



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL APPEAL NO 511 OF 2013**

**TOM ODHIAMBO OTIENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from original conviction and sentence dated 13th September, 2012 in Kangema PM Criminal Case No 476 of 2012 - J O Magori, PM)***

**J U D G M E N T**

1. The Appellant was convicted of ***assault causing actual bodily harm*** contrary to **section 251** of the **Penal Code**. It was alleged that on 20<sup>th</sup> August 2012 at Kamacharia Sub-location in Murang'a County, he unlawfully assaulted one ***Imelda Ann Kajimba***, thereby occasioning her actual bodily harm. He was sentenced to 1 year probation. He has appealed against both conviction and sentence upon the following 3 main grounds -

(i) That the learned trial magistrate erred in law and fact by holding that the evidence against the Appellant had been corroborated by all the three prosecution witnesses and thereby arrived at the wrong conclusion that the Appellant was guilty of the offence charged.

(ii) That the learned trial magistrate erred in law and fact by failing to consider and appreciate the Appellant's evidence as well as that of his witnesses.

(iii) That the learned trial magistrate erred in law and fact by holding that the complainant had been treated at ***Othaya District Hospital*** when no such evidence was presented, and further failed to take judicial notice that the Appellant had been denied access to such medical records despite court orders.

2. The prosecution case as laid before the trial court was that on 19<sup>th</sup> August, 2012, the complainant travelled from Rongo in Homa-Bay County to Kamacharia in Murang'a County to visit the Appellant who was her fiancé at his invitation. The Appellant had sent her KShs. 2,000/00 for her fare. At Kamacharia she proceeded to the Appellant's house where she found him standing outside. They exchanged greetings and she went into the house; she found a lady in the living room. She greeted the lady, proceeded to the bedroom, showered and then went back to the living room to take some tea.

3. The Appellant then summoned her to the bedroom and ordered her to leave his house. She

informed him that she was tired and that she had no fare to travel back to Rongo. She left him in the bedroom and went to the living room where he followed her and started beating her up using fists and a trouser belt. She fell down and started bleeding from her private parts. Upon seeing the blood the Appellant ordered her to go to the toilet and wipe herself.

4. The Appellant declined to take the complainant to hospital but he gave her KShs 400/00 to travel to Nairobi, but she chose to use the money to buy medicine as the beating had caused her swelling on her upper lip, swelling on the left collar-bone region, and the bleeding from her private parts. She bought pain-killers and went back to the Appellant's house where she found him with a yellow paper bag containing her clothes which had been in the wardrobe. These were 4 trouser suits and 3 skirt suits, all valued at KShs 30,000/00. He told her to leave but she protested that it was late. It was then about 4.00 p.m. He then pushed her out of the house and locked her out, and then doused her clothes in paraffin and set them on fire. This action had formed the subject of a second count of malicious damage to property of which the Appellant was acquitted.

5. The Appellant then threatened the complainant that if she did not leave his compound by 6.00 p.m. he would call his officers to come and forcefully eject her. The complainant then went to a nearby church to seek refuge but it was locked; so she sat outside until about 7.00 p.m. when she sought accommodation at a nearby house, but the lady there was reluctant to offer any and said that she was afraid. So she went back to the church and remained there outside overnight.

6. The following day at about 7.00 a.m. the complainant went to the District Commissioner's office where she found a lady DC who summoned the Appellant (who was a District Officer). The Appellant, after consulting with the DC in private, gave her KShs 1,500/00. The DC advised her to go to hospital. She went to hospital at Othaya and later at Nyeri. Subsequently she reported the assault at **Kiriaini Police Station** and was issued with a P3 form after she was initially denied one. The P3 was filled at Kangema Sub-District Hospital on the following day. She then self-recorded her statement with the police. The Appellant was arrested and charged. A doctor (PW2) produced in evidence the complainant's medical report (P3) according to which the complainant suffered the following injuries -

- **mild swelling on the lower lip;**
- **cut on the lower lip;**
- **haematoma on the left upper anterior chest wall with mild tenderness;**
- **tenderness on the left lower side of the abdomen;**
- **limited range of movement of the left hip;**
- **small cut on the anterior left thigh;**
- **some little blood in the vagina.**

The injuries were 2 days old at the time of examination.

7. In his own defence the Appellant testified under oath and called 2 witnesses. One was his girlfriend (now wife) that the complainant had found in the house. The other witness was lady neighbour. It was the Appellant's testimony that the complainant was a former girlfriend who appeared at his house without notice. She demanded to stay there claiming that she was now his wife. He denied that he had invited her to visit, or that he had sent her fare for that purpose. He reminded her that their affair had ended and she had accepted that fact. He told her that he had moved on with his life and demanded that she leaves his house. She claimed that she had no fare to travel back, so he gave her the only money he had, KShs 400/00. She went away but left her hand-bag which he placed out on the veranda.

