REPUBLIC OF KENYA

High Court at Meru

Criminal Case 78 of 1999

CATHERINE MPINDA KIRAI.....APPELLANT

V E R S U S

STATE.....RESPONDENT

LESIIT J.

JUDGEMENT

(*Being a first appeal against conviction and sentence in District magistrates court*

at Isiolo, Criminal case No. 1550 of 1998 Delivered on 2.3.1999)

The Appellant was convicted of one count of grievous harm contrary to section 231 of the Penal Code and malicious damaged contrary to section 339(1) of the Penal Code. She was sentenced to 18 months imprisonment in count 1 and a fine of 3000 in default 6 months imprisonment in count 2. The sentences were imposed on 2nd March, 1999.

Being aggrieved by the conviction and sentence the Appellant filed this appeal. The Appellant successfully applied for bail pending appeal and was on 23rd April 199 released on bail.

The Appellant relied on four grounds of appeal as follows:

1. The learned trial magistrate erred in law an fact in failing to find that there're was no sufficient and reliable evidence to show what was the cause of the incident between the complainant (PW1) and the Appellant and it was upon the prosecution to have proved that if they were to sustain a conviction.

2. The learned trial magistrate erred in law and fact in rejecting appellants defence as of no substance without giving any reason.

3. The learned trial magistrate erred in law and fact in convicting appellant of causing grievous harm whereas there was no sufficient and convincing evidence to establish the nature of injuries sustained.

4. The sentences imposed on appellant were manifestly harsh and excessive considering the circumstances of the case.

The facts of the prosecution case was that at about 10 pm on the material day, the Appellant went to the

complainant's house where she met her in the company of a man, PW3. The Appellant is said to have turned violent, picked bottles and hurled them at the complainant. She then held the complainant and tore her clothes.

The Appellant's defence was that the complainant invited her to her home only to turn against her causing her injuries. She was arrested the next when she went to report to the Police.

I have carefully considered this appeal and have subjected the evidence adduced before the lower court to a fresh analysis and evaluation drawing my own conclusions, while bearing in mind I neither saw nor heard any of the witnesses and have given due allowance. I am guided by the court of Appeal case of **Okeno Vrs. Republic** 1972 EA 32. It was stated in that case as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

The Appellant was represented by Mr. Mburugu advocate while the State was represented by Mr. Makori, learned State Counsel, who opposed the appeal.

Mr. Mburugu urged that the cause of assault was not proved and that it was imperative to establish it in order to sustain a conviction. Counsel urged the court to find that the irresistible conclusion which could be drawn is that the Appellant and complainant were fighting over the man, PW3. Counsel urged that it was the reason PW3 did nothing to stop the fight but instead ran away.

Mr. Makori for the State urged that the prosecution had proved that the Appellant had gone to the complainant's house just before the attack and was therefore a trespasser. Learned State Counsel submitted that the Appellant was the one who started the fight.

The evidence before the court from the complainant was she and the Appellant knew each other before and that they had no grudge between them. The evidence was that the Appellant went to the complainant's home and attacked her. The complainant did not disclose the motive of the attack. However, considering the Appellant was let into the home seems to give credence to the Appellants defence that it was the complainant who called her to her home saying that she wanted to show her something only for the fight to break out.

Mr. Mburugu urged that the injuries suffered by the complainant were not established. The Appellant's counsel urged that while the complainant told court that she had suffered an injury on the forehead and the bruise on the right cheek, the Clinical Officer who examined her found her to have suffered maim. Mr. Mburugu submitted that the evidence adduced by the prosecution did not support the doctor's finding.

Mr. Makori in response urged that PW4 described the injuries he noted on the complainant and in support produced a P3 form.

I have perused the record of proceedings. PW4's evidence was that he noted complainant had "**forehead injury. She looked sick at the time. Right cheek had a bruise. I graded the injuries as maim**"

The Black Law Dictionary describes maim as follows:

"Serious injury to part of a person's body that is necessary for fighting".

The Concise Oxford English Dictionary defines maim as:

"**wound or injure someone so that part of the body is permanently damaged."**

The Latter definition is clearer. Prosecution had to prove that the complainant had a permanent damage caused by the Appellant to sustain the charge.

There was no permanent damage to any part of the complainant's body noted either by the complainant herself or PW2 and 3 the eye witnesses. The only conclusion one can reasonably make is that PW4, being a clinical officer was either incompetent to access the degree of injury the complainant suffered or was negligent or simply exaggerated it. The learned trial magistrate ought to have looked at the injury the complainant alleged to have suffered, and compared it with the report in the P3 form in order to make his own conclusions. Had he done so, he would have come to a different conclusion of the matter.

The learned trial magistrate did not consider the Appellant's defence that she too had suffered some injuries during the incident. Indeed she was arrested at the police station as she went to make a complaint against the complainant. Had the learned trial magistrate considered the defence, he would have come to a different conclusion.

From the evidence before the court it is clear that the complainant and Appellant were involved in a brawl in the former's house, in which both were injured and bottles broken. The degree of injury to both was not serious as to be classified as grievous harm. The prosecution had not proved both counts. The Appellant should have been acquitted in both.

In the result I find merit in the appellants appeal and allow it accordingly. I quash the conviction entered against the Appellant in both counts and set aside the sentence.

Since Appellant was on bond pending appeal, same is cancelled and any surety discharged. Any monies or securities deposited to secure the Appellants release should also be released.

Those are my orders.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF MAY, 2013

LESIIT, J

JUDGE.