



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.285 OF 2001

GEORGE WILLIAM OMUYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Conviction and Sentence delivered on 12th July, 2001 by Ms. A. Ngugi in the Chief Magistrate's Court Criminal Case No.780 of 2001)

J U D G M E N T

George William Omuya (the appellant) was convicted in Counts 1 and 2 of assault causing actual bodily harm contrary to Section 251 of the Penal Code in that on 22nd February 2001 he unlawfully assaulted Mercy Masumbuko and Rael Nyongesa respectively and occasioned them actual bodily harm. He was sentenced to serve one year imprisonment in each count.

Appellant was convicted in Count 3 of causing grievous harm contrary to Section 234 of the Penal Code though he had originally been charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code, and was sentenced to serve 4 years imprisonment. I will revert to this conviction later in this judgment.

The trial magistrate ordered the sentences in courts 1, 2 and 3 to run consecutively, making a total of six years imprisonment. The appellant has already served two years in prison now.

Evidence which the trial magistrate accepted was that the appellant and his wife lived together in Mushomoroni. They were the immediate neighbours of Celestine Wafula (PW.5) and Violet Tindi (PW.6). In fact they seemed to have had their houses facing each other.

On the 22nd February 2001 at about 8.00 a.m., one of the neighbours was boiling porridge along the verandah of her house. At the same time Mercy Masumbuko (PW.6's daughter aged 3 years) and Rael Nyongesa and Beatrice Nyongesa (PW.5's daughters) were playing at that verandah near the boiling porridge. The appellant started to quarrel with and fight his wife and the latter escaped, running past these children and porridge. The appellant pursued her. Upon reaching where the porridge was boiling on fire he picked up the sufuria in which porridge was boiling and threw it at his fleeing wife, who ducked. But the porridge was splashed all over these three children who got seriously burnt. Thereupon the appellant was arrested and was taken to Nyali Police Station, while the children were taken for medical examination and treatment.

Dr. Wadie Mustafa of Coast General Hospital examined Mercy Masumboko (complainant in count 1) and found that she had received second degree burns on the left side of the head. Degree of injury was assessed as harm. Rael Nyongesa (complainant in count 2) had sustained multiple burns on the head and both arms. Degree of injury was also assessed as harm. Beatrice Nyongesa (complainant in count 3) sustained burns on the back and an infected second degree burn both the left arm. The injury was assessed as main. In all the instances a hot liquid was used.

The appellant denied the offences but evidence from his neighbours was overwhelming against him. The trial magistrate rightly dismissed his defence. The conviction of the appellant in counts 1 and 2 was safe. The sentences passed by the trial magistrate were lawful and not excessive. Save that they should have been ordered to run concurrently. I make the order that they shall run concurrently.

As regards the conviction of the appellant in count 3 for the more serious offence of Grievous Harm contrary to Section 234 Penal Code when he had been charged with a minor offence of Assault causing actual bodily harm contrary to Section 151 of the Penal Code, it is not supported by statutory provisions.

When a person is charged with a criminal offence and facts are proved which show that a serious offence has been committed he cannot be convicted of the more serious offence. A conviction for a serious offence when an accused had been charged with a minor offence would be unlawful.

The only occasion when convictions for offences other than those charged may be recorded are provided for under Sections 179 and 180 of the Criminal Procedure Code, which read:

“S.179(i) when a person is charged with an offence consisting of several particulars, a combination of some only of which constitute a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it. (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it. S.180. When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt”.

For the above reasons the conviction of the appellant in count 3 for the offence of Grievous Harm Contrary to Section 234 Penal Code is unlawful and is quashed. The sentence of four years imprisonment is set aside.

The appellant is now convicted as charged in count 3 with assault causing actual bodily harm and is sentenced to two years imprisonment to run from the 12th July 2001. This sentence will run consecutively to the sentences in Counts 1 and 2. The appellant will, in effect, serve three years imprisonment from the 12th July 2001. It is so ordered.

Dated and delivered at Mombasa this 24th July 2003.

A.G.A. ETYANG

JUDGE