



No. 2782

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 239 OF 2010

**EBISIBA KWAMBOKA ..... APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

JUDGMENT

***(Being an appeal from the judgment and decree of the Resident Magistrate's court at Keroka Hon. J. P Ndege in Criminal Case No. 1592 of 2009 delivered on 9<sup>th</sup> November, 2009)***

**Ebisiba Kwamboka**, the appellant was charged before the Senior Resident Magistrate's court, Keroka with the offence of assault causing actual bodily harm contrary to section 251 of the **Penal Code**. It was alleged that on 7<sup>th</sup> December, 2009 at Bogeche sub-location in Masaba district within Nyanza Province she unlawfully assaulted **Ebisiba Moraa Olweri** thereby occasioning her actual bodily harm. She denied the offence and her case proceeded to trial.

PW1 **Ebisiba Moraa**, the complainant stated the appellant on the material day pinned her down and assaulted her. As a result she was injured on the back and chest among other areas. Her daughter **Eunice Nyaboke Ogweri** PW2 was present and she screamed, thereby attracting several people who came to her rescue. She then went to Ibacho sub district hospital and later Nairobi for further treatment. She subsequently reported the incident to Ibacho Police Patrol base. The appellant was her daughter in law and she imagined that she was assaulted because she found the appellant's son digging her land. She ordered him to get out of the land and as he was getting out, her mother the appellant emerged and threatened her daughter PW2 before leaving her. She then got hold of her and assaulted her whilst pinning her on the ground. She was however rescued by neighbours who answered to PW2's screams.

PW2, **Eunice Nyaboke Ogweri** the complainant's daughter confirmed witnessing the appellant get hold of the complainant and assault her on the mouth. PW1 fell down and she screamed and people who were worshipping nearby responded including PW3. They assisted her pick PW1 up. They then took her to Ibacho sub-district hospital and later to Ibacho Police Patrol base where a P3 form was issued to her.

PW3 **Keki Osoro** was one of the worshippers near where the incident took place. He confirmed responding to the screams. He found the complainant lying on the ground while the appellant was standing beside her with a jembe. PW1 had a swelling on her chest while the appellant had some bruises on her neck.

PW4 **PC No. 63334 Gideon Mutua** received a report from the complainant. He issued her with a P3 form which was later filled by a clinical officer PW5, **Jared Birundu**. He confirmed treating and examining PW1 on the same day of the incident. The complainant's chest had a small blood stain. That she also had some bruises on her mouth and chest. That a blunt weapon must have been used to inflict the injury. He assessed the degree of injury to be harm. The appellant was subsequently arrested and charged.

Put on his defence, the appellant in a sworn statement stated that on the material day she was with PW1 who was sick. She had gone to see her because of her sickness as she was her husband under Kisii woman to woman marriage. There was land which the complainant and her daughter, PW2 were bent on selling. When she confronted them PW2 just screamed at her thinking that she was there to prevent the sale of the land. She denied assaulting PW1 as alleged.

The learned magistrate having evaluated the evidence on record found the appellant guilty as charged and convicted her. Upon conviction, he sentenced her to 18 months imprisonment.

That conviction and sentence prompted this appeal which was filed by the appellant through **Messrs Koina Onyancha & Co. Advocates**. The appeal was both on conviction and sentence. At the hearing of the appeal however, **Mr. Onyancha**, learned counsel for the appellant abandoned the appeal on conviction. Instead he elected to pursue the appeal on sentence only. **Mr. Mutuku**, learned Senior Principal State counsel not objecting, the appellant's wish was granted.

In support of the appeal on sentence, **Mr. Onyancha**, submitted that the complainant was the husband to the appellant in a woman to woman marriage under Kisii customs. The appellant has 3 very young children. Infact one of them was still breastfeeding at the time. The appellant was a first offender and remorseful. The trial magistrate should in the circumstances have called for a probation officer's report. counsel therefore prayed for the reduction of the sentence in the circumstances.

**Mr. Mutuku's** response was not to oppose the appeal on sentence. To him the appellant had already served four months of the prison term which was sufficient punishment given the circumstances.

I have no hesitation whatsoever in agreeing with the learned Senior Principal State counsel. The sentence of eighteen months given the facts and circumstances of the case was no doubt manifestly harsh and excessive. The appellant was a first offender and remorseful. The complainant was her husband under the Kisii woman to woman marriage. Therefore this was a domestic dispute which called for sobriety on the part of the learned magistrate so that our criminal justice system is not seen as being invoked to settle family scores and discord. Being a family dispute and as correctly submitted by **Mr. Onyancha**, the learned magistrate should have considered an alternative mode of punishment, bearing in mind that the appellant had three small children at the time. Infact one of them was still breast feeding. I do not think therefore that a custodial sentence was called for and indeed met the ends of justice. The sentence imposed should have been aimed at promoting family harmony and reconciliation. However, the sentence imposed in my view only helped to promote discord in the family.

On the whole, I am satisfied that this appeal on sentence must succeed. The appeal is allowed and the sentence imposed set aside and substituted with the sentence so far served by the appellant. The consequence of the foregoing is that the appellant should at once be set at liberty unless otherwise lawfully held.

**Judgment dated, signed and delivered** at Kisii this 4<sup>th</sup> day of May, 2011.

**ASIKE-MAKHANDIA**  
**JUDGE**