



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 151 OF 2013**

**MARIA WARUHI MUIRURI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(From original conviction and sentence in Criminal Case No. 1503 of 2012 of the Chief Magistrate's Court at Naivasha- S. Muchungi [R.M])

**JUDGMENT**

1. The Appellant was charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on 19<sup>th</sup> May 2012, at Kabati Estate in Naivasha Municipality within Nakuru County, unlawfully caused grievous harm to Mary Wanjiku Mwariri.
2. To prove its case, the Prosecution called a total of five (5) witnesses. The Complainant, (**PW1**), was a fruit vendor who operated a stall rented from the then Municipal Council of Naivasha. Her stall was situated right opposite the Appellant's whom she had known for about five years prior to the incident.
3. On the material day at about 10.00 a.m, she was at her stall carrying several crates of fruit, when the Appellant attacked her with hot water. She explained that the Appellant first poured water on her right arm, and then again in her face. She reported the matter to the Police Station and was later sought treatment at Naivasha D. Hospital. The Appellant told her that she had insulted her the previous day, hence the attack.
4. In cross-examination, the complainant denied demanding KES 30,000/= from the Appellant as payment not to file the case against her. She acknowledged having withdrawn the case after making the report at the Police Station because she had been informed that the Appellant was seriously sick but she later pursued her claim when she realised the Appellant was feigning sickness.
5. The incident was witnessed by **PW2** and **PW3** who also used to operate stalls in the same market. They told the court of how Maria (the Appellant) poured water on the Complainant occasioning her the serious injuries. **PW2** saw the Appellant, whom she had known for about five (5) years emerging from the kitchen, carrying hot water which she poured on the Complainant once. Both witnesses testified that there were payments to be made to the Complainant by the Appellant. **PW2** said that this money was not paid, because the Appellant's husband told them that the Appellant was diabetic and they could not afford the same.
6. The Complainant was examined by **PW4** who observed that the Complainant had sustained partial loss of vision in the left eye, scalding in the right lower abdomen, right arm and upper thigh. He classified the injuries as maim. **PW4** filed the P3 Form which he produced as "Pexb 1".
7. The investigating officer **PW5** stated that his investigations revealed that the Appellant and the complainant had quarreled the previous day because of the Appellant's habit of pouring dirty water

- outside the Complainant's kiosk. He visited the scene and confirmed that the two stalls are opposite each other separated by a road. His decision to charge the Appellant was informed by the P3 Form which indicated that the injuries sustained by the Complainant amounted to grievous harm.
8. On being put on her defence, the Appellant gave sworn testimony. She explained that on this day, she was pouring some dirty water in the nearby trench as she always did, but some of it happened to pour on the Complainant who was passing by. She had not realised that the water in the bucket was hot. The Appellant asserted that the Complainant had been incited into reporting the incident, despite the fact that it was an accident, and pursue the claim with an intention to make money out of her. After their negotiations, she agreed to pay the Complainant Kenya Shillings Thirty Thousand (Kshs.30,000/=) to facilitate the withdrawal of the case and actually paid the Area Chief Kenya Shillings Ten Thousand (Ksh.10,000/=).
  9. This agreement was confirmed by **(DW2)** who was among the village elders asked to settle the case. The Appellant made a payment of KES 10,000/= which was later refunded to her after the Complainant refused to make collect it.
  10. Upon evaluating the above evidence, the trial court found that the charges against the Appellant had been proved beyond reasonable doubt, convicted her and sentenced her to five years imprisonment. Aggrieved, the Appellant has appealed against the conviction and sentence. She raised five (5) grounds in her Petition of Appeal, that:

**(a) the trial magistrate erred in law and fact in finding that the Appellant had committed the offence of grievous harm as alleged;**

**(b) that the learned magistrate erred in law and in fact in finding that that the incident was an accident and not intentional;**

**(c) the learned magistrate erred in failing to consider that PW2 and PW3 could not have witnessed the incident because they were far from the scene and the place was crowded;**

**(d) that the evidence adduced was tainted with malice and was also contradictory and unbelievable; and**

**(e) the sentence passed was extremely harsh and excessive.**

11. Mr. Cheche for the Appellant argued the first and second grounds together. He faulted the trial court for finding that the charges against the Appellant had been proved. He argued extensively that the ingredient of malice aforethought had not been established as the evidence demonstrated that the injuries were inflicted accidentally.
12. He also argued that the evidence of **PW2** and **PW3** was unreliable and contradictory. He submitted that the distance between the witnesses' stalls and where the attack took place was considerably far that they could not have been able to comfortably see what transpired. Counsel pointed out the inconsistencies in their testimony regarding the number of times the Appellant allegedly poured water on the Complainant and whether the Appellant was carrying a bucket or a basin at the time. He also argued that the two were not independent witnesses but rather, as demonstrated by the evidence, they were active in the incitement of the Complainant to report the matter and to extort money from the Appellant. Finally, he argued that the information in the P3 Form did not support the Complainant's Contention that she had sustained any injuries to her face.
13. On the sentence, Counsel submitted that the court failed to consider the Appellant's mitigation and a result passed a sentence that was harsh in the circumstances. It is for all these reasons that he urged the court to quash the conviction and set aside the sentence.
14. The appeal was opposed by the State. The Prosecution Counsel alleged that the Appellant was generally a liar who absconded court hearings.
15. The Appellant was not remorseful even after being convicted and offered no statement in mitigation. The Prosecution evidence proved the case against the Appellant beyond reasonable doubt, counsel urged the court to uphold the conviction and sentence and to dismiss the appeal.

