



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

**Criminal Appeal 220 of 2003**

**ZIPPORAH KEMUNTO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction (s) and Sentence(s) in Criminal Case No. 13985 of 2000 of the Chief Magistrate's Court at Makadara (Mrs. Juma - PM)**

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

**ZIPPORAH KEMUNTO** was charged with **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to **Section 251** of the **Penal Code**. She was found guilty for the offence after a full trial and sentenced to six months imprisonment. The Appellant was aggrieved and therefore lodged this appeal against both the conviction and sentence. Pending the hearing and determination of her appeal, the Appellant was granted bond after serving one month's imprisonment.

The facts of the prosecution case were that the Complainant was estranged from her husband who was DW1 in this case. That on 12<sup>th</sup> April 2000, the Complainant went to her former husband's workshop where his house was also located, to drop a letter from F.I.D.A. It was after she gave him the letter, had plucked and packed some vegetables that the accused, whom she did not know before then, picked a piece of wood and hit her on the chest and scratched her on the neck. She reported to police after which the Appellant was arrested.

The defence case was that there was no such an assault. That the Complainant had gone to the former husband's house to take a letter where she met the Appellant living as her former husband's wife. That after picking vegetables, the Complainant banged the door threatening to ensure that the Appellant did not continue living there.

The Appellant was represented by Counsel during this appeal, one **Miss Masaki**, while the State was represented by **Mrs. Gakobo**. The Appellant raises six grounds of appeal in the petition of appeal thus: -

1. The learned magistrate erred in law and fact in finding that the Complainant had been injured whereas there was ample evidence to the contrary.
2. The learned magistrate erred in allowing inadmissible evidence.
3. The learned magistrate erred in finding that the appellant was guilty against the weight of evidence to the contrary.

4. The learned magistrate further erred in arriving at a decision that was wholly against the weight of the evidence adduced.

6. The learned magistrate misdirected herself in convicting and sentencing the Appellant.

The Appellant's advocate stated that they were not relying on the fifth ground.

On ground 1 that there was ample evidence to show that the Complainant was not assaulted, **Miss Masaki** raised issue with failure by the Complainant to take treatment notes from Kayole Hospital to PW3, the Police Surgeon who examined her one month after the alleged attack. That submission is not only misleading but contradicts the evidence of PW3, **Dr. Kamau**. **Dr. Kamau** said that the Complainant showed him her treatment notes from Kayole Hospital. That issue is therefore misleading and a non-issue. The submission that the Complainant's name did not appear at the Kayole Hospital records produced by DW2 was an exaggeration since DW2 was very clear that the register he produced in court was not the only one entered for the period in question and further DW2 was not working at the hospital at the period of time in question. DW2 also admitted that he did not keep the said registers as part of his duty. The Appellant's advocate that there was no evidence that the Complainant did not attend Kayole Hospital or any hospital is misleading in all the circumstances of the case.

**Miss Masaki** also made a further submission, which contradicts the evidence on record. Counsel submitted that the Complainant's evidence was that she was attacked by the Appellant in the presence of many customers including her former husband, DW1. **Miss Masaki** submitted that the prosecution ought to have called those customers as witnesses. **Mrs. Gakobo** did not agree that an adverse inference should be made against the prosecution case for failing to call those who allegedly witnessed the attack. Learned State counsel submitted that the Complainant was clear she did not know their alleged customers.

What both Counsels stated is not accurate. The Complainant's evidence was that she was attacked by the Appellant in the presence of her former husband DW1. In the circumstances, no adverse inference can be made against the prosecution. In any event, the defence case was that there was no attack and so there could have been no witnesses on their part.

**Miss Masaki** questioned the delay of three months in having the Appellant arrested arguing that since she was known an explanation should have been given for the delay.

Having analyzed the evidence on record, the submission that the delay in Appellant's arrest was unexplained is not correct. The Complainant explained in details efforts she made to have the Appellant arrested and the difficulties she encountered. It was only 3 months after the alleged attack, when DW1 was summoned to the Police Station that he took the Appellant with him and she was promptly arrested.

In support of grounds 3 and 4 **Miss Masaki** raised issue with the Complainant's choice to report the Complaint to BuruBuru Police Station instead of Kayole Police Station which was the nearest. The evidence on record by the Complainant during the rigorous cross-examination by the defence Counsel, explained clearly why the Complainant reported to BuruBuru Police Station. I do not think that where the report was made should raise any suspicions of machination or bias. The Complainant's explanation that she reported where other related cases had been made is not all together unreasonable as **Miss Masaki** argued. The most important issue is whether there was a genuine Complaint or not. The fact that the Police arrested and charged the Appellant is proof that they were satisfied that an offence had been committed. Otherwise it was within their power to close the investigations without charging the Appellant.

**Miss Masaki** submitted that the learned trial magistrate did not weigh the evidence before her as expected of her and that had she done so, she could not have convicted in this case. Counsel submitted that in the circumstances the conviction was erroneous.

**Mrs. Gakobo**, learned State Counsel submitted that the prosecution had availed sufficient evidence to prove the charge against the Appellant through the witnesses called. Learned Counsel submitted that the

Complainant's evidence that she had been assaulted was corroborated by PW3, the Doctor who examined her and confirmed the injuries.

I have on my part evaluated the entire evidence adduced by both sides and agree with the learned trial magistrate's findings that the prosecution proved its case as required. The Complainant's evidence was corroborated by PW5's evidence which confirmed not only the nature of injuries suffering but also the manner in which they could have been inflicted. In addition, the Complainant's evidence that she attended hospital due to the injuries suffered was corroborated by PW3 who saw the hospital notes.

The defence denied that any injuries were inflicted on the Complainant. However, the Appellant's denial, supported by DW1, who had direct interest in the matter, viewed objectively, that defence witness No. 1 was the centre of the attack. The evidence is clear that the Complainant and DW1 had separated. The Appellant was the one who took the Complainant's place in DW1's life. The cause of the confrontation was clearly related to the sour relations between the Complainant and DW1. There was motive for the attack. There is also a clear explanation why DW1 would appear for the Defence as opposed to appearing as a prosecution witness.

In my own evaluation of the prosecution case, I am fully satisfied that the evidence adduced by the prosecution was strong enough to convict. The learned trial magistrate found the Complainant a reliable witness and I see no reason to fault her conclusion. I am also satisfied that the learned trial magistrate exercised her decision judiciously when she rejected the defence case. In the circumstances, I will uphold the conviction entered herein as safe. The appeal against the convictions is dismissed.

On the sentence, I did not accept the learned State Counsel's submission that the sentence was proper. The learned trial magistrate failed to take into account the fact that the offence was not serious as injuries inflicted were minimal. There was also no aggravation of the charge since the Complainant's evidence was clear that she was hit only once. Considering the entire circumstances of the case, I believe that a non-custodial sentence should have sufficed as penalty for this offence. I will allow the appeal against sentence by setting aside the sentence of six months imprisonment. In substitution thereto, I order a fine of Kshs.5000/- in default 3 months imprisonment.

To that extent the Appellant's appeal succeeds.

Dated at Nairobi this 14<sup>th</sup> day of February 2007.

.....

**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant present

Miss Masaki for the Appellant

Mrs. Gakobo for the State

Tabitha: CC

.....

**LESIIT, J.**

**JUDGE**