



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO.48 OF 2016

NANCY NJERI NJAGI.....APPELLANT

VERUS

REPUBLI..... RESPONDNET

JUDGMENT

The appellant was charged with the offence of causing grievous harm Contrary to 234 of Penal Code. The particulars of the offence are that the appellant on the 25th day of July 2015 at Nyalari village of Kathanjuri sub-location within Embu County, unlawfully did grievous harm to RISPER NJERI MWANIKI.

The trial court convicted the appellant and sentenced her to three years imprisonment.

There are eight grounds of appeal namely:

- 1. That the learned trial Magistrate erred in law and fact and seriously misdirected himself by failing to find the evidence tendered before court was insufficient to sustain the charge of grievous harm.***
- 2. That the learned trial Magistrate erred in law and fact and seriously misdirected himself by failing to meticulously analyze the evidence of PW4 who never produced any medical records to support his so called finding.***
- 3. That the learned Magistrate erred in law by failing to call as witness the alleged E.N.T expert to whom the complainant was referred thereby failing to exercise the courts discretion hence consequently made his judgment on insufficient evidence; a miscarriage of justice was occasioned to the appellant.***
- 4. That the learned Magistrate erred in law by failing to appreciate the fact that both the appellant and the complainant fought in public and hence failed to advice on the charge of affray instead of the charge of grievous harm.***
- 5. That the learned magistrate erred in law and fact by failing to appreciate the fact that according to prosecution witness the appellant allegedly assaulted the complainant by hands and never used any object much less a blunt one as alleged hence arrived at judgment against the weight of the evidence tendered before the court.***
- 6. That the learned trial magistrate erred in law and fact by failing to consider that the appellant was a mother of an infant of two years who needed motherly care and further 1st offender who would have benefited from a non custodial sentence consequently the appellant's constitutional rights were grossly violated.***
- 7. That the learned trial Magistrate erred in law and fact by failing to consider that the appellant was remorseful on mitigation hence failed to give the appellant the benefit of doubt.***
- 8. That the learned trial magistrate erred in law and fact by failing to consider the appellant's entire evidence but instead improperly analyzed the evidence for the respondent in isolation and hence arrived at a wrong conclusion.***

Miss Wairimu appeared for the appellant. Counsel for the appellant contend in her submission that the prosecution did not prove its case. The injuries suffered by the alleged complainant cannot be categorized as grievous harm. The threshold for grievous harm is that the injury must be permanent. The complainant had an injury on her ear but it was not a permanent injury. The complainant was seen by the clinical officer ten days after the incident. When the complainant testified seven months after the incident, she did not complain that she had pain or had lost her hearing on the left ear. No treatment notes were produced. No E.N.T specialist report was also produced. There was no

evidence that the complainant's eardrum was damaged.

Miss Nandwa, prosecution counsel, opposed the appeal. Counsel contend that Section 4 of the Penal Code defines grievous harm as follows:

“grievous harm” means any harm which amounts to a main 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:

It is submitted that the complainant suffered serious injuries that were classified as grievous harm. The complainant's eardrum was damaged. It is the appellant who caused the injury. The trial court sentenced the appellant to serve 3 years Imprisonment and the sentence is lenient. The complainant is likely to lose her hearing.

Before the trial court five witnesses testified for the prosecution. The complainant **Risper Njeri** was in her shop on the 25.7.2015 at about 5.00p.m when the appellant and another lady went there. The appellant told her that she wanted to teach her a lesson. She started assaulting her using her fists. She fell down and the appellant continued to assault her. She screamed and her husband went there. The appellant and her colleague disappeared. The matter was reported at the Kathajuri AP camp and they were referred to Runyenyes Police station. She was later issued with a P3 form and was attended by a E.N.T specialist in Embu. The appellant simply started beating her without any reasons.

