REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 13 OF 2017

N C N..…….... APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From original conviction and sentence in Criminal Case Number 219 of 2016 in the Senior Principal Magistrate's court in Wundanyi delivered by Hon N.N. Njagi (SPM) on 7th February 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, N C N alongside E M, (hereinafter referred to as "her Co-Accused"),were jointly charged with others not before the court on three (3) Counts. On Count I, they had been charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the 13th day of April 2016 at 6.00 p.m. at [particulars withheld] location within Taita Taveta County, jointly with others not before court, wilfully and unlawfully did grievous harm to J M M (hereinafter referred to as "PW 1").

2. In Count II, they were charged with the offence of malicious damage to property contrary to section 339(1) of the Penal Code. The particulars were that on the aforementioned date, time and place, jointly with others not before court, willfully and unlawfully damaged PW 1's dress.

3. In Count III, they were charged with the offence of sexual assault contrary to Section 5 (1) as read with Section 5 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that at the aforementioned date, time and place, jointly with others not before court, they unlawfully manipulated PW 1's waist so as to cause her to be carried with a motorcycle by forcing her to be carried by a motor cycle (sic).

4. The alternative charge was that they committed an indecent act with an adult contrary to Section 11 A of the Sexual Offence Act. The particulars therein were that on the aforementioned date, time and place, jointly with others not before court, intentionally and unlawfully touched PW 1's breasts without her consent

5. The Learned Trial Magistrate Hon N.N. Njagi, Senior Principal Magistrate convicted both of them on Count I, Count II and the alternative charge and sentenced them to serve four (4) years, two (2) years and three (3) years imprisonment respectively. The sentences were to run concurrently.

6. Being dissatisfied with the said judgment, on 21st February 2017, the Appellant filed her Petition of Appeal and she relied on four (4) Grounds of Appeal. Subsequently, counsel took over conduct of the matter on her behalf and listed thirteen (13) Grounds of Appeal. The Appellant's Written Submissions were filed on 12th July 2017.

7. When the matter came up in court on 11th October 2017, the State informed this court that it would not be filing its Written Submissions as it was conceding to the Appeal herein.

LEGAL ANALYSIS

8. Despite the State conceding to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

9. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR,**the Court of Appeal made a similar observation when it stated as follows:-

> **"The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited."(*See* *NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC*, *CR.APP.NO.279 OF 2005 (NYERI)).*"**

10. This court therefore considered the following issues that emerged from the Appellant's Grounds of Appeal and Written Submissions with a view to establishing whether or not the conceding of the Appeal by the State was justified.

11. A perusal of the said Grounds of Appeal and Written Submissions that were filed by her counsel on 12th July 2017 really related to the question as to whether or not the Prosecution did not prove its case beyond reasonable doubt.

12. The Appellant questioned the admissibility of D T and E M testimonies (hereinafter referred to as "PW 2" and "PW 3" respectively) who were PW 1's brothers. She argued that independent witnesses ought to have called to corroborate PW 1's evidence. He submitted that there were contradictions regarding the description of PW 1's dress with some witnesses referring to a blouse while others referred to a dress and that there was no evidence that suggested that the Appellant committed an indecent act with her.

13. He added that the P3 form and treatment notes should have been produced by a medical officer and not a police officer as the latter was not a medical expert. He averred that the role of police officers ought to be limited to police abstracts and other non-technical documents. He contended that the P3 Form was not one of the documents that was referred to in Section 77 of the Evidence Act Cap 80(Laws of Kenya) and that the manner in which the said document was adduced in evidence was slipshod.

14. In this regard, he referred this court to the case of **David Jefwa Kalu vs Republic Cr Appl No 133 /03** (full citation and copy of authority not provided to the court) where it was held as follows:-

> **"Medical evidence if sought to be adduced ought to be done so with propriety and not in a slipshod manner."**

15. He argued that No 55197 CPL David Gitahi, the Investigation Officer (hereinafter referred to as "PW 5") failed to get a statement from a boda boda rider to establish if the injuries PW 1 had sustained were as a result of an accident that she had been involved in. His submission was that PW 5 could not be Cross-examined on the nature of the injuries PW 1 alleged to have sustained as he was not skilled in medical matters.

