



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 18 OF 2018

BETWEEN

REPUBLICAPPELLANT

AND

CONSOLATA CHEYECH RESPONDENT

(Being an appeal by the state against the judgment of P. Y. Kulecho, Resident Magistrate dated 28.9.2018 in Kapenguria PMCCr case no. 482 of 2018)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The respondent herein, Consolata Cheyech was the accused person in Kapenguria PMCCr. Case no. 482 of 2018. In the case, the respondent was charged with *grievous harm contrary to section 234 of the Penal Code*, the particulars being that on the 23rd day of March 2018 at Chepareria Village of West Pokot County willfully and unlawfully did grievous harm to Jessiah Chesang. The respondent pleaded not guilty to the charge. The case then proceeded to hearing during which the prosecution called 6 witnesses to testify against the appellant.
2. At the close of the prosecution case, the respondent was found to have a case to answer and placed on her defence. She is the only one who gave evidence in her defence.
3. The learned trial court thereafter carefully analyzed the evidence as required by law. Upon the said analysis, the trial court reached the conclusion that the prosecution had not proved the case against the respondent to the required standard of proof namely beyond reasonable doubt. The court proceeded to acquit the respondent under *section 215 of the Criminal Procedure Code*.

The appeal

4. The appellant was aggrieved by the order of acquittal and preferred this appeal on grounds:-
 - i. **THAT the learned trial magistrate erred in law by acquitting the respondent when the prosecution had discharged their mandate of proofing (sic) their case beyond reasonable doubt.**
 - ii. **THAT the trial magistrate erred in not analyzing the evidence on record hence arriving at a wrong judgment.**
 - iii. **THAT the trial magistrate erred in believing that the respondent had also been assaulted and accepting her P3 [form] yet she had not presented the same to the investigators.**
 - iv. **THAT the trial magistrate erred in law by acting like respondent's advocate rather than being an arbitrator.**
5. The appellant prays that the acquittal order be set aside and an order for conviction or retrial be made.
6. This being a first appeal, this court is under a duty to reconsider and evaluate the whole of the evidence afresh with a view to reaching its own conclusions in the matter save to remember and make allowance for the fact that it has no opportunity of seeing and hearing the

witnesses who testified during the trial.

The Prosecution Case

7. The case for the prosecution is brief. The respondent and the complainant, PW1, were neighbours at their business premises at Chepareria. On 23rd March 2018, PW1 was in her shop when the respondent confronted her and demanded to know what the respondent had told Cheru. The complainant denied any wrong doing, but the respondent attacked her. The two were separated by one Nelly Chepchumba, PW4. PW1 then closed her shop and went home. At about 7.00pm when PW1 was seated on the floor of her house, the respondent, who was holding what looked like a knife, went to where PW1 was and hit her with that thing. PW1 realized that what the respondent hit her with was a piece of wood.

8. The respondent hit PW1 first on the mouth, knocking out some teeth, and also hit her on the tummy. PW1 was pregnant. PW1's son, Elias Krop screamed. Neighbours rushed to the scene and separated PW1 and the respondent who were fighting. PW1 was taken to Chepareria for medication. Later, PW1 reported the matter to the police, leading to the arrest of the respondent. The police issued PW1 with a P3 form and referred her to Kapenguria County Referral Hospital where she was treated and her P3 form – Pexhibit 1 –filled by Dr. Kiprotich Ksang, PW5. From the examination carried out by PW5, PW1 suffered the following injuries:-

- Broken upper tooth
- Chest pains
- Stomach pains, with pain on palpitation
- Left hand pain

9. PW5 carried out the examination some 3 days after the incident. PW1 was treated for tetanus and was also given antibiotics as well as painkillers. The degree of injury was classified as harm. During cross examination, PW5 stated that he did not see any injury marks on PW1's mouth, though one tooth was broken. PW5 also confirmed that PW1 had a cut wound on the hand.

10. PW6 was number 87999 PC Charles Wang'ang'a of Kapenguria Police Station. He was the investigating officer in this case. He received PW1's report at the station on 23rd March 2018. PW6 testified that PW1 was missing two front teeth. He issued the P3 form to PW1. PW6 also testified that the respondent had also been issued with a P3 form; but he decided to only charge the respondent.

The Defence Case

11. The respondent gave sworn evidence. She testified that on 23rd march 2018 at about 7.00pm she was at home lighting her charcoal stove when PW1 approached, holding a cooking stick. PW1 hit her with the cooking stick, and then grabbed her by the braids on her head. The respondent screamed. PW1 bit her. Two ladies named Margy and Jane went to respondent's aid. None of the two ladies was called as a witness by the respondent. Though PW1 told the two ladies that she had lost 2 teeth, the respondent did not see any bleeding on PW1's mouth. The respondent stated that upon reporting the matter, she was issued with a P3 form. She produced the P3 form as Dexhibit 1.

Submissions

12. Both the appellant and respondent made their rival oral submissions. The appellant faulted the trial court for allowing the respondent to personally produce the P3 form instead of having the same produced by a medical officer. The appellant also submitted that with the evidence on record, the trial court erred in acquitting the respondent, hence this appeal.

13. The respondent denied the allegations by PW1, though she conceded that her P3 form – Dexhibit 1 should have been produced by a medical officer. The respondent submitted that it was PW1 who attacked her and pulled the braids on her head. She urged the court to dismiss the appeal for lack of evidence.

Issues, Analysis and Determination

14. The only issue in this case is whether the prosecution proved its case against the appellant beyond any reasonable doubt. While the appellant contends that the prosecution did so, the respondent contends otherwise.

15. There is a dispute in this case as to who attacked the other person between PW1 and the respondent. Both allege they were attacked in their homes. What is therefore before the court is PW1's word against the respondent. In my considered view, there is no sufficient evidence in support of the prosecution's case.

16. PW1 testified that at 7.00pm on 23rd March 2018, she was sitting on the floor in her house. She does not say what she was doing but PW2, a minor aged 11 years stated that his mother was making supper when she was confronted by the respondent. PW2 does not say whether the confrontation by the respondent was a physical attack or not, but from what he says in the 'last part of his evidence in chief, the respondent did not attack PW1,' though in cross examination, PW2 stated "**you entered the house. You had something in your hands hidden at the back. You attacked my mother.**" In my considered view, PW2 who was not taken through a *voir dire* examination was not sure of whether or not the respondent attacked PW1.

17. It is also not clear whether PW1 lost one or two teeth. PW1 stated she lost some teeth during the attack, yet PW5 who examined PW1

and produced Pexhibit 1, told the court that PW1 had one missing tooth, without saying whether the loss was old or new. This evidence thus contradicts the evidence of both PW1 and PW6. I also find from the evidence of both PW1 and the respondent that there was a fight between the two of them, and that being the case the learned trial court was correct in concluding that the police should have charged PW1 and the respondent with affray. In fact PW6 does not explain why he elected to charge the respondent in this case.

Conclusion

18. For the reasons given above, I find no merit in the appellant's appeal and accordingly dismiss the same.

19. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 30th day of April, 2019.

RUTH N. SITATI

JUDGE

In the Presence of

Present in person – for Appellant

Mr. Thuo for Respondent

Mr. Juma Barasa – Court Assistant