



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 690 of 2003

**(From original conviction and sentence in Criminal Case No. 18757 of 2001 of the
Chief Magistrate's Court at Makadara)**

RICHARD KABURU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

RICHARD KABURU was convicted for GRIEVOUS HARM contrary to section 234 of the Penal code, and then sentenced to fifteen years imprisonment together with 4 strokes of the cane. In his appeal against conviction and sentence, the appellant canvassed three issues, as follows:

1. That the conviction was founded on untrustworthy evidence.
2. The learned trial magistrate did not give due consideration to the defence.
3. The sentence was too harsh.

When canvassing the appeal, Mr. F.N. Njanja advocate for the appellant emphasized that the complainant had been the wife to the appellant. The two had had serious differences, which culminated in the complainant moving out of the matrimonial house. Prior to that, the appellant had caused the arrest of the complainant, on allegations of theft. Therefore, the appellant believes that the complainant made up the story against him, so as to repay him.

The appellant insists that the story was made up, and illustrates that contention, by pointing out some discrepancies in the evidence of PW1 and PW2. PW1, Zipporah Warugu, was the complainant. According to the appellant, PW1 had testified that the appellant was in the company of another person, at the time when the appellant stabbed PW1. But the appellant had contended that there had been a fight between him and 2 men who were fronting for PW1. During the fight, the appellant is said to have used PW1 as a human shield, resulting in her being stabbed by the two men. As there were two versions of the incident, the appellant reckons that he should have been given the benefit of doubt, because even PW2 did not witness the complainant's stabbing PW2 was said to have been with the complainant during the incident.

The appellant further submitted that PW1 could not be trustworthy as she had alleged that the policeman

who took her to hospital were those whom she met on her way to Pangani Police station, whereas the police who took her to hospital were actually those whom she found at the police station.

Starting with the last of the foregoing submissions, I found no factual basis for it. Although the appellant submitted that in his defence, he had told the court that it is policemen who were at the police station who took PW1 to hospital, there is no such evidence on record. If anything, the appellant testified that he ran away. This is what he said:

“I saw people who were armed to stab me to death. I moved aside and they followed me and I ran towards Pangani Police Station where I stated they wanted to kill me. There were people who told me to escape and I escaped him.”

As the appellant escaped, I cannot see how he was able to ascertain that PW1 was taken to hospital by policemen whom she found at the police station. But, in any event, he did not say so in evidence.

Meanwhile, as regards the two versions of the incident, all I can say is that that fact alone would not necessarily imply that there was some doubt on the prosecution evidence. It is the duty of a trial court to weigh all the evidence tendered, with a view to ascertaining whether or not the prosecution case had been proved beyond any reasonable doubt. Therefore, it is only when the evidence adduced fell short of proof or if the defence put forward cast some doubt on the prosecution case that the accused would be entitled to the benefit of doubt. I must nonetheless emphasize that during any trial, the burden of proof vests squarely upon the prosecution. In other words, the accused person was under no obligation to put forward a defence. He was entitled, if he so wished, to say nothing, and that fact would not be held against him.

Now that the appellant is challenging the verdict of the trial court, this court, being the first appellate court, is also obliged to re-evaluate all the evidence on record, and arrive at its own conclusions.

PW1 testified that on 30.6.2002, at about 7.00 p.m, she was leaving from her place of work, at Parkroad. PW1 was in the company of her friend Esther Wachuka (PW2). About 10 metres from the salon, PW1 was tapped from behind, by the appellant. PW1 said that the appellant dared her to phone the place which she had rung the previous day. The appellant also demanded that PW1 remove the jacket she was wearing as it was his. As the appellant continued pulling her, PW1 told PW2 to go call her (PW2's) sister. According to PW1, when people asked what was wrong, the appellant told them that she was a thief, who was being taken to the police station.

After PW1 had been pulled along for a while, the appellant is said to have produced a knife, which he used to stab PW1. The stabs were first to PW1's stomach, then her right wrist, the back and the right shoulder.

After stabbing PW1, the appellant left her on the ground, and went away. PW1 struggled to get up, and managed to walk for a short while. She then ran into some three police officers, to whom she reported the incident. They took PW1 to the Pangani Police Station and booked her report. Later they took PW1 to Guru Nanak Hospital, where she was given First aid. An ambulance from Kenyatta National Hospital, then took PW1 to Kenyatta National Hospital, where she was admitted at the ICU, for an operation. PW1 remained hospitalized for three weeks.

