



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.196 OF 2012

ESTHER MORAA NYANGOTO.... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Kehancha, Hon. T. A Sitati Criminal Case No. 460 of 2011 dated 27th July, 2012)

JUDGMENT

1. The appeal herein arises from the conviction and sentence passed against the appellant herein **ESTHER MORAA NYANGOTO** by the Senior Resident Magistrate's Court at Kehancha on 27th July 2012. Briefly, the appellant was charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal code**. The particulars of the offence were that, on the 21st day of September 2011 at about 7.00pm at Nyankore village in Kuria West District within Migori County, the appellant and her then co-accused one, **FILBERT GACHARE MWITA** jointly willfully and unlawfully assaulted one, **SAMUEL MWITA RIOBA** thereby occasioning him actual bodily harm.
2. The prosecution called three witnesses. PW2, **Thomas Nyangwisi**, testified that on the material day namely, the 17th day of September, 2011 at about 7.00pm he was on his farm when he heard wails of a man who sounded as if he was being beaten. He abandoned his work and dashed to the scene that was about 100metres away and on arrival he found a man bleeding while lying on the ground. He told the court that he also found a woman and 2 young men surrounding the man and the woman had a panga while the two young men had knives each. When the attackers saw him approaching, they ran into a nearby maize plantation. He recognized the victim as **Samuel Mwita Rioba** while the 3 attackers were Mama Esther, Kamau Mwita and Simeon Magaiwa. He told the court that he got a motor cycle which he used to take Samuel Mwita Rioba to the hospital. Afterwards, he recorded his statement with the police at Isebania Police Station. He identified two of the attackers in court and told the court that one of the attackers had gone underground. On cross examination he told the court that other neighbours also came to the scene.
3. **Josephat Sagwe**, PW1, a clinical officer at Gucha Hospital told the court that Dr. Indagiza of Akidiva Memorial Hospital who was his colleague had filled a P.3 form in respect of Samuel Mwita who had complained of being assaulted by known persons. He told the court that the complainant's clothes on examination by Dr. Indagiza were blood stained and there was a deep cut wound on the right side of skull – 5 inches long and 2cm deep. He also had; a cut on the right shoulder measuring 10 inches long, a deep cut on the right scapula shoulder plate – 5cm long, a deep cut on the right upper arm 5cm long and 2 inches deep. There was also a deep cut wound on

- the lumbar region. According to Dr. Indagiza, the degree of injury was harm and probably caused by a sharp object. He produced the P.3 form on behalf of Dr. Indagiza and told the court that the same was prepared and signed by Dr. Indagiza.
4. PW3 was Police constable **Festus Musembi**, who was attached to Isebania Police station. He told the court that he was assigned to handle the police file in respect of the case by PC Kimchir who had been transferred to Maralal Police Station in Samburu District and who was not available to testify. He therefore opted to testify on his behalf. He told the court that he had perused the file that was prepared by Kimchir wherein the complainant had recorded a statement that, as he was walking from Nyankore Market, he met the appellant whom he owed kshs.500/=. That he had paid her kshs.250/= leaving a balance of kshs.250/= which she demanded. He recorded further that the appellant was in the company of her friend FILBERT GACHARE and her son MWITA alias KAMAU and that her demand for the said sum of Ksh.250/=led to a bitter exchange of words. It is at that time that the appellantgrabbed **Samuel MwitaRioba** by the collar assisted by Filbert Gachareand they both pushed him to the ground. The appellant then slashed **Samuel MwitaRioba** on the nape while he was still on the ground while Filbert Gacharestabbed him on his hand. These actions made **Samuel MwitaRioba** to scream.Villagers then came to his rescue prompting the 2 attackers to flee abandoning him in a semi-conscious state. He recovered much later while admitted at Isebania sub-district hospital. He further testified that PC Kimchirhad recorded that he visited the scene and saw blood clots and he gathered from the villagers that **Samuel MwitaRioba** who was the victim was taken to Isebania District Hospital on a motor cycle where he was admitted for 4 days. P.3 form was completed and later the 2 suspects were arrested and charged.
 5. On cross examination by the appellant, he admitted that he was not present at the scene but read what his colleague had prepared in the police file based on his investigations. After hearing the prosecution's case the court found that the prosecution had established a prima facie case against the appellant and put her on her defence. The appellant chose to remain silent.
 6. In its judgment delivered on 27th July, 2012, the trial court noted that the appellant's co-accused did not give evidence because he absconded court from 17th January, 2012 when the court issued a warrant of arrest for his apprehension. He remained at large and this prompted the trial court to proceed with the case in his absence as per the provisions of **section 206** of the **Criminal Procedure Code**.The trial court found that the evidence of PW2 as against the appellant was corroborated by the evidence of the medical officer (PW1) who examined the complainant and by the investigating officer's report that was presented by PW3. The court found that the decision by the appellant to remain silent could only be construed to mean that she was defenceless.
 7. The trial court found that the prosecution's evidence was believable and that the appellant was a principal offender. The trial court found the appellantguilty, convicted her under **section 215** of the **Criminal Procedure Code** and sentenced her to serve 5 years imprisonment. The appellant was aggrieved by this conviction and sentence and decided to file the appeal herein which was brought on the following grounds:-
 - a. *That the trial court did not have enough evidence to prove beyond reasonable doubt that the appellant participated in the said incident and proceeded to sentence her heavily.*
 - b. *That the trial magistrate erred in that the complainant did not testify that appellant was involved in the assault.*
 - c. *That the trial magistrate erred in both law and fact in failing to consider that the incident took place in a drinking joint and that the appellant was not drinking.*
 - d. *That the trial magistrate did not consider that the appellant is a widow taking care of six siblings who are still young and are school going and as such giving her custodial sentence for an offence that she did not commit went against not only her fundamental rights but also brought suffering to her entire family.*
 8. The appellant urged the court to quash her conviction and sentence. When the appeal came up for hearing, the appellant appeared in person while **Mr. Majale** appeared for the state. The appellant in her oral submissions relied on her petition of appeal and prayed that the appeal be allowed.**Mr. Majale**opposed the appeal. He submitted that the sentence imposed upon the appellant was not harsh as it was provided for under **section 215** of the **Penal Code**. He submittedfurther that the

