



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 29 OF 2014

LONA MURUNGI KATHIGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of the Resident Magistrate (S. Ngii) in Principal Magistrate's Court at Wang'uru Criminal Case Number 122 of 2014)

JUDGMENT

1. The appellant herein, **LONA MURUNGI KATHIGI** was charged with grievous harm contrary to *Section 234* of the Penal Code before the Principal Magistrate's Court at Wang'uru vide PMCC CR. NO. 122 of 2014. The trial court found her guilty of the offence and convicted her sentencing her to serve twenty (20) years imprisonment. She was dissatisfied with both the said conviction and sentence and appealed to this court raising seven (7) grounds in her Petition of Appeal.

2. These are the grounds in the petition:

1. *That the learned magistrate erred in law and fact by failing to consider and appreciate the long family feud existing between the complainant's family and that for the appellant.*
2. *That the learned trial magistrate erred in law and fact by failing to appreciate the defence.*
3. *That the learned magistrate erred in law and fact by failing to appreciate that the evidence adduced did not support the charge.*
4. *That the learned trial magistrate erred in law and fact in failing to appreciate that there were glaring discrepancies regarding the witnesses and manner in which the alleged offence was committed.*
5. *That the learned trial magistrate erred in law and fact in failing to appreciate that the co-existing destroyed the inference of the appellant involvement in the alleged offence.*
6. *That learned magistrate erred in law and fact in failing to appreciate that the conviction was against the weight of evidence adduced.*
7. *That the sentence was manifestly harsh and excessive in regard to the circumstances.*

3. The appellant's counsel, Mr. Gitonga advocate made oral arguments and submissions on behalf of the appellant to support the above grounds in urging this court to allow this appeal. He pointed out that the weapon used in the attack of the complainant said to be a knife was never produced as an exhibit in court. He also added that the clothes worn by the complainant, if it is true that they were soaked in blood were never produced as exhibits to prove the allegation and that the nurses who attended to the complainant were also not called to give evidence. He faulted the trial magistrate for relying on the evidence of P.W.6 – a clinical officer at Kerugoya who according to the appellant testified that the complainant was attended to at **KIBIMBI HEALTH CENTRE** and that no basis was laid for production

of treatment cards as exhibits at the trial court.

4. On ground 4 of the petition, the appellant's counsel submitted that there were glaring contradictions on how the incident occurred between the evidence of P.W.1 and P.W.2. He argued that while P.W.1 (complainant) told the court that he saw the appellant in the company of one **VERONICA** and **JENNIFER** (P.W.2) and he called her but in the process he was held by Jennifer as the appellant stabbed him severally while P.W.2 gave a different version of events telling the court that the complainant started abusing the appellant and kicking her but he was stabbed.

5. The appellant also pointed out the existence of a grudge between the appellant's family and complainant a fact she argued was admitted by P.W.2. She faulted the learned magistrate for not considering the dispute.

6. It was submitted further that P.W.2 was unreliable witness as she told the court that she was made to sign a statement that did not contain her input. According to the appellant, the State should have summoned one **VERONICA** who was said to have been present during the incident.

7. The appellant further took issue with the learned trial magistrate for not considering her sworn statement of defence which she argued explained in detail what transpired during the incident. According to her, she was the one who was attacked and it is P.W.2 who rescued her by holding onto the complainant to enable her flee from the scene.

8. The appellant contended that the case was not proved beyond reasonable doubt and that the sentence meted out was harsh and excessive.

9. Mr. Sitati appearing for the Office of the Deputy Public Prosecutor for State for the record did not oppose the appeal. Mr. Sitati stated that both conviction and the sentence handed out was not safe as in his view the evidence offered before the trial court was insufficient to convict the appellant. He conceded that the defence put forward by the appellant concerning the existence of bad blood between the two families of the appellant and complainant was not considered. Mr. Sitati however, did not give reasons why he did not comply with the provisions of *Section 352A* of the Criminal Procedure Code upon being served with the petition of appeal. However, that as it may this court in the exercise of appellate jurisdiction must determine the appeal on the merits.

10. I have considered the grounds raised in the petition of appeal herein plus the submissions made by Mr. Gitonga counsel for the appellant. The appellant has contended that the evidence adduced did not support the charge and that the evidence tendered did not prove the prosecution case beyond reasonable doubt.