Whilst still at the hospital, the appellant visited her on 14th July 2002. PW1 alerted the hospital security about the appellant's presence, but he managed to get away.

The said visit was admitted by the appellant when he gave his sworn defence. It was also common ground between the complainant and the appellant that PW1 had had disagreements with the appellant. Indeed, PW1 had been arrested and held in custody for five days, after the appellant accused her of stealing his mobile phone and Kshs.15,000/=

The appellant attributes this case to the complainant's designs to pay him back. In the

circumstances, I have got to ask myself if that line of defence casts any doubt on the prosecution case.

PW2, Eshter Wachuka, testified that when she left the salon with PW1, she saw two men sitting at a kiosk. The said men were the appellant and Karish.

According to PW2, the appellant went over and held PW1 at the chest, by her clothes. PW1 started screaming, and PW2 went off to her (PW2's) sister's house, to seek assistance.

PW2 did not witness the appellant stabbing PW1. However, she did see the appellant pulling PW1, while saying that he was taking her to Pangani Police Station.

To my mind, that evidence clearly corroborates that of PW1. At the same time, the said evidence is clearly inconsistent with the appellant's defence, in which he alleged that two men attacked him, and that he used PW1 as a human shield.

PW3, Dr. Z.M. Kamau, is a police surgeon. He examined PW1 after she had been discharged from hospital. He found a scar with stitch marks over PW1's right scapula and also on her middle right thorax back. PW3 testified that PW1 had an abdominal operation scar; a scar just below the right side of PW1's lower ribs; and a scar on the back of her right scar. In his assessment, the injuries to PW1 had been caused by sharp objects. And, finally, PW3 assessed PW1's injuries as grievous harm.

To my mind, the evidence of PW3 provides corroboration to PW1's evidence. The said evidence also totally displaces the appellant's defence. I say so because the appellant had said that when he used PW1 as a human shield, she was injured by one of the two men who were with PW1. According to the appellant;

“I saw her injured at the stomach. That is the only injury I saw

If the appellant only saw the complainant's injury to the stomach, that would not account for all the other injuries which PW1 sustained, and which were verified by PW3. Clearly, the said injuries were only consistent with the attack by the appellant, in the manner described by the complainant.

Furthermore, the learned trial magistrate, who had the benefit of observing the demeanor of the witnesses, found PW1 to have been a witness of truth. Having reevaluated the evidence on record, even though I did not have the benefit of observing the witnesses, I have found no reason at all to fault the assessment of the learned trial magistrate, as to the credibility of PW1.

In my considered view, the testimony by the prosecution witnesses was not only consistent and corroborative, it was also sufficient to sustain the conviction for the offence of grievous harm. Meanwhile, as regards the sentence, the appellant says that as the whole issue arose out of a domestic dispute, the trial court should have exercised leniency rather than harshness. During his cross-examination, the appellant said:

“I know the complainant. She was my wife but now she is not. I got her from a bar in Nyeri and not from her parents. It is true we had disagreed. She did not shift out but she shifted out later. I was bitter as I loved her.”

From the foregoing, it is clear that the appellant was confirming the complainant's testimony, to the effect that she had moved out of the matrimonial house. The appellant did not consider her to be his wife any longer. Therefore, I do not understand why the appellant is now saying that the offence was committed in the course of a domestic dispute.

But in any event, even if the appellant and the complainant had still been a husband and wife, I cannot comprehend why that should be a ground for treating the appellant with leniency. Surely, a husband should not treat his wife with such cruelty, to the extent of occasioning her grievous harm.

To my mind, if an offender has caused grievous harm to his/her spouse, he/she should not expect to be treated with leniency, just because the victim happens to be the spouse. If anything, such a conduct, by a spouse ought to be discouraged, through an appropriate penal sanction. I hold the view that leniency in such situations may well act as a catalyst for more offences. Therefore, the only way to instill discipline is to send a clear message that courts will take a serious view of spouses who physically abuse the other.

For those reasons, I do agree with the learned state counsel, to the extent that a sentence of fifteen years is not at all harsh, when the statute provides life imprisonment as the maximum penalty. I therefore find no reason to interfere with the sentence, save only to quash the corporal punishment, as the same has been outlawed in Kenya: Apart from that, I do dismiss the appeal, and uphold both conviction and sentence.

Delivered at Nairobi on this 18th day of March 2005

FRED

A.

OCHIENG

JUDGE