



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NUMBER 19 OF 2017
JULIUS NTORURU KAMUIAPPELLANT
VERSUS
REPUBLICRESPONDENT

(Being an appeal against the Judgment of Hon. G. Sogomo – SRM, delivered on 26th January 2017 in Tigania Cr Case No.1839/2014 at Tigania Principal Magistrate's Court)

J U D G M E N T

The appellant was charged with two counts of assault causing actual bodily harm contrary to **section 251** of the Penal Code. The particulars of the offence in the first count is that the appellant on 22nd July 2015 at Nthalami village, Thau location in Tigania West District within Meru County, unlawfully assaulted **Jennifer Karemi** by hitting her by kicks and fists blows thereby occasioning her actual bodily harm. The second count involved assaulting **Zachayo Mwenda** using a club thereby occasioning him actual bodily harm. The second incident took place on the same day.

The appellant was convicted of both counts and sentenced to serve three (3) years imprisonment. The grounds of appeal are that there was an existing grudge between the appellant and the two complainants, the prosecution did not prove its case beyond reasonable doubt, the evidence is inconsistent and uncorroborated, vital witnesses were not called and that the appellant's defence was not considered.

In his written submissions, the appellant submit that the medical report by PW1 lacks merit. The two complainants were out to fix the appellant as there were differences over land. The evidence does not prove that the appellant had a machete. The appellant further submit that no independent witnesses were called to testify. These include the neighbours who went to the scene and the chief. The defence evidence and mitigation was not considered.

Mr. Odhiambo, prosecution counsel opposed the appeal. Counsel submit that the evidence proved the charges. The appellant was armed with a panga. The defence did not disprove the charge. Counsel further submit that the sentence is excessive as the parties are related.

Before the trial court four witnesses testified for the prosecution. PW1 **Geoffrey Muthomi Murithi** is a clinical officer who was based at Miathene sub-district hospital. He filled the P3 forms for the two complainants on 23/7/2015. The first complainant **Jennifer Karemi** (PW2) sustained scratch marks on the neck and both cheeks, swollen left hand and both legs were swollen. The second complainant **Zachayo** (PW3) suffered a fracture of the radius and ulna bones.

PW2 **Jennifer Karemi** is the wife of PW3 and a sister in law to the appellant. On 22/7/2015 she was

heading to her house from work at around 6.00pm when the appellant waylaid her and assaulted her. The appellant was armed with a machete. He put down the machete and started punching her. She screamed and her husband went to her rescue. The appellant hit her husband with a stick leading to a fracture on the right hand. She reported the matter to the police and was treated at Miathene Hospital.

PW3 **Zakayo Mwenda** testified that he heard screams. He rushed to the scene and found his wife on the ground while the appellant was punching her. He inquired from the appellant what was wrong. The appellant turned on him and hit him with stick. He blocked with his right hand but suffered a fracture from the impact. The appellant ran away. He was treated at Miathene Hospital.

PW4 **Corporal Noel Makoba** was stationed at Tigania Hospital. She investigated the case. She caused the appellant to be charged with the offence.

In his unsworn defence, the appellant testified that PW3 is his elder brother while PW2 is his sister in law. He arrived at home from Nairobi. PW2 and PW3 started fighting after taking alcohol. He went to separate them. Their mother (DW2) also went to separate the two. PW3 claimed that this hand had been dislocated. He went back to Nairobi. When he went back home he realized that there was a warrant of arrest.

DW2 **Charity Kimaiyo** is the mother to the appellant and PW3. She testified that at one time she went to separate PW2 and PW3. This was in July 2016. She could not recall the date. PW3 had taken illicit brew and was causing trouble. He was fighting with his wife. She managed to separate the two.

The evidence on record shows that PW2 and PW3 sustained injuries. PW3 suffered a fractured right hand. The appellant's evidence is that PW3 suffered the injuries while fighting with his wife. During the hearing, a machete was produced. It is the prosecution evidence that the appellant had the machete. The defence evidence did not displace the prosecution evidence. The matter was reported to the police and the appellant was charged with the offence. The defence evidence does not establish that PW3 suffered a fractured hand while fighting with his wife. I am satisfied that the prosecution proved its case beyond reasonable doubt.

The appellant was sentenced to serve three (3) years imprisonment. He was convicted on 20/1/2017 and sentenced on 26/1/2017. He has now served six (6) months imprisonment. This was a family dispute. I find the period the appellant has served to be enough punishment.

In the end, the appeal on conviction is disallowed. The three (3) years sentence imposed by the trial court is set aside and replaced with a period already served. The appellant shall be set at liberty unless otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF JULY 2017.

SAID CHITEMBWE

JUDGE