REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 192 of 2006

JOYCE NKOMO KAILIBA……..……..……APPELLANT

V E R S U S

REPUBLIC…….....…….RESPONDENT

(Being an appeal against the original conviction and sentence in Tigania Resident Magistrate's Court Criminal Case No 124 Of 2006 By Hon. G. OYUGI – Ag SRM)

J U D G M E N T

1. The Appellant, Joyce Nkomo Kailiba was charged with the offence of grievious harm contrary to s.234 of the Penal Code. It was alleged that on 16.1.2006 at Kamarima village, Kitheo Location, she occasioned grievous harm to Janet Kairu by use of a panga.

2. The circumstances leading to the charge according to the evidence tendered by prosecution witnesses were that P.W.2, Janet Kariu, said that on 16.1.2006 she was at her house within Kitheu Location when the accused who was her neighbour came in and when asked what she wanted, proceeded to cut the witness on the left ear and neck and P.W.1 fell down. Her son Muthomi and others took her to Mikinduri Police Station and later to Miathene Sub-District Hospital and Meru General Hospital for treatment.

3. As to how she recognized the Appellant and yet it was at night, P.W.1 said that she recognized her voice when the Appellant spoke to her. When the Appellant cross-examined P.W.1, the witness replied;

"**It is not true that I was trying to get to you that [you] cut me on the ear….. It is not true that I report you to the chief that you are a witch** (sic)".

4. P.W.3, Geonisho Muthomi, recalled that on 16.1.2006 at 9.00 p.m. the Appellant went to his house and then left and before long, P.W.1 started screaming and P.W.3 heard the Appellant saying that it was

her she was looking for and when he rushed to P.W.1's house, he found that she had been cut on the left ear and neck and the Appellant then left. P.W.3 took P.W.1 who is his mother for treatment.

5. P.W. 4, Peter Kirima was at his house and when he heard P.W.1 screaming, he rushed there and found her injured and the Appellant going away from the scene. He identified her from the moonlight that night. He denied in cross-examination that he is the one who cut his mother and denied threatening to beat up the Appellant.

6. P.W.5, P.C. James Mugo investigated the matter and stated that when P.W.1 made her initial report, she named the Appellant as her assailant and on that basis the Appellant was arrested on 21.1.2006 and charged with the offence for which she was eventually convicted.

7. P.W.1, Martha Njeri Mumba, a clinical officer at Miathene Sub-Location Hospital treated P.W.1 on 17.1.2006 and noted the injuries as having been caused by a blunt object. The injuries themselves, she said, were to the neck, ear, thumb and bruises on the right leg and left thigh.

8. When the Appellant was asked to defend herself, she denied having cut P.W.1 and said that she was framed up and that her "**child is the one who came and told** [her] **that Kariu had been cut by her son.**" She called her son, Mbothi Mwenda, a 10 year old who said that on 16.1.2006, Kirimi, son of P.W.2 came and requested him for an axe and he gave it to him. That later the Appellant came and asked for the axe and when he went for it, P.W.2 took it and Kirimi followed her, grabbed it and cut her with it and the witness ran away to tell his mother what had happened.

9. I am obligated to evaluate this evidence afresh as the first appellate court and I know that I should also reach my own conclusions irrespective of the findings of the trial court. I am also aware of the handicap that I have; I did not see the witnesses nor did I note their respective demeanours.

10. In making my decision I note that there are two grounds in this Appeal viz;

    1. "**The learned Magistrate erred in law and fact by finding that the prosecution had proved the case against the appellant beyond reasonable doubt.**
    2. **The conviction and sentence given by the Learned Magistrate against the appellant was against the weight of the evidence."**

11. In any case where the offence is that of grievous harm a Court must ask itself "**did the injury result from the act of the accused?"** see Archbold, Criminal Pleading, Evidence and Pracit, 2003 page 1670 para. 19-208.

12. In the instant case, there is no denial about the injury because the Appellant and her son in evidence clearly said that indeed P.W.2 was injured. The remaining question would be, who injured her? The Appellant or P.W.4, Peter Kirimi, her son? My reading of the evidence is that P.W.4, Peter Kirimi could not have been the person who did it because assuming for a minute that P.W.2, P.W.3 and P.W.4 were all ganging up against the Appellant and in fact it was P.W.4 who inflicted the injuries, when was the conspiracy hatched when P.W. 5 who received the report after the injury was categorical that the initial report indicated the name of the assailant as the Appellant? Further, it is instructive that in her cross-examination of P.W.2 it emerged that the Appellant had a grudge with P.W.2 allegedly because P.W.2 had reported her to the chief as being

a witch. In cross-examination of P.W.4, she alluded to the fact that P.W.4 had threatened to beat her up and therefore also had a grudge with him.

13. All the above matters would leave me and any reasonable man to conclude that the Appellant is the one who recklessly hacked P.W.2's ear and cut her neck and her defence that it was P.W.4 who did so is both incredible and far-fetched. The defence was also clearly an afterthought and incapable of belief and is made that more ridiculous when she dragged her 10 year old son to give false evidence.
14. On all fronts therefore the conviction of the Appellant was safe and was based on credible and sound evidence and must be sustained.

15. As to sentence, I note that the offence of grievous harm was substituted with the original offence of assault causing actual bodily harm C/S 251 of the Penal Code because of the seriousness of the injuries inflicted by the Appellant. The offence for which she was convicted carried a maximum sentence of life in prison. The Appellant was sentenced to five years in prison and as I understand it this court can only interfere with that sentence if it is shown that the trial court "**overlooked some material factors, took into account some immaterial factor, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case" – Wanjema vs R. [1971] EALR 493 at 494**

16. I am certain that applying these principles, no cause has been shown why the sentence should be reduced or interfered with in any way.

17. The Appeal herein for all the reasons articulated above, must fail and is dismissed.

Orders accordingly.

Dated, signed and delivered in open court at Meru this 2nd day of August 2007

ISAAC LENAOLA

JUDGE

In presence of

Mr. Kariuki holding brief for Mr. Kibanga Advocate for the Appellant

Mr. Muteti State Counsel for the State.

ISAAC LENAOLA

JUDGE.