REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO 12 OF 2018

ANNASTACIAH KALUCY MUTINDA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant was charged with offence of grievous harm contrary to Section 234 Penal Code.

2. Particulars being that on 13/08/2015, at Matooni village, Nzaui Sub-county, Makueni County willfully and unlawfully did grievous harm to Penina Loko Musyimi.

3. The Appellant pleaded not guilty and matter proceeded to full trial.

4. The Appellant was convicted and sentenced to a fine of Kshs.100,000/= and sentenced and in default to serve two years imprisonment.

5. Being aggrieved by the above decision, the Appellant lodged instant appeal and set out seven grounds of appeal namely:-

> ***1) That learned magistrate erred in law and in fact in convicting the Appellant while the prosecution had not proved their case beyond reasonable doubt as required by the law.***
>
> ***2) The learned magistrate erred in law and in fact in convicting the Appellant on the evidence of the complaint alone which evidence was not corroborated by any other independent evidence of an eye witness.***
>
> ***3) The learned magistrate erred in law and in fact in convicting the Appellant on allegations of a cut inflicted by a panga which panga was not produced in court as an exhibit in support of the charge.***
>
> ***4) The learned magistrate erred in law and fact in convicting the Appellant of the strength of a P3 form which was not supported by the original treatment notes from the hospital which first attended the complainant.***
>
> ***5) The learned magistrate erred in law and in fact in convicting the Appellant while the Appellant did not give any evidence in her defence.***
>
> ***6) The learned magistrate erred in law by failing to request and/ or guide the Appellant to give her defence on the charge and further erred in relying on the Appellant's purported mitigation as her defence in arriving at her conviction***
>
> ***7) The learned magistrate erred in giving the Appellant excessive sentence in the circumstances.***

6. When matter came for directions, the parties agreed to canvass, same by way of submissions.

7. The Appellant filed and served her submissions but the Respondent submitted orally.

APPELLANTS SUBMISSIONS

8. The first ground of the appeal is that the learned Magistrate erred in law and in fact by convicting the Accused/Appellant while the prosecution had not proved its case beyond reasonable doubt as required by law.

9. A close and serious analysis of the evidence adduced in court by the prosecution clearly shows that, there were a lot of doubts that the learned magistrate ought to have looked at regarding the occurrence of the alleged offence which doubts ought to have been exercised in favor of the Appellant/Accused in the lower court.

10. First, the offence is alleged to have been committed on the 13/08/2015 and reported to Emali Police Station. It was alleged to have been committed with a panga.

11. According to the P3 form, the matter was reported to the police station on the 14th September 2015. The date of the alleged offence was also recorded as 14th September 2015 but it was later cancelled to read 13/08/2015.

12. Thereafter the complainant was sent to hospital on 19/10/2015. The matter was therefore according to the record reported one month after its accordance a fact corroborated by PW4, the investigating officer and the complainant sent to hospital again one month later after reporting to the police.

13. The treatment card produced as Exh.2 shows the complainant had a history of medical attendance, wither first case being on 23/01/2015.

14. It is quite clear, that the second entry where a record of assault is shown was interfered with and to say the least, the dates shown doctored.

15. There was no indication in the first entry of the treatment card of anything to do with a fracture and the X-ray which purportedly showed a fracture was conducted a month later.

16. According to the complainant's evidence, she never mentioned anywhere, that she was cut or injured on her medical finger, the site of the injury indicated on the P3 form where an alleged fracture was found. It was also not mentioned in her initial treatment notes.

17. It is their humble submission that, an injury on a finger is distinct such that a complainant injured on a finger would clearly state that; he/she was injured on a finger and not on the hand, it is also my humble submission that, a fracture cannot take a month or two months without being attended given the serious pain that accompanies a fracture.

18. She therefore submit, the injury on the finger on which the charge against the Appellant was based was not inflicted by the appellant/accused and it was a therefore a framed up case.

19. The dates on the P3 form and the treatment notes, and the complainant's evidence casts serious doubts on whether the accused committed the offence.

20. The court should take note of the fact that, when the Appellant took her plea, according to the record, she first pleaded guilty but when requested to mitigate, she asked whether somebody who has been cut can put on a plasta. This question made the court, Hon. G. R Mutiso (PM) to automatically change her plea of guilty to plea of not guilty since this statement cast doubts on the Appellant's plea of guilty.

21. From the evidence on record there were eye witnesses at the scene. The complainant said in cross examination that the accused was with her children and the complainant was also with her children. None of those eye witnesses was called as witnesses by the prosecution.

22. Had the prosecution called one of those who were purportedly at the scene, then the prosecution's case would have been corroborated which the prosecution never did, thus the prosecution's case was therefore not proved beyond reasonable doubt.

23. PW2 was not an eye witness. She only received report after the alleged event. PW2 did not state the nature of injuries alleged by the complainant. PW3, the police officer admitted the complainant took a month before reporting the offence to the police station.

