



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 126 of 2011

IRENE ADHIAMBO ODHIAMBO APEPLLLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence in Migori SRM's court by

L.N.. Waigera, DM II dated 22nd June in criminal case No.1896 of 2010)

JUDGMENT

THE CHARGE

1. The appellant herein, Irene Adhiambo Odhiambo was arraigned before the Homa Bay Principal Magistrate's court on a single count of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The particulars thereof being that on the 26th day of November 2010 at Got-Rabour area within Homa Bay County, she unlawfully assaulted Ruth Adhiambo, thereby occasioning her actual bodily harm. The appellant pleaded not guilty and during the ensuing trial, the prosecution called 5 witnesses.

THE PROSECUTION CASE

2. The complainant testified as PW1. She stated that on 26th November 2010 at about 9.00 am, she was at her employer's place at Got Rabour in Makongeni area in Homa Bay. The complainant worked as a house help, and was at the material time washing dishes. The employer then told her that she (employer) had been informed by the appellant that she had stolen some of her employer's items. Though PW1 did not know the appellant by name, she knew her by face because the appellant lived at PW1's employer's home as a tenant.

3. PW1 stated further that after hearing the accusation from her employer, she decided to call ON the appellant whom she found in a foul mood and so was PW1. Because of the anger that was so visible by both PW1 and the appellant, PW1's employer did not talk to both of them. Later as PW1 was cleaning a toilet that was next to the appellant's house, the appellant asked her why she (PW1) had reported her to the land lady. The appellant promised to pluck out PW1's eyes. Just as PW1 was locking the door after the cleaning chores, the appellant poured hot water on her. PW1 was scarred on the left hand and on the breast area. After accomplishing her mission, the appellant just stood there and watched PW1 writhe in pain.

4. The incident between PW1 and the appellant was witnessed by Robinson Odiwuor Oner, a plumber

by profession who testified as PW4. PW4 testified that he knew both PW1 and the appellant and that on the material day, he heard the appellant asking PW1 why she had told the landlady about the stolen clothes. PW4 testified that he heard the appellant abusing PW1, calling her a prostitute and despite PW1's plea to the appellant to stop the abuses, the appellant did not stop. Instead, PW4 said he heard the appellant tell PW1 to wait outside the house, whereupon, the appellant entered her house and came out with hot water which she poured on PW1. That the hot water was in a sufuria. PW4 ran and separated the two, and also went and informed the landlady. Together with the landlady's daughter, Grace Achieng Odero who testified as PW2, PW4 took PW1 to hospital and later went to the police station where he recorded his statement.

5. PW1 was taken to Homa Bay District Hospital where she was seen and examined by Michael Ocholla, a clinical officer at the said hospital who testified as PW3. PW3 stated that PW1 had sustained superficial burns on the left hand and right breast, the left mid upper arm and on the right mid upper arm. According to PW3, the injuries were about 7 hours old by the time PW1 was seen by him. PW3 gave anti-tetanus injection and also dressed the wounds before filling the P3 form, which was produced in court as **P. Exhibit 1**. On cross examination, PW3 told the court that the most probable substance used in inflicting the injuries on PW1 was a hot liquid.

6. PW2 was Grace Achieng Odero, a daughter to the land lady. She is the one who rushed PW1 to Homa Bay District Hospital and thereafter she went to Homa Bay police station where she recorded her statement.

7. The report made to Homa Bay police station was received by Number 70447 PC Josephat Nyamai who testified as PW5. PW5 who investigated the case stated that he received the complaint from PW1 at about 2.00 p.m. on 6th November 2010. After booking the report, he issued PW1 with a P3 form which was filled and returned to him. He also recorded statements from witnesses. He followed up leads on where to find the appellant. Appellant was taken to the police station by the area elder. PW5 re-arrested her from the village elder, booked her and subsequently charged her with the offence of which she was tried, found guilty and convicted. PW5 stated that PW1 suffered burns on her hands as well as on her private parts.

8. During cross examination, PW5 stated that the appellant did not file any assault report with him although he could not say whether she filed a report with any other police officer.

THE APPELLANT'S CASE

9. At the close of the prosecution case, the appellant was put on her defence. She gave an unsworn statement. She told the court that on the material day at about 9.00 a.m., PW1 went to where she was and told her how she was creating a conflict between her (PW1) and the land lady. She said that PW1 was quarrelsome and had the intention of fighting her but because she was breastfeeding, the appellant told PW1 she did not want to fight. The two went to the land lady's house, but the land lady sent them back with a warning to PW1 never to visit the appellant's house. The appellant stated further that as she made her way to her house, PW1 followed her, got hold of her and pushed her next to the bed. The appellant had left some tea boiling on the jiko and during the encounter of pushing the appellant, PW1 fell on the jiko which had a sufuria with tea in it. PW1 was scalded by the tea. Thereafter, PW1 was taken to the hospital by Grace Achieng Odero, PW2. The appellant then went and reported the matter to the police station from where she was referred to the hospital. She was issued with a P3 form.

THE JUDGMENT

10. After carefully considering all the evidence adduced before her, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt and proceeded to find her guilty as charged. Upon conviction, the appellant was sentenced to serve three (3) years imprisonment without the option of a fine.

THE APPEAL

11. The appellant was aggrieved by both conviction and sentence. She brought this appeal. The petition of appeal does not clearly give the grounds of appeal, but at the hearing of this appeal on 20th December 2012, the appellant reiterated what she told the court during the trial thus denying that she assaulted the PW1. She contended that during the struggle between her and PW1, PW1 put her hand in the sufuria with the hot tea.

12. The appeal was opposed. Counsel for the respondent submitted that the conviction of the appellant was safe and the sentence deserved. Counsel urged the court to consider the evidence of PW4, Robinson Odiwuor Oner, who witnessed the incident and gave very independent evidence in support of the prosecution's case. Regarding sentence, counsel submitted that considering the legal maximum sentence of 5 years, 3 years cannot be said to have been excessive in the circumstances. He urged the court to dismiss the appeal in its entirety.

THE DUTY OF THIS COURT

13. This is a first appeal, and as such this court is under a duty to reconsider and evaluate the whole of the evidence afresh with a view to reaching its own independent conclusion, remembering however that it has no opportunity of seeing and hearing the witnesses who gave evidence before the trial court. Generally see **Pandya –vs- R. [1957] EA 336.**

FINDINGS AND CONCLUSIONS

14. This court has carefully reconsidered and evaluated the evidence afresh. It has also considered and weighed the judgment of the learned trial magistrate. From an analysis of the above, the issue that arises for determination is whether the prosecution proved its case against the appellant beyond any reasonable doubt.

15. It is this court's considered view that the prosecution proved its case against the appellant beyond any reasonable doubt. The testimony given by PW1 was corroborated by that of PW4 who confirmed that the appellant attacked PW1 by pouring hot water on her. As a consequence, PW1 suffered superficial burns on her upper limbs, on parts of her breasts and on the lower limbs. After examining PW1, the clinical officer, PW3 confirmed the injuries testified to by PW1.

16. The court has carefully considered the appellant's defence, but finds the same to be unreasonable. During her defence before the trial court, the appellant stated that PW1 got hold of her and pushed her next to the bed and that in the process of pushing her, PW1 fell on the jiko which had a sufuria with hot tea in it. During the hearing of the appeal, the appellant stated that PW1 attacked her from the back and when she (appellant) tried to defend herself, a struggle ensued and PW1 fell down and put her hand in the sufuria with the boiling tea. This story by the appellant, contradictory as it is, is hard to believe; and the same has not in any way shaken the evidence given by both PW1 and PW4. The appellant did not appear to be telling the truth at all both during her trial and on this appeal. The appeal on conviction must therefore fail.

17. As regards appeal on sentence, I do not think that the appellant has brought her plea for a reduced sentence within the parameters set out in the case of **Diego –vs- Republic [1985] KLR 621** to warrant an interference by this court. As submitted by counsel for the respondent, I am persuaded that the three (3) year imprisonment was neither excessive nor illegal. The appellant caused many superficial burns all over PW1's hands, legs and breasts. In my considered view, the attack upon PW1 by the appellant was uncalled for.

18. In the premises, this appeal lacks merit and the same is accordingly dismissed on both conviction and sentence.

19. It is so ordered.

Dated and delivered at Kisii this 27th day of February, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Absent (already released) for the Appellant

Mr. Shabola for the Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.