



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL 18 OF 2015**

**CHARLES MULINGE NGUNGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the conviction and sentence arising out of the judgment of Hon. M.I Kahuya, Ag SRM delivered on 23<sup>rd</sup> January 2015 in Criminal [Case](#) No.1369 of 2014 at the Chief Magistrate's Court at Machakos)**

**JUDGMENT**

**The Appeal**

The Appellant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code in the trial Court. The particulars were that the Appellant on the 9<sup>th</sup> day of August, 2014 at Konza area of Machakos County within the Eastern Province, unlawfully assaulted Ann Syokau thereby occasioning her actual bodily harm.

The Appellant was tried and convicted of the charge of assault causing actual bodily harm, and sentenced to 6 months in prison for the offence. The Appellant, being aggrieved by the judgment of the trial magistrate preferred this appeal against the conviction and sentence, in a Petition of Appeal filed in Court by his counsel, Mulwa Isika & Mutia Advocates dated 10<sup>th</sup> February 2015.

The grounds of appeal are as follows:

- a) That the learned magistrate erred both in law and fact when she convicted the appellant against the weight of the evidence.
- b) The learned magistrate erred in both law and fact when she found that the prosecution had proved the case beyond any reasonable doubt.
- c) The learned magistrate erred both in law and fact when she failed to give the accused the benefit of doubt.
- d) The learned magistrate erred in both law and fact when she dismissed the whole of the appellant's defence.
- e) The sentence is extremely harsh and excessive in the circumstances of the case.

The Appellant's counsel in addition filed submissions dated 4<sup>th</sup> April 2017, wherein it was urged that PW1 confirmed that the injuries sustained by PW2 were solely as a result of the actions of the Appellant to the exclusion of any other cause, considering that DW3 had assaulted PW2 before the Appellant did. Further, that the evidence of PW2 and PW3 who were eye witnesses were contradictory, in that while PW2 stated that the Appellant slapped her severally then hit her once, PW3 stated that the Appellant hit PW2 twice and slapped her twice. That on the other hand all the five defence witnesses stated that the Appellant never assaulted PW2. In addition, that the corroboration is a clear indication and proof beyond reasonable doubt that the appellant never assaulted PW2.

It was further submitted that PW2 stated that DW3 hit her first, which evidence is said to have been corroborated by PW3 and DW2 who stated that it was the Appellant who interjected to stop DW3 from hitting PW2. Furthermore, that DW3, DW4 and DW5 gave sworn evidence that there was no fight at all, and that is enough evidence to create doubt as to whether or not the Appellant committed the crime he was charged with.

Lastly, the Appellant further urged the court that the sentence ought to have been non- custodial or of lesser gravity considering that the Appellant and PW2 are siblings. He cited section 121 of the Penal Code and section 26 (3) of the Penal Code in reliance.

Ms. Mogoi Lillian, the learned Prosecution counsel, filed submissions dated 3<sup>rd</sup> July 2017 wherein it was observed that from the evidence on record, there was bad blood between the siblings, but it was not clear what clearly what caused the disagreement on the material day. It was submitted that the Appellant did not try to explain to court why PW2 would accuse him falsely if indeed he did not assault her.

Further, that the evidence of PW2 and PW3 was consistent, and was corroborated by the P3 form and the evidence of the investigating officer that when PW2 went to report the offence, she was swollen though not bleeding. Lastly, that the defence evidence is marred with contradictions as to what exactly transpired after PW2 and PW4 were asked to leave the meeting.

The Prosecution, while urging this Court to uphold the conviction of the trial Court, conceded that the remainder of the sentence should be substituted by a custodial sentence.

### **The Evidence**

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The prosecution in this regard called five witnesses, whereupon the trial Court found that a *prima facie* case was established and put the Appellant on his defence. The Appellant in turn testified as DW1 and called four additional witnesses to testify in his defence.

Dr. Mariane Mutinda, a doctor from Machakos Level 5 hospital, was the first prosecution witness (PW1). She produced a P3 form of the complainant who was examined by Dr. Luisa who had since resigned from service. The said P3 form was produced under section 77 of the Evidence Act. Relying on the said P3 form (P. Exhibit 1) she stated that the complainant had sustained soft tissue injuries on her head, neck and eye, and complained of pain on the said areas. She stated that the weapon used was a fist and that the injury was classified as harm.

