REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLANT SIDE

CRIMINAL APPEAL NO. 364 OF 2002

(From Original Conviction and Sentence in Criminal case No.907 of 2002 of the Chief Magistrate's Curt at Mombasa –H.M. OKWENGU –CM)

ROSE MWENDE……APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

J U D G M E N T

The appellant with another were jointly charged with the offence of grievous harm contrary to section 234 of the Penal Code. They were each convicted and sentenced to pay a fine of KSh.320,000/= and in default to serve two years imprisonment. The facts of the charge were that on the 4th day of April 2002 at about 1.00 p.m. at Matopeni village in Mombasa District within the Coast Province jointly and unlawfully did grievous harm to Lucy Muthoni.

The appellant through an amended petition of appeal filed four grounds of appeal which I have summarized as follows:-

(i) That the learned Resident Magistrate erred in relying on uncorroborated evidence.

(ii) That the learned Resident magistrate erred in arriving at her decision based on contradictory evidence;

(iii) That the learned Resident Magistrate erred in not finding that there was Police conspiracy.

(iv) That the learned Resident Magistrate erred by failing to consider the appellant's defence.

The brief facts of the case before the trial court were that on the 4th day of April 2002 at 7.00 the complainant Lucy Muthoni was at her house when the appellant in company of Margaret Okoth her co-accused arrived demanding from the complainant to be given a P3 form which had been issued to the complainant by the Police over an assault by one of the appellant's friends on the complainant. The two ladies started abusing the complainant and in a short while started beating her with kicks and stones thus injuring her. The complainant was hit with stones on the eye, right elbow and the chest. The complainant yelled for help but the appellant ran away when they saw the Police. The complainant reported the matter

to Nyali Police Station where she was issued with a P3 and referred to hospital where she was treated and her P3 filled which was identified and produced in court as exhibit 1. The appellant with her co-accused were later arrested and charged with the offence of grievous harm.

The appellant did not call any witnesses during her defence before the trial court but opted to give unsworn statement of defence . The gist of her defence was that the complainant visited her place to check for tomatoes and that later the complainant's husband visited the appellant's place and started beating the complainant. The appellant's co-accused gave a similar story.

On appeal, the appellant stated that she was relying entirely on the amended grounds of appeal which were summarized into four grounds of appeal.

The Respondent through Miss Mwaniki opposed the appeal. She pointed out that the sentence meted out against the appellant is improper and urged this court to exercise its powers under Section 364 of the criminal Procedure to record a proper sentence. The learned State Counsel further pointed out that there was ample evidence which proved the case beyond reasonable doubt before the trial court and hence she was properly convicted. She also stated that the appellant's defence was taken into consideration and urged this court to dismiss the appeal.

The issues which this court will determine are basically three:-

(i) Whether the learned trial magistrate considered the evidence of the appellant.

(ii) If so, whether the offence was proved to the standard of beyond reasonable doubt.

(iii) Whether the trial magistrate passed a proper sentence.

It is my considered opinion based on the record placed before this court and the submissions of the learned State Counsel that the trial magistrate considered the defence of the appellant. The trial magistrate pointed out in her judgment and rightfully regarded as a mere denial. There was no evidence to support the appellant's contention that her evidence were improperly disregarded. The trial court used its discretion to disbelieve her evidence which is not equivalent to not considering her evidence.

The second aspect is whether the evidence on record proved the case beyond reasonable doubt. The appellant and her co-accused were properly identified by P.W.1 the complainant, P.W.3. Rose Nekesa and P.W.4 Juma Ali as the persons who assaulted the complainant. P.W.1. gave the details of her injuries and even the trial court had the advantage of seeing the injured hand on plaster. The evidence of P.W.1 was corroborated by P.W.5, Dr. Lawrence Ngome who examined the complainant and filled the P3 form assessing the degree of injury as "maim". The P3 form was produced as Exhibit 1. This exhibit clearly gives the definition of "maim" as the destruction or permanent disabling of any external or internal organ, member or sense. "Grievous Harm" is described as any harm which amounts to main, or endangers life or seriously or permanently injures health or which is likely so to injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ.The offence or charge before the learned trial Resident Magistrate was proved beyond reasonable doubt and hence the trial magistrate properly convicted the appellant.

The final issue to consider is whether the learned Resident magistrate properly sentenced the appellant.The learned State Counsel rightly pointed out that the learned trial Resident Magistrate gave a wrong sentence. Section 234 of the Criminal Procedure Code states:-

> ***"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life with or without corporal punishment.***

I consider the sentence of a fine imposed on the appellant and her coaccused by the trial court inappropriate. However section 264 of the criminal procedure code which was referred by the learned State Counsel or gives this court power to interfere with a sentence on Revision. The relevant provision of

the law is section 354(3)(b) of Criminal Procedure Code.

> "***The court may in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence."***

In the case of **Juma Shabani Keshallilla =vs= Republic [1963] E.A. P. 184 -187 .**

The Court of Appeal or East Africa had this to say:-

> ***"Under S.319(1) of Tanganyika criminal Procedure Code (that is the equivalent of Section 354 (3) (b) of the Kenya Criminal Procedure Code) that there is power not only to reverse an order but there is also power to alter it and make any amendment which is just and proper. The word 'alter' is to be construed as embracing the substitution of another order in the same way as the power to alter a finding gives power to substitute a different conviction. A sentence is an order of the court and it is one of the nature of which may under the section be altered by the Revising court."***

I adopt the above view expressed by the court of Appeal of East Africa. From the foregoing therefore I have come to the conclusion that the conviction was properly funded and that the sentence is improper.

For the foregoing reasons the appeal is dismissed. The sentence is set aside and substituted with an order that the appellant do serve a prison term of 2 years instead of a fine.

This Judgment is read and Delivered on the 28th day of February, 2003.

Read in the presence of State Counsel and Appellant.

J.K. SERGON

J U D G E

28.2.2002