



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 63'B' OF 2010

CATHERINE WAMBUI KINYUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by L. Mbugua Ag. Principal Magistrate in the Karatina Senior Resident Magistrate's Criminal Case No.184 of 2009 delivered on 18th March 2010 at Karatina)

JUDGMENT

CATHERINE WAMBUI KINYUA, the appellant herein, was tried on a charge of assault causing actual bodily harm contrary to *Section 251* of the Penal Code. After undergoing a full trial, the Appellant was convicted and sentenced to serve five(5) years imprisonment. She was aggrieved hence this appeal.

On appeal, the Appellant put forward the following grounds of appeal in her amended Petition:

1. ***I am a first offender.***
2. ***I am innocent Kenya suffering for an offence I never committed and suffer from ulcers whereby my condition will deteriorate in prison for five years.***
3. ***I am the sole read winner of my family and my parent are old thus living and nobody to take care of them.***
4. ***The trial magistrate erred in law and fact in convicting me on evidence that was scanty hence arriving a wrong judgment.***
5. ***I was attending part time computer and Accounts classes at Palmax College Karatina and being prison has terminated my studies.***
6. ***The sentence of five years is harsh and excessive. I therefore beg you honourable court to allow my appeal, quash the sentence and set me at liberty.***

Before dealing with the merits or otherwise of the appeal, let me set out in brief the case that was before the trial Court. The prosecution's case was supported by the evidence of six (6) witnesses. On 22nd February 2009, Evelyn Wanjiru Maina Ruguru P.W.1 (complainant) and Margaret Wangechi Wambui (P.W.4) went to fetch water from the river. On their way back, the duo met the Appellant. It is said the Appellant held P.W.1 who as a consequence fell down. The Appellant is alleged to have stabbed P.W. 1 twice on the stomach and over various parts of her body. P.W.4 had rushed to seek for help. Johnson

Ndegwa Wamae (P.W.3) told the trial court that P.W.1, his wife, had left him sleeping. Shortly he heard screams. He rushed to the scene where he found P.W.1 badly injured. P.W.3 said he was told by P.W.1 that she had been stabbed by the Appellant. P.W.3 rushed P.W.1 to hospital for treatment. **Wamae Ndegwa** (P.W.2) was informed by P.W.4 that P.W.1 had been stabbed by the Appellant. He rushed home i.e. the scene of crime where he found P.W.1 being prepared to be taken to hospital for treatment. Dr. Paul Kimathi (P.W.6) produced the P3 form filled by Dr. Mwangi. In the P3 form Dr. Mwangi indicated that P.W.1's abdomen had one metre of her intestines protruding and that her scalp was wounded. She also had a small cut on her upper lip. By that time she was 24 weeks pregnant. P.W.1 was taken to the theatre for paratomy. The injury was categorized as harm. When placed on her defence, the Appellant stated that on 21st February 2009 she went home and found the door locked. She said her husband (P.W.3) refused to open the door despite her persistent knock. She alleged to have spent the night at the kitchen. She also said that she managed to enter the house when P.W.3 went out to answer a call of nature. The Appellant claimed she picked a quarrel with her husband (P.W.3) when she discovered he had another woman inside her house. She said a fight ensued between the trio. The Appellant said P.W.1 was taken for treatment by P.W.3 the next day. The trial magistrate found that the Appellant was seen by P.W.4 stabbing P.W.1 and that the evidence of P.W.1 and P.W.4 was corroborated by the evidence of P.W.2, P.W.3 and P.W.6. The trial magistrate did not believe the evidence of the Appellant.

Having given the brief background of the facts of the case leading to this appeal, let me now turn my attention to the appeal. Mr. Nderi, learned advocate for the Appellant, argued three main grounds on appeal. It is the submission of the learned advocate that the Appellant was provoked to act in the manner. She alluded that there was a love triangle between the Appellant, P.W.3 and P.W.1. Secondly, it is argued that the trial magistrate shifted the burden of proof to the Appellant. It is also said that the Appellant's husband should not have been allowed to testify against the Appellant under *Section 127* of the Evidence Act without the Appellant's consent. Thirdly, it is argued that the sentence meted out was manifestly excessive. Mr. Makura, learned Senior State counsel, opposed the appeal on the basis that there was overwhelming evidence to sustain a conviction. Mr. Makura further conceded that the sentence meted out was the maximum sentence. He said the same was justified in the circumstances of the case.

I have re-evaluated the evidence. There is no doubt that the Complainant was injured on 22nd February 2009. The injury is classified as harm although the P3 form produced by P.W.6 shows that the Complainant may have suffered more serious injuries. The question is who inflicted the injuries? It would appear from the evidence tendered that P.W.4 saw the Appellant stab the Complainant. P.W.1 (Complainant) appears to have told P.W.3 that she had been stabbed by the Appellant. P.W.3 took the Complainant for treatment at Karatina District Hospital. At Karatina District Hospital, the Complainant was treated, issued with the duly filled P3 form which was produced by P.W.6. The Appellant admits that she fought with the complainant when she found her with P.W.3. I am convinced there was sufficient evidence showing that the Appellant committed the offence. I find that there was no justifiable reasons to excuse the Appellant from blame. In other words it cannot be said that there were provocative grounds to justify the Appellant's action. It has been argued that the trial magistrate shifted the burden of proof to the Appellant. With due respect, I have not seen any iota of evidence showing the trial magistrate shifted the burden of proof to the Appellant. I am unable in the circumstances of this case to fault the trial magistrate's finding on conviction.

On sentence, the Appellant has cried foul that the sentence meted out is harsh and excessive for a first offender. There is no doubt that the Appellant was sentenced to five (5) years imprisonment. That sentence is the maximum prescribed under *Section 251* of the Penal Code. There is also no doubt that the Appellant is a first offender. The trial magistrate appears not to have taken into account the fact that the appellant was a first offender. It is a principle of sentencing that courts should pronounce a lenient sentence on first offenders. It would appear this principle was not applied here. The trial magistrate therefore erred in principle thus meting out a harsh sentence. In the circumstances I am entitled to interfere with such a sentence.

In the end I dismiss the appeal as against conviction. I however, allow the appeal as against sentence. Consequently the sentence of five (5) years is set aside and is substituted with a sentence of three years. The sentence is to run from the date of sentence.

Dated and delivered at Nyeri this 1st day of April 2011.

J. K. SERGON
JUDGE

In open court in the presence of Kimunya h/b Nderi for Appellant and Makura learned State Counsel.

J.K. SERGON
JUDGE