



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 212 OF 2009

DORCAS JEMUTAI SANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the decision of the Honourable Principle Magistrate J.M Njoroge in Kapsabet Principal Magistrate's court Criminal Case No. 3279 of 2007 Delivered on 26Th November 2009)

JUDGMENT

This appeal arises from the decision of the Honourable Principle Magistrate, Kapsabet who on the 25th November, 2009 sentenced the appellant to a fine of Kshs 20,000/= or in default to serve a term of two (2) years imprisonment.

This sentence arose from the appellants conviction of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the Charge are that the appellant;

“On the 13th day of October 2007 at Ngoroin Village, Surungai Location in Nandi North District of the Rift Valley Province assaulted Stella Kirwa thereby occasioning her actual bodily harm.”

In her Petition of Appeal which was wrongly headed and referred to as the Memorandum of Appeal the appellant submitted through her counsel, **Mrs. Toigat** that the trial magistrate erred in convicting and sentencing the appellant and relied on the seven (7) grounds set out in the Memorandum (six) of Appeal which are as set out hereunder:-

- (i)** The learned magistrate erred in law and fact by convicting the appellant on flimsy and uncorroborated evidence.
- (ii)** The learned magistrate erred in law and in fact by convicting the appellant without hearing the evidence of the Investigating Officer.
- (iii)** The learned magistrate erred in law and in fact by arriving at a decision without giving reasons for the same as provided in the Criminal Procedure Code.
- (iv)** The learned magistrate erred in law and in fact in failing to consider the scanty and vague evidence of the 4th prosecution witness, which might have led him to hold otherwise.
- (v)** The learned magistrate erred in law and in fact by basing the conviction on inconsistent and contradicted evidence of PW3.

(vi) The learned magistrate erred in law and in fact by shifting the burden of proving her innocence to the appellant by citing her failure to call witnesses to support her defence where as the prosecutions case was evidently flimsy.

(vii) The learned magistrate erred in law and in fact by meting out a sentence that was excessive in the circumstances, the appellant having been said to be a first offender.

Mrs. Toigat urged this court to quash the conviction and set aside the sentence.

The State Counsel, Mr. Kabaka opposed the appeal and submitted that the appeal be dismissed for lack of merit and that the conviction and sentence be upheld.

I have perused the Record of Appeal and given due consideration of the grounds of appeal and submissions of both counsel.

On ground (i) of the appeal I find that even if the evidence given was flimsy as submitted there was still corroboration of the same. PW 2 & PW 3 gave evidence on the attack and the identity of the appellant which evidence was corroborated by the complainant. The attack was in broad daylight PW 2 & PW 3 saw the assailant and the complainant knew the assailant as they were neighbours and identification was by recognition. The complainant gave evidence of her injuries which evidence was confirmed and corroborated by PW 5, the Doctor.

I find no merit on this ground of appeal and concur with the state counsel that the prosecution proved the issues relating to assault, identification and injuries beyond reasonable doubt.

At the trial it is submitted by the appellants counsel that the Investigating officer was not called to testify and this forms the basis of ground of appeal number (ii).

Mrs. Toigat, counsel for the appellant submitted that from the time that the complainant made the report to the time of arrest of the complainant, there was a time lapse of two weeks. She further submitted that no evidence was adduced at the trial to explain the time lapse and the chain of events leading to the arrest of the appellant. Could this time lapse have been prejudicial to the appellants conviction is the issue.

From the Record of Appeal at page 4 PC No. 77283 Zacharia Kandie was called to testify. When asked to cross-examine PW4, the appellant did not ask this pertinent question on time lapse she chose instead to ask no questions.

In HCCR Appeal No. 297 of 2000 (Mombasa) SYLVESTER KELI KARUMI –VS- REPUBLIC – P Tutui Commissioner of Assize stated that:

“.....it is for the prosecution to decide which witnesses are relevant to their case. The investigating officer played a very insignificant role that his evidence may not have been necessary...”

I concur that it is upon the prosecution to decide which witnesses to call. The evidence against the appellant as to the assault and identification was sufficient and the Investigating Officer’s evidence may not have been necessary. I find no merit on this ground.

On ground three (iii) of the appeal I must agree that the judgment of the trial magistrate was brief. However no judicial officer has the same style of writing judgments. It is also not a requirement that a court should set out the points for determination at length and give lengthy reasons for arriving at a particular decision.

I find that the trail magistrate addressed the pertinent issues that is assault, identification and

injuries. In my view this was a straight forward and simple case and a summary sufficed. I find no merit on this ground, as well.

On ground No. (vi) the appellant chose not to ask any questions in cross-examination that may have been expounded the evidence and raised doubt in the appellant's favour. I find no merit on this ground.

As for ground (v) this is covered by the reasons that I have set out in ground No. (i) of the appeal. The evidence of PW 3 was corroborated by that of the complainant.

I shall proceed to ground (vi) of the appeal and say that it was a significant fact that the appellant did not call or failed to call any witnesses at the trial.

In an adversarial legal system like the one in Kenya a party greatly undermines their case by failing to call witnesses. In this respect I find that this is not a ground to quashing the trial courts decision.

The seventh and last ground of appeal that the sentence was excessive considering the appellant was a first offender. I am guided by the principles set out in the case of WANJEMA –VS- REPUBLIC (1970) E.A at page 494 it was stated and I quote:-

“.....An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into account some immaterial fact, OR on a wrong principle.....”

I find that the trial magistrate when considering the evidence before the court did not overlook some material fact nor did he take into account any immaterial or extraneous factors, by considering that which he ought not to have considered. Nor do I find any application of a wrong principle in the record.

Before pronouncing sentence the appellant did not pray for leniency, did not state she was remorseful nor did she offer any form of mitigation. She chose to remain silent. The trial magistrate then proceeded to pronounce sentence.

I find no reason to fault the manner in which the trial magistrate conducted the trial nor in the manner he exercised his discretion in convicting and sentencing the appellant. I find that the sentence imposed was lawful and not manifestly excessive. Accordingly the appeal is hereby dismissed and the conviction and sentence are both upheld.

Dated and Delivered at Eldoret this 8th day of December 2011.

**A. MSHILA
JUDGE**