



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 298 of 2006

BONIFACE NGANGA GITHINJI..... APPELLANT

V E R S U S

REPUBLICRESPONDENT

J U D G E M E N T

The appellant herein Boniface Ng’anga Githinji had been jointly charged along with Caroline Wanjiku Githinji in Criminal Case 1067 of 2004 for the offence of grievous harm contrary to section 234 of the Penal Code, that on 19th day of July, 2004 at Kahuho Trading Centre in Kiambu District, jointly and unlawfully did grievous harm to Lucy Wangari Karanja. Both denied the charge and the matter proceeded to hearing whereupon the appellant was convicted as charged while his co accused was acquitted under Section 215 of the Criminal Procedure Code. He was sentenced to a prison term of three years in the magistrate’s court, the appellant was the second accused. It is against this conviction and sentence that he now appeals.

The evidence of the complainant Lucy Wangari Karanja (P.W.1) is that she was working in a bar in Kahuho – that bar belonged to the accused person who were husband and wife. On 17/7/04 at about 3.00 pm she went to the bar to ask 1st accused for money as the couple owed her two month’s salary in arrears. 1st accused slapped P.W.1 on the cheek and pulled her outside, P.W.1 decided to wait for Ng’ang’a (*the appellant*) so as to tell him about her salary – she went to the place where potatoes are sold, but before reaching there, she saw appellant following her from behind. He beat her using kick and fist. Then she says “He kicked me at the genital area, hit me on the cheeks using fists and blows. I started bleeding from my private parts. I rose up and fainted..... I was pregnant. I was feeling a lot of pain. I got a miscarriage.’

P.W.2 Dr. George Kanyi Mwaura runs Kinoo Medical Clinic. It is his evidence on 18/7/04 at the request of Kikuyu Police Station, he examined P.W.1 in case of assault. His findings were that “the back of the head and right cheek were swollen and bruised, there was pain and tenderness anterior front part of chest wall and lower abdomen. She was two months pregnant and she was bleeding. The approximate age of the injuries was one day. Probable type of object was blunt. She received treatment at the same clinic. There was a miscarriage and I classified degree of injuries as main.” He then filled the P3 form which was proceeded as Ext. P.W.3 is a police officer Police Constable Ezekiel.

Judgment Criminal Application 298 of 2006. Mbayadu of Kikuyu Police Station. He testifies that on 21/7/04 while in that office he received the complainant’s report about an assault. He accompanied her to Kahuho Shopping Centre where he arrested 1st accused. Later the appellant was arrested by Administration Police and taken to the Police Station and he was jointly charged with 1st accused. The

appellant in his defence gave unsworn testimony. He confirms that P.W.1 was working at the bar but says he was not at the bar. In the evening, he learnt about the assault – Kamau was said to have assaulted P.W.1 – she was drunk and was beaten by Kamau. He states that P.W.1 claimed that they had not paid her for work done, but that is not true and that she is framing him. The learned trial magistrate in her judgment indicated that the issue for determination was whether the complainant was assaulted and hence suffered previous harm (b) who assaulted her. She then stated that from the evidence on record there was no doubt that P.W.1 had suffered some beating and the P3 form showed injuries. The learned Trial Magistrate observed that the appellant even seemed to know more as he stated that the complainant was beaten by a certain Kamau, though he had earlier stated that he was not present during the alleged incident but during his cross-examination of the complainant, there was an allegation that the toilet had been messed up. Even at defence, the 2nd accused stated that complainant had been beaten by a certain Kamau. So how did he know about the messing of the toilet and about Kamau, if he was not present. The truth is that the 2nd accused was present and his alibi defence cannot stand.

The learned trial magistrate also considered the allegation by appellant that the charge against him had been framed up by P.W.1 for allegedly failing to pay her salary. Then the learned trial magistrate reasoned that from the evidence on record, the offence took place on 17/7/04 while the complainant was still working for the accused person and this has not been denied. Had she planned to frame then, reasonably she would have quit employment and then institute the present charges. But this is not the position, as action was taken immediately after the incident. I find no basis for the allegation that charges are framed up...”