24. The question which the lower court ought to have asked itself is why the complainant took that long to report the matter to the police. The answer is simply because she had not been injured by the Appellant.

25. The complainant said in her cross-examination that the Appellant's husband later came and strangled her in September 2015 and pulled the injured hand. This further casts doubt on the accusation against the accused/Appellant.

26. PW4, the doctor, said he saw the complainant on 19th September 2015 and the X-ray was done on 14th September 2015. He stated that, the approximate age of the injury was weeks. He ruled out the possibility of the injury being beyond a month. From the time of the alleged offence on 13th August 2015 and the time the Doctor saw the complainant, it was more than one and half months.

27. Thus according to the evidence of PW4 it is clear, that the injury was not inflicted by the Appellant. If the court had considered the allegation by the complainant that she was strangled on the injured hand in September 2015, by the accused's husband, she would have had doubts whether the alleged injury was indeed inflicted by the Appellant.

28. As stated above, and as prayed in ground 2 of the appeal, the learned magistrate erred in law and in fact by failing to find that, the evidence of PW1 was not corroborated. All the other witnesses were not at the scene. The evidence of PW4 has not corroborated the charge of grievous harm. Indeed, PW4 stated that the age of the injuries was weeks while the alleged offence alleged took place more than one and a half months earlier thus exonerating the Accused/Appellant.

29. The object purportedly used by the Appellant/Accused in inflicting the injury, i.e. a panga, was not produced in court as an exhibit; the injury could therefore have been as a result of another object or even a fall, as raised in ground 4 of the memorandum of appeal.

30. In ground 5 of the appeal the learned magistrate erred in law in convicting the Appellant/Accused on a statement purporting to be her defence which statement was not a defence but mitigation.

31. It is my humble submission that the court failed to discharge its duty under Section 212 of the Criminal Procedure Code by failing to explain and guide the Accused/Appellant what a defence entails and that she was supposed to give her version of what transpired on the material day pertaining the charges facing her.

32. They submit that what the Appellant gave as her defence in the lower court was not a defence but a mitigation which mitigation could not amount to a defence and therefore convicting the Appellant without according her the opportunity to tender her defence and convicting on that that basis was a violation of the Appellant's Constitutional rights of a fair hearing as envisaged under Article 159 of the Constitution.

PROSECUTION SUBMISSION

33. In Respondent Submissions, it is submitted that, the sentence meted out was sufficient. There was option of fine of Kshs.100,000/=.

34. The prosecution evidence it is contented as sufficient, vide testimonies of PW1 and PW2 and P3 to warrant conviction. It is conceded that weapon allegedly used was not produced. However the prosecution supports the verdict.

35. The duty of a first appellate Court was set out in the celebrated case of **Okeno V. Republic (1972) E.A. 32** in the following terms;

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (3365) and the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters Vs. Sunday Post [1958] E.A. 424."***

EVIDENCE TENDERED

36. The prosecution called four witnesses and closed their case. PW1, Peninah Loko, complainant herein told court on 13/08/2015 at about 9.00 a.m. she was drawing water at a well designated for livestock while the accused was drawing water for making bricks.

37. She asked the accused to stop drawing water but she refused and continued drawing water. The children started abusing her and the accused joined asking her why she was protecting the water and whether it comes from her house. The accused had a panga which she was using to cut firewood for making bricks and cut her twice with it on the right hand using the blunt side.

38. The accused asked her child to hold her so that she could cut her to death. The accused elder son snatched the panga from her to stop her from cutting her. She reported to the Nyumba Kumi chairwoman who told her she would inform the chief.

39. She summoned the accused who pleaded for her forgiveness but she refused since she had been seriously injured. She was treated at Sultan Hamud Sub-county Hospital and referred for specialized treatment at Makindu Sub-county Hospital.

40. PW2, Phyllis Ndunge Mutuku, Nyumba Kumi member, told court on 13/08/2015, the complainant went to her farm crying and reported the accused had cut her with a panga on the hand. She had sustained injuries on the right hand.

41. She called and informed the assistant chief sent her to go talk to both the complainant and accused. She accompanied the complainant to the scene and tried to reconcile them but both had high tempers.

42. The complainant told her she had sustained serious injuries inflicted by the accused and the accused retorted she should let her go where she wanted. Since they could not be reconciled she referred the matter to the assistant chief.

43. PW3, No. 81343 Cpl. Antony Maina from Emali Police Station, Crime Office, and investigation officer herein told court on 14/09/2015 the complainant made a report the accused has assaulted her on 13/08/2015 as a result her hand had been broken. She had received first aid at Sultan Hamud Sub-county Hospital and referred for specialized treatment at Makindu Sub-county Hospital.

44. He issued her with a P3 form which was filled at Makindu sub-county Hospital and degree of injury assessed as maim. He recorded statement from other witnesses. He learnt that the accused had cut her right hand using a panga after they had quarreled over water from a community water project.