16. On its part, the State agreed with the Learned Trial Magistrate erred when he did not direct that a medical officer be called to adduce the P3 Form in evidence and treatment notes because the matter was still fresh, it first having proceeded for trial on 9th September 2016 and concluded on 29th January 2017, a span of about four (4) months.

17. Counsel for the State added that as the Appellant was charged with the offence of causing grievous harm and not assault contrary to Section 251 of the Penal Code, there was need to ascertain the degree of harm allegedly suffered by PW 1, which ascertainment could only be done by a doctor and not PW 5 as he did not have the expertise to do so.

18. Counsel for the State added that whereas there were many witnesses who were said to have been present at the material time, none were called to testify and that in any event, PW 1 did not mention PW 2 and PW 3 as having been present at the material time. Counsel also added that there was no evidence of sexual assault or indecent act as PW 1 had contended and the Learned Trial Magistrate erred in having convicted her as aforesaid.

19. The Prosecution's case was that on the aforesaid date, time and place, PW 1 was at her home when the Appellant and her Co-Accused came to her home and assaulted her after she refused to board a boda boda to the market in respect of some money she was to repay. PW 1, PW 2 and PW 3 identified the Appellant and her Co-Accused as having been part of the group of people who were beating up PW 1.Both the Appellant and her Co-Accused were related to her and they had had a good relationship before the said incident.

20. There were several other women from her women group at the time. When they got to the market, they did not find the goats. It was then that the Appellant and her Co-Accused searched for money in her breasts and vagina while slapping, beating and kicking her but they did not get any money. She then heard a Stanley of Kenya Women Finance Trust tell the Appellant and her Co-Accused to take away her mobile phone, which she did not know who took.

21. Although she testified that she sustained a dislocation of her wrist due to twisting by the Appellant's Co-Accused herein, she did admit when being Cross-examined by the Appellant and during Cross-examination that she had had an accident at her home in Kishushe and she injured her wrist. None of the witnesses alluded to her having had an accident with a boda boda as the Appellant herein had contended.

22. PW 2 and PW 3 told the Trial Court that there were several people who were beating PW 1 and that the Appellant and her Co-Accused intentionally touched PW 1's breasts and vagina. Both PW 2 and PW 3 stated that they were at the shamba when they saw the Appellant and her Co-Accused assaulting PW 1.

23. The question of how far the shamba was from where PW 1 was being beaten was a pertinent issue that was not interrogated. It would have been important to have ascertained if PW 2 and PW 3 could have witnessed the Appellant and her Co-Accused assault PW 1 from where they were considering that there were almost eight (8) motor cycles in the compound. It was also not clear how PW 3 said was at the shamba at the material time came and found PW 1screaming.Appreciably, PW 1 could not have mentioned them as having been present at the material time as they both said they were at the shamba.

24. According to PW 1, it was the Appellant who was looking for money in her breasts and her vagina. According to PW 2, the Appellant's Co-Accused was the one who was touching PW 1's breast to look for money while the Appellant was the one who was touching her vagina. According to PW 3, the Appellant opened **(sic)**PW 1's blouse and started touching her breasts. She then lifted her blouse and put her hands in the inner pants.

25. It is important to point out Section 144 of the Evidence Act provides that the prosecution has the discretion to decide how many witnesses it shall call to prove a particular point. There is also no law that stipulates that relatives cannot testify in a case. The evidence by both PW 2 and PW 3 was admissible evidence.

26. However, failure to call crucial witness can weaken a prosecution's case considerably.In the case of **Criminal Appeal No 31 of 2005 Julius Kalewa Mutunga v Republic**(unreported), theCourt of Appeal held that:

> **"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."**

27. There was no explanation that was advanced by the Prosecution why Mohamed who PW 1 said accompanied her to the market was not called as an independent witness to corroborate her evidence. Indeed, he could also have corroborated PW 2's and PW 3's evidence regarding the touching of her breasts and vagina as he appeared to have been at the scene at the material time.

28. Notably, Stanley did not appear to have been a suitable witness in her case as he was the one who PW 1 said she heard telling the Appellant and her Co-Accused to take her phone. Mohamed may also not have been on her side. This therefore ought to have come out clearly in her evidence to avoid this court making a negative inference of the Prosecution having failed to call him.

