REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 72 OF 2010

(From original conviction and sentence in Criminal Case No. 7218 of 2008 of the Chief Magistrate's Court at Nakuru - D. K. Mikoyan {SRM})

EUNICE WAMBUI THUO…….…….....
…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant was charged with the offence assault causing actual bodily harm contrary to Section 251 of the Penal Code, *(Cap. 63, Laws of Kenya).*

The particulars were that the Appellant on the 11th day of November 2008 at Heshima Trading Centre Bahati in Nakuru District of the Rift Valley Province unlawfully assaulted A.W.M thereby occasioning her actual bodily harm.

The Appellant was on the evidence before the trial court, found guilty, convicted and was sentenced to one year's imprisonment. Being aggrieved with both her conviction and sentence, the appellant has by a Petition of Appeal dated and filed on 12th March 2010 appealed against both her conviction and sentence, on the grounds following -

(1) the Learned Magistrate erred in law and fact in relying on the uncorroborated evidence of PW1, a minor.

(2) the Learned Magistrate erred in law and fact in finding on his analysis that the sufuria was used as an "assault weapon."

(3) the Learned Magistrate erred in law and fact in finding that the accused threw the sufuria at PW2 from the house and later picked the sufuria and threw it to the complainant when there was no evidence to support this particular finding.

(4) the Learned Magistrate erred in law and fact in finding that the prosecution had proved its case beyond all reasonable doubt while there was no independent evidence to support this finding.

(5) the Learned Magistrate erred in law and fact in failing to appreciate that in the full

circumstances of this case, a non custodial sentence was most appropriate.

(6) that in the circumstances of this case, a custodial sentence of one year without the option of a fine is manifestly excessive and oppressive.

And for said reasons the appellant prayed that the appeal be allowed by quashing the conviction, setting aside the sentence and setting the appellant free.

Although the State conceded the appeal, it is still the duty of this court as the first appellate court, albeit briefly, to review and re-evaluate the evidence before the trial court in order for this court to make its own findings, and arrive at its own conclusions.

Firstly, the complainant is said to have been a child of 6 years, and under the Children Act 2001 *(No. 8 of 2001),* a child of tender years *(a child below the age of ten years).* Under Section 19 of the Oaths and Statutory Provisions Act *(Cap. 15, Laws of Kenya),* the trial court is required to subject the child to examination to ascertain whether it is possessed of sufficient intelligence and understands the duty of speaking the truth to justify the reception of the evidence. In the esoteric French language the child is subjected to **"a voire dire").**

The trial court failed to carry out a *voire dire*. This was a grave procedural error which goes to the root of the admissibility of the child's evidence. Under Section 124 of the Evidence Act *(Cap. 80, Laws of Kenya),* the appellant could not be convicted without corroboration of the child's evidence by other material evidence implicating the appellant.

Secondly, the sufuria which is alleged to have been thrown by the appellant at the child *(the complainant),* belonged to the complainant's mother (PW2). PW2 had a dispute with the appellant over the payment of an electricity bill over which PW2 says, she had a ***"silent fight"*** with the appellant. There are not many *(if any)* fights which are silent! PW2 says one Macharia, a co-tenant in the premises found the appellant in PW2's house and tried to remove the appellant, but he (Macharia) was never called as a witness - because he did not witness the appellant hit the child. PW2's other daughter whose name is not given, and who PW2 says witnessed the incident, was not summoned to testify. There was therefore no independent evidence called to corroborate the evidence of either the child (the complainant) or that of PW2 *(its mother).*

Thirdly, why would an incident which is alleged to have occurred on 11th November 2010 be reported on 27th November 2010 some 16 days after the event? Any occurrence of a serious assault - an assault causing actual bodily harm is ordinarily reported within hours of its happening. To make a report of such incident some 16 days later and affer no explanation for the delay is clearly an **"afterthought"** as Mr. Mugambi, the counsel for the appellant put it, and in my view, is an abuse of the criminal law process.

Lastly, if indeed the appellant used the sufuria *(cooking pan),* which the appellant denied in her sworn evidence, it was not her intention to hurt the **"complainant".** It was collateral damage arising from the dispute between PW2 and the appellant. In any event PW2, in cross-examination only said, - **"Wambui kicked the stove and sufuria outside, my door was open -"** If that is so, at what stage did the appellant pick the sufuria and hit it at the child? According to the evidence of the appellant, PW2 told her the next day, that she, hit her child, and as I have stated already the appellant denied hitting the child with the sufuria which had **"food which was poured on her"** by PW2.

The evidence of PW3, the Investigating Officer is very preemptory. There is no explanation why he did not inquire into the delay in reporting the incident which occurred on 11th November 2008 but was reported 16 days later on 27th November 2008.

For those reasons, I allow the appeal, quash the conviction, set aside the sentence, and direct that the appellant be set free forthwith unless otherwise lawfully held.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 11th day of March 2011

M. J. ANYARA EMUKULE
JUDGE