8. She shortly came back and banged on the locked door of the house. He refused to open. She then

started drama out on the veranda, shouting and wailing that she was being beaten. She also rolled about on the floor of the veranda as the Appellant and his girlfriend watched her from inside their locked house. After about 2 minutes of this drama she went away, threatening them with dire consequences as she went away. He denied that he had assaulted her or burned her clothes as charged.

9. The Appellant's girlfriend's testimony was the same as that of the Appellant in the material particulars. She denied that the Appellant assaulted the complainant as alleged. She also stated that the complainant had subsequently asked her to join her in the case to fix the Appellant, and that they would share any money she (the complainant) would thereafter extort from the Appellant. She declined.

10. DW3 was the Appellant's neighbour. Her testimony was that she had given the complainant a place to sleep in her house on the material evening and also the following night at her request. She (the complainant) had told her that she was the Appellant's wife; that she had found him with another woman in the house; and that as a result they had quarrelled. She further stated that if the complainant said that she had spent a night outside s church and the following night in a lodging, it was plainly not true.

11. DW3 also stated that her house was only 25 meters away from the Appellant's house, and that had there been a commotion there with a woman wailing and shouting that she was being beaten, she would have heard it all as she was in her house at the material time. This plainly belied the testimony of the Appellant and his girlfriend about the drama allegedly caused by the complainant on their veranda.

12. This being a first appeal, it is my duty to evaluate on my own the evidence placed before the trial court and arrive at my own conclusions regarding the same. I must bear in mind though, that I neither heard nor saw the witnesses as they testified, and give due allowance for that fact. See *Okeno -v- Republic [1972] EA 32*.

13. There are a few facts that are not in dispute and others that cannot be in dispute. On the material date the complainant visited the house of the Appellant. The complainant says it was at the invitation of the Appellant who even facilitated it by providing the necessary fare. The Appellant denies this and says the visit was unexpected and unwanted, and she was not welcome at his house. It really matters not whether the complainant visited the Appellant's house at his invitation or not. It is common ground that she was there. It is also common ground that neither the complainant nor the Appellant was happy at the state of affairs. The complainant found another woman in the house whereas she appears to have thought that she was the Appellant's fiancée soon to get married to him. The Appellant on the other hand already had another girlfriend in the house and certainly did not want the complainant present; in any event it was his position that his affair with the complainant had already ended and the complainant had accepted that fact. To the Appellant therefore the complainant's uninvited presence was a very unwelcome intrusion into his personal space. He wanted her out immediately.

14. On her part the complainant would not at first leave. What would result in this volatile situation? Obviously, a mighty quarrel between the two lovers (from the complainant's perspective) or former lovers (from the Appellant's perspective) ensued.

15. The Appellant's and his new girlfriend's testimonies as to what then transpired was that after initially agreeing to leave after being given KShs 400/00 she came back and lodged an almighty drama on the veranda of the house to falsely make neighbours believe that she was being assaulted. The Appellant's own witness, DW3, did not hear this drama from her house only 25 metres away. According to her testimony she would have heard the drama if it had taken place.

16. The complainant's version of events on the other hand was that when she refused to leave the house the Appellant got angry and assaulted her using fists and a belt. The assault took place in the living room. I am not surprised that DW3 did not hear that commotion as it took place **inside** the house.

17. From my own assessment of the totality of the evidence placed before the trial court, I am satisfied that in anger and in an effort to make her leave the house, the Appellant assaulted the complainant as charged. There were some slight discrepancies in the prosecution evidence, for instance as to whether

the complainant suffered injury on the upper or lower lip. These discrepancies however did not go to the root of the matter. The fact is that she suffered various other injuries as set out in the medical report (P3). It is also of no great significance that shortly before the incidence the complainant had had an abortion, spontaneous or induced. She does not appear to have been bleeding when she arrived at the house of the Appellant. The beating she received from the Appellant may well have provoked fresh bleeding from her private parts on account of the recent abortion.

**18.** I am therefore satisfied that the Appellant was convicted of assault causing actual bodily harm to the complainant upon good and sound evidence. His defence was properly rejected. The offence was proved beyond reasonable doubt. The conviction is safe.

**19.** In the event this appeal is dismissed in its entirety. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 20<sup>TH</sup> DAY OF FEBRUARY 2015**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS            DAY OF FEBRUARY 2015**