



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APPEAL NO. 101 OF 2013**

**HUMPHREY IRUNGU KURIA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against conviction in Kangema Senior Resident Magistrate's Court Criminal Case No. 236 of 2009 (Hon. Orimba) on 9<sup>th</sup> February, 2010)**

**JUDGMENT**

The appellant was charged with the offence of assault causing actual harm contrary to **section 251** of the **Penal Code**. According to the particulars of the offence, on the 28<sup>th</sup> day of December, 2008 at Gikui sub-location in Murang'a West district within central province, the appellant unlawfully and wilfully assaulted Lucy Njeri Kimani thereby occasioning her actual bodily harm.

At the conclusion of the trial, the learned magistrate was convinced that the prosecution had proved the case against the appellant beyond reasonable doubt and accordingly convicted him; however, rather than sentence the appellant, the learned magistrate exercised his powers under **section 35** of the Penal Code and discharged the appellant.

The appellant was not satisfied with the conviction and has therefore appealed against it in this court. In his petition which he filed in court on 28<sup>th</sup> April, 2010 the appellant faulted the learned magistrate's decision on the grounds that he erred in law in convicting the appellant without sufficient evidence; that he disregarded the appellant's evidence; that he erred in law and in fact in relying on inconclusive and unreliable evidence and that he also erred in law and in fact when he convicted the appellant based on contradictory evidence.

The record from the subordinate court shows that the complainant, Lucy Njeri testified as the first prosecution witness. She told the court that the appellant is her brother in law, who on 25<sup>th</sup> day of December, 2009 at around 7 am assaulted her. On the material day the appellant is said to have called the complainant outside her house and that when she responded to the call, she found the appellant armed with a stick and a panga. According to the complainant, after the appellant questioned her on what it is that she had been discussing with the appellant's wife, he hit her with the stick. She was hit on her

hands and even her right arm got broken.

She raised alarm and people came to her rescue; among these people who came to her rescue was one **Benjamin Kuria (PW3)**. The appellant is said to have ran away immediately she saw Benjamin coming. The complainant further testified that she was taken to hospital by her mother at Murang'a and that she reported the matter to Kangema police station where she was issued with a P3 form which she identified in court. She told the court that immediately after this incident the accused disappeared and was only arrested long after he committed this offence. The complainant said that she never had any grudge with the appellant and that her parents and the appellant's parents had a cordial relationship.

The complainant's mother in law Mary Waitherero testified as the second prosecution witness. According to her she recalled that on 25<sup>th</sup> October, 2009 at about 7 am she was in her house when she heard screams from the complainant's home. She immediately rushed there only to find the complainant with her children crying. Upon enquiry on what was happening, she was told that she had been assaulted by the appellant. She confirmed that the appellant had sustained injuries on her hands.

This witness sought the assistance of Margaret Waithera to help the complainant to the house; she also summoned her husband from work and together they proceeded to Kangema police station and to Murang'a for treatment. She confirmed on cross-examination that the appellant disappeared for several months after the incident before he was finally arrested and charged.

The eye witness who witnessed the appellant assaulting the complainant was **Benjamin Kuria (PW3)**; he confirmed that on 25<sup>th</sup> December, 2008 at around 7 am he was in his house when he heard screams from the direction of the complainant's house. He rushed to the scene and found the appellant assaulting the complainant who was her sister in-law. The appellant was armed with a panga and a stick. This witness testified that though she asked the appellant why he was assaulting the complainant he never responded. He said that the complainant sustained injuries on her hands and legs. He said that the appellant ran away.

Police Constable John Thiraku (PW4) is the police officer who arrested the appellant. This officer told the court that he effected the arrest after the appellant's father reported on 11<sup>th</sup> July, 2009 that the appellant who had earlier disappeared had resurfaced. The officer together with his colleague arrested the appellant and handed him over to Kangema police station.

The final witness called by the prosecution was Linus Materi Kabura, a medical officer attached to Murang'a district hospital. This witness filled the P3 form in respect of the complainant on 28<sup>th</sup> January, 2009 after he examined her. In summary his findings were that the complainant was injured on the forehead, the left eye and the left leg. The complainant had also multiple bruises on the left elbow and generally both her hands were injured. In the medical officer's estimation, the degree of the injury was "harm" and the type of weapon used to injure the complainant was described as a "blunt object".

In his unsworn testimony, the appellant denied having anything to do with the assault. He said that the complainant was his uncle's wife. He sought to produce in evidence a statement by the complainant and a letter from an advocate as exhibits in support of his case. Those exhibits were not marked and are not indicated to have been admitted in evidence.

