REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 11 OF 2011

AMINA WARIO …….....1ST APPELLANT

ADHAN YAKUBU……2ND APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

JUDGMENT

(Formerly High Court Nairobi Criminal Appeals No. 519 and No. 520 of 2010 from original conviction and sentence in Criminal Case No. 538 of 2009 in the Resident Magistrate's Court at Garissa).

1. The complainant in the trial court case, Hussein Roba (PW1), left home at Madogo in Tana River District of Coast Province in the evening of 26th June 2009. He was walking towards the Madogo bus stage. He met the 1st appellant, Amina Wario, the 2nd appellant, Adhan Yakubu and one Mohamed Matio still at large. The 1st Appellant, was his estranged wife who was at the time living with the 2nd appellant. The 1st appellant pointed at Hussein and said, "he is the one" upon which the 2nd appellant and Mohamed set upon the Hussein. The 2nd appellant was using a club to hit the complainant with. It is not stated what Mohamed was using to attack the complainant. The complainant fell down bleeding profusely. While lying on the ground, the 1st appellant stepped on his head. He could not move.

2. The commotion attracted members of the public among them Aden Isaack Matoye (PW2), Abdikadir Abdullahi (PW3), and Harun Molu Sebalo (DW3). The complainant was assisted to the Madogo Police Station and later to Garissa Provincial Hospital. He was to remain in hospital for six days. It is also stated that the 1st appellant and the complainant had been married but the 2nd appellant married her while the marriage between her and the complainant was still persisting. The complainant had also filed a case against the 1st appellant on child neglect at the Kadhi's court. It further emerged that the complainant had reported theft of his academic certificates by the appellant to the police. It is not clear which appellant had stolen the certificates. All these facts disclose bad blood between the complainant and the appellants.

3. Both appellants are challenging the conviction and sentence of the lower court. Each appellant had filed a separate record of appeal. Initially there were two appeals filed at the Criminal Division of the High in Nairobi being Criminal Appeal Nos. 519 and 520 of 2010. Upon the file being transferred to Garissa, one file was opened for both appeals and given Garissa High Court Criminal Appeal No. 11 of

2012. Before the appeal commenced, this court consolidated both appeals and confirmed the Criminal Appeal number as Garissa High Court Criminal Appeal No. 11 of 2012.

4. The appellants are relying on the similar grounds of appeal. These grounds are reproduced here as follows (mistakes in grammar and sentence structure notwithstanding):

i. The trial magistrate erred in both law and facts in that he did not consider all the vital facts only rushed to convict a term of imprisonment,

ii. The magistrate further erred in the evidence was one sided and very dull,

iii. The witnesses availed were hired and coached resulting to a conflicting evidence which the trial magistrate ignored. Instead he entertained rumours and hearsay to be honoured in the court of law,

iv. The magistrate failed to give me a chance to call defence witnesses in that, every time we went with the witnesses we were given extension date more than five times up to a point that when the witnesses failed to come, judgement was passed without warning or consideration. That my defence witnesses did not testify,

v. The trial magistrate highly relied on prosecution side and also violated my human rights by not giving me any chance to give my side of the story,

vi. The trial magistrate did not reason well since he committed me to jail together with my husband/wife,

vii. There was no exhibit or direct evidence to subject our convictions,

viii. The evidence by the medical officer was irrelevant in that his incomplete report was conflicting and could not be honoured in any competent court of law.

5. My understanding of the grounds of appeal is that the appellants are challenging the evidence of the prosecution witnesses which they say is conflicting; is based on rumours; was given by couched witnesses; and was one sided. They also claim that they were not given a chance to call witnesses and that their constitutional rights have been infringed upon after the lower court jailed the entire family; the two appellants and their infant.

6. The appeal has been opposed by Mr. Gitonga for the State. He submitted that the evidence by all the five prosecution witnesses is strong and has not been challenged. He also submitted that the five year sentence handed to each of the appellants is not excessive given that the complainant suffered live threatening injuries.

7. This court takes cognizance of the legal requirements of an appellate court on first appeal to consider and re-evaluate all the evidence adduced during trial at the lower court and make an independent finding on the same. This requirement takes into account that the appellate court has not had the advantage of observing the witnesses testifying (see **Selle v. Associated Motor Boat Co. Ltd (1968) EA, 123 and Okeno v. R. (1972) EA, 32.)**

8. Before re-evaluating the evidence of the lower court, I wish to point out some irregularities in the records of the lower court. The record shows that the 1st and 2nd appellants were initially jointly charged with another not in court with assault causing actual bodily harm contrary to section 251 of the Penal Code. Each appellant pleaded not guilty to this charge. The 1st appellant faced another charge of refusing to permit fingerprints to be taken contrary to section 121 of the Police Act. She pleaded guilty to this charge and the facts were read to her. She confirmed the facts. No further action was taken by the lower court in respect to that matter. Likewise the 2nd appellant faced a similar charge but he pleaded not guilty. Again the lower court did not mention the matter after that. The record shows the court directing in the course of its proceedings that both appellants submit themselves for fingerprint lifting. I will return to

this issue towards the end of this judgement.