PW2 Venanzio Mwaniki Joel is PW1's husband. On 25.7.2015 at about 5.00pm he was at the back of his shop when he heard screams. He went out and saw the appellant trampling on his wife. The appellant was assaulting PW1 using her fists. When they saw him they started running away. The matter was reported to the Police. **PW3 Daniel** Mureithi Njiru is a boda boda operator. On the material day he had dropped a customer near the shop and was looking for ksh.200 change. He saw two ladies heading to the shop. Shortly the ladies started assaulting the shop owner. He saw PW2 appearing from behind the shop and the ladies ran away.

PW4 Stephen Mureithi Mugo is a clinical officer. He was stationed at the Runyenjes sub district hospital. He filled the P3 form on 5.8.2015. The complainant's left ear had blood discharge. He referred PW1 to an E.N.T specialist. At the time he filled the P3 form PW1 was awaiting repair of the eardrum. **PW5 PC Jackson Siachi** was stationed at Runyenjes Police Station. The case was reported on the same day 25.7.2015. He investigated the case and arrested the appellant on 11.9.2015.

In her unsworn defence the appellant testified that all the evidence against her was false. The complainant's husband was not present when the alleged incident occurred. The clinical officer did not produce the treatment notes used to treat the complainant. The investigations were not adequate. The investigations were shoddy and the blood stained clothes were not produced. **DW2 Jackline Karimi** testified that on the 25.7.2015 she went to the complainant's shop to get change. She found the appellant talking to the complainant. She heard the complainant tell the appellant that she is a prostitute. She then went home. She was also arrested but was later released.

The issue for determination is whether it is the appellant who assaulted PW1 and caused her grievous harm. The submissions by council for the appellant mainly concentrate on the issue of the injuries and whether the same can be classified as grievous harm. The incident took place at about 5.00pm. The evidence from both sides confirm that the appellant was at the complainant's shop. According to the appellant's witness, the complainant called her a prostitute. The appellant herself did not make such allegation. It is the evidence of the complainant that she was attacked by the appellant for no apparent reason. She suffered injuries and was treated. Her husband also saw the appellant attacking his wife. PW3 who is an independent witness also saw the appellant attacking PW1. The defence evidence is that all the prosecution evidence is false. The defence evidence does not raise any doubt on the prosecution case. Parties knew each other and the incident occurred during the day. I do find that it is the appellant who assaulted PW1 and caused her the injuries.

With regard to classification of the injuries, PW4 informed the court that the complainant had blood discharge from the left ear and he could not manage her. Section 4 of the Penal Code defines what grievous harm is. The definition does not insist that such an injury must be permanent. According to the definition the injury can be any maim which amounts to harm or a dangerous harm or seriously or permanently injures health, or which is likely to injure health or which extends to permanent disfigurement. The word harm is defined by the Penal Code as any bodily harm, disease or disorder whether permanent or temporarily. The evidence shows that the complainant suffered an injury on the ear. The P3 form indicate that blood was seen from the left ear. PW1 will require typanoplasty and was referred to E.N.T specialist. The injury was therefore likely to extend to permanent disfigurement. It is a dangerous harm. It was properly classified as grievous harm. The appellant cannot come before the court and say that she did not cause grievous harm but caused simple harm. The clinical officer testified and was cross examined on the injuries. There is no need to produce a report from a specialist. PW4 had sufficient knowledge to classify the injuries. He told the court that he had a Diploma in clinical Medicine and Surgery from Egerton University and a higher Diploma from Kenya Medical Training College. He saw the injuries and in his considered view they were serious.

Under Section 234 of the Penal Code the offence of grievous harm attracts a sentence of life imprisonment. A common assault under Section 250 attract a sentence of one year. Under Section 251 the offence of assault causing actual bodily harm attracts a sentence of five years. It is the appellant who assaulted the complainant. It was not a case of common assault. One of the grounds of appeal is that it was an affray. The evidence proves that it is the appellant who attacked the complainant. There was no fight between the two. The appellant was properly identified and the conviction is proper. I do find that the prosecution proved its case beyond reasonable doubt.

In the end I find that the appeal lacks merit and is hereby dismissed.

Dated and Signed at Marsabit this day of May 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 27th Day of June, 2018

F. MUCHEMI

JUDGE