



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL APPEAL NO. 147 OF 2013

MERCY KATUNGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Mwingi SRM Criminal Case No. 258 of 2013

I.W. Gichohi delivered on 20/06/2013)`

JUDGMENT

The appellant was charged in the subordinate court with grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on 5th April 2013 at Thokwa Location in Migwani District within Kitui County unlawfully did grievous harm to Pius Mulwa. She denied the charge. After a full trial, she was convicted and sentenced to serve fifteen (15) years imprisonment.

Dissatisfied with the decision of the trial court, she has now appealed to this court. She initially filed a petition of appeal on 10th September, 2013. On 2nd September 2014 however she filed amended grounds of appeal. The amended grounds of appeal are that:-

1. The charge was defective contrary to the Criminal Procedure Code.
2. The prosecution evidence was inconsistent and contradictory.
3. That the magistrate wrongly convicted her on the evidence of a single witness though there was an existing grudge.
4. That the magistrate erred in convicting her though she was not positively identified as the culprit.
5. That no investigation was done.
6. That since she took the complainant to hospital and paid the medical bill, the magistrate should have treated the incident as accidental and not malicious, as the complainant was infact intoxicated at the time of the incident.
7. That the sentence imposed was harsh and excessive in the circumstances of the offence and considering that she was suckling a baby and had four other young children.
8. That the magistrate was wrong in dismissing her strong defence.

The appellant also filed written submissions. The Prosecuting Counsel Mr. Orwa for the DPP also filed written submissions. By consent parties relied on the written submissions filed. I have perused and considered both sets of written submissions.

In summary the case involved a wife (the appellant) and the husband (the complainant). The prosecution called three witnesses. PW1 Thomas Gichohi was a Clinical Officer at Migwani District Hospital. It was his evidence that on 6th April 2013 he received a report from the OCS Migwani Police Station and asked to examine Pius Mulwa the complainant. He did so. The complainant had burns and the shirt was blood stained. He was not well oriented. He noted severe injuries all around the head, face and left ear. The complainant was fully burnt on the back, and both hands and legs were severely burnt. The burns were less than 24 hours old. He filled a P3 form and classified the injuries, which he produced in evidence.

PW2 was the complainant. It was his evidence that the appellant Mercy was his wife whom she married on 22/11/2002 and had four children. That they lived well for the first two years. Thereafter they had problems because she never cultivated and he suspected her of infidelity. They used to fight and she went back to her parents home a number of times. They later reconciled. On 5/04/2013 when he came back from casual work in the evening, he met the appellant seated outside the house. She had not planted maize and beans as agreed. When he asked her about it, she packed her bags and went to her parents home with the children. He followed her and found the parents outside the house. He was not welcomed and decided to walk back. After walking a distance of 100metres the appellant followed and poured hot water on him and he got severely burnt. He later went for treatment.

PW3 was Cpl. Purity Kitau. She received the report at Migwani Police Station. The complainant also came to the station and was given a note go to hospital for treatment. It was her evidence that on 19th May 2013, the appellant was arrested and charged.

When put on her defence, the appellant gave sworn testimony. She stated that she had a long standing dispute with her husband the complainant, mainly due to drunkenness and selling food stuffs and leaving the family hungry. It was her position that the brother of the complainant tried to mediate between them in vain. They had several fights.

On this incident, the two had quarreled and she went back to her parents home with the children. The complainant came there drunk and without the company of his parents as per custom. When he found that her parents were also away, he picked a fight with her. The appellant had heated water to bathe the children and the complainant being drunk, fell on the water and was thus injured. She later helped and took him to hospital, and even paid the hospital bills. She was now surprised to be arrested and charged in court.

DW2 was Kennedy Musee Masia the assistant chief. It was his evidence that he persuaded the appellant to take the complainant to hospital and pay the hospital bills. She paid Kshs. 3,000/=. Later she was arrested and charged.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences. **See Okeno Vs. Republic [1972] EA 32.**

Though the appellant has argued that the charge was defective, I find no defect in the charge. In my view, it was a proper charge and the particulars were clear. It was amended to correct the date of the incident and the appellant correctly made to plead to the same. I dismiss the complaint.

The appellant has argued that she was not identified as the culprit. In my view, there was no point of physically identifying her. She clearly stated that they had a quarrel on that day with the complainant her husband. She also testified that the complainant got burnt with hot water in the process. The only variation is with regard to how the hot water burnt the complainant. I dismiss that ground.

I have considered the issue of contradictions raised by the appellant. From the evidence on record, however, I find no contradictions which weakened the prosecution case. I dismiss that ground.

Having re-evaluated all the evidence on record I find that the prosecution proved its case against the appellant beyond reasonable doubt. The injuries were classified in the P3 form as grievous harm. They were described as having been spread from the head back to the legs. The injuries are consistent with the pouring of hot water from behind as described by the complainant. Nobody except the appellant had a reason to pour hot water on the complainant other than the appellant. In any case, the appellant stated that the complainant suffered injuries due to pouring of hot water in her presence. She only gives a different version which is not believable. In my view the learned magistrate was right in disbelieving the defence of the appellant, and believing the prosecution evidence. The fact that the appellant paid the medical bills was no defence to the offence. It could only be a mitigating factor. I thus uphold the conviction.

The appellant has argued that the sentence was harsh and excessive. The Learned Prosecuting Counsel has argued that life sentence for grievous harm is mandatory.

Counsel has urged me to impose the life sentence. In my view, the life sentence was not mandatory. Though the word "shall" was used, under the section defining the sentence, the situation was moderated by use of the word "liable" in the same section. In my view therefore, the magistrate had the discretion to impose any lawful sentence, provided the same was not higher than life imprisonment.

The sentence of 15 years imprisonment imposed, was thus lawful. However, taking into account the facts surrounding the case, that the cause was a disagreement between husband and wife and the young children in the family, I would think that a lesser sentence would serve the purpose. I will thus interfere with the sentence.

I thus dismiss the appeal on conviction. I uphold the conviction. I however allow the appeal on sentence. I set aside the sentence imposed instead order that the appellant will serve five (5) years imprisonment from the date on which she was sentenced by the trial court.

Dated and delivered at Garissa this 20th day of April, 2015

GEORGE DULU

JUDGE