REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 241 of 2011

REPUBLIC …..... APPELLANT

VERSUS

ELKANA MUKAYA RAGIRA …..... 1ST RESPONDENT

JOYCE YUKA RAGIRA …..... 2ND APPELLANT

(Being an appeal from both conviction and sentence in the Jugdment of G. Mutiso, Resident Magistrate in Kapsabet Criminal No. 4050 of 2008)

JUDGMENT

Both Appellants, Elkana Mukaya Ragira and Joyce Yuka were jointly charged with the offence of grievous harm contrary to Section 234 of the Penal Code.

Particulars of the charge were that on the 6th day of December, 2008 at Kerborgok Village in Nandi Central District of the Rift Valley Province, jointly unlawfully assaulted Lilian Maiyo thereby occasioning her grievous harm.

At the close of the hearing the learned Magistrate found both Appellants guilty and sentenced each one of them to serve five (5) years in prison.

The Appellants, being dissatisfied with the decision of the learned Magistrate have appealed to this Court against both the conviction and sentences. Their grounds of appeal are as follows (**quoted verbatim**):-

1. The investigation officer in this case did not avail himself before the Court to testify or brief the court how he carried out the investigation before the Court of law. Thus my lordship we tend to feel that we have been convicted for a matter which was never investigated.

2. The court does not have any report in record why the investigating officer did not avail himself to testify in this case. Thus my lordship the charge lack merit and ought to be dismissed with costs.

3. The only witness who testified in this case was the husband of the complainant and the clinical officer. Thus my lordship evidence was one sided and lacked substantial proof.

4. The 1st accused is a husband to the 2nd accused and the only role I played was to separate the two who were fighting. Thus my lordship as an adult and responsible family man I

could not just see the two fighting.

5. The body grievous harm which was sustained by the complainant resulted from mouth bite from the 2nd Appellant which she admitted. Thus lordship there is no logic of 1st accused to be charged with the same offence.

6. The conviction of five (5) years imprisonment and without fine was too high as its apply to the two family member who had responsibility of upbringing of five kids who are still underage.

7. That my lordship I as the 1st accused person in this matter was the only bread winner of the family thus the kids are left as orphans.

The grounds of appeal were filed on 7th December, 2011. The language applied therein implies that it is only the 1st Appellant who has appealed. However the Petition of Appeal is signed (by way of thumb print) by both Appellants. The presumption I will hold is that both Appellants filed a joint Petition of Appeal, save that it is written in the lay man's language. In any event, each one of them separately argued his/her case respectively and so this court will accordingly consider each Appellant's submissions separately.

The complainant's case before the subordinate Court was that on 6th December, 2008 at about 5.00 p.m. She was at the river fetching water when the 2nd Appellant accosted her with stones. One stone hit her at the chest, the other on the back and a third on the right leg. The complainant ran for her dear life towards her home but the 2nd Appellant pursued her. As she ran, she fell down on nappier grass. The 1st Appellant came and held her on the ground. That is when 2nd Appellant bit her ear. She screamed for help and her husband came over. He took her to hospital. She was treated, issued with a P3 form and upon examination, the degree of injury was assessed as harm.

It became clear during the hearing of this appeal that the cause of the conflict between the warring parties was that PW.1's (complainant) cows were trespassing to graze in the farm of the Appellants.

This is the first Appellate Court. Its duty is to reconsider the evidence, evaluate it itself and draw its conclusions in deciding whether the judgment of the trial Court should be upheld – **OKENO -VS- REPUBLIC (1972) EA, 32**.

With respect to grounds of appeal numbers 1, 2 and 3 it is true that the investigating officer did not testify. However the failure to call an investigating officer in a criminal case is not fatal to the prosecution's case as long as other evidence adduced and taken into consideration is sufficient to found a conviction against an accused. Be that as it may it is the onus of this Court to determine whether the evidence of the three prosecution witnesses who testified was sufficient to found the conviction.

