

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 545 OF 2000

(Being an appeal from Original conviction and sentence in Criminal Case

No. 528 of 2000 of the Senior Resident Magistrate Court at Voi – E. Maina)

HARRIS MJOMBA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was convicted and sentenced for the offence of assault under Section 251 Penal Code. He was represented by counsel in this appeal.

The prosecution case is that the appellant is a husband of the complainant but they have separated. They have decided to share the custody of children. The son Jimmy Mwavula resides with the accused and a girl Mkamachi Martha resides with her mother the complainant.

On 28.2.2000 when the complainant was in her house asleep, there was a knock at the door. She asked who it was and the voice sounded as of her son who resides with his father the accused. This evidence was confirmed by DWI that the son knocked because his father the accused asked him to knock. The accused was standing behind the son. He knew that if he knocked the complainant would not open for him. Under the said deception the accused gained entrance into the house of the complainant and set upon her assaulting her. She went to police station and was issued with P3 form which she took to the doctor the sameday. The medical report was produced indicating that the complainant had blood stained T shirt and had injuries in the chest, bruised elbows, swollen right foot, knees bruised and painful right foot.

These injuries are consistent with assault. Both prosecution and defence called as witness a child of the marriage on both sides. Each child gave evidence supporting the parent with whom she/he was residing. This evidence is not helpful. What the court has to consider is the evidence given by complainant and the defence.

Looking at the evidence I see that she was in her house sleeping at night. The appellant gained entrance into her house by a trick. This is not denied by the defence. The complaint went to report the matter in the morning the following day. I find that the complainant was telling the truth. Evidence of a single witness need not be corroborated if it is truthful and unshaken in cross examination. That the Trial Magistrate found the child PW2 a competent witness does not prejudice the position of appellant. The child's evidence was correctly taken.

There is complaint that the sentence was harsh and excessive and option of fine was not considered. Looking at Section 251 Penal Code I see the punishment is for imprisonment for a period of 5 years with or without corporal punishment. No option of fine is imposed. The punishment of 18 months imprisonment cannot be said to be excessive in the circumstances. Lastly there is a complaint that the Trial Magistrate did not write the judgment in form and manner required by law. I have read the trial magistrate's judgment and the provisions Section 169 C.P.C.

I am satisfied that the judgment complies with the provisions required and that the appellant has not

been prejudiced by the manner in which the judgment is written.

I, therefore find no reason to interfere with the conviction and the sentence. The appeal is hereby dismissed.

Dated at Mombasa this 6th Day of November, 2001.

J. KHAMINWA

COMMISSIONER OF ASSIZE