## **ISSUES FOR DETERMINATION**

16. Upon hearing the submissions made by both Counsel this court finds the following issues for determination;

- i) Whether the evidence adduced by **P.W.2** and **P.W3** was contradictory and unbelievable
- ii) Malice aforethought
- iii) Whether the sentence imposed was harsh and excessive in the circumstances.

## **ANALYSIS**

17. This court being the first appellate court it is incumbent upon the court to re-assess and re-evaluate the evidence on record afresh and to arrive at its own independent conclusion and must be alive to the fact that the court did not have the opportunity to observe and or hear the witnesses. Refer to the case of **Okeno V. Republic** (1972) EA 32.
18. Counsel had submitted that the evidence of **PW2** and **PW3** was contradictory as it did not corroborate that of the Complainant in that the two witnesses testified that the Appellant threw water on the Complainant, once. Whereas the evidence of the Complainant was that the water was splashed on her twice.
19. This court is of the view that the number of times the Appellant threw water onto the Complainant is not of great significance because even with the one throw the damage was done and injuries were sustained.
20. What is of significance is that the two witnesses that is **PW2** and **PW3** were able to identify the Appellant and place her at the scene. These two witnesses also witnessed the incident and gave first hand narrative as to what transpired on the material date and how the Appellant scalded a hapless Complainant with hot water thereby occasioning her with grievous bodily harm.
21. Upon reviewing the evidence on record this court is satisfied that the evidence of the two witnesses is believable and not in any way contradictory. This ground of appeal that the evidence of the two witnesses as being contradictory and unbelievable is found lacking in merit and is disallowed.
22. It is not in dispute that the Appellant threw hot water onto the Complainant and that this action occasioned injuries to the Complainant. These injuries were corroborated by **PW4** who examined the Complainant and confirmed the extent and nature of the injuries.
23. What is in dispute is the intention and Counsel for the Appellant submitted that the actions of the Appellant were accidental and that the prosecution had failed to establish the key ingredient of malice aforethought.
24. This court makes reference to **Section 206** of the **Penal Code** which provides the statutory definition of malice aforethought which is as follows:

**“Section 206: aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;**

**i) An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**ii) Knowledge that the act or omission causing the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**iii) An intent to cause a felony;**

**iv) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

25. In trying to establish the issue as whether or not there was malice aforethought this court is guided by the first two definitions.
26. The evidence of the **PW2** was that the Appellant used to report to work at about midday but on this material date she came early that is at 9.00am.
27. It was the evidence of the Complainant, **PW2** and **PW3** that the Appellant never used to pour the dirty/used waste water from her githeri onto the road but was in the habit of pouring it into a trench which was near the Kiosk operated by the Complainant.
28. This habit of the Appellant was the bone of contention as the Complainant found this action offensive and there had been an altercation between the two the previous day.
29. This court is of the view that the actions of the Appellant on that material date were premeditated in that she reported to her kiosk earlier than her expected time. She confirmed in her statement of defence that she used to pour the dirty water into a trench besides the road. No explanation is given by the Appellant as to the change in routine.
30. The Appellant testified that she did not know that her househelp had left hot water in the bucket. Like the trial magistrate I am not also satisfied that the Appellant was being candid when she said that she did not know that the water in the bucket was not hot. There is a great difference between cold water and hot water and I also note from the court record that this house-help was not called as a defence witness to corroborate the Appellants version.
31. This court reiterates and is satisfied that the actions of the Appellant on that material day were deliberate and premeditated and further the existence of an altercation between the two, the previous day is not denied and further the Appellant confirms the existence of a grudge between herself and the Complainant.
32. This court is of the view that if the Appellant's actions were indeed accidental and not intended she would have been remorseful and when called upon by the trial court to mitigate would have specifically stated so but the court record shows that the Appellant had nothing to say in mitigation.
33. I am satisfied that the prosecution proved its case beyond reasonable doubt and that the Appellant knew the consequences of her actions in that they would cause grievous harm to the Complainant and that the knowledge was accompanied by indifference.
34. The ground of appeal on failure by the prosecution to prove the key ingredient of malice aforethought is found lacking in merit and is disallowed.
35. On the last issue that relates to sentence this court makes reference to the renowned case of **Wanjema V. Republic [1972] EA 493** which sets down the principles as to when an appellate court may interfere with the sentence imposed. In this instance the Appellants Counsel submits that the sentence is harsh for the circumstances of the issue.
36. This submission is one of the principles set down in the above case that an appellate court may interfere with the sentence if it is found to be manifestly harsh and excessive in the circumstances in issue.
37. The circumstances of this case are that the Appellant scalded the Complainant with hot water which was thrown straight at her face. That the actions resulted in partial loss of vision in the Complainant's left eye. The trial court gave reasons for the sentence imposed which was the veracity of the offence and degree of the injuries sustained. The trial court clearly cited the penal provisions of Section 234 of the Penal Code which provides that a person found guilty is liable to imprisonment for life.
38. This court holds that the sentence imposed of five years is deserved and is not harsh in the light of the injuries inflicted and also in the absence of mitigation to show remorse. This court is disinclined to interfere with the sentence and this ground of appeal is disallowed.

**FINDING AND DETERMINATION**

39. For the reasons stated above this court makes the following findings;

40. This court finds that the prosecution proved its case to the desired threshold.
41. The court finds no reason to warrant interference with the sentence.
42. The appeal is found to be lacking in merit in its entirety and is hereby dismissed.
43. The conviction and sentence is hereby upheld.

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 29th day of September, 2014.**

**A. MSHILA**

**JUDGE**