45. PW4, Doctor Meshack Nzioki, medical officer from Makindu Sub-county Hospital told court the P3 from the complainant was filled on 19/10/2015 and contained what was done to the patient and P3 findings upon examination. She had a swollen right hand presented on 24/08/2015. X-ray done on 14/09/2015 show fracture of the fifth metacarpal bone. He saw her on 19/10/2015. She was in fair general condition and well oriented.

46. On the right hand there was limited extension of the finger meaning she was not able to stretch the finger and limited use. There was also slight stiffness and thus recommended physiotherapy. There were also multiple scars on the finger and hand.

47. The approximate age of injury was weeks. The injury was caused by a blunt object. Treatment given was pain killers, antibiotics and plaster of paris applied on 15/09/2015 and removed on 15/11/2015. The degree of injury was assessed as main. P3 form (P. EXB. 1, treatment notes (P. EXB. 2) and X-ray (P. EXB. 3).

DEFENCE

48. At the close of the prosecution case the prosecution had established a prima facie case against the accused. Accordingly, she was put on her defence and she opted to give evidence on oath her defence and called no witness. DW1 Monicah John, accused, told court she was asking for forgiveness, she has children who depend on her, hers and orphaned children.

ISSUES, ANALYSIS AND DETERMINATION

49. After going through evidence on record and parties submission, I find the single issue is;

Whether the prosecution proved its case beyond reasonable doubt?

50. In criminal cases, the general rule is that the burden is on the prosecution to prove the guilt of the accused beyond a reasonable doubt and that the accused bears no legal burden. This is powerfully reflected in the judgement of Viscount Sankey in **Woolmington Vs DPP [1935] AC 462** where the "golden thread" of English law is referred to**.** It held that;

> ***"Throughout the web of English criminal law one golden thread is always to be seen. That is the duty of the prosecution to prove the prisoner's guilt subject to what I have said as to the defence of insanity and subject also to any statutory exception. He continues to say that 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 law of England and no attempt to whittle it down can be entertain."***

51. Section 107 of Evidence Act, Defines Burden of Proof-of essence to burden of proof is proving the matter in court. (2) Refers to the legal burden of proof.

52. Section 109. Specifically exemplifies the Rule in S. 107 and it talks about proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. If you do not discharge the burden of proof then you will not succeed in as far as that fact is concerned.

53. The offence in the instant matter is alleged to have been committed on the 13/08/2015 and reported to Emali Police Station. It was alleged to have been committed with a panga. According to the P3 form, the matter was reported to the police station on the 14th September, 2015.

54. The date of the alleged offence was also recorded as 14th September, 2015 but it was later cancelled to read 13/08/2015. Thereafter the complainant was sent to hospital on 19/10/2015.

55. The matter was therefore according to the record reported one month after its occurrence a fact corroborated by PW4 and the investigating officer PW3 who testified that, the complainant was sent to hospital again one month later after reporting to the police.

56. The treatment card produced as Exh.2 shows the complainant had a history of medical attendance, with first case being on 23/01/2015. It is quite clear, that the second entry where a record of assault is shown was interfered with. There was no indication in the first entry of the treatment card of anything to do with a fracture and the X-ray which purportedly showed a fracture was conducted a month later.

57. According to the complainant's evidence, she never mentioned anywhere, that she was cut or injured on her finger, the site of the injury indicated on the P3 form where an alleged fracture was found.

58. It was also not mentioned in her initial treatment notes. It is apparent that it took a month or two months without the alleged fracture being attended thus creating doubt as to the truthfulness of its existence given the serious pain that accompanies a fracture.

59. The complainant said in her cross-examination that the Appellant's husband later came and strangled her in September 2015 and pulled the injured hand. This further casts doubt on the accusation against the Accused/Appellant.

60. From the evidence on record there were eyewitnesses at the scene. The complainant said in cross examination that the accused was with her children and the complainant was also with her children. None of those eye witnesses was called as witnesses by the prosecution. Had the prosecution called one of those who were purportedly at the scene, then the prosecution's case would have been corroborated which the prosecution never did.

61. PW2 did not state the nature of injuries alleged by the complainant. PW3, the police officer admitted the complainant took a month before reporting the offence to the police station.

62. The question which the lower court ought to have asked itself is why the complainant took that long to report the matter to the police and even go to hospital.

63. PW4, the doctor, said he saw the complainant on 19th September, 2015 and the X-ray was done on 14th September, 2015. He stated that, the approximate age of the injury was weeks. He ruled out the possibility of the injury being beyond a month. From the time of the alleged offence on 13th August, 2015 and the time the Doctor saw the complainant, it was almost one and half months.

64. The court finds that, if the trial court had considered the allegation by the complainant that she was strangled and pulled on the injured hand in September 2015, by the accused's husband, she would have had doubts whether the alleged injury was indeed inflicted by the Appellant.

65. Thus the court in sum finds that the prosecution did not prove case against appellant beyond reasonable doubt and thus ,the appeal has merit and same succeeds in the following terms;

i. The conviction is quashed and the sentence set aside.

ii. The appellant is set at liberty forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF JULY 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE