REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 153 OF 2010

SAMMY K. ROTICH *alias* NYAMU...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(*Being an appeal from the original conviction and sentence in Criminal Case No. 153 of 2010 Republic vs Sharon Sammy*

K. Rotich alias Nyamu and another in the Resident Magistrate's Court at Kabarnet by E. Bett, District Magistrate)

<u>JUDGMENT</u>

1. The appellant was convicted on one count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The complainant was Irene Jepkoech Komen. The offence was committed on the 9th February 2010 at Pleasant Dove Estate in Baringo District within Rift Valley Province. The appellant was sentenced to one year imprisonment.

2. The appellant was aggrieved by the conviction and sentence. He has lodged an appeal to the High Court. The petition of appeal is dated 12th October 2010. The grounds can be summarized as follows: first, that the trial court disregarded his defence; secondly, that the learned trial magistrate failed to analyze the evidence and draw proper conclusions; thirdly, that the appellant was framed up by the complainant; fourthly, that the sentence handed down was harsh and excessive; and, lastly that the charge was not proved beyond reasonable doubt.

3. The appeal is contested by the State. In a nutshell, the case for the State is that all the elements of the offence of assault causing actual bodily harm were proved; and, that the sentence handed down was quite lenient.

4. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *<u>Njoroge v Republic</u>* [1987] KLR 19, *<u>Okeno v Republic</u>* [1972] EA 32, *<u>Kariuki Karanja v Republic</u>* [1986] KLR 190.

5. The appellant and complainant PW2 used to be friends. They separated three days before the assault. The complainant's evidence was that on the material day at 9.00 pm, she was walking along a path. When she looked back, she saw the appellant following her. She asked him what the problem was. The appellant opened a bottle of *Kane Extra*, poured the contents of petrol into her eyes, knocked her down and injured

her. Her screams attracted Kibet (PW3) who went out to the scene. He testified that the appellant ran away. He saw him when he trained a torch on him. He noticed some injuries to the complainant's mouth. He said that at the scene, there was a bottle containing some petrol.

6. PW1 was a clinical officer. He examined the complainant on 10th February 2010 and filled out a P3 form on the same date. He testified that the complainant had multiple injuries on her face; that her right hand was swollen and painful; and that her clothes smelled of petrol. He formed the opinion that the injuries resulted from a blunt object and chemicals. He assessed the degree of injuries as *harm*.

7. From that evidence, the appellant was identified by both the complainant and PW3. Like I stated, the appellant and complainant had separated only three days before the attack. The complainant thus knew the appellant very well. This was a case of recognition. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. See *Wamunga v Republic* [1989] KLR 424. I am satisfied that in this case the appellant was *positively* recognized as the person who attacked the complainant.

8. From the evidence of PW1, the clinical officer, there was no doubt that the assault caused actual bodily harm. The appellant contended at the hearing of this appeal that there were inconsistencies in the date of the examination. He referred to page 16 of the record where the complainant (PW2) stated that she was issued with a P3 form on "16th February 2010 which was filled out by a doctor". I think the evidence of PW1 was clear that he conducted the examination on 10th February 2010, the day following the assault and that the injuries were a "some hours old". PW1 was not a doctor. I agree that there was some discrepancy between his evidence and that of PW2. But I find the discrepancies were minor, immaterial and curable under section 382 of the Criminal Procedure Code.

9. In *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993**,** the Court of Appeal held:-

> "*In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."*

10. PW4, the investigating officer testified that he did not recover any exhibits at the scene of the attack; and, that the exhibits (the *Kane Extra* bottle and its contents) were brought to the police station by the complainant and Kibet (PW3). PW4 used to know the complainant and the appellant as lovers. They had previously reported some disputes between them at the station. The appellant contended at this appeal that the exhibits were worthless. The learned trial Magistrate was of the view, and I am in agreement, that the exhibits were neither here nor there because the injuries *arose* from the violence by the appellant. He stated in the judgment as follows-

> *"As regards the issue cited by the accused in relation to the "Petrol" in the "KANE" bottle I find this issue to be neither here nor there for the following reasons. The offence here is assault. Assault which arose when the accused beat the complainant and also caused injuries to the complainant in the process of feeding her the liquid contents of the bottle whether the liquid is petrol or water - it is immaterial as it is not the one that caused the injury."*

11. The appellant claimed that his defence was not taken into account. The appellant at his trial had stated as follows-

> *"The way I saw it these people are just framing me. Even the witnesses are not sure. The I.O. says he did not see any external injuries as he did not examine her as he was not a doctor. They say that we met me on the road and I disappeared whereas the police officers say they did not see me. They say especially they saw a petrol 'Kane' bottle on the ground. Witnesses say that the can had some few teaspoons of petrol. This girl is first bitter as I had reconciled with my first wife. I think she must have simply been bitter with me. Finally I was arrested by members of the public who beat me up. Two charges were opened against me at Eldoret remand where I was for five*

months, my family suffered."

12. It is not true that the trial court disregarded that defence. The learned trial Magistrate weighed the unsworn evidence of the appellant against the case of the Republic. He concluded as follows-

> *"I however find this unsworn defence unreliable for the following reasons. Firstly no witness was called by the accused to corroborate his evidence especially where as in this case overwhelming evidence had been offered against the accused. No colleague was called to confirm he saw the accused drinking at the bar. Further if he was innocent as alleged one would wonder why he would ran away from the police upon seeing them. Since he had gone to police station to surrender the easier thing for him to do would have been to surrender to the oncoming police officers."*

13. The burden of proof, subject to section 111 of the Evidence Act, rested entirely with the prosecution. I think the appellant was not required to call any witnesses to corroborate his evidence. That was a *misdirection*. There was no need to place the burden on him to *rebut* the prosecution's case. But from the evidence of the PW1, PW2, and PW3 I have no doubt that the State had proved its case *beyond reasonable doubt*. There was no doubt that it is the appellant who assaulted the complainant. The injuries to the complainant were corroborated by the medical evidence. From the totality of the evidence, the defence set up by the accused was feeble and unbelievable. True, the couple had their differences, but there was no clear evidence to show the charges were framed up.

14. That leaves the matter of the sentence. Section 251 of the Penal Code provides for a sentence of up to *five* years. The appellant was sentenced to serve *one* year. Considering the nature of the assault, I find that the sentence was *lenient* in the circumstances. I will thus *not* disturb the sentence.

15. In the result, I find that the appeal is devoid of merit. I uphold the conviction and sentence handed down by the learned trial Magistrate. The entire appeal is dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of November 2014

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant (in person).

Ms Kagari for the State.

Mr. J. Kemboi, Court clerk.