It has been necessary to bring out the evidence as presented in the trial court because as the first appellate court, this court has a legal obligation to evaluate that evidence afresh and arrive at its own conclusions taking into account the fact that in making the decision it did, the trial court had the advantage of seeing and hearing the witness. This principle was reaffirmed in the case of **Dinkerrai Ramkrishan Pandya versus Republic (1957) E.A. 336**. It was applied by the Court of Appeal in **Okeno versus Republic (1972) EA 32** and has since been consistently followed in subsequent decisions in criminal appeals such as the appeal herein.

**Section 251** of the **Penal Code** under which the appellant was charged states:-

**251. Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.**

The complainant's testimony that she was assaulted and as a result she suffered actual bodily harm was not controverted. Her testimony was not only corroborated by eye witnesses, Mary Waitherero (PW2) and Benjamin Kuria (PW3) but also by Linus Materi Kabura (PW5) the medical officer who examined her. The medical officer produced a P3 form in which his findings were made.

According to this officer, the complainant was injured on other parts of the body other than the hands to which the complainant referred in her testimony. His evidence was not displaced and therefore there is no doubt that the offence of assault occasioning actual bodily harm as known in **section 251** of the **Penal Code** was committed.

The next question is whether the appellant was the person who assaulted the complainant. To answer this question, the sworn evidence of the complainant herself and that of Benjamin Kuria (PW3) is pertinent. The complainant was categorical that it is the appellant who attacked her. She knew him as her brother in law. The attack was in the broad daylight and there was no question of mistaken identity. The learned magistrate found her evidence credible and trustworthy and as far as I can see there is nothing on record to suggest otherwise. She is a witness who remained firm when she was cross-examined and there is little to suggest that her evidence was ever shaken.

To corroborate her evidence, Benjamin Kuria (PW3) actually saw the appellant assaulting the complainant. This witness even asked him why he was assaulting the complainant though he did not get any response. He said that soon thereafter the appellant disappeared. Again the learned magistrate found this witness to be credible and trustworthy and there is no basis of faulting his finding.

When the appeal came for hearing on 14<sup>th</sup> October, 2013, counsel for the appellant made most of what he referred to as inconsistencies in the prosecution evidence. In particular, counsel said that though the complainant testified that she was assaulted on 25<sup>th</sup> October, 2009, and that it is only her hands that were injured, the third prosecution witness said that she was injured on 25<sup>th</sup> October, 2008 and that apart from the hands her legs were also injured. More so, the medical officer (PW5) detected even more injuries on the forehead and the left eye. In view of the inconsistencies on the evidence with regard to the date when the offence is said to have been committed and the scope of the injuries, the appellant's counsel argued that the appellant should have been given the benefit of doubt and acquitted.

I am unable to agree with the arguments by the appellant's counsel. It is true that the complainant, in her testimony, complained of her hands having been injured but she did not say that, it only her hands that were injured. If anything, the appellant never cross-examined her on the extent of her injuries. The third prosecution witness and the medical officer were also not cross-examined on the scope of the complainant's injuries. In my view, the fact that the complainant was injured on parts of her body other than what she mentioned in her evidence does not make the appellant any less culpable.

On the question of dates, the charge sheet is clear that the offence was committed on 25<sup>th</sup> December, 2008. The medical examination report which was produced and admitted in evidence is clear that the offence was committed on 25<sup>th</sup> December, 2008 and reported to the police on the same date. That report is also clear that the complainant was examined on 28<sup>th</sup> January, 2009. PW3, Benjamin Kuria also testified that the offence occurred on 25<sup>th</sup> December, 2008. The evidence of the first two prosecution witnesses, whose evidence is said to be inconsistent with the date in the charge sheet was given long before December, 2009; it would be illogical to suggest that the appellant was tried and the evidence against him given even before the offence was committed.

I agree with the learned counsel for the state that the discrepancy on the dates was not so material as to prejudice the appellant's case; in any event he never raised this issue in cross-examination at his trial. The accused was fully aware of the case against him and there was no doubt as to the dates when the offence for which he was charged was committed.

In the final analysis I find that the appellant was properly convicted because the case against him was proved to the required standard. I have not been able to gather why the learned magistrate decided to discharge the appellant rather than sentence him. The reason given that there was a long standing dispute between the parties is not apparent from the record. The appellant did not refer to such a dispute. Indeed the complainant testified that she did not know why the appellant was assaulting her. The appellant was discharged without any basis at all and, in my view, he should have been sentenced in accordance with the law.

For the reasons I have given, the appeal here is dismissed.

**Signed, dated and delivered in open court this 27<sup>th</sup> day of January 2014**

**Ngaah Jairus**

**JUDGE**