29. In her sworn defence, the Appellant herein told the Trial Court that PW 1 had had an accident when she fractured her hand, a fact that was reiterated by A M (hereinafter referred to as 'DW 3"). Her Co-Accused testified that she was the Chairlady of [particulars withheld] Women Group and that she had gone to PW 1's house together with her Co-Accused to collect monies PW 1 had failed to pay. She stated that PW 1 fractured her hand after intentionally falling down and that she tore her dress.

30. DW 3 admitted that they went to PW 1's house in seven (7) boda bodas. B W M and R S (hereinafter referred to as "DW 4" and "DW 5" respectively) confirmed about the collection of the debt by the members of the women group.

31. It did appear to this court that the Appellant and her Co-Accused together with other members of the women group went to PW 1's house to demand money. There was an altercation. Since there was a big group of women, it was difficult to say for a fact that it was the Appellant who tore PW 1's blouse.

32. There also appeared to be some inconsistencies in the roles of the Appellant's Co-Accused herein as only PW 2 alluded to her having searched PW 1's breasts for money. Both PW 1 and PW 3 only mentioned the Appellant as having been the perpetrator. This inconsistency created doubt in the mind of this court on exactly what happened on the material date. This court asked itself whether PW 1 zeroed down on the Appellant and her Co-Accused merely because she could identify them as they were her relatives or if they indeed assaulted PW 1 as had been contended.

33. Turing to the issue of the P3 Form, this court agreed with both counsel for the Appellant and the State that PW 3 Forms ought to be tendered in evidence by persons with medical expertise. This is because they are the only ones who can answer questions on degree of harm.

34. A perusal of the P3 Form showed that PW 1 presented at the hospital on 14th April 2016 with injuries on her body parts especially left arm, shoulder and head. There was marked swelling on the forehead, left shoulder with swelling, inability to use the left upper limb and deformed left elbow joint. The probable type of weapon was blunt. There was no mention of a dislocation as had been contended by PW 1 in her testimony. The doctor opined that she sustained grievous harm.

35. According to the hospital attendance notes, on 24th April 2016, PW 1 presented with a fracture of the elbow. Orthopaedic review was set for 20th May 2016. A plaster of paris (pop) was applied. The P3 Form was filled on 28th April 2016, almost two (2) weeks after the alleged incident.

36. It was not therefore clear whether the doctor indicated "grievous harm" due to the fracture on the arm

or it was only in the initial injuries for 14th April 2016. As no doctor was called to answer these questions, it would be a gross miscarriage of justice to attribute the P3 Form to the injuries PW 1 was said to have sustained on 13th April 2016. Failure to have called a doctor to present the P3 Form was detrimental and fatal to the Prosecution's case.

37. In the case of **Julius Karisa Charo vs Republic [2005] eKLR**, Ouko J(as he then was) expressed similar reservations about police officers tendering in evidence P 3 Forms because they should only restrain themselves to tendering documents that would fall in their docket. He stated as follows:-

> **"To my mind police officers role in the production of documentary evidence ought to be restricted police abstracts and other non-technical documents. For the reasons stated I find and direct that PC Sang cannot produce the post-mortem report on behalf of Dr. Olumbe who has relocated at Australia and the efforts made in trying to procure his attendance, from what I have stated above, there must be pathologists who are conversant with his writing and signature."**

38. Having considered the evidence that was adduced in the Trial Court and the submissions by the Appellant and the State, this court agreed that with both parties that the Prosecution did not prove its case to the required standard which was proof beyond reasonable doubt.

39. In conclusion, it was also the considered view of this court that having convicted the Appellant on Count I, the Learned Trial Magistrate erred when he convicted her on the alternative charge. An alternative charge is a safely net in case the main charge collapses. An accused person cannot therefore be convicted on an alternative charge if the trial court finds and holds that the prosecution has been able to prove the main charge.

DISPOSITION

40. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 21st February 2017 was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

41. Doubts were raised in the mind of this court lending it to give the Appellant benefit of doubt. This court therefore hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

42. It is so ordered.

DATED and **DELIVERED** at **VOI** this **21st**day of **November** 2017

J. KAMAU

JUDGE

In the presence of:-

Aywa h/b for Oduor for Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk