



153/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 46 OF 2012

RUTH ATIENO OTIENO.....PETITIONER

VERSUS

REPUBLICRESPONDENT

(Being and appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 387 of 2011 by Hon A.G. Kibiru , PM, on 20/1/2012)

JUDGMENT

1. **Ruth Atieno Otieno**, the appellant herein was charged with the offence of **grievous harm** contrary to **Section 234** of the **Penal Code**. Particulars thereof being that on the **27th day of May, 2011** at about 6.30am at **Kitui Township Location** in **Kitui County**, did grievous harm to **Catherine Mwanzia**.
2. The appellant was tried, convicted and sentenced to **ten (10)** years imprisonment. Being aggrieved by the judgment and sentence she now appeals on grounds that the learned trial magistrate erred in law and facts by holding that she wilfully burnt the complainant; the evidence was not properly corroborated by a minor (PW5); the prosecution's case was not proved beyond a shred of doubt whereas essential witnesses did not testify and by rejecting her defence without giving it effective weight against the prosecution's case.
3. At the hearing the appellant relied on written submissions and urged the court to be considerate as her only child had been taken to a Children's Home.
4. **Mr. Mwangi**, learned Counsel for the State opposed the appeal. He submitted that the case had been proved to the required standard. He called upon the court to uphold the conviction and sentence that was within the law.
5. The facts as presented by the prosecution were that on the **27th May, 2011**, **PW1, Catherine Nduku Mwanza (complainant)** was going to throw rubbish outside her house when the appellant, her neighbour ambushed her, pulled her into her house and locked the door. She accused the complainant of having mocked her the previous day and having a love affair with her husband. She hit her with a cooking stick on the head and poured on her hot water that burnt her on the neck. The complainant struggled and opened the door amid screams. **PW5, Brian Mwanthi**, her son saw her come out of the house with burns on the shoulders, chest and back. One, **Carol** who also answered her call of distress called for a taxi. She was taken to **Kitui District Hospital** where she was treated prior to being transferred to **Kenyatta National Hospital** where she was admitted for **21** days. **PW4, Dr. Patrick Mutuku** who produced the P3 form issued, stated that the complainant had burns on the left face, neck, chest, shoulders and stomach. She suffered 30% burns. He classified the degree of injury sustained as grievous harm.
6. In her defence the appellant stated that a woman went to her house and told her that she had been

sent by her husband to check on her child. The lady had in the past taken away her husband. The complainant held her and she pushed her away. They struggled and she fell on hot water. She denied having poured on her the hot water.

7. This being the first appeal, I am duty bound to reconsider and re-evaluate the evidence adduced so as to reach my own independent determination. This was well put in the case of **Njoroge versus Republic [1987] KLR 19 at page 22.**

“As this court has constantly explained, it is the duty of the first appellate court to remember that parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that the court cannot excuse itself from the task, of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect”.

8. The main issue for determination will be whether the prosecution’s case as weighted against the defence put forward by the appellant was proved beyond a shred of doubt. Having carefully evaluated the evidence adduced and the defence put forward by the appellant it is not in doubt that the complainant sustained injuries while inside the house of the appellant. The prosecution sought to prove that the appellant wilfully did grievous harm to the complainant, while the appellant argued that the complainant accidentally fell on hot water as they struggled. Further, it is not in doubt that the injuries sustained were grievous harm.
9. Evidence adduced by the complainant that she was pulled into the house of the appellant as she passed by going to throw rubbish was corroborated by that of PW5. The evidence of PW5 was not challenged on cross-examination. As to what transpired inside the house was the complainant’s word as against that of the appellant. However taking into consideration the conduct of the appellant prior to the complainant sustaining injuries she suffered, it is evident that she acted with a guilty state of mind. Medical evidence adduced was not consistent with falling on water as alleged. The complainant sustained burns on the left side of the face, the whole neck, the chest, abdomen and shoulders. If indeed the two (2) struggled and fell onto hot water, then the appellant could also have sustained injuries. The trial court was correct in making a finding that the burns sustained were not as a result of falling onto the water.
10. From the foregoing, I am satisfied that the learned trial magistrate analysed the evidence properly and reached a correct determination. I therefore have absolutely no reasons to interfere with the conviction. Consequently I uphold the conviction.
11. With respect to the sentence imposed, the appellant accused the complainant of having taken away her husband who has never bothered to take care of their child who is now at a Children’s Home. These are mitigating circumstances that the court ought to have considered.
12. In the premises the appeal against the conviction is dismissed. The sentence imposed is set aside and substituted by **five (5) years imprisonment**
13. It is so ordered.

DATED, DELIVERED and SIGNED this 15th day of JANUARY, 2014.

L.N. Mutende

Judge