



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO.204 OF 2009

(Appeal against conviction and sentence from the Original Criminal Case No.316 of 2009 in the Senior Resident Magistrate's Court at Butere from the Judgment of [MR. G.O. OYUGI, R.M.] dated 5.11.09)

CATHERINE OMUSINA AWINJA ::::::::::::::::::::::::::::::: APPELLANT

V E R S U S

REPUBLIC ::: RESPONDENT

J U D G M E N T

1. Catherine Omusina Awinja and her son, Boniface Shirako Omusina had been charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code. It was alleged that on 24.3.2009, jointly with others not before the court, they, allegedly grievously, harmed Bulasio Nyangweso Lutuba.
2. I have had occasion to read the record of the trial court and I note that upon trial, they were both convicted and sentenced to serve four (4) years' imprisonment on 5.11.2009 and in the Petition of appeal, worded more like a statement of defence than a proper Petition of Appeal, the Appellant, like she did when she appeared to argue the Appeal, has made the point that she never committed the offence and that she had gone to rescue her son, Boniface, from the beating of PW1, Bulasio Nyangweso but she was instead arrested, charged and convicted.
3. The evidence tendered by the Prosecution was that on 24.3.2009 at around 9 p.m. PW1, aforesaid and his wife, PW5, Phanice Ayuma, were in their home when Boniface aforesaid came and started cutting down banana plants. That PW1 then confronted him and Boniface slashed him on the first finger and he ran back to his house and locked himself in.
4. According to both witnesses, the Appellant, Boniface, one Moyi, one Nicholas and another person then descended on their house, broke down the door and Moyi cut PW1 with a panga while the Appellant used a rungu to hit him.
5. As to how they could identify their assailants at night, both PW1 and PW5 said that PW1 had a torch which he had lit and there was a paraffin lamp in the house which emitted sufficient light. It was their evidence that the village headman, (the "liguru" who was PW2) intervened and the Appellant and the others went away by which time, PW1 had cuts on his fingers and he also lost two teeth during the

incident.

6. PW2 aforesaid was Joseph Omolo Otachi who responded to the cries for help and who stated that his home was 120 meters away and when he got the scene, he found the Appellant with a rungu and with the others named elsewhere above, they were jointly assaulting PW1.
7. He spoke to the Appellant and her group and they left. According to him PW1 was injured on the head and hands and he assisted in taking PW1 to hospital.
8. PW6, Robert Wanyonyi, a clinical officer examined PW1 on 25.3.2009 and noted injuries to the head, nose, legs as well as loss of two upper frontal teeth. He produced the treatment notes and P3 form as P.Exht.2 and 3.
9. PW4, P.C. Jackson Ouma received the initial report at Butere Police Station on 25.3.2009 and investigated the case before charging the Appellant and Boniface aforesaid. The other alleged assailants were not traced and had never been charged, according to him.
10. The Appellant's defence was that on 24.3.2009 at 8 p.m., she heard her son Boniface screaming that PW1 had hit him on the eye. She rushed there and found him lying on the ground and she helped him up and took him to hospital. On 25.3.2009, she was attacked by a group of people who claimed that together with her sons, she had assaulted PW1. Later she was arrested and charged. That evidence was also given by one Francis Musina who stated that he found Boniface and the Appellant after the incident but did not find PW1 when he tried to trace him.
11. I have considered the above evidence and would like to state as follows;
12. Firstly, there is no doubt that there was some physical engagement between the Appellant, members of her family and PW1 on the material night. There is also no doubt that PW1 and Boniface aforesaid were the primary participants in that engagement.
13. Secondly, from the evidence of PW1, PW2 and PW5, there is also no doubt that the Appellant was at the scene during the incident.
14. Thirdly, from the evidence of PW1, PW2, PW5 and PW6, there is no doubt that PW1 was injured during the incident and PW6's medical evidence in that regard was not challenged at all.
15. The Appellant's contest at the hearing and on Appeal was that she never committed the offence and that is the only issue to address at this instance. PW1 and PW2 as well as PW4 were categorical that she was wielding a rungu and assaulted PW1. The injuries that he sustained and which PW6 authenticated were testimony to the brutal beating that he received and I am satisfied that the Appellant was properly identified in sufficient light. Her defence that she only came to assist her injured son cannot be true and I dismiss that defence as inadequate in the face of the overwhelming evidence against her.
16. In the end, I see no merit in the Appeal and I see no reason to tamper with the conviction.
17. As to sentence, no complaint has been made that it is excessive and it is not so, in any event.
18. The Appeal is without merit and is best dismissed.
19. Orders accordingly.

Delivered, dated and signed at Kakamega this 13th day of April, 2011

ISAAC LENAOLA
J U D G E