The learned Trial Magistrate said she was more inclined to believe the version given by the complainant and that the complaint must have suffered injuries as a result of the kicks and blows by the 2nd accused person. In conclusion the learned trial magistrate stated this:-

“Thus though the accused persons are charged with causing grievous harm, I am of the opinion that the cause of the harm was the 2nd accused person who kicked and hit the complainant, thus the miscarriage And the Doctor confirmed that the injuries such as those sustained ... would not be caused by one stap.”

The learned trial magistrate then warned herself of the danger of convicting on the evidence of a simple witness but said she was convinced that the appellant committed the offence.

The grounds of appeal are that the learned trial magistrate failed to consider the Doctor’s evidence that the injuries were caused by a blunt object and hold that complainant’s evidence was at variance with the medical evidence. In this regard, the appellant’s counsel Mr. O. Githinji submitted that the findings of Dr. George Kilungu (P.W.2) were tenderness on the chest and lower abdomen and that these areas were not hit by appellant as P.W.1 referred to her cheeks and genital area. Mr. Makuria, learned State Counsel in opposing the appeal on both sentence and conviction submitted that complainant testified that the appellant kicked her near the genital area and hit her with blows and this resulted in her bleeding in her private parts and thus the miscarriage of her pregnancy. He further submitted that this evidence is further corroborated.

Is there a vast difference between what is known as Genitalia area and what is referred to as lower abdomen? Mr. Makura insists that the Doctor’s evidence corroborates P.W.1’s evidence as he noted tenderness on the cheek, chest wall and ***lower abdomen***.

I think in medical terms genital area is very specific and in the female being, I would be restricted to the vagina and its environs while the lower abdomen would be the area between the navel and the pelvic bone. Yet in real terms I think for the lay person versus the medic, that would be purely an anatomical description and that fine distinction could only have been best achieved if the question had either been put in question had either been part to Dr. Kanyi Mwaura, or for better effect a demonstration by P.W.1 as to what ***“genital area”*** meant in her use of the word. On cross-examination of P.W.2 the only issue raised by applicant was whether drinking beer was recommended for one who is pregnant and whether a pregnant drunken individual who fall down can have abdominal injuries – the issue as to whether there

was a destruction between lower abdomen and genital area was never canvassed – yet as a court of 1st appeal, must address my mind to this issue, because as Mr. Githinji for appellant put it, the entire prosecution case and conviction in the charge of grievous harm hinged on the miscarriage. But then again the evidence of P.W.1 is that the 2nd appellant kicked her and rained blows on her. She begun bleeding in her private parts and then fainted – so that would fit in with the answer given by P.W.2 on cross-examination that the injuries could not be caused by one slap and that **“if someone is pregnant and falls down, she can have abdominal injuries leading to miscarriage.”** - my emphasis is on the word ***falls down*** because there was no evidence led or even suggested by the defence that P.W.1 was drunk. There is also no contention that P.W.1 fainted and remained standing and I take judicial notice that when one faints, the result will be to lose the vertical position and land onto the ground. Only that the court is left asking whether the miscarriage was as a result of the fall, the assault other causes. This can be deciphered from P.W.1’s own evidence that when appellant slapped and kicked her in genital area, she started bleeding – then of course Mr. Githinji suggests that the bleeding may have started earlier because of the reference to a messed up toilet and that appellant in cross-examination had even suggested that P.W.1 was probably on her monthly periods. This suggestion is however discomited by two factors-

(a) There is no evidence that P.W.1 had been to the toilet or what “messed up” meant.

