



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 87 OF 2013**

A W M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 621 of 2012 (Hon. Nyakundi, RM) on 10<sup>th</sup> July, 2013)*

**JUDGMENT**

The appellant was charged in the subordinate court with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code, cap 63**. The particulars of the offence were that on the 19<sup>th</sup> day of March, 2012 at [Particulars withheld] estate in Nyeri district of the central province, the appellant assaulted J W thereby occasioning him actual bodily harm.

She was convicted of this offence and sentenced to serve three years in prison. Being aggrieved by the conviction and sentence she appealed against the decision of the magistrates' court and raised the following grounds in her petition of appeal:

1. The learned magistrate erred in law and in fact in convicting the appellant on the evidence that did not meet the threshold which is mandatory in criminal cases.
2. The learned magistrate erred in law and in fact in failing to find that the prosecution did not prove to the required standard that the injuries sustained by the complainant were occasioned by the alleged attack of 19<sup>th</sup> March, 2012.
3. The learned magistrate erred in law in failing to find that the prosecution evidence before court was inconsistent.
4. The learned magistrate erred in law and in fact in failing to consider the mitigation of the appellant while sentencing her.

The prosecution called four witnesses to prove its case; the first of these witnesses was the complainant himself who testified that on 19<sup>th</sup> March, 2012 at around 11 AM, the appellant approached him with the intention of leaving him with their three-year-old baby. They were previously married but at the material time they were separated and their relationship was not cordial. He testified that the appellant insulted him and later stabbed him with a knife at the back of his head. He testified that he fell down unconscious and found himself at the police station when he regained consciousness.

At his cross-examination, he testified that he recorded his statement in June 2012 though the offence happened in March 2012, three months before; the rest of the prosecution witnesses also recorded their statements at this time, long after the offence had been committed. He named one Kariuki, one Mohamed and one Thuli (PW2) as the people who were present when he was attacked. The same month of June in the year 2012, he appeared before the children's officer; it was not clear from his evidence the reason behind presenting himself before the children's officer.

**Charles Thuli (PW2)** testified that on 19<sup>th</sup> March, 2012, he was in a shop when the appellant attacked the complainant and stabbed him at the back of his neck using a kitchen knife. He administered first aid to him because he was bleeding profusely. Before this incident, he knew both the appellant and the complainant and that he was the only one present when the complainant was attacked.

**Dr Consolata Kinuthia (PW3)**, who testified that she worked at Nyeri provincial general hospital produced a P3 form which was completed by Dr Karanja who was alleged to have examined the complainant. According to that form, the complaint had a cut wound on the scalp on the temporal region. The age of the injury was stated to be a few hours and the type of weapon used was described as a sharp weapon. The degree of injury was assessed as "harm". Again, the form was filled on 8<sup>th</sup> June, 2013. In cross-examination, she admitted that she did not have treatment notes which ordinarily form the basis of assessing the age of the injuries.

The investigations officer sergeant **Elizabeth Nyaga (PW4)** testified that the complainant lodged a complaint of assault at Nyeri police station on 19<sup>th</sup> March, 2012 but that it was not until five months later that the P3 form was filled.

In her sworn evidence, the appellant denied having attacked the complainant. She said that the complainant used to be her husband and they lived together as a married couple for one and half years but due to differences between them, they had separated and were now living apart as at the time of the alleged assault. Their union had been blessed with one issue. Sometimes in June 2012 they both visited the children's officer; the complainant had apparently been summoned on the issue of maintenance of their child.

The state conceded the appeal on the ground that the prosecution evidence was doubtful. The learned counsel for the state noted that there were several contradictions among the state witnesses which left doubt as to whether the complainant was ever attacked as alleged.

I agree with the learned state counsel that indeed there are fundamental contradictions in the prosecution witnesses evidence which could not support a safe conviction.

To begin with, although the complainant alleged that he fell down unconscious when he was attacked by the appellant and that he only found himself at the police station, **Charles Thuli (PW2)** who is alleged to have witnessed the incident testified that he administered first aid to the complainant and even asked him to go to hospital for treatment. He never suggested at any one moment that the complainant fell down unconscious.

Secondly, the complainant himself testified that there were three witnesses, whom he named and who were present when he was attacked but **Charles Thuli (PW2)** testified that he was the only person who witnessed the incident.

These contradictions and inconsistencies cast doubt on the credibility of the prosecution witnesses and in particular the complainant himself.

It would appear that the complaint against the appellant was instigated by the fact that the appellant had complained against him before the children officer for child maintenance. This explains why although the offence is alleged to have been committed in March 2012, it was not until the month of June of the same year, when they both appeared before the children's officer that the witnesses' statements were taken, the P3 form filled and the appellant was arraigned in court.

It follows that apart from the contradictions and inconsistencies in the prosecution evidence combined with lack of candour and credibility on part of these witnesses and in particular the complainant himself, the prosecution of the appellant was malice driven. For these reasons the appellant ought not to have been convicted. Accordingly, I find merit in her appeal and it is hereby allowed. Her conviction is quashed and the sentence set aside. She is set at liberty unless she is lawfully held.

**Dated, signed and delivered in open court this 31<sup>st</sup> day of March, 2017**

Ngaah Jairus

**JUDGE**