REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 42 of 2005

CATHERIN KAREMA ……..…… 1ST APPELLANT

PLISILA KAMENE ……..…….. 2ND APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(An appeal from a judgment of M.S.G. Khadambi SRM Meru

dated on 25the February 2005)

JUDGMENT

The two appellants whose appeals were consolidated before the hearing of this appeal were jointly charged with third person who was acquitted for lack of evidence. They were convicted and each sentenced to twelve months imprisonment. The three were charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. It was alleged that on 20th July 2003 at Gakoromone market within Meru they jointly with others not before court they unlawfully assaulted Stella Wanzau thereby occasioning her actual bodily harm.

The three denied the charge, were tried, convicted and sentenced as aforesaid. Being aggrieved, they have preferred this appeal raising five grounds.

The first four grounds were argued together and last one separately. The first four grounds are to the effect that the learned trial magistrate erred in finding that the appellants were guilty when there was no sufficient evidence to support charge. The last ground is to the effect that the sentence was harsh. Learned counsel for the respondent argued that there was sufficient evidence against the appellants.

Before I deal with these grounds I am duty bound to re evaluate the evidence recorded afresh in order to come to my own independent conclusion. See **Kimeu V. R.** (2002) KLR 756.

From the evidence on record the complainant had gone for dinner at Kanana Lodge, where she was also accommodated. On her way to her room she passed through the bar. At the bar there were four women and five men. The accused who was acquitted asked her for a drink. She bought for her a bottle of Guinness beer. She walked towards her lodging but on reaching the gate the crowd she had left in the bar confronted and attacked her. In the process she sustained injuries for which she was treated and assessed as harm by PW2 Wilson Namu, a clinical officer at Meru General Hospital.

The 1st appellant in her unsworn evidence stated that on the day in question she had visited the 2nd accused person (acquitted). She found the complainant trying to borrow money from the 2nd accused person, who declined to lend her the money. Later the 1st appellant went to the police station and was detained. Similarly the third appellant testified that the 1st appellant told her that she was required at the police station. When she got there she was detained.

The learned trial magistrate was persuaded by the prosecution evidence in respect of the appellants. He, however, found no evidence against the 2nd accused person, who she set at liberty.

I have considered the evidence on record and the grounds raised in this appeal. I find as a fact that the complainant was assaulted by a group of about 15 people comprising men and women; that she sustained injuries; that that assault was not justified or lawful. The only question is whether the appellants were part of the crowd that assaulted the complainant.

The complainant contends that prior to the date of the incident the appellants were known to her; that she knew the 1st appellant very well; that she had known the 2nd appellant from 14th June 2003, approximately one month prior to the assault.; that she gave the names of her assailants including the appellants to the police. I can also add that the clinical officer confirmed that the complainant was assaulted by persons she said were known to her.

It will be noted that the complainant was the only witness to the assault. It is trite law that the evidence of a single witness on identification must be treated with great caution before entering a conviction even where the witness claims that the assailants were known to her previously. The court must see that there is some other evidence to lend assurance as to the participation of the assailants before convicting. See **Abdalla Bin Wendo and Another V. R.** (1953) 20 EACA 166.

As stated in the celebrated case of **R. V. Turnbull** (1976) 3 ALL E.R. 549 such evidence must be watertight to justify a conviction. The attack occurred at 7.30pm near the gate to where the complainant was lodging. There were about fifteen (15) people attacking her. She has not explained whether there was light or how she was able to identify the appellants, in a crowd of fifteen people. It was the complainant's evidence that in the bar she saw the 2nd accused person, who was acquitted and three other women. She did not state whether the appellants were in that group. Although she contended that she supplied the names of her assailants including those of the appellants, the investigating officer was not called to corroborate that fact.

It was stated in **Simiyu V. R.** Criminal Appeals Nos. 33 and 34 of 2004 (consolidated) that:-

"***In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."***

See also **R. V. Kabogo s/o Wagunyu** 23(1) KLR.

The person to whom the complainant gave the names of her assailants was not disclosed. He was also not called. There is therefore no other evidence to lend credence to her testimony that she was able to identify the appellants. I have no intention of considering the remaining ground as this ground alone is enough to dispose of this appeal.

I find that indeed the learned trial magistrate erred in convicting the appellants against the weight of evidence. This appeal is allowed, conviction quashed and sentence set aside. The appellants will be set at liberty unless they are held for any lawful cause.

Dated and delivered at Meru this 29th day of January 2009.

W. OUKO

JUDGE