(b) The Doctor’s evidence and P3 form shows that

the complainant was bleeding in fact the notes on the P3 form read – pregnancy for 2 months. Now bleeding (miscarriage almost complete) – this is under the paragraph covering Thorax and Abdomen. Surely that evidence when taken in its totality with what P.W.1 says not only corroborates her evidence, but shows that the miscarriage was a sequel to the beatings.

Another levels of the appeal is that the trial magistrate erred in relying on the evidence of a single witness whom the magistrate did not see or hear so as to assess and engage the demeanor of that witness in determining her credibility. Further that the learned trial magistrate did not give reasons for relying on that simple witness’s evidence and that her warning herself of the danger of relying on evidence of a simple witness does not apply.

To this, Mr. Makura submits that a conviction can be based on evidence of a simple witness so long as the court warns itself of the danger of doing so and that under section 143 Kenya Evidence Act any fact can be proved even by a simple witness and prosecution does not have to call the whole world to prove a single fact. Indeed section 143 of the Kenya Evidence Act (Cap 80) provides:-

“No particular number of witness shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

However Mr. Githinji’s contention is that the learned magistrate did not give any reasons as to why she believed P.W.1 – all she said was t hat she preferred a believed P.W.1. He further points out that the incident took place in a busy sitting and the prosecution should have called other witnesses and having failed to do so, then the conclusion is that there was no better evidence to produce and he cited the decision in ***Shazard and 2 Others –Vs- Republic 1988 KLR page 283*** which held, inter alia that,

“The fact that the alleged fight, which was said to have taken place near a temple on a busy street, seemed not to have been witnessed by any independent persons and the evidence of one witness that the complainant appeared drunk and did not have any injuries had been proved by the trial court”

I think this current case can easily be distinguished from the Shazard one, on one simple aspect – the defence had called a witness who gave evidence that complainant was drunk and did not have injuries, - so his credibility was in question. In the present case – there is no evidence that complainant was drunk and Doctor confirms that she had injuries.

So the learned trial magistrate appropriately warned herself, and I have already pointed out the distinction between the prosecution case and the situation envisaged in Shazard’s (***infra***) case and the

redemption offered by Section 143 Kenya Evidence Act and in my considered view, the learned trial magistrate did not err in relying upon the evidence of a simple eye witness.

Mr. Githinji's insistence that since the learned trial magistrate took over the matter under section 200 of the Criminal Procedure Code from another magistrate, she did not have occasion to see or hear the witness testify and cannot turn around and say "***I am convinced he committed the offence***" and that the learned trial magistrate in fact" and that the learned trial magistrate took over the matter under Section 200 of the Criminal Procedure Code from another magistrate, she did not have occasion to see or hear the witness testify and cannot turn around and say "I am convinced he committed the offence" and that the learned trial magistrate in fact shifted the burden of proof onto the appellant and malice inferences from appellant's defence and by making conclusions that "Had she planned to frame then, reasonably, she would have quit employment and instituted these charges. He says the learned trial magistrate was putting himself on the complaint's shoes. To this learned State Counsel, Mr. Makura responded that the purported inferences actually fitted in with Section 169 of the Criminal Procedure Code which requires the trial magistrate to analyse the evidence, make finding on existing evidence (which must be reasoned) and this is what she did – I agree. But what about the submission that the conviction is based on "things not seen or heard by the trial magistrate. I have read through the lower court's judgment – that conviction was not based on the issues of demeanour of P.W.1, it was fully on an analysis of the evidence availed on record, so that limb of the appeal cannot stand – section 200(3) of the Criminal Procedure Code was properly complied with and appellant said he wished to proceed.

Consequently my finding is that-

(1) *the conviction was proper and secure and I therefore uphold it.*

(2) *I find no reason to interfere with the sentence meted out and I confirm it.*

(2) *Since Appellant was out on bond pending appeal, his bond is now cancelled and he should be placed in prison custody to complete his sentence.*

Written, dated and delivered at Nairobi this 7th day of March, 2008.

H.A OMONDI

JUDGE.