REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 115 of 2005

(Appeal against both conviction and sentence in Criminal Case No. 1288 of 2004 of the Chief Magistrate's court at Kakamega (E. O. Obaga, Esq. SRM)

VIOLET MULAYI……..……APPELLANT

V E R S U S

REPUBLIC…….RESPONDENT

J U D G E M E N T

After a full fledged hearing, the appellant, **Violet Mulayi,** was on 10.8.2005 convicted of the offence of grevious harm contrary to **section 234** of the **Penal Code, Cap 63 of the Laws of Kenya** and sentenced to imprisonment for a term of 5 years in Kakamega C.M.Cr.case No.1288 of 2004 by the Senior Resident Magistrate, E. O. Obaga, Esq. The particulars of the charge against her were that:

*"**VIOLET MULAYI**: on the 14th day of March 2004 at Shitamba village, Shibuye Location in Kakamega district within Western Province did grievous harm to EVERLYNE KITE KIZITO."*

Aggrieved by the conviction and sentence, the Appellant without aid of counsel filed an appeal seeking orders that the conviction be quashed and sentence set aside.

When the appeal came up for hearing before me on 27th June, 2007, the appellant was represented by Mr. Momanyi, Advocate, while the State was represented by Mr. Karuri, State Counsel. Mr. Momanyi argued two points which he said emerged from the grounds of appeal.

The first point, he submitted was that the appellant did not cause the complainant grievous harm as charged because there was affray between the appellant and the complainant. Affray is defined in section 92 of the Penal Code thus:

"***S. 92 Any person who takes part in a fight in a public place is guilty of a misdemeanour and is liable to imprisonment for one year."***

Mr. Momanyi referred to the evidence of PW5 to buttress this point. That evidence shows that the Appellant was restrained from hitting the complainant. She was armed with a jembe. The evidence does not support affray. The appellant had already hit the complainant and she brought hot water from her kitchen and poured it on the complainant. This evidence does not show affray. Rather, it shows that the appellant was the aggressor who attacked and injured the complainant.

Andrea Muyuga Khamere, (PW5), saw the appellant with a jembe and heard the appellant saying she was going to kill the complainant. The appellant was heading to the complainant's house. PW5 saw the appellant carrying water in a sufuria and pouring the contents on the complainant.

Mr. Momanyi, learned counsel for the appellant, in his second point submitted that PW4, the Clinical Officer, did not treat the complainant and did not give the age of injuries and he submitted that it was for this reason, that conviction should be quashed. I must confess my difficulty in following the argument on this point.

Samuel Chelule, PW4, was a Clinical Officer from Kakamega Provincial General Hospital. He completed the P3 form after reviewing the complainant's injuries which had been treated at Mukumu Hospital. PW4 produced the P3 form and was not cross-examined although opportunity was given to the appellant to do so. It was not necessary for PW4 to have treated the complainant. PW4 examined the injuries which were yet to heal and gave his opinion.

The evidence in support of the charge was overwhelming and it proved beyond any reasonable doubt that the appellant was guilty of harming the complainant. The injuries were categorized as maim by the Clinical Officer. The offence of grievous harm under s. 234 of the Penal Code is defined thus:

S. 234 "Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

In section 4 of the Penal Code, "grevious harm" is defined to include "maim" and to mean:-

S. 4 "Any harm which amounts to a main or dangerous harm, or seriously or permanently injuries health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any extend or internal organ, membrane or sense."

There is no doubt that the harm inflicted on the complainant which PW4 described as "**maim**" fell within the description of "**grevious harm"**, and hence came under **section 234** of the Penal Code. The P3 form was medical evidence which stood unchallenged.

Mr. Karuri, the learned State Counsel, opposed the appeal and submitted that the evidence adduced in the trial court proved the offence beyond any reasonable doubt and that the sentence was not excessive.

I have perused the record and given due consideration to the submissions of both counsel. It is my finding that the appellant attacked the complainant and viciously maimed her after resisting attempts to stop her. It is also my finding that the injuries inflicted on the complainant amounted to grevious harm. In her defence, the appellant denied the offence. Her allegation that there was a conspiracy to have her imprisoned had no evidential basis.

I am satisfied that the trial magistrate rightly convicted the appellant. As regards sentence, the maximum provided by law is life imprisonment. The appellant was jailed for 5 years.

I observe that although the trial court did give the appellant an opportunity to mitigate against sentence, the appellant declined to do so and instead told the trial court that she had nothing to say. She added, "**I was framed."** The trial court noted that the appellant was a first offender and that the offence was serious. The trial court also noted the deliberate manner in which the appellant caused grevious harm to the complainant. It also noted that the appellant showed no remorse.

An appellate court will not normally interfere with the discretion exercised by the trial court unless it is evident that the trial court acted upon the wrong principle or overlooked some material factor or the sentence is manifestly excessive in the light of the circumstances of the case ***(see R. v. Shershewsky (1912) C.C.A. 28 T.L.R. 364).*** Normally it is necessary for the trial court in passing sentence to indicate why a severe sentence has been imposed or why a light sentence has been given and the circumstances that the court has taken into account in doing so. It is my finding that in the instant case, these criteria

were met. In the result, I find no merit in the appeal. I decline to interfere with the conviction and sentence. I dismiss the appeal.

Dated at Kakamega this 18th day of October, 2007.

G. B. M. KARIUKI

J U D G E