



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

Criminal Appeal 146 of 2007

MERCY WAIRIMU WAMBUI..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Resident Magistrate

Mr. Adamba, of 9th March, 2007 in Criminal Case No. 2886

of 2006 at Makadara Law Courts)

JUDGEMENT

The appellant was charged with the offence of causing grievous harm contrary to s.234 of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant, on 9th April, 2006 at Githurai Estate in Nairobi, jointly with others not before the Court, did grievous harm to *Peter Ndung'u*, by fracturing his scalp.

PW1, *Peter Ndung'u Njoki*, testified that he used to work as a cook in a hotel at Githurai, and on 9th April, 2006 he was at his place of work, at Mwafrika Safi Hotel. It was while so engaged, that his wife, the appellant herein, came in and asked him for the keys to the family house. The appellant, who used to work at a bar, known as Mwayoika Bar, did not return the house keys to the complainant. At about 11.00pm on the same date, the complainant saw the appellant go away with the said keys, and while she was in the company of two men. The complainant followed, and, as he got close to the appellant, she screamed at him and raised alarm that the complainant was a thief. One of the men accompanying the appellant hit the complainant on the head with a metal bar, forcing him to run away, only to fall down later. The two men accompanying the appellant followed PW1 and caught him; but he informed them that the appellant was his wife. The two men then called the appellant to come closer; she did, but told the two men that she knew not the complainant. PW1 fell unconscious thereafter, and later found himself at Kenyatta National Hospital, where he was admitted for a period of two weeks.

Upon being discharged, the complainant returned home, where he found certain household items, including the appellant's personal clothing, missing. PW1 reported the incident to the Police station, and he was issued with the P3 medical-reporting form, which he took to the Government surgeon. PW1 said he was still undergoing treatment, at the time of the hearing of the assault case against his wife of six months.

In reply to cross-examination and re-examination, PW1 confirmed that the assault upon him had taken place at about 11.00 pm; he did not know the two men who had accompanied the appellant, but he saw them clearly, as the scene was illuminated by electric lights; he was able to see the appellant well, as she was dressed in a pair of trousers, and was accompanying the said two men. There were no other persons at the scene.

PW2, *Mary Wanjiru Mbugua*, who resides at Githurai 44, testified that on 10th April, 2006 in the morning, the complainant's brother, *Daniel Kiiru* came to her, to inform her that PW1 was being assaulted at Githurai 45, and she asked *Daniel Kiiru* to proceed to Githurai Kimbo Police Post, or Kasarani Police Station, and report the matter. PW2 testified that, on an earlier occasion, PW1 had sought accommodation in her house, when he met the appellant herein, and the two were co-habiting. PW2 later learned that PW1 had been hospitalised at St. John's Hospital after being assaulted by the appellant herein. She went to St. John's Hospital only to find that the complainant had been transferred to Kenyatta National Hospital. PW2 was able to find the appellant herein, and to go with her to the Police station, together with some other people. PW2 left and went to Kenyatta National Hospital, where he found PW1 already admitted, being in a serious condition with a "severely damaged" face. PW1's hand and legs were bandaged. PW1 had been unconscious for 13 days; but on the 14th day he was able to respond, when PW2 called his name. PW2 reported these developments to the Police station. The complainant remained in hospital for about two months. After he was discharged, PW2 took him to the Police station, where he recorded a statement.

PW2 testified that the complainant and the accused had cohabited for six months. The appellant worked in a bar, and every Saturday, some people would come along and pick her up.

On cross-examination, PW2 testified that she had on several occasions, before the material incident, advised the appellant to stop bar-work, and to desist from spending nights outside her home, "but she refused." The appellant had been residing in PW2's house together with PW2's grandson (PW1).

On re-examination, PW2 testified that the complainant and the appellant, while living together, were in the habit of quarrelling lots of time. PW1 used to inform PW2 that the appellant was in the habit of spending nights outside the family home.

PW3, Police Force No. 70541 *Police Constable Joseph Kiansa* of Kasarani Police Station, was the investigating officer in this matter. PW2 had reported the incident to PW3, and said the appellant herein was at the Chief's Camp. It was three days after the incident, on 12th April, 2006 that the incident was reported to PW3. PW3 went with PW2 up to Kenyatta National Hospital, and they found the complainant in a serious condition, not being able to talk. Two weeks later, PW3 returned to Kenyatta National Hospital, and found the complainant now able to speak. After being discharged, the complainant went to the Police station, and recorded a statement on the circumstances in which he had been attacked on the material date; and he also identified the appellant who was then in custody. PW3 gave to the complainant the medical-reporting P3 forms, which were then duly filled in by Government doctor, who assessed the harm to the complainant as grievous harm. PW3 produced the medical report, after the appellant raised no objection.

The appellant, when put to her defence, made an unsworn statement in which she said she was on her way from her place of work, when "some men came [along] and started fighting." She said she did not know the men in question, but later on she was arrested.

In the judgement, the critical passage of findings thus reads:

"[I have] considered the entire evidence [adduced] by the prosecution. The evidence on record points to the fact that [the] accused was part of the group that attacked the complainant (PW1); in fact, [she is] the one who initiated the attack by calling the complainant a thief, yet she knew him quite well as her husband, and months earlier she had just [taken] the house keys from him. The report by the doctor indicates [that] the degree of injuries [was] grievous harm. PW1 was admitted in hospital for not less than two weeks. In the circumstances, I find that the prosecution has proven their case beyond

reasonable doubt. [The] accused is thus convicted as charged....”

The learned Magistrate, after hearing the appellant’s mitigation statement, and after treating her as a first offender, sentenced her to a three-year prison term.

The main grounds set out in the petition of appeal are, firstly, that the sentence imposed was too harsh; and that the appellant is “a single mother of two children and the bread-winner.” These grounds, however, did not feature in the appellant’s submissions, in which she said the complainant had “annoyed me, and I was expectant.” She also stated that the complainant had stabbed her with a knife – something not at all featuring in the evidence. Lastly, she said she was seeking forgiveness.

Learned counsel, *Ms. Gateru* opposed the appeal. She supported the conviction and sentence, for the offence of causing grievous harm. Counsel urged that the appellant had initiated the process leading to the attack upon the complainant; and the injury sustained was confirmed medically to have amounted to grievous harm. Counsel urged that the sentence meted out was neither harsh nor excessive, considering that the maximum sentence provided for was life imprisonment.

I am in agreement with the learned Magistrate that the testimonies given correctly showed the appellant to have committed the offence charged, and illuminated the circumstances in which the offence had been committed. Conviction, therefore, was correctly arrived at. As to sentence, once again, I agree with learned counsel, that a three-year term, out of a possible penalty of life-imprisonment, was quite lenient, bearing in mind the circumstances in which the offence had been committed.

The appeal is dismissed; conviction upheld; sentence affirmed.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 21st day of July, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gateru

Appellant in person