



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO.491 OF 2000**

**ANGELINA MASAI.....1st APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO.492 OF 2000**

**JANE MASAI.....2nd APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

**(From Original Conviction and Sentence in Criminal Case No.4743 of 2000 of the Chief Magistrate's Court at Mombasa –B. Maloba, Miss –S.R.M.)**

**J U D G M E N T**

The two Appeals herein were consolidated and heard together as they arose from the same trial before Mombasa Senior Resident Magistrate. The Appellant in 491/00 (Angelina) was the 1st Accused while the Appellant in 492/00 (Jane) was the 2nd Accused. Both were charged with the offence of Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code and were sentenced to serve 6 months imprisonment upon their conviction. They were subsequently granted bail pending Appeal.

It had been alleged that on the 17.12.1999 at 12 noon at Blue Room Restaurant in Mombasa they jointly assaulted one Cecilia Sheila Owambo, thereby occasioning her actual bodily harm. Although the complainant at first feigned unfamiliarity with the two Appellants and gave the impression that they simply pounced on her in a crowded restaurant and set upon her with insults, abuses and beatings, it turned out that they were all well acquainted with each other, as they grew up together in neighbouring houses in Majengo, and that the centre of the whole saga was a Nigerian National known as Goodwin Okoli.

It would appear that at one time Okoli resided at Majengo and was a good friend of the brother of the Appellants. Indeed he was a good friend of the Appellants themselves and had romantic involvement with

their sister with whom he had a baby. It would appear that although Okoli was no longer staying with the sister he was still looking after their child. According to the complainant, he referred to her as his ex-girlfriend. The complainant knew all this information as it came from her during cross-examination and in her report to the Police. She even went to see the baby in hospital when the trial in the lower court was still pending.

But she says Okoli was her husband and that they both went for lunch at the Blueroom Restaurant on 7.12.99. They sat at a corner and Okoli went to buy the food. But on the way to the counter he met the two Appellants and greeted them. Then the Appellants headed to where she was sitting and Angelina gave her a hard stare greeting her in Kiswahili “habari gani shujaa”. She was lectured to by Angelina without talking and was eventually slapped on the face. As she turned round Jane hit her on the back with an umbrella. The complainant screamed. The Restaurant was packed with people at that hour. Security people came and Okoli too returned but was also kicked and insulted by Jane. The whole episode took one hour. She did not go to the Police until the following day when she was given a P3 which was not completed until after 3 days (20.12.99) and was not returned to the Police until 27.1.2000. That is when she took the Police to the home of the Appellants and they were arrested.

Surprisingly neither Okoli nor the security officers who are said to have intervened or any other member of the public in the packed restaurant was called to testify in the matter. What transpired therefore remained the complainant’s word against the Appellants.

According to the Appellants they were at the Restaurant to buy Popcorn when they saw Okoli whom they knew very well. They went to greet him but then the complainant seeing them together went and started insulting them. They left and went home only for the complainant to allege 10 days later that they had assaulted her.

In their identical Petitions of Appeal which were drawn up and argued by learned counsel Mr. Gakuhi, they attacked the evaluation of the evidence relating to medical evidence; the failure by the prosecution to call material witnesses and lack of investigation of the entire incident; failure to consider Appellants defence; and that the sentence imposed was excessive in all the circumstances of the case.

On the issue of the alleged injuries, Mr. Gakuhi submitted that the injuries purportedly suffered by the complainant were not corroborated by the Doctor who testified and it was erroneous therefore to so find.

Indeed the complainant stated that she was slapped on the face and was hit on her back near the shoulder with an umbrella. She also says she had “bruises on the whole body” and she had “bruises on both arms”. She went to hospital but has no medical records to show for it or what treatment was prescribed for what injuries. To compound matters she appears to have been examined by a Dr. Mustafa who never gave her any medicine. That Doctor did not testify but one Dr. Michael Peter Muita of Coast General Hospital did and could not remember whether he saw her personally or not. The P3 form completed however showed that the complainant had “multiple abrasions on the chest”.

Actual bodily harm is a necessary ingredient of the offence charged which ought to be proved beyond reasonable doubt. It seems to me from the inadequate and contradictory medical evidence tendered that that element of the offence remained in doubt. Without it the charge of assault would remain unproved and that would be sufficient to dispose of this Appeal.

But I think there is merit also in the other submissions made by Mr. Gakuhi. The complainant does not emerge as a credible witness when she tried to deny familiarity with the Appellants. She also sounds exaggerative when she says she was beaten up for one hour in a packed hotel and her children and husband were also beaten up and insulted. At the end of it no one else including the husband turned up to support her story and she does not go to hospital immediately and waits 10 days before returning to the Police. The presumption in law may well be drawn that evidence which can be adduced but is not, would if adduced be adverse to the party who withholds it. It is true as the trial Magistrate states that it is upon the prosecution to call witnesses and it was not necessary to call everybody who witnessed the incident. But in the circumstances of this case it was necessary to buttress the evidence of the complainant who

gave to the Police the names of some of those who were present and could have given independent evidence, but that evidence was withheld. Instead the Police through PW.3, Pc Martin Ekirapa admitted that there was no investigation carried out at the Restaurant. They simply accepted what the complainant said and were led by her to arrest the Appellants.

In all the circumstances, it was not beyond belief as stated in the Appellants' defence, that it was the complainant who set upon the Appellants with insults when they greeted the man she called her husband, and the man the Appellants regarded as their sister's husband. Whether the altercations that followed lasted one hour as claimed or not, no one except the complainant said it was assault or affray or a shouting match in a love triangle.

It only remains for me to dismiss the submissions of the learned State Counsel Mr. Ogoti that the evidence of assault was watertight or that the Appellants had more reason to assault the complainant while the complainant had none.

I allow the appeal, quash the conviction, and set aside the sentence.

The appellants shall be set at liberty forthwith unless they are otherwise lawfully held.

Dated this 29th day of March, 2001.

P.N. WAKI

**J U D G E**