



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

HC.R.A NO.49 OF 2009

REPUBLICPROSECUTOR

VERSUS

SALIM OWINO OMONDIACCUSED

J U D G E M E N T

The appellant Salim Owino Omondi was convicted by Busia Senior Resident Magistrate of the offence of grievous bodily harm contrary to Section 234 of the Penal Code and sentenced to serve five (5) years imprisonment. The appellant being dissatisfied with the judgement of the trial court lodged this appeal.

In his petition of appeal the appellant, does not dwell on the merits or otherwise of the evidence. He states that the two of the prosecution witnesses, PW1 and PW2, were his children and that the complainant was his son. He further states that the assault on the complainant was meant to discipline his son for some wrongdoing which the complainant admitted. The appellant then urges the court to have leniency on him.

The State opposed the appeal on grounds that the evidence of the prosecution was overwhelming thus leading to a safe conviction.

Although the appellant does not fault the conviction, he appears to justify his conduct by saying that as a parent he was justified to discipline the complainant who was his son. I will therefore briefly evaluate the evidence on record with a view of determining whether the conviction was safe.

The evidence of the two key witnesses PW1 and PW2 forms the backbone of the prosecution's case. PW1 aged ten (10) years testified that on the material day, he ate kale vegetables (sukuma wiki) prepared for his father the appellant by his stepmother. When the appellant returned home later in the day, he was annoyed with PW1. He then took a knife and put it in the fire and then used it to burn PW1 on the hands. This was in the presence of PW2 brother to PW1 and who in his testimony corroborated PW1's evidence on the assault. The appellant and his wife did not take the complainant to hospital. PW1 went to school the following day. It is the teacher who noticed the burns on the hands and took PW1 to hospital. PW2 further testified that before her father came home, their step-mother had beaten her with a cooking stick and also burned him with a hot knife. PW2 had to escape to her grandmother's house where she was threatened with similar punishment. PW2 told the court that anytime the complainant did something wrong, his step-mother forced him to eat peppered food as a punishment.

The case of PW1's torture was referred to PW3, a child's rights worker at an Non-Governmental Organization (NGO) known as Rural Education and Economic Enhancement programme operating at

Butula and Nambale Divisions. This was after the teacher had summoned the appellant to school who admitted the wrongdoing. The teacher had gone further and taken the complainant for treatment at Bumala "B" Health Centre. The appellant also appeared before the Director of the NGO and admitted having tortured the complainant in the guise of disciplining him. PW3 then escorted the appellant to Butula A.P camp where he was detained before being handed over to regular police who charged him with the offence.

PW4 was the school head teacher who testified that the case of torture on PW1 was referred to him by PW1's class teacher. The witness explained how he dealt with the case by taking the boy for treatment and later referring the matter to the N.G.O.

PW5 is the police officer at Nambale Police Post who received the appellant from PW3 and the Administration Police and investigated the case.

PW6 is the Clinical Officer said she examined PW1 and found extensive burn blisters on his hands. The injuries were 72 hours old and were assessed as grievous harm.

In his defence the appellant said that the complainant had developed habits of a delinquent child. He had warned PW1 but he failed to heed to the warning. The appellant decided to discipline him.

The trial court found that the case was proved against the appellant beyond any reasonable doubt. The court considered the defence of the appellant that he was justified to discipline his son and found that it had no justification. The appellant did not deny inflicting burns on the complainant. In doing so, the appellant used excessive force and caused severe injuries on the child of tender age. The evidence of PW1, PW2, PW3 and PW5 is overwhelming and left the trial court with no doubt that the appellant committed the offence. I come to a conclusion that all the ingredients of the offence were satisfied and that the defence of the appellant has no justification and is unacceptable. The conviction was therefore safe and is hereby upheld.

As for the sentence imposed, I note that the appellant and his wife, the step-mother of PW1 and PW2 mistreated the children to an extent that they were denied food and subjected to other forms of inhuman treatment.

The appellant in his defence and in cross-examining PW2 brought out the ugly scene. He accused the complainant of stealing from his grandmother and uncle. It was clear that it was food which was stolen from these relatives. PW1 said he was hungry when he ate the vegetables kept for the appellant by his wife. This is evidence that the children were denied food regularly and punished by beatings and through other degrading methods by their own parents. The appellant was under a duty of care over PW1 to ensure he provided food, clothing and education for the child. The safety of the child was bestowed upon him as a parent. The sentence of five (5) years imprisonment was lenient in the circumstances. Section 234 of the Penal Code provides for a maximum sentence of life imprisonment. This court has the power on its own motion to enhance the sentence.

I therefore, enhance the sentence imposed to eight (8) years imprisonment. The appeal has no merit and dismiss it accordingly.

F.N. MUCHEMI J.

Judgement dated and delivered in open court this 10th day of November 2011 in the presence of the appellant and the State Counsel Mr. C.O. Okeyo.

JUDGE

F.N. MUCHEMI