



REPUBLIC OF KENYA
IN THE HGH COURT OF KENYA AT KISII

Criminal Appeal 227 of 2009

JULIUS ONDIEKI OSEKO APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Keroka, Hon. A. P Ndege in Criminal Case No. 547 of 2009 dated 10th November, 2009)

The appellant, **Julius Ondieki Oseko** 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 26th March, 2008 at Saigankia village Isoge/Kineni sub location, Nyansiongo location in Borabu district within Nyanza Province, unlawfully assaulted **Alice Moraa John** thereby occasioning her actual bodily harm. He was tried and convicted by the RM's court at Keroka. On 11th November, 2009, he was sentenced to serve 1 ½ years imprisonment.

On 12th November 2009, the appellant filed the present appeal. The appeal was first fixed for hearing on 26th September, 2010. It did not proceed on that date due to the absence of the appellant who had previously been granted bond. A warrant of arrest returnable on 23rd November, 2011 was issued upon the application of the prosecution. The warrant was later lifted by the court on 21st January, 2011 and the appellant readmitted to bail and the appeal set down for hearing on 9th March, 2012. On that date, the appellant missed court prompting the court to cancel his bond for the second time. A warrant of arrest was issued and a fresh hearing date given as 9th May, 2011. On that date the appellant missed court yet again.

Subsequently on 10th May, 2011, the appellant presented himself to court and explained the reason for his absence stating that he had been present in court 1 but that his file had been placed before court 2 without notice of the change. The court lifted the warrant and gave a fresh hearing date being 27th June, 2011. The matter did not take off on that date due to absence of the appellant's counsel. The court granted a last adjournment to the appellant.

The appeal was finally argued before me on 31st October, 2011. The appellant presented seven grounds of appeal indicating in summary that: that there was no corroboration; that charge was not proved; the evidence was not properly evaluated leading to a wrong conclusion; and, that the sentence was too harsh.

Mr. Maosa, learned counsel for the appellant argued the grounds together. His submissions emphasized

that there was inconsistency in the prosecution evidence and that the evidence of the complainant was not corroborated. **Mr. Mutai** learned counsel of the respondent, submitted that the conviction was safe and was based on sound evidence. He asked the court to dismiss the appeal.

I have, as a first appellate court, subjected the evidence to a fresh evaluation as required by law. See **Boru & Anor –vs- Republic Criminal Appeal No. 19 of 2001 (2005) 1 KR.**

The appellant’s main complaint is that the evidence of the complainant was not corroborated. The record demonstrates that the testimony of PW1 was supported by the testimony of PW3 who examined the complainant and noted injuries to the left hip joint and leg. He produced the P3 form which detailed the injuries. I therefore find the complaint regarding lack of corroboration to be untrue and dismiss it accordingly.

Secondly, the appellant has argued that no eye witness was called by the prosecution. It is instructive to note there that the eye witness who witnessed the assault was the appellant’s wife who by law is not a compellable witness. The complaint is therefore without merit.

Having evaluated the evidence of all the prosecution witnesses, I find that the charge was proved and respectfully agree with the trial court on the conclusions reached. I therefore affirm the conviction.

On sentence, I find the sentence of 1½ years imprisonment to be lawful as provided under Section 251 of the **Penal Code**. However, due to the need to decongest our correctional facilities, I exercise the court’s power under section 354 of the **Criminal Procedure Code** and vary the sentence to a non-custodial sentence. Consequently, I order that a community service/probation report be presented before this court can make appropriate orders.

I further direct that the appeal be mentioned on 8th October, 2012 for purposes of sentencing.

Judgment dated, signed and delivered at Kisii this 27th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

Julius Ondieki Oseko : appellant (present/absent)

..... : counsel for respondent (present/absent)

Edwin Mongare : court clerk

R. LAGAT-KORIR
JUDGE