



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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 128 OF 2015**

**PAGER KELVIN MACHARIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kiambu Cr.  
Case No. 3281 of 2012 delivered by Hon.S. K. Arome, RM on 30<sup>th</sup> September, 2014).*

**JUDGEMENT**

**Background**

The Appellant, **Pager Kelvin Macharia**, was charged with the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that on the 23<sup>rd</sup> of October, 2012 at Kahawa West in Kasarani Division within Nairobi County, unlawfully assaulted Carolyne Wanjiku thereby occasioning her actual bodily harm.

He was subsequently convicted and sentenced to pay a fine of Ksh 20,000/ or serve 12 months imprisonment. The Appellant paid the fine and preferred this appeal on the following grounds; that the prosecution did not prove their case beyond reasonable doubt, that his defence was consistent and the trial magistrate failed to consider it, that there were no independent witnesses from the scene that were called and lastly, that the complainant took advantage of her caesarian section wound to frame the Appellant of assault.

Learned Counsel, M/s Akunja in opposing the appeal submitted that the Appellant attacked the complainant with a mop stick when he saw her at his place of business where she had gone to be taught how to make soup by one John. She had recently undergone an operation and was in severe pain after being hit with the mop stick. She reported the matter the following day and the Appellant was subsequently arrested and charged. She added that the failure of DW2 and DW3 to record statements with the police was suspicious as it was meant to aid the Appellant.

**Submissions**

The appeal was canvassed before me on 27<sup>th</sup> September, 2017. Learned counsel Mr. Makori who was holding brief for Mr. Ondieki represented the Appellant whilst learned State Counsel, M/s Akunja represented the Respondent. Mr. Makori did not make any oral submission and submitted that he would entirely rely on the Grounds of Appeal filed on 13<sup>th</sup> August, 2015. On behalf of the Respondent, Ms.

Akuja submitted that there was sufficient evidence that the complainant who testified as PW1 was assaulted with a mop stick at the place of business of the Appellant. She submitted that at the time, PW1 had gone to be taught how to make soup by one John. It is then that the Appellant picked a quarrel with her which led him to assaulting her with a mop stick. Furthermore, there was also sufficient evidence that PW1 had recently undergone a cesarean section surgery where the Appellant assaulted her causing her immense pain. According to the counsel, PW1's evidence was corroborated by PW3, a police surgeon who produced a medical examination report (P3 form) prepared by his colleague Dr. Maundu. The report indicated that PW1 had suffered a blunt injury on her abdomen and assessed the degree of injury as harm. This, according to the counsel, proved that PW1 had indeed suffered harm as a result of the assault.

Counsel discredited the evidence of the two defense witnesses indicating that none witnessed the assault. As such, she urged the court to dismiss their evidence as the same did not oust the strong prosecution case. Furthermore, DW2 was an employee of the Appellant who had invited PW1 to the premises so that he could assist her make soup. He therefore could not give evidence implicating the Appellant. Ms. Akuja also submitted that the Appellant's defence was considered but dismissed as lacking in credibility. She added that there was no need of calling additional independent witnesses for the prosecution as PW1's evidence was sufficient. In any case, DW2 and 3 had declined to record statements for the prosecution so as to aid the Appellant. She urged that the appeal be dismissed.

### **Evidence**

The Prosecution called a total of 3 witnesses. **PW1, Carolyn Wanjiru** was the complainant in the case. She testified that on the 23<sup>rd</sup> of October, 2012, she was called by one John who offered to teach her how to prepare soup at his place of business. While she was there, the owner of the shop who is the Appellant appeared and hit her with a mop stick on her abdomen. She was in a great deal of pain as she had a fresh wound after undergoing a recent cesarean section surgery. After this altercation she went home and slept but woke up and reported the incident to the Police the following day before seeking treatment at Kamiti Health Center. In her testimony, she said that the Appellant was a friend of her father.

**PW2, Police Constable Luke Rotich** of Kiamumbi Police Station received the assault report from PW1 on 24<sup>th</sup> October, 2012 at about 10.00 a.m. She reported that she had been assaulted the previous day by the Appellant along Bima Road in Kahawa West at the Appellant's premises. She was referred to the hospital and was treated at Kamiti Health Centre. The witness testified that PW1 showed him an outpatient card/book which was dated 25<sup>th</sup> October, 2012. He recorded her statement, issued her with a P3 form and the same was filled by a police surgeon. He testified that one Jaspartet Comora arrested the Appellant on 30<sup>th</sup> November, 2012. The Appellant was thereafter charged accordingly.

**PW3, Dr. Kisa Sako** of Police Surgeon produced PW1's P3 form that had been filled by a Dr. Maundu who had examined PW1 on 30<sup>th</sup> October, 2012. The report showed that PW1 had suffered a blunt injury on her abdomen and had soft tissue injury on the upper limbs. The injuries were then six days old. The doctor relied on previous treatment notes. He adduced the PW3 form as an exhibit.

After the close of prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He testified as DW1 in a sworn defence and called two other witnesses.

**DW1**, the Appellant testified that on the 23<sup>rd</sup> of October, 2012 at about 2:00 p.m. the complainant showed up at his place of work demanding that he give her money. He told the court that the complainant had been his girlfriend for about 1 and a half years but they had been separated for over a year after he discovered she had another boyfriend. She claimed her other boyfriend was mistreating her. After he refused to give her money, she began shouting and uttering words before leaving bitterly. The Appellant never laid a hand on her and was arrested a month later on charges of assault.

