



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 131 OF 2015

BETWEEN

BENTA ACHIENG OPONDO APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. Kasavuli, SRM dated 25th August 2015 at the Principal Magistrates Court at Winam in Criminal Case No. 6 of 2013)

JUDGMENT

1. The appellant, **BENTA ACHIENG OPONDO** was charged with the offence of causing grievous harm contrary to **section 234** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 30th October, 2012 at about 7.30pm at Kajulu area in Kisumu East District of Nyanza Province, she unlawfully did grievous harm to **MOUREEN ACHIENG OMOLO**. She was convicted and sentenced to 4 years' imprisonment. She now appeals against conviction and sentence.
2. In her petition of appeal dated 7th September 2015, the appellant has faulted the trial magistrate for convicting her despite the glaring contradictions on the evidence regarding the place of the alleged attack and for failing to appreciate her contention that it is the complainant who went to attack her in her house and that she acted in self-defence. She complained that she was forced to conduct her defence in the absence of her legal counsel leading to gross breach of her constitutional rights.
3. Mr Nyanga, learned counsel for the appellant, reiterated the grounds raised in the petition of appeal and emphasized the contradictory nature of the evidence. He submitted that the trial magistrate failed to consider the appellant's defence that there was a grudge between her and the complainant and that the attack actually took place in the appellant's house and that she acted in self-defence. Counsel further submitted that the medical report showed that the class of injury was maim and not grievous and hence the sentence meted was manifestly harsh and excessive.
4. Ms Osoro, learned counsel for the respondent, opposed the appeal and submitted the contradictions in the prosecution case were not material as it was clear from the evidence that the attack took place at PW 4's house. On the issue of the sentence, she urged that the sentence meted out was fair as the maximum sentence provided for the offence was life imprisonment.
5. As this is a first appeal, the duty of this court to reconsider and to re-evaluate the evidence adduced so

as to reach its own independent determination whether or not to uphold the conviction (see **Njoroge v Republic [1987] KLR 19**). In order to deal with this obligation, I now proceed to set out the evidence as it emerged at the trial.

6. The complainant, Mourine Achieng Omollo (PW 1) told the court that at the time of the incident the appellant was her employee in a hotel she operated. On 30th October 2012, she went with her daughter Faith Akinyi Ayoti (PW 3) to the house of Gaudesha Akoth Ouma (PW 4) to pick some salad but she was informed by PW 4's daughter Catherine Ouko Ouma (PW 2) that she was away. She opted to wait for PW 4 to return. As she waited, the appellant came, called out her name and then poured hot water on her. PW 1 testified that she suffered burns on her face, chest, stomach, thighs and legs. She stated that she was inside the house when the appellant poured the hot water on her. On cross-examination, PW 1 stated that she was outside PW 4's house when the appellant poured the water on her and the only person who witnessed the incident was PW 3. Thereafter PW 1 went and spoke to the appellant's brother before going to hospital.

7. PW 2 testified that she was with PW 3 outside their house washing utensils when the appellant came with hot water in a jug from her house and poured it in on PW 1 who was seated in their house. She informed her mother, PW 4, when she came later what had transpired whereupon PW 4 followed PW 1. PW 3 testified that the appellant carried the water in a sufuria and poured it on PW 1. PW 4, who was PW 1's employee, told the court that at the time of the incident she was not present and did not know that PW 1 would come visiting. When she returned she was informed that the appellant had injured PW 1. In cross examination, PW 4 stated that when she returned, she found PW 1 leaving the appellant's house heading to the road.

8. Dr Odhiambo Olwala (PW 5) examined PW 1 and observed scars in different parts of her body. He concluded that the degree of injury was maim and that they were caused by heat. The investigating officer, PC Albert Micha (PW 6) told the Court that on the material date, he was on duty at Kondele Police station when PW 1 reported him that the appellant had burnt her with hot water. Following the report, he recorded her statement and issued her with a P3 form. The appellant was later arrested at her rural home in Koru.

9. In her sworn statement, the appellant testified that there was a grudge between her and PW 1 which had led her to leave her job at PW 1's hotel days before the incidence. She testified that three days after she left her job, PW 1 came to her house and threatened to kill her. On the day of the incident, PW 1 came to her house and found her boiling water. PW 1 intended to pour the boiling water on the appellant but the appellant pushed the sufuria and the water poured on PW 1 instead.

10. The appellant has raised the ground that she was forced to conduct her defence in the absence of her advocate. From the record it is evident the appellant was represented by Mr Kasiala who was holding a brief for the Mr Rakewa, appellant's counsel. The appellant gave her sworn statement and it is not evident that she was prejudiced in any way or that her defence was compromised (see **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR**).

11. I now turn to consider the evidence. From the facts I have outlined, it is clear that some aspects of the case are not in dispute. It is not in dispute that PW 1 was burnt with hot water on the material date and that the appellant was involved in some form of altercation or physical engagement with PW 1. Thus in my view, the contradictions and inconsistencies are immaterial as to whether the incident took place. They only go to the issue whether the assault was deliberate or a case of self-defence. In **Ibrahim Kinyua Kingau v Republic (2010) eKLR** where Ouko J., quoted the case of **Palmer v Regina [1971] ALL ER 1077** and held that;

Where the evidence is sufficient to raise the issue of self-defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence.

In other words, the prosecution had to disprove the appellant defence of self-defence beyond reasonable doubt.

12. Nothing was suggested to the prosecution witnesses in cross-examination that PW 1 went into the appellant's house and a confrontation ensued. The witnesses were clear that it is the appellant who came and poured hot water on PW 1. Although the appellant admitted that she was burnt, she did not seek treatment or go to the police to complain that PW 1 had threatened to kill her and assaulted her. In sum her conduct after the event was inconsistent with her innocence and with self-defence. Like the learned magistrate, I find the appellant's defence an afterthought and was disproved by the prosecution.

13. Mr Nyanga disputed the fact that the injuries sustained by the appellant could be classified as grievous harm. Grievous harm as found in **section 4** of the *Penal Code* is defined as follows:

grievous harm means any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely so to injure health, or which extends to the permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense. [Emphasis mine]

14. PW 1 sustained burns on the face and ear which impaired her hearing on right ear and left hyper pigmentation. The thorax, abdomen and limbs also suffered burns and hyperpigmentation. She was hospitalized for 1 month. PW 5 classified the appellant's injuries as "*maim*." I am satisfied that the injuries suffered by PW 1 fell within the definition of grievous harm.

15. The sentence was not excessive considering that the appellant's action was deliberate and uncalled for and the complainant sustained serious injuries.

16. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 4th day of August 2016.

D.S. MAJANJA

JUDGE

Mr Nyanga instructed by Nyanga and Company Advocates for the Appellant.

Ms Osoro, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.