



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 658 of 2006**

**DAVID KINUTHIA KARIUKI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**J U D G M E N T**

**DAVID KINUTHIA KARIUKI** (the appellant) and his wife **MILKA NWANJIKU KINUTHIA** (lias **MILKA WANJIKU NJOROGE**), were tried and convicted in the subordinate court of grievous harm contrary to section 234 of the Penal Code. The particulars of the charge were that on the 28<sup>th</sup> March 2005 at Ngegu village in Kiambu District within Central Province jointly unlawfully did grievous harm to **JEMIMAH NJOKI KINYANJUI** by strangling her neck and hitting her chest with a feast.

After a full trial, they were both convicted and sentenced to serve 12 months probation. Both of them appealed to this court against conviction and sentences. However, before the appeals were heard, **MILKA WANJIKU KINUTHIA** died and therefore her appeal No.659 of 2006 was marked as abated.

At the hearing of the appeal learned counsel for the appellant Mr. Faya, submitted that the evidence on record did not establish who the aggressor was. Counsel submitted that the magistrate did not take into account the defence of the appellant. In addition, counsel contended, there were contradictions in the evidence of PW2 as to who caused the scuffle. It only happened that the complainant went to report to the police before the appellant, and which fact the magistrate gave undue weight. In addition, counsel submitted that there were other people at the scene and, in fact, PW3 and PW4 supported the appellants story. Counsel contended that the conviction was unsafe.

The learned State Counsel, Mrs. Gakobo, opposed the appeal and supported both the conviction and sentence. Counsel submitted that it was clear from the evidence that PW1 was not the aggressor, but the victim of the assault. He urged this court to peruse the proceedings and the evidence which established that it was the appellant who tripped the complainant, strangled her and burnt her with a cigarette – causing the subject injuries. Counsel submitted that PW1 merely held the shirt of the appellant to prevent him from getting away from the scene as she screamed. PW2 who responded to the screams gave direct evidence on the incident, and was an independent witness. There was also evidence of the doctor who assessed the injuries suffered by PW1 and classified them as grievous harm. Therefore, counsel contended, the evidence of the prosecution was sufficient to sustain a conviction. On sentence, the learned State Counsel submitted that the maximum sentence for the offence was life imprisonment and that the magistrate was quite lenient in sentencing the appellant to 1 year probation.

I have reviewed the evidence on record as I am duty bound to do in a first appeal. The conviction of the appellant is clearly based on the determination of credibility between the evidence of the prosecution (PW1 and PW2) as against that of the defence. Both sides gave evidence on oath.

The prosecution case is as follows. PW1 **JEMIMAH NJOKI GITAU** (the complainant) escorted PW2 **MARY**

NJERI at about 7pm to 7.30 pm at a place called Ngegu. PW1 escorted PW2 for just about 20 meters from her (PW1's) house and they parted ways. About 5 meters from her house PW1 met the appellant and his wife (now deceased). The wife of the appellant told PW1 "You old woman, you will keep your hens enclosed". When PW1 responded that she had already received a message on the same, the appellant's wife responded that she would poison the chicken if they were not enclosed. When PW1 passed the two, the appellant tripped her and she staggered and fell.

The wife of the appellant slapped her while the appellant strangled her by the neck and the wife of the appellant beat her all over the body with a bottle which she was holding. Then PW1 screamed but the appellant still burnt her with a cigarette in the armpit. People came on hearing the screams, and, though the appellant tried to run away, PW1 held him by the shirt and restrained him. PW2, who had been escorted by PW1 was the first person to arrive, and she saw PW1 holding the appellant by the shirt. The evidence of PW4 Pc Justice Mithuku was that the complainant reported the incident to the police on the same 28/3/2005. The Clinical Officer (PW3 DORCAS MATHAAI) testified that she examined the complainant and, because the complainant suffered a concussion on the head which will result in recurring headaches, she classified the injuries suffered by the complainant as grievous harm.

When the appellant was put on his defence he gave sworn evidence. In brief his evidence was that he and his late wife actually met the complainant on the day in question. He stated that there was a scuffle, but that it was the complainant who provoked the scuffle by calling his wife a prostitute. He also stated that it was the complainant who in fact beat his wife (now deceased) and himself. He called two witnesses who testified that when they arrived at the scene, they found the complainant holding the shirt of the appellant.

Faced with this evidence the learned magistrate held ?

**"I find the complainant to be a credible witness. That her evidence was credible is further compounded by the conduct of each side following the altercation. Though the two accused the complainant of being the aggressor they went home and did not follow through with a report to the police. This would have been the most prudent cause of action considering their history of acrimony. Their conduct in this instance was not typical of one who has been offended."**

Learned counsel for the appellant has attacked these findings of the magistrate. With due respect, I find a lot of reason to agree with the magistrate's findings. In addition, even if the complainant had called the wife of the appellant a prostitute, that could not be a justifiable lawful reason to inflict on her the injuries that she sustained. The Clinical Officer found serious injuries on the complainant which were consistent with her version of what occurred at the scene. There is no evidence, or even an allegation by the appellant and his wife that any of them was injured. All the two witnesses for the defence just confirmed what the complainant stated that she held the shirt of the appellant to restrain him from running away. They actually found the complainant still holding the shirt. On inconsistency or contradictions in the evidence of the prosecution I find none. In short I agree with the learned magistrates findings on the credibility of the complainant. The sentence is very lenient but I will not interfere with the same. On the whole, I find that the appeal has no merits and have to dismiss the same.

Consequently, I dismiss the appeal and affirm both the conviction and sentence of the subordinate court.

Dated and delivered at Nairobi this 25<sup>th</sup> day of February 2008.

**George Dulu**

**Judge**

**In the presence ?**

Appellant

Mr. Faya for appellant

Mr. Makura for State - absent

Mwangi – court clerk