REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 49 OF 2018

WANJIKU KOOME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the whole judgement of Hon Kibelion (SRM) delivered on 22.5.2018 in Criminal Case 417 of 2016)

ARISING FROM

REPUBLIC .....PROSECUTOR

VERSUS

WANJIKU KOOME.....ACCUSED

JUDGEMENT

1. The appellant was charged and convicted of Causing Grievous Harm contrary to Section 234 of the ***Penal Code*** by the Chief Magistrates Court Machakos. She was subsequently sentenced to imprisonment for 7 years. This appeal is against conviction and the sentence.

2. The prosecution marshalled 4 witnesses in support of their case. PW1**, Evelyne Uside Gaire,** the complainant in the case told court that on 3rd November, 2015, she was outside Cookport Building where she used to live when about 11.00 a.m. she was inside a kiosk with one Christine and the vendor when the appellant went into the kiosk, picked the boiling maize and beans and poured them on her and further hit her with the jiko. As a result, she sustained burns on her face, chest and right hand. She was then taken to hospital by friends on her way to the hospital she passed by Kyumbi Police post. She testified that she was admitted in hospital for a period of 2 weeks and 2 days and in the meantime recorded her statement. Later she was issued with a P3 form which was filled. According to her, she did not know the appellant before that date but had just heard her name.

3. It was her evidence that the incident was witnessed by the said **Christine** and admitted that there were allegations that she had a relationship with the appellant's husband.

4. PW2, **Jonathan Musyoka Kamia,** an assistant chief for Koza sub location testified that on 3rd November, 2015, he received a call from members of public that there was an incident at Konza market at about 9.30 a.m. He was informed that there was a woman who had poured boiling mixture of beans and maize on another woman. He then relayed the information to the police and by the time he arrived at the scene, he found the appellant having already been arrested while the complainant was being taken to the hospital. It was his evidence that the complainant had burns from the face to the chest.

5. PW3, **Cpl Maureen Otieno,** from Kyumbi Police Station was at the station when she was assigned a duty to investigate the incident. By that time the appellant was in custody while the complainant was at Machakos Level 5. The victim had reported that on 3rd November, 2015 while in Konza at a restaurant she was called by her friend Christine who sells fruits and food to go and select oranges while selecting fruits the appellant and her mother in law entered the hotel. That the appellant then picked boiling *githeri* and poured on the victim; the chief was called who came with Aps and arrested the suspect. The victim was taken to Kyumbi police station by a good Samaritan. Later she was

issued with treatment notes to be taken to hospital and was taken to Machakos Level 5 hospital. Pw3 went to see the victim on 13th November, 2016 and she had not been discharged but could record a statement which she did and issued her with a P3 form. Pw3 also recorded statements form other witnesses and charged the appellant. She testified that in her investigation, she learnt that the genesis of this incident was allegations that the victim had an affair with the appellant's husband. She was not informed whether any exhibit was retrieved from the scene. On cross-examination, she testified that she did not find any exhibit at the scene. She issued the P3 form on the 3rd November, 2015 and the same was filled after 6 months after the incident.

6. PW4**, Dr John Mutunga,** examined the complainant and filed a P3 form for her.

7. In her evidence, the appellant testified that on 3rd November, 2015 she went to the hospital to take her mother in law and her mother in law was treated but she did not have money to pay for drugs. She decided to go to the bar within Konza where her husband was. It was her testimony that her husband was living with a woman in the bar together with her mother in law and when she arrived at the bar, there was a small iron sheet hotel where she saw her husband with the woman he was having an affair with. She went to the hotel and the woman stood on the door and told refused her from talking to her husband and when she blocked her from entering the hotel she forced her way. She told court that the hotel had two rooms; the first room is the kitchen then the other is where the service was done. She told court that the woman blocked her and they pushed each other and in the process the complainant slid and fell on the said *githeri*. She therefore denied that she poured the same on the complainant. According to her, since the complainant is big bodied, she could not manage to push her. As a result, she also suffered a burn on the hand when the mixture when it splashed on her but was not treated.

8. This appeal was conceded by the Respondent through learned prosecution counsel, **Miss Mogoi**.

9. I have considered the material on record as well as the submissions made. In this case, it is clear that the only available evidence as to how the incident took place was that of the complainant and the appellant. While the complainant stated that the appellant poured hot boiling maize and beans on her, the appellant stated that the complainant fell on the said boiling maize and beans following an altercation between them. Although it was stated that one Christine witnessed the incident, she was never called to testify in the case.

10. Viscount Sankey L.C in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

11. In Sekitoliko vs. Uganga (1967) EA 53 it was held that:

> **"The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of he accused is depended upon the strength of the prosecution case and not the weakness of the defence case."**

12. Brennan, J in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated:-

> **"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

13. In 1997, the Supreme Court of Canada in **R vs. Lifchus [1997] 3 SCR 320** suggested the following explanation:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond reasonable doubt."**

14. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in**

the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."

15. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR**:

> **"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."**

16. In this case the appellant was sentenced to serve 7 years in prison. In my view, without any other corroborative evidence, the only evidence available on record was insufficient to prove the case beyond reasonable doubt in light of the appellant's explanation as to how the incident occurred. I agree with the learned prosecution counsel that the appellant's conviction was unsafe. I therefore allow the appeal, set aside the conviction and quash the sentence. I direct that the appellant be at liberty forthwith unless otherwise lawfully held.

17. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 29th day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Nthiwa for the Appellant

Ms Mogoi for the Respondent

CA Geoffrey