9. Again, the original charge sheet had three pages; count two facing 1st appellant appeared on page two of the charge sheet while count three facing 2nd appellant appeared on page three of the sheet. Upon substitution of the charge to grievous harm against both appellants, page two containing the count two against the 1st appellant was removed leaving page one and page three with the charge facing the 2nd appellant. There is nothing in the record to show the court's directions on the matter and as the record of the lower court stands and as far as I can ascertain, the second charge facing the 2nd appellant, to which he pleaded not guilty has not been dealt with in one way or another.

10. Going back to the grounds of appeal, this court has fully read the evidence of all the five prosecution witnesses in a bid to re-evaluate the same against the grounds of appeal. Aden Isaack Matoye, PW2 had been with the complainant on 26th June 2009 shortly before the complainant left him to walk towards the bus stage. After a while PW2 heard screams and he rushed to the scene of screams. He found the complainant having been attacked and injured. He was lying on the ground while members of the public were trying to restrain the 2nd appellant and another man from further attacking the complainant. At the time the 2nd appellant was holding a club.

11. This evidence is confirmed by Abdikadir Abdullahi, PW3, who testified that he was at his home in Madogo when he heard screams coming from Madogo main road. He rushed there and found the complainant on the ground. Complainant was not able to talk and the 1st appellant was stepping on his head. The 2nd appellant and another man were being restrained from attacking the complainant further by members of the public who had gathered. Both PW2 and PW3 were among the people who assisted the complainant to Madogo Police Station on a wheelbarrow and later to Garissa Provincial Hospital. DW3 too confirms rushing to the scene where he found 2nd appellant and complainant fighting. He confirmed that the complainant had been injured and admitted in hospital.

12. PC Joseph Menza (PW5) confirmed receiving a report from both appellants at about 7.00pm on 26th June 2009 that they had fought with the complainant. After a short while, the complainant was brought to the station on a wheelbarrow. He was unconscious. He was taken to hospital. Three days later, on 29th June 2009, PW5 visited the complainant in hospital and took his statement in which the complainant implicated the 1st and 2nd appellants and another person at large.

13. The medical evidence confirms that the complainant had suffered grievous harm. The P3 form shows that the complainant suffered contusions on the skull and was bleeding from the nose and mouth. He also had fractured left mandible (jawbone) and left eye was red.

14. The defence of the 1st appellant, given under oath, is that the complainant attacked her as a result of which the 2nd appellant who is her husband went to her rescue. A fighting between the 2nd appellant and the complainant, her former husband ensued. She denied seeing any injuries on the complainant.

15. The second appellant gave unsworn defence. He denied assaulting the complainant. He told the lower court that he was being framed because of tribal differences. He said he acted in self defence after the complainant assaulted the 1st appellant, his wife.

16. After re-evaluating and considering all the evidence, it is my finding that the trial court considered all the evidence including that of the defence. I find no evidence that the witnesses had been coached. I believe they gave the facts as they knew them after having seen what had happened.

17. My reading of the record shows that the appellants were given an opportunity to give evidence in support of their defence and also to call witnesses. The court had to adjourn the hearing to give both appellants a chance to call their witnesses. After DW3 testified, both appellants closed their case. I see no justification that they had been denied a chance to call defence witnesses. I find no miscarriage of justice in sentencing both appellants to serve a jail term. The trial court was acting under the dictates of law. It so

happened that both appellants are said to be married.

18. The appellants were charged with grievous harm under section 234 of the Penal Code. The sentence imposed by that section is life imprisonment. This is the maximum sentence any court could sentence a convicted person under that section. The trial court in this case sentenced each appellant to five years prison term. Is this sentence excessive?

19. Sentencing is normally almost an exclusive jurisdiction of the trial court. Courts have different objects in sentencing, it could be deterrence, retribution/exemplary or rehabilitation. This object may differ between the trial and the appellate courts. This, to my mind, could be one of the reasons behind the principle that an appellate court shall not interfere with the discretion of trial court unless the trial court exercised that discretion on wrong principles or failed to consider relevant factors **(see Criminal Appeal No. 10 of 2000, Nasibu Ali Fondo v. Republic). In Wanjema v. Republic (1971) 493** the court stated that:

"That an appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into account some immaterial principle or the sentence is manifestly excessive in the circumstances of the case".

20. To my mind, a sentence of five years against a maximum life sentence imposed under section 234 of the Penal Code is not excessive. In so finding I have considered the seriousness of the injuries suffered by the complainant. While I sincerely sympathise with the innocent infant who has either to stay in prison with the mother (1st appellant) or to stay with relatives as the mother serves sentence, I feel it would not fair to interfere with the sentence in respect of the 1st appellant because the law must be applied equally to both appellants.

21. The appeal by each appellant is hereby rejected and dismissed forthwith on the grounds given in this judgement. Each appellant will continue to serve the five year sentence imposed by the trial court, or the remaining un-served term of that sentence.

22. The 1st appellant pleaded guilty to a charge of refusing to have her fingerprints taken contrary to section 121 of the Police Act. She also confirmed the facts after these were read to her. I order that the 1st appellant be produced before the trial court or another court equipped with similar jurisdiction for appropriate orders in respect thereof.

23. The 2nd appellant pleaded not guilty to a charge of refusing to have his fingerprints taken contrary to section 121 of the Police Act. Likewise, I order that the 2nd appellant be produced before the trial court or another court equipped with similar jurisdiction for further action and appropriate orders in respect thereof.

SIGNED, DATED AND DELIVERED IN OPEN COURT, ON the 27TH FEBRUARY 2012

Stella N. Mutuku

Judge