



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 51 of 2008

LILIAN AKINYIAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

[From original conviction and sentence in Criminal Case number

2369 of 2006 of the Senior Resident Magistrate's Court at Winam]

JUDGMENT

The appellant, Lilian Akinyi, appeared before the Resident Magistrate at Winam charged with the offence of grievous harm contrary to Section 234 of the Penal Code, in that on the 19th November 2006 at Kajulu Location Kisumu District Nyanza Province, unlawfully did grievous harm to Mary Achieng.

After trial, the appellant was convicted and sentenced to serve seven years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant filed the present appeal on the basis of the grounds contained in her petition of appeal filed herein on the 23rd May 2008. The grounds are at most a complaint on the insufficiency and contradictory nature of the prosecution evidence and a failure by the prosecution to avail essential witnesses such as neighbours.

The appellant also complains that the sentence was harsh for a first offender and that her constitutional rights were violated by being held in police custody for one week.

The appellant therefore urges this court to allow the appeal by quashing the conviction and setting aside the sentence.

At the hearing of the appeal, the appellant represented herself and elected to address the court after the respondent's submissions.

The respondent was represented by Mr. Musau, the learned Senior Principal State Counsel who contended that the appellant was convicted on sound evidence which showed that she was the one who attacked the complainant, a co-lover, in broad daylight and occasioned her injuries.

The learned State Counsel further contended that under Section 143 of the Evidence Act no particular number of witnesses is required to prove a fact.

Regarding the alleged violation of the appellant's constitutional rights, the learned State Counsel said that the issue was not raised at the earliest opportunity. Consequently, the prosecution assumed no duty to explain the alleged delay.

In effect, the respondent supported the appellant's conviction and sentence.

In her address, the appellant said that she was surprised and did not raise the constitutional issue in the lower court. She asked for this court's leniency and stated that what transpired between herself and the complainant who is her co-wife was a fight which occurred due to their grudges and when they had both been called for a meeting with their common husband. She urged this court to quash the conviction and set aside the sentence or have the sentence reduced.

This being a first appeal, the duty of this court is to re-examine the evidence afresh with a view to arriving at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

The case for the prosecution was that the complainant Mary Achieng (PW1) is married to one Joseph Owang and on the material date of the offence at 10:00 a.m. she was in her house at Kajulu Kisumu preparing to leave for church when the appellant arrived. She (complainant) enquired from her husband the reason for the appellant's arrival but before she was answered the appellant grabbed her neck and assaulted her thereby occasioning her bodily injuries. She was rescued not by her husband but a person called Odhiambo. She later reported the matter to the police.

P. C. Peter Berenge (PW2) received the report on the 23rd November 2006 and issued a P3 form to the complainant who was thereafter examined by Dr. Eric Kwayo (PW3) then of New Nyanza Hospital. The doctor upon examination of the complainant filled and signed the P3 form (P.EXH 3) showing that the complainant suffered grievous harm.

The appellant was eventually arrested and charged with the present offence which she denied.

In her defence, she made an unsworn statement and said that the complainant is her co-wife and on the material date the husband told her that they meet at the complainant's house for a word. She went to the co-wife's house and found the co-wife (complainant) at the door. The complainant ushered her into the house and as their husband started speaking, the complainant demanded to know what she (appellant) had come to do.

The complainant then grabbed her (appellant) collar and pulled her out of a chair. The two struggled and fought before they were separated by their husband who hit both of them with a club.

The husband Joseph Oaka Otuge (DW2) confirmed that both the complainant and the appellant are his wives and that they fought on the material date as he was talking to them. He said that he separated them by beating them with a stick but that the appellant was later arrested for fighting.

The trial court considered the evidence in its totality and after a careful and detailed analysis disbelieved the defence version and upheld that of the prosecution.

The finding of the trial court in as much as it was gauged on the veracity of the witnesses may not be faulted by this court.

In any event, there was ample evidence showing that the complainant's injuries were inflicted by the appellant whether or not the two were engaged in a fight inside a private house as opposed to a public place.

A fight in a public place would attract an offence under Section 92 of the Penal Code.

It is arguable as to who between the complainant and the appellant commenced the unlawful transaction which culminated in the complainant suffering serious injuries. However, the appellant must be held criminally responsible for the consequences of her unlawful act of assaulting and injuring the complainant. If she was provoked as implied in her defence then she ought not have taken the law into her own hands.

She did not have to correct a wrong by committing another wrong using a lethal weapon (i.e. human teeth).

Two wrongs do not make a right. In the circumstances, this court would hold that the charge against the appellant was proved beyond any reasonable doubt. Her conviction by the trial court was safe and is hereby upheld.

The maximum sentence provided for grievous harm under Section 234 of the Penal Code is life imprisonment. Therefore, the sentence of seven years imprisonment may not be considered as being harsh and excessive. It was a lawful sentence. However, taking into consideration that the appellant was a first offender and that she is rightly or wrongly, a co-wife to the complainant the sentence may and is hereby reduced to three (3) years imprisonment.

As regards the violation of the appellant's fundamental rights under Section 72(3) (b) of the Constitution of Kenya, it is apparent that going by the charge sheet the appellant was detained in police custody for a period longer than stipulated. However, the issue was only raised in this appeal and not at the earliest opportunity for the prosecution to avail reasonable explanation (if any) for the appellant's prolonged stay in police custody.

It is only an unexplained breach of the provisions of Section 72 (3) (b) of the Constitution which may constitute a violation of a suspect's fundamental rights.

The prosecution herein was not accorded any opportunity to offer an explanation. The appellant cannot be heard to say that she did not raise the issue in the trial court because she was surprised.

All in all, other than the alteration in the sentence, the appeal is dismissed.

Dated, signed and delivered at Kisumu this 17th day of December 2008

J. R. KARANJA

JUDGE

JRK/aao