



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 98 OF 2011**

**ALICE WANJIRU GAKURO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**(Being an Appeal from the Original conviction and sentence of the Senior Resident Magistrate's Court at Kehancha, Hon. T. A Sitati in Kehancha SRMCR Case No. 1188 of 2010 dated 20<sup>th</sup> day of May, 2011)**

1. The appellant, **Alice Wanjiru Gakuro** was charged with assault causing actual bodily harm contrary to section 251 of the **Penal Code**. The particulars of the offence were that on the 29<sup>th</sup> day of September, 2009 at Nyabikaye sub-location Bukira West location in Kuria District within Nyanza Province jointly with another not before court unlawfully assaulted **Hilda Wangari Wanjohi** thereby occasioning bodily harm.

2. In summary the facts of the case were that the accused attacked the complainant on 29<sup>th</sup> September, 2009 at a house in Isebania. The accused had differed with her husband one **Michael Ng'ang'a**, had gone away for two months and on coming back found the complainant in the house previously occupied by herself and her husband. She attacked her and inflicted injuries on her. The complainant was admitted at Ombo Hospital for four days where her injuries were classified as harm.

3. The appellant was later arrested and charged. When put on her defence, she told the court that she fought with the complainant because she found her in her husband's house after she (the appellant) went away because of the differences with her husband.

She told the court that what ensued was a fight between her and the complainant in which the complainant was hurt. She stated that she (the appellant) also sustained some minor injuries.

4. The prosecution called five witnesses among them (PW3) **Michael Ng'ang'a** the man at the centre of the fight who acknowledged the appellant as his wife of 11 years with 3 children to boot and the complainant as his new wife. He testified that on the material day he received a call that his wife had been attacked. On rushing home he found his new wife (the complainant) writhing in pain with numerous cuts on her head and an injury on her leg. He rushed her to the hospital where she was admitted. He also testified that he was instrumental in getting the accused (his estranged wife) apprehended.

5. PW1 testified to the injuries suffered by the complainant and produced the P3 form on behalf of his colleague **Stephen Kerario** who had earlier filled it. The trial court convicted the appellant and sentenced her to two (2) years imprisonment. The appellant has now appealed against conviction and sentence on the grounds that:

1. *That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without properly evaluating the evidence on record.*
2. *That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without taking into account that there was no corroboration of evidence between PW2, PW3 and PW5.*
3. *That the learned trial magistrate erred in law and fact by failing to appreciate the fact that there was no proper identification done.*
4. *That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without an option of fine in spite of the appellant's mitigation.*
5. *That the learned trial magistrate erred in law and fact by delivering an ambiguous judgment.*
6. *That the learned trial magistrate erred in law and fact by relying on the hearsay evidence.*
7. *That the learned trial magistrate erred in law and fact by failing to comply with the provisions of section 168 of the Criminal Procedure Code.*

6. When the appeal came before me on 1<sup>st</sup> November 2011, **Mr. Nyambati** learned counsel for the appellant submitted that he relied on the record of appeal highlighting only that the case was basically a marital dispute and that the trial court ignored the probation report. He further submitted that the sentence given by the court was ambiguous with the court having on one hand ordered the appellant to pay kshs. 10,000 to the complainant and on the other hand to serve two years' imprisonment. **Mr. Mutai** for the state conceded the appeal without citing any grounds, stating that he wished to leave the matter to the court to decide.

7. I have reviewed the evidence on record. The appellant was convicted on the evidence of PW5 who stated to the court that he peeped through a glass window and saw *Mama Wairimu* hitting the complainant then ran away to call *Mama Lulu*, another neighbour. He stated to the court that he saw the appellant pulling the complainant's hair. That evidence was not corroborated. It is also apparent from the record that the trial court relied on the evidence of PW3, the man at the centre of the controversy. Having noted the relationship between the complainant, the accused and PW3, the court went ahead to entertain the testimony of PW3 and disregarded the social inquiry report which confirmed the said relationship. It is my view that the court ought in the circumstances of this case not have given weight to the testimony of PW3 as the same prejudiced the accused.

8. On the issue of sentence, I observe and agree with the appellant's counsel that the sentence imposed by the trial court was ambiguous. On the one hand, the court ordered the appellant to pay kshs. 10,000 and on the other to serve 2 years imprisonment. In ordering the appellant to pay kshs. 10,000 to the complainant, the court failed to comply with the requirements of section 175 of the **Criminal Procedure Code**.

9. For the foregoing reasons I allow the appeal quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

**Judgment dated, signed and delivered at Kisii this 28<sup>th</sup> day of March, 2012.**

**R. LAGAT-KORIR**

**JUDGE**

***In the presence of:***

Edwin Mongare : Court clerk

..... : Appellant

..... : Counsel for the appellant

..... : Counsel for the respondent