**DW2, John Kariuki Gitonga** owned a butchery and restaurant where he also sold soup and meat. He was a neighbor to DW1. He testified that on the 23<sup>rd</sup> of October, 2012 at about 2:00 p.m., PW1 walked into the place of business belonging to DW1 where they talked for about 10-15 minutes. He was standing outside his place of business and two metres away from the Appellant and PW1. After the conversation

ended, he heard the complainant shouting at the Appellant as she walked away. He did not see any stick in the vicinity.

**DW3, Judy Wairimu** baked and sold cakes about two metres away from restaurant of the Appellant. She testified that on the 23<sup>rd</sup> of October, 2012 at about 2:00 p.m., she saw a lady walk into the restaurant belonging to the Appellant. She had seen the lady occasionally visit the Appellant. After about 10-15 minutes, PW1 left the premises while making noise. She did not see any stick or the Appellant assaulting her.

### **Determination**

It is now the duty of this court, as the first appellate court, to re-evaluate the evidence before it and arrive at its own independent conclusions. See **Pandya vs. Republic [1957] EA. 336.**

I have considered the evidence on record and the respective rival submissions. It is now the onerous duty of this court to determine whether the case was proved beyond a reasonable doubt. A scrutiny of the trial court's judgment drives me to conclude that the Appellant was convicted based on the sole evidence of the complainant which the court held was ably corroborated by the evidence of PW3 in his capacity as a medical expert. The latter filled a P3 form which indicated that PW1 had suffered a brunt injury on her abdomen. It also showed some soft tissue injury in the upper limbs. I have no doubt in my mind that there was a meeting between PW1 and the Appellant. This is deduced from the defence case because the Appellant and his witnesses confirmed that indeed PW1 had visited the Appellant's premises.

From the Appellant's testimony and that of his two witnesses, a confrontation ensued after which PW1 left making noise in a bitter manner. What this court then must determine is whether this confrontation and exchange of words culminated in an assault against PW1. According to PW1, the Appellant assaulted her using a mop stick which the Appellant denied. PW1 testified that she had just gone to the premises to be taught to make soup by one John when the Appellant confronted her with a mop stick.

It is not clear whether DW2 John Kariuki Gitonga is one and the same person as the John PW1 mentioned was to teach her to make the soup. I say so because DW2 did not mention that PW1 had gone to him to be taught to make soup. All that he testified was that he worked outside PW1's restaurant where he sold soup and meat. He recalled PW1 coming to the Appellant's place of business and while outside his restaurant heard the two talk for about 10 to 15 minutes. Thereafter, he heard PW1 shouting and going away. He did not witness any assault of PW1 by the Appellant. He also never saw any stick yet he was only two metres from the two. The same applied to DW3 who sold cakes outside the Appellant's restaurant. She also recalled that PW1 visited the Appellant and she left the premises making noise.

My view is that the prosecution ought to have led evidence that would have cleared the shadow of doubt on whether DW2 was one and the same person that PW1 had gone to visit. That way, the court could conclude that he had given evidence for the defence so as to protect and cover up for the Appellant. The lack of this crucial clarification makes me conclude that it was erroneous of the Respondent to make a conclusion that DW2 worked for the Appellant and was therefore deliberately covering up for the Appellant. That said then, it is clear that the evidence of PW1 was ousted by DW2 and 3 that the Appellant had assaulted him.

In addition, it begs why and how if indeed PW1 was assaulted on a recently stitched cesarean wound, the medical evidence did not indicate that she had undergone a cesarean section surgery. That would obviously have been borne from the initial medical treatment card, the P3 form and the testimony of PW3. Unfortunately, that was not the case. Again, it casts doubt on whether PW1 brought up the issue of having recently undergone a cesarean section surgery with a view to ensuring that the Appellant was convicted.

There is also inconsistency in PW1's testimony and the medical evidence adduced. She testified that when she went home on 23<sup>rd</sup> October, 2012 her mother advised her to seek treatment on the following day. She testified that indeed she was treated on the following which would have been on 24<sup>th</sup> October,

2012. A medical treatment card that was produced and which was used to fill in the P3 form is surprisingly dated 25<sup>th</sup> October, 2012. This of course sharply contrasts PW1s evidence that she was treated on 24<sup>th</sup> October, 2012. It also does not indicate that she had suffered an injury or pain on a cesarean section wound. It only indicated that she suffered a blunt injury to her abdomen. This again raises an eye brow on whether she spoke the truth that she had a wound on her abdomen.

It is also surprising that she was hit with a mop stick on a freshly stitched wound yet she did not find it prudent to visit a hospital on the date of assault. Instead, she just went home, slept and was not treated not on the following day a she claimed but two days thereafter. In my mind, she was not only telling lies but was giving evidence aimed at ensuring that the Appellant was convicted. This ultimately lends credence to the defence case that although she had visited the Appellant's premises, the Appellant did not assault her.

Respectively, notwithstanding the presence of medical evidence that PW1 suffered an injury, I find that on account of the inconsistencies and discrepancies in the prosecution case, the prosecution failed to discharge its burden to the required standard; beyond a reasonable doubt. The fact that DW2 and 3 exonerated the Appellant does not lessen the onus placed on the prosecution to discharge their burden. It is never the onus of an accused person to prove his innocence.

Respectively, I will not hesitate to find and hold that this appeal is meritorious. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. The fine he paid of Kshs. 20,000/= vide receipt No. 0197070 dated 4<sup>th</sup> December, 2012 should be refunded to him. It is so ordered.

**Dated and Delivered at Nairobi this 17<sup>th</sup> day of November, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

*1. Appellant in person*

*2. M/s Sigei for the Respondent.*