The complainant, Ann Syokau (PW2) stated that on the material day she was attending a family meeting at her mother's home in Konza. She recounted that the efforts to reconcile her siblings never bore fruits. That she and some of her siblings walked out of the meeting. Her elder brother pleaded with them to return and they complied. That at that point the Appellant warned her never to return to any family meeting. Her other brother who goes by the name Onesmas hit her using a cane but when he wanted to punch her, her mother pushed him away.

PW2 testified that the Appellant then slapped her severally on the cheek and pushed her. She stated that she made a report to the police and was treated at Machakos Level 5 Hospital. On cross examination, PW2 denied there having existed any misunderstanding between her and the Appellant in the past, or that she was thrown out of the home by their mother. She contended that the Appellant had refused to pay for the maize she had lent him.

Joseph Matata (PW3) who is a brother to PW2 and the Appellant, testified that there arose an issue of a debt, being a cow, between PW2 and their brother Onesmus in that family meeting. That Onesmus then called PW2's husband over the alleged debt, which issue annoyed the complainant that she walked out of the meeting. Further, that Onesmus was annoyed and picked up a cane and hit PW2, and the Appellant then slapped and punched her twice. On cross examination, PW3 denied that he had incited PW2 due to his drunken and irresponsible behavior. He maintained that the Appellant assaulted PW2 due to the issue of debt.

Corporal Cherop (PW4) indicated that PW2 visited their office on 10<sup>th</sup> August, 2014 at about noon. She made a report that the Appellant assaulted her the previous day in a family meeting. He booked the report and then issued her with a P3 form. That PW2 later came back with an eye witness and their statements were taken. He instructed the Administration Police at Konza to arrest the Appellant, who was so arrested on 16<sup>th</sup> August, 2014. On cross examination, PW4 stated that PW2's face was swollen but was not bleeding when he saw her. He denied being biased on his investigations.

APC Joel Mwangi from AP Konza (PW5) who was the arresting officer, recounted that he received a letter from Kyumbi police station on 15<sup>th</sup> August, 2014 asking for the arrest of the Appellant. That on the following day, he together with APC Mbithi went to Malili where they arrested the Appellant. He stated that it was PW2 who took the said letter to him. PW5 further stated that he knew the Appellant as a person of the locality.

The trial court found the Appellant to have a case to answer and he was put on his defence under section 211 of the Penal Code. The Appellant who testified as DW1, gave an unsworn statement, and testified there was a family meeting on the material day. Among those in attendance were his mother, his brother Joseph and Sister Agnes. That it had been reported that some of them were disturbing their mother. He stated that in the midst of the meeting, PW2 started making noise and proceeded to do so despite their mother's warning. That at that point it was resolved that PW2 and Agnes leave the meeting since they are married. PW2 was unhappy and threw tantrums. He said that she fell down and rolled severally. The meeting was adjourned at that point and he and his wife left. The Appellant denied assaulting PW2.

DW2 was David Muema, a brother to the Appellant and PW2, and he stated as follows. That PW2 created disturbance in the meeting occasioning the Appellant to order her and Agnes out. That the two left and while outside the gate continued quarrelling. PW3 went to resolve the issue and returned. That minutes later, PW2 returned and asked their mother why she had been thrown out. They quarreled and PW2 started insulting Onesmus who got angry and beat her up. He stated that PW2 then started rolling over while crying. The meeting aborted and they went away. On cross examination, DW2 denied that there was a debt owed to PW2 and stated that it was Onesmus and PW2 who had a feud which they wanted resolved.

DW3, Onesmus Mbuvi, stated that PW2 bad mouthed all of the family members in the midst of the meeting on the material day. The meeting aborted and she started crying. He denied that PW2 was beaten up by anybody. He stated that the agenda of the meeting was to resolve the dispute between their mother, PW2 and PW3. He denied ever quarrelling with PW2 and stated that he was at a loss why PW2 made the false allegations against the Appellant.

On cross examination, DW3 denied that he was neither the cause of the family disputes nor that he had sold off PW2's cow. He further denied owing PW2's debt and stated that he paid her KShs. 7,000/=. He also denied that the agenda of the meeting was to resolve the feud between him and PW2. He stated that he did not know why PW2 cried.

Agnes Mutinda (DW4) testified as follows. That PW2 and PW3 made it difficult for the meeting which was meant to resolve disputes among them to be held. She stated that she did so by interjecting the speaker frequently. They then had to adjourn the meeting and it is at that point that she threw herself down and started crying. They then left her there and went away. She denied ever quarrelling with any of her siblings. She denied that she witnessed any fight and stated that the same had been fabricated. On cross examination, DW4 stated that DW3 had PW2's debt, and that the Appellant and DW2 sold a cow in order to pay PW2.

Joyce Ngunga (DW5) stated that she called for a family meeting on the material day, because PW2 and PW3 had shown her contempt. That the disrespect continued even in the meeting. That due to that, PW2 and DW4 were ordered out so that she could be left with the male children. PW2 broke down and started crying. She then fell down and started shouting stating that she had been assaulted. The meeting aborted. On cross examination, DW5 admitted that there was a feud between PW2 and DW3 concerning a cow and KShs. 16,500/=. She however denied that PW2 was assaulted.

### **The Determination**

The grounds raised in this appeal can be collapsed into two issues. These are firstly, whether the Appellant's conviction for the offence of assault causing bodily harm was based on reliable, consistent and sufficient evidence; and secondly, whether if so, the sentence imposed on the Appellant was harsh.

On the issue whether there was sufficient evidence to convict the Appellant for the offence of assault causing bodily harm, the ingredients of the offence of assault are the application of force on the person of another, which occasions bodily harm. In the present appeal, as regards proof of use of force on her person, the complainant who was PW2 testified that she was slapped severally by the Appellant who she positively identified, as the Appellant is her brother.

Her evidence about being slapped was corroborated by PW3, another of her brothers who was at the scene, which was a family meeting. DW2 also did testify that PW2 was assaulted, but claimed that it was DW3 who did it, while the other defence witnesses denied that there was any assault.

The only contradiction in the prosecution evidence is the number of times the Appellant is said to have hit PW2, which was a minor contradiction and not material, nor did it change the fact that PW2 was indeed assaulted. I am guided in this respect by the decision by the Uganda Court of Appeal in **Twehangane Alfred v. Uganda, Criminal Appeal No. 139 of 2001 of 2001, [2003] UGCA 6** cited with approval by the Kenyan Court of Appeal in **Erick Onyango Ondeng' v. Republic, [2014] e KLR** in its holding as follows:

**“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”**

Evidence of the bodily harm caused by the Appellant was provided by PW1 who produced a P3 form on the results of a medical examination of PW2, and who testified as to the injuries suffered by PW2, which were soft tissue injuries on her head, neck and eye, which injuries were classified as harm. This evidence was consistent with the evidence of the nature of assault by the Appellant. It is thus my finding the prosecution proved its case beyond reasonable doubt, and the conviction of the Appellant by the trial Court for the offence of assault causing bodily harm was not erroneous.

On the second issue as to whether the sentence meted on the Appellant was harsh, section 251 of the Penal Code in this regard provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years. The trial magistrate while acknowledging the fact that the probation report recommended a non-custodial sentence, took note of the fact that the violence on PW2 could not be wished away and applied the essence of the sentence being

deterrence.

I however note the concession by the Prosecution on the issue of the sentence, meted on the Appellant. Further, I also note that the offence arose from a family dispute, and that there was some element of provocation on the part of the complainant as seen in the evidence by PW3 and the Defence witnesses. In addition, the Appellant was a first offender, and the probation report was positive and recommended for a non-custodial sentence, which in my view was deterrent enough in the circumstances.

I accordingly uphold and affirm the conviction of the Appellant for the charge of assault causing actual bodily harm contrary to section 251 of the Penal Code. I will however set aside the sentence of 6 months imprisonment imposed by the trial magistrate for this conviction, and substitute it with an appropriate sentence of this Court. I accordingly sentence the Appellant to serve the remainder of his sentence under probation, and under the supervision and direction of a Probation Officer in Machakos County.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 21<sup>ST</sup> SEPTEMBER 2017.**

**P. NYAMWEYA**

**JUDGE**