REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.175 OF 2010

FRED WELISHA…………………………....…..APPEALLANT

VERSUS

REPUBLIC…………………….……...…..RESPONDENT

[An Appeal from original conviction and sentence in Nyahururu P.M.CR.C.NO.610/2009 by Hon T. M. Matheka, Principal Magistrate, dated 14th day of May, 2010]

JUDGMENT

The appellant, Lillian Waithera Macharia, was charged with the offence of **assault causing grievous harm** contrary to **section 234** of the **Penal Code**. After a full trial and upon conviction, the court below sentenced her to three years imprisonment.

Being aggrieved, the appellant has preferred this appeal challenging her conviction and sentence on the following grounds:

i) that the trial magistrate failed to appreciate the ingredients of the offence charged;
ii) that the charge was not proved beyond reasonable doubt;
iii) that the trial magistrate erred in imposing an aggravated sentence
iv) that the evidence adduced by the main witness was not corroborated

Learned counsel for the respondent conceded the appeal on the last ground, that the evidence of the complainant was not corroborated.

Before I consider those submissions, it is imperative that I re-evaluate the evidence on record in order to come to an independent conclusion bearing in mind that the witnesses were heard and seen by the trial court.

The prosecution witnesses presented evidence that the complainant, Samuel Mburu Kiiru, a child aged 12 years and his younger brother, **P.W.2 Joseph Kamau (Joseph)** ten years old went to harvest potatoes from their *shamba*. On their way back, they cut maize stalk to chew from the appellant's *shamba*. The complainant and Joseph recalled that when the appellant saw them, she got hold of Joseph and hit him with a stick on the buttocks before turning her fury on the complainant who she threw down, boxed and slapped. Using a stick, she aimed at the complainant's head but the latter used his arm to shield the attack and the appellant struck the arm inflicting what **P.W.3, Peter Nginyo**, the Clinical Officer found to be a fragmented fracture. The complainant and Joseph ran away as the appellant took their

potatoes and hoes.

They reported the attack to their parents who in turn reported to the police and took the complainant to the hospital. P.C. Silas Birir upon receiving the report arrested the appellant.

In her sworn defence, the appellant confirmed that on the day in question she noticed four boys in her maize *shamba*. On seeing her, the boys ran away. When she inspected the *shamba* she found the boys had uprooted maize stalks. Because she had not identified the boys, **D.W. 2, Virginia Wambui Muthoni (Muthoni)** who was working in the adjacent *shamba* informed her that one of the boys was Richard son of Muturi. The next day the appellant met Muturi and asked him to warn his son, Richard. Muturi confirmed that the other boys who were with the son (Richard) were Isaac, Muturi's other son, Sammy and Kamau, the children of Mama Kaende.

On 6th March, 2009, four (4) days later, the police arrested her claiming she had fractured the complainant's arm. She was categorical that she did not beat the complainant and Joseph or take their potatoes and hoes. While at the police station, the complainant's parents demanded to be paid kshs.40,000/=. Muthoni who was with the appellant at the material time reiterated her evidence that the children who were in her *shamba* ran away as the appellant called out a name. She however confirmed that the appellant took two sacks containing potatoes and maize which the boys had left behind. The appellant's third witness, **D.W.3, Charles Chiunza Luvayi** confirmed the incident of the boys running away from the appellant's *shamba* and the fact that he (Luvayi) identified only the son of Richard.

The learned trial magistrate found that the evidence of the complainant and Joseph although of children was consistent and corroborated by that of the clinical officer. She waspersuaded and found that the case against the appellant was proved beyond any reasonable doubt.

On my part, I find as a fact that the complainant and Joseph trespassed on the appellant's maize *shamba* and damaged maize stalks. They were interrupted by the appellant. While the complainant and Joseph maintained that they were confronted by the appellant and beaten up, the latter on the other hand was categorical that she did not see or encounter any of the boys who were in her shamba.

The learned trial magistrate conducted a *voire dire* examination of the complainant and concluded that he understood the nature of an oath and proceeded to testify on oath. The learned trial magistrate similarly noted in her judgment that the complainant and Joseph were consistent.

I have no justification or basis for doubting that conclusion and observation noting that the witnesses testified before the learned trial magistrate. They innocently admitted a wrong; that they trespassed on the appellant's *shamba*, cut maize stalks to chew. Joseph said that although he was also caned by the appellant he did not suffer any physical injury.

The appellant herself was at a loss why the two would lie against her. Aged only 12 years it is difficult to imagine why the complainant would make up a story against the appellant. Where was his arm fractured? It is clear that the dispute emanated from the appellant's destroyed maize. Like the learned trial magistrate, I find that the complananait was a witness of the truth and his evidence was correctly accepted.

The next question is whether that evidence was corroborated. It was submitted by both counsel for the appellant and for the respondent that the trial magistrate erred in relying on Joseph's testimony as corroborating evidence.

Section 124 of the **Evidence Act** provides that:

"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof

implicating him."

It is trite learning that, evidence that itself requires corroboration cannot corroborate another. However Joseph's evidence was not the only corroborative evidence. The complainant explained how his arm ended up with the fracture. That evidence was corroborated by his father, Samuel Kiiru Kiai who saw the injured hand a few minutes after the assault. The clinical officer who examined the complainant the next morning also confirmed the injury.

Muthoni, the appellant's own witness confirmed the complainant's evidence that the appellant took the sacks and hoes which the complainant and Joseph had left behind as they ran away.

The offence of grievous harm under **section 234** of the **Penal Code** is proved if it is shown that a suspect unlawfully did any of the acts enumerated under **section 4** of the **Penal Code –** including, as in this case, harm which amounts to dangerous harm, or seriously or permanently injures health or which extends to permanent disfigurement, or to any permanent or serious injury to any external organ.

"Harm" on the other hand is defined as:

"… any bodily <u>hurt</u>, disease or disorder whether permanent or temporary"
(Emphasis supplied)

The clinical officer sufficiently explained this. The ingredients of the offence was proved.

The sentence of three years was both lenient and lawful as the offence attracts life imprisonment. For all these reasons, the appeal fails and is dismissed.

Dated, Signed and Delivered at Nakuru this 22nd day of February, 2011.

W. OUKO
JUDGE