REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 552 of 2003

THOMAS NJOROGE MBUGUA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant, Thomas Njoroge Mbugua, was charged with the **offence of assault causing grievous bodily harm contrary to Section 234 of the Penal Code**. The particulars of the offence were that on the 13th of February 2003 at Kasarani Estate Elburgon Nakuru District, the appellant unlawfully did grievous harm to Susan Muthoni. The appellant pleaded not guilty to the charge and after a full trial he was found guilty. He was duly convicted and sentenced to serve 4 years imprisonment. Being aggrieved by his conviction and sentence, the appellant appealed to this court.

In his petition of appeal, the appellant did not challenge his conviction. He however pleaded with this court to consider reducing the custodial sentence that he was sentenced to serve. He stated that he was not of good health and his health condition had deteriorated when he was imprisoned as a result of which he now suffers from fits. He further stated that the custodial sentence that he was ordered to serve was harsh and excessive putting into consideration that he was the sole breadwinner of his family. He further stated that during the period that he has been in prison he had reformed and was ready to be rehabilitated back to the society.

At the hearing of the appeal, the appellant veered off from the written script of his petition of appeal and instead challenged the decision of the trial magistrate in convicting him. He told the court that the complainant had been injured when she fell down as she was struggling with him after a domestic quarrel. He denied that he had injured the complainant. Mr Koech Learned Counsel for the State supported both the conviction and the sentence imposed on the appellant. He submitted that the prosecution had adduced sufficient evidence to establish that the appellant had without any justification attacked the complainant with a hammer by hitting her on the head and thus causing her to suffer injury an of permanent nature. He submitted that the complainant had become paralysed as a result of the attack. He urged this court to dismiss the appeal. I will consider the submissions made before me after setting out the facts of this case.

The cause of the quarrel between the complainant's mother and the appellant's parents was smoke which was alleged to be coming out of the complainant's mother's kitchen to the main house where the appellant's parents resided. From the evidence it is apparent that the two houses were adjoining each other. The witnesses in this case, PW1 Susan Muthoni Karanja (*the complainant*), PW2 Julia Wambui Karanja and PW3 Mary Waithera narrated how there

were ongoing differences between the two families as a result of smoke which was alleged to be polluting the house of the appellant's parents from the complainant's mother's kitchen. On the material day *i.e*. 13th of July 2003 the disagreement escalated to the extent that a quarrel ensued between the appellant's parents and the complainant's mother. The quarrel degenerated into a fight. The complainant PW2 and PW3 testified how the appellant picked a hammer and first hit the complainant's mother on the stomach with a hammer. When the complainant sought to intervene and rescue her mother from being from being assaulted by the appellant, the appellant used the hammer and hit the complainant on the head on it. Immediately after being hit the complainant fell down. Her injury proved to be serious. She was taken to Elburgon Hospital where she was first treated but was later referred to the Nakuru Provincial General Hospital where she was admitted for one week before being discharged.

PW4 PC Bernard Githinji testified that the complainant was brought to the police station by members of the public who informed him that the appellant had attacked her causing her to suffer serious injuries on her head. PW4 told the complainant to go to hospital for treatment. PW4 upon receiving the information arrested the appellant and charged him with the present offence. He charged the accused after receiving the P3 form duly filled from the hospital. PW5 Ephantus Kinyanjui a clinical officer at Elburgon Hospital filled two P3 forms indicating the injuries that the complainant has sustained as a result of the assault on her. The two P3 forms were produced in evidence at prosecution exhibit No. 1 and 2. According to the said P3 forms the complainant had sustained injury on her head that led her to suffer what PW5 referred to as hemiparalysis. When the appellant was put on his defence he denied that he had assaulted the complainant. He testified that it was while he was struggling with the complainant during the fight that the complainant who was armed with a panga fell down and cut herself. The appellant's evidence was corroborated by the evidence of DW2 Beatrice Mumbi a neighbour to both the complainant and the appellant who testified that the complainant was injured when she fell during a fight with the appellant.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses so as to reach a determination whether or not to uphold the conviction of the appellant by the trial magistrate. In reaching its determination this court is required to put into mind the fact that it neither saw nor heard the witnesses as they testified. (*See* **Okeno –vs- Republic 1972 E.A. 32**). In the instant case the issue for determination by this court is whether the prosecution adduced sufficient evidence to prove the charge against the accused to the required standard of proof beyond any reasonable doubt. I have considered the submissions made by the appellant and the response made thereto by the State. The evidence offered by the prosecution was direct evidence.

PW1, PW2 and PW3 all testified that they saw the appellant attack the complainant with a hammer. All the three witnesses testified that they saw the appellant hit the complainant on the head using a hammer. The witnesses testified that before the appellant hit the complainant on the head with a hammer a quarrel had ensued between the appellant's parents and the complainant's mother over the smoke which was alleged to be polluting the house of the appellant's parents and which smoke was emanating from the complainant's mother's kitchen. PW1 testified that she was hit on the head by the complainant when she sought to intervene and rescue her mother who had been hit on the stomach with the hammer by the appellant.

Upon re-evaluating this evidence it is clear that the prosecution witnesses clearly saw the appellant assault the complainant using a hammer. There is no case of mistaken identity as no one else is claimed to have been at the scene when the complainant was injured. Indeed when the appellant testified in his defence, he confirmed that there was a fight involving himself and the complainant. On my analysis of the evidence it is clear that the appellant assaulted the complainant and caused her to suffer injuries which resulted in her being hospitalized.

I have looked at the appellant's defence and also considered the submission made by the appellant on this appeal and I find no merit whatsoever with the said defence which was to the

effect that the complainant had injured herself when she fell to the ground. I find that the prosecution had proved its case beyond any reasonable doubt that the appellant indeed assaulted the complainant.

As to whether the appellant caused grievous harm to the complainant the two P3 forms which were produced in evidence are contradictory and inconclusive as to the injuries which the complainant sustained. This court cannot state with certainty whether the complainant was grievously injured or not. The doubt raised by the two P3 forms produced in evidence shall be resolved in favour of the appellant. I therefore find the appellant guilty of a substituted but lesser cognate offence of **assault causing actual bodily harm contrary to Section 251 of the Penal Code**. I set aside his conviction on the **charge of grievous harm contrary to Section 234 of the Penal Code**. The accused is accordingly convicted for the said charge of assault causing actual bodily harm.

In view of the reduction of the nature of the charge that the appellant faced, I will review the sentence that the appellant is to serve. I therefore set aside the sentence of four years imprisonment imposed and substitute it with an appropriate sentence of this court. In view of the fact that the appellant has already served two years and two months in prison, I do hold that the said period served is sufficient punishment for the offence which the appellant had now been convicted. I therefore commute the sentence of the appellant to the period already served. He is therefore set at liberty and ordered released from prison unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 3rd day of January 2006.

L. KIMARU

JUDGE