were adjacent to each other. Her investigations revealed that it was not the first time the appellant was causing chaos. She told court that after receiving the filled P3 form she proceeded to arrest the appellant.
- Mr. Otieno, state counsel, made oral submissions that the prosecution's evidence was sufficient to sustain a conviction but the 18 months' sentence was excessive and harsh and urged the court to relook the sentence.
- The appellant was directed to file written submissions and told court that she had filed the same, in what is titled 'Petition of Appeal'. The appellant contends that she reported to Kisii police station vide OB No 13/17/4/2019 that she was assaulted by Pw1. Pw1 later reported her assault incident vide OB/21/17/4/2017 and that the trial court failed to take note of the sequence of the reports made at the police station.

DETERMINATION

10. For the prosecution to prove the offence of assault causing actual bodily harm, it must prove that the appellant assaulted the complainant and occasioned her actual bodily harm (see *Ndaa v Republic [1984] KLR*).

11. Section 251 of the Penal code provides as follows: -

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.”

12. *Alex Kinyua Murakaru v Republic [2015] eKLR* John M. Mativo held that:

“Thus, actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic. To make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (mens rea) and the assault must have taken place (actus reus).”

13. Pw1 testified that the appellant hit her with a stone and her evidence is corroborated by the testimony of Pw2 who witnessed the ordeal. Pw2 testified that the appellant picked up a stone, hit Pw1 on the left side of her head and he intervened by pulling Pw1 away.

14. *Daniel Nyameiono* (Pw3) based at Kisii teaching and referral hospital examined Pw1 and concluded on the P3 form that the degree of Pw1’s injury was harm. He recalled that on 17th April 2017 he examined Pw1’s head and neck. He observed that, there was a clean dressing the left side of her head and he noted that Pw1 experienced pain as he removed the dressing. He told court that there was a crush stitched wound on the left side of her head which was tender and the surrounding area was swollen. He testified that the weapon used to inflict the injuries was blunt. Pw3 testified that Pw1 also had blood stains on the left side of the chest and he approximated that the injuries must have occurred 3-4 hours before the examination.

15. The appellant has also faulted the trial court for not considering her case against Pw1 whom she reported to have assaulted her. The office of the Director of Public Prosecutions is independent body with the discretion to commence criminal proceedings against any person without the consent of any person or authority. **Article 157(10)** of the **Constitution of Kenya** provides that:

“The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

16. The office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law (see *Kenya Commercial Bank Limited & 2 Others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2011 [2013]eKLR*). It therefore follows that the trial court had no powers to direct the office of the Director of Public Prosecution to prosecute Pw1.

17. Having considered the evidence of Pw1, Pw2 and Pw3, I find that the prosecution proved that the appellant assaulted Pw1, occasioning her actual bodily harm. This court therefore affirms the conviction.

18. I now turn to the issue of sentence. In the case of *Macharia v Republic [2003] KLR 115* the court stated as follows:

“The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence.....The court will also not ordinarily interfere with the discretion exercised by a trial judge unless as was held in *James vs Republic [1950] EA 147*. It is evident that the Judge has acted upon some wrong principles or overlooked some material facts.”

19. In *Vitalis Okoth Ibrahim v Republic [2018] eKLR* the court upheld the sentence of a fine of Kshs. 20,000/= in default, 4 months’ imprisonment for assault causing actual bodily harm after considering that the 1st and 2nd appellants therein were previous convicts for the same offence.

20. In this instant case the state indicated that it did not have any previous records on the appellant an indication that the appellant was a first offender and I find that the 18 months’ sentence was excessive in the circumstance.

21. Consequently, I hereby allow the appellant’s appeal on sentence, set aside the 18 months’ sentence meted on her and substitute the same with a term of 4 months’ imprisonment from 14.2.2020 the date of sentence by the trial court.

Dated, signed and delivered at KISII this 17th day of June 2020.

R.E. OUGO

JUDGE

In the presence of:

Appellant In Person

Mr. Kaino Senior Prosecution Counsel Office of the DPP

Ms. Rael Court Assistant