11. The appellant herein faced a charge of causing grievous harm to the complainant on 23rd November, 2013. The evidence tendered before the trial court by the complainant (P.W.1) shows that he went for treatment at Kerugoya County Hospital immediately after the attack and was admitted there for a week and thereafter referred to Kenyatta National Hospital. P.W.4 (mother to the complainant) however, told the court that his son (complainant) was first taken to Kibimbi Sub-District Hospital for treatment before being referred to Kerugoya County Hospital. This was supported by the evidence of the medical officer, the clinical officer (P.W.6).

12. I have looked at the treatment cards from Kibimbi Sub-District Hospital and the entries on the card shows that the complainant was taken there for treatment on 27th December, 2013 and only for physiotherapy – (a referral case from Kenyatta National Hospital). This appears to be the case as the complainant told the court that after Kenyatta Hospital, he was referred back to Kibimbi for physiotherapy. That is not the only inconsistency. The complainant told the court that he was first treated at Kerugoya County Hospital but the treatment card from the hospital produced as P. Exhibit 4 shows that he was taken there on 27th November, 2013 and not 23rd November, 2013 when he was attacked. It was not clearly explained by the prosecution at the trial where the complainant was between 23rd November, 2013 to 27th November, 2013. It is also not very clear why the prosecution did not

produce the treatment card from Kibimbi Sub-District Hospital showing that the complainant was first treated there on 23rd November, 2013. As I have observed the treatment card produced as P. Exhibit 2 from Kibimbi Hospital clearly shows that the complainant was seen in the Hospital on 27th December, 2013.

13. The discrepancy was even made worse by the P3 filled and signed by P.W.6 (Clinical Officer Kerugoya) and produced as P. Exhibit 1. The P3 indicates the age of injuries suffered by the complainant when he was taken for examination as “hours” but critically the date of examination and filling the P3 is not given. The omission was fatal in my view as it clouds the chain of events that offered a sound explanation on how the complainant was injured. The prosecution in my view did great disservice to the complainant. The investigation was done yes but there were apparent loose ends in the prosecution case that needed tightening up. One is bound to ask why did the clinical officer fail to date his findings even after approximating the age of the injuries. The office of the Deputy Public Prosecutor should have been more diligent in the presentation of evidence to the trial court in view of the serious nature of injuries suffered by the complainant.

14. I also find the evidence of P.W.6 tendered before the trial court quite casual and inconsistent to the charge. According to him the complainant gave a history of having been assaulted on 23rd October, 2013. However, the charge sheet plus the evidence tendered by all the other witnesses show that the complainant was attacked on 23rd November, 2013. I have counter checked this disparity shown in the typed proceedings and confirmed from the hand written proceedings from the learned magistrate that the date given by the clinical officer is indeed 23rd October, 2013.

15. The trial court appeared to have misdirected itself on this anomalies or inconsistencies in the prosecution case and I do find that had the learned magistrate properly directed its mind to the said discrepancies in the prosecution, the finding would have been different.

16. I am not persuaded by the appellant’s submissions that the family differences of the complainant and the appellant should have been used as a defence to such a serious crime. No one can be allowed to hide behind family feuds or disputes to commit serious crimes such as the one committed against the complainant before the trial court. It is not disputed that no one is allowed to take the law into his/her hands whether the offender is a female or male whether student or not. An offence is an offence and will always be met with full force of the law.

17. Having said that I will allow this appeal on only one ground which I have explained above. The inconsistencies on the dates appearing on the treatment cards with the date of the offence and evidence tendered by prosecution witnesses were sufficient to create some doubt to the mind of the trial court. And the existence of such doubts can only benefit an accused person as a principle in law.

Consequently, the appeal is allowed. The conviction and the sentence imposed by trial court on 30th May, 2014 against the appellant herein is quashed and reversed. She shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kerugoya this 27th day of May, 2015.

R. K. LIMO

JUDGE

27.5.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Appellant: present

Gitonga for Appellant present

Omayo for State present

COURT: Judgment dated, signed and delivered in the open Court in the presence of Gitonga for the Appellant and Omayo for the State.

R. K. LIMO

JUDGE