This then leads me to consider grounds of appeal numbers 4 and 5 together. The evidence of PW.1 (complainant) was that it is the 2nd Appellant who bit his ear lobe but after the 1st Appellant held her to the ground. Thus, it was with the assistance of the 1st Appellant, that the 2nd Appellant overpowered PW1, giving way to the latter biting her ear. According to PW3, the husband of PW1, he went home to find his wife with an injured ear, after which he took her to Kapkangani Health Centre where she was treated. PW3, the clinical officer who examined PW1 and filled her P3 form on 9/12/2008 testified that he observed PW1 with a bitten off left ear. That she complained of pain around the neck, chest and lips and had a wound on the right elbow. He testified that the ear could not be repaired since the bitten off part could not be found. He assessed the degree of injury as maim.

The assessment of the injuries by PW2 on PW1 was consistent with the account of events as narrated by PW1. While the 2nd Appellant conceded that she assaulted PW1, it is apparent that the pain and wound on the latter's neck and elbow respectively were occasioned by the 1st Appellant who pinned her down to enable the 2nd Appellant execute her heinous mission.

The 2nd Appellant pleaded innocence of her husband, stating that he only played the role of separating them. The evidence is to the contrary. My view is that PW1 gave a very candid testimony of what transpired on the fateful day. Therefore even if the 1st Appellant did not bite PW1's ear, he is as guilty as he aided 2nd Appellant to execute her mission. He would in the circumstances be described as a principal offender. The definition of a Principal Offender is given in Section 20 of the Penal Code. For purposes of this case, sub-section (I) thereof refers which reads:-

"S.20 (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission."

In the instance, I over-rule both Appellants and the State Counsel, M/s Ruto who conceded to the two grounds of appeal. She submitted that the 1st Appellant only played the role of separating the warring parties but contrary evidence is on record as I have already observed. I further hold that the conviction of the 1st Appellant in this respect was not unwarranted and does not merit this court to quash it.

The 2nd Appellant admitted having committed the offence. The evidence on record is full-proof against her. She however asked this court to be lenient on her given that it is PW1 who provoked her by reminding her that her (2nd Appellant) cows had been grazing on her farm. Against this backdrop, she felt bitter as herself and her husband had hosted both Appellants during the post election violence.

It is human to get provoked and feel bitter at what one does not wish to be reminded of. However, the brutality with which the 1st Appellant avenged was totally undeserved. She should have exployed better ways to resolve the conflict. The action of the 1st Appellant who went to the aid of his wife only made things worse. Indeed had he not pinned down PW1, the 2nd Appellant would not have bitten PW1's ear.

I will now consider grounds of appeal numbers 6 and 7 simultaneously. I uphold the submissions by the Appellants and the learned State Counsel that the sentences handed to each Appellant was excessive given the mitigating factors. Both Appellants are a husband and wife respectively. They have three (3) children, the youngest aged 2½ accompanying the mother in prison. The other two are aged eight (8) and five (5) respectively. They were left at home unattended to. Whereas sentence must be commensurate with the offence committed, court must be alive to the rights of the children who stand great risks in health and social welfare if left unattended to by one or both parents for a long time. Against this background, I will reconsider the sentences of each of the Appellants.

I will consider that the 1st Appellant is the sole bread winner to this young family and has already served sufficient sentence of about one (1) year and three (3) months. I do accordingly order that he be hereby set free unless otherwise lawfully held.

As for the 2nd Appellant who bore the greatest blame, must serve a deterrent sentence. I will however take into account the mitigating factors which include the circumstances under which the offence was committed and the extent of the injury. While a portion of the ear lobe was bitten off, the portion was not so big and grave. Infact, record has it that the 2nd Appellant swallowed it (albeit an

ascertained). I accordingly quash the sentence and substitute it with a two-year jail term to run from the date of the conviction.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 27th day of February, 2013.

G. W. NGENYE – MACHARIA

JUDGE

1st Appellant - present
2nd Appellant - present
Mr. Wainaina State Counsel