- magistrate awarded the maximum sentence. He submitted that the prosecution had proved their case. He submitted that PW2 heard wails and ran to where the noise was coming from and found a man bleeding. The man was surrounded by a woman and two young men. The woman had a panga and the young men had knives. The woman was identified as the appellant. He submitted that PW3 who testified on behalf of the investigating officer corroborated the evidence of PW2 as concerns the involvement of the appellant. He further submitted that when the appellant was put on her defence she chose to remain silent meaning that she was defenceless. He submitted that the evidence as a whole shows that the appellant was the principal offender. He therefore urged the court to dismiss the appeal and uphold the appellant's conviction and the sentence.
9. In a brief reply, the appellant submitted that it is her son who was involved in the fight with the complainant and that she was not involved at all. She submitted that she heard of the incident in the evening and that she did not know even where the fight was and why the two had fought. The appellant added that she is a widow with children and urged the court to be lenient to her. On why she remained quite before the trial court, her response was that it was her first time to enter a court room. This being a first appeal the court is under a duty to reconsider and re-evaluate the evidence afresh with a view to reaching its own conclusions on the matter. See, **Okeno vs. Republic (1972) EA 32** and **Ngui vs. Republic (1984) KLR 729**. The court must however warn itself of the fact that it did not have the opportunity to see the demeanor of the witnesses as they testified before the trial court and should therefore make due allowance for that. See, **Pandya vs. Republic (1957) E. A 336** and **Shantilal M. Ruwala vs. Republic (1957) E. A 570**.
 10. After careful perusal of the record of the lower court and after considering submissions made and the law, I find that the trial court did not have sufficient evidence to convict the appellant herein. PW2 was the only one who testified as being at the scene after the incident had occurred. He heard screams 100 metres away from his farm at about 7.00pm. He did not tell the trial court how long it took him to reach the scene of crime and how he managed to see and identify the appellants. I believe that it is normally dark at 7.00pm and it is naturally hard to identify people from a distance unless with the aid of a torch or moonlight. Secondly, PW2 claimed that the appellant had a panga. It is worth noting that no weapon was produced as exhibit before the trial court. Although it was claimed by PW3 that the complainant was rescued by villagers who came to the scene and who made the attackers to flee, no one else testified to corroborate or confirm PW2's testimony. It is interesting that even the complainant himself **Samuel Mwita Riobadid** did not testify as to what happened on the material day. Due to the foregoing reasons, I am not in agreement with the submission by **Mr. Majalet** that the evidence of PW2 was corroborated by the evidence of PW1 and PW3. It is also interesting to note that PW1 did not examine the complainant but only came to produce the medical report prepared by Dr. Indagiza. PW3 also did not investigate the incident herein but relied on the file prepared by his colleague, PC Kimchir. It is clear that most of the evidence the trial court relied on were not direct but more of a hearsay and I am not convinced that it was safe to convict the appellant on the basis thereof.
 11. I am unable to agree with the trial court's findings and the state counsel's argument that the appellant's choice to remain silent meant that she had no defence to the charge and as such she was guilty. The appellant was within her right to keep quiet as the onus was upon the prosecution to prove their case against her. I have not seen any reasonable basis for suspecting that the appellant was involved in assaulting the complainant. It is trite law that guilt has to be proved by evidence that is beyond reasonable doubt and suspicion however strong cannot supply a basis for inferring guilt where there is insufficient evidence. See, the case of, **John Kamunda Gitau & another vs. Republic, Criminal Appeal No. 28 of 1997** (unreported).
 12. Due to the foregoing, it is my finding that the conviction of the appellant was unsafe. I consequently allow the appeal herein, quash the appellant's conviction and set aside her sentence. The appellant shall be released forthwith unless she is otherwise lawfully held.

Delivered, Dated and Signed at Kisii this 6th day of December 2013.

S.OKONG'O

JUDGE

In the presence of:

Appellant present in person

Mr. Shabola for the state

Mobisa court clerk

S.OKONG'O

JUDGE