

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 59 OF 2000

FRANCIS MAMAI MUNGAI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

Coram: J. W. Mwera J.

Appellant not wishing to be present 10

Mrs. Murungi State Counsel for Respondent

C.C. Muli

J U D G E M E N T

The appellant was charged under S.234 Penal Code in that on 13.9.99 at Bissel Trading Centre Kajiado, he unlawfully did grievous harm to one Mary Kumalasho. He was tried convicted and sent to prison for 7 years and to receive three (3) 20 strokes of the cane with effect from 20.4.2000.

The appellant then filed a 6-point appeal wherein he said that the complainant was his ex wife and so the criminal case was a frame-up tainted with malice. That their son Kennedy Sunde Mungai (P.W.2) was couched to testify as he did and that the complainant was ambiguous in her testimony. That the assault weapon was not produced and the sentence was manifestly harsh.

The Learned State Counsel supported the conviction on the evidence on record and thought the sentence was deserved.

This court considered the appeal grounds in the light of the recorded evidence and the judgement of the Learned Trial Magistrate. There is no question of the identity of the 10 appellant as the one who assaulted his ex-wife on the material night. This court is satisfied that he assaulted his wife as she had gone out of the house to answer the call of nature. He pounced on her and tied her with a rope asking P.W.1 why she had not thrown the children of their marriage in a pit. The complainant recognized her exhusband's voice and also her physique in the moonlight. She pleaded with him. The appellant hit P.W.1 and fled. At this juncture their son P.W.2 heard the commotion. He came out to check what was happening to her mother. He found the appellant assaulting her. P.W.2 recognized their father and spoke to him asking him not to hurt her for she had done nothing. The appellant answered him. He escaped.

Kennedy Mungai (P.W.2) was aged about 12 years but on proper examination of him by the Learned Trial Magistrate whether he understood the duty to say the truth under oath and that he had intelligence to testify on oath, got him to give evidence on oath. His story flows clearly and this court does not agree that he was couched to say what he said. It all boiled down to him having found his father assaulting his mother outside the house. The appellant had tied her with a rope. This court similarly saw no part where malice showed because of the separation between him and his wife, the complainant. Indeed the appellant does not say who, by malice, framed – him up. In his defence he seemed to say that he never was at the scene. But evidence of P.W.1 and P.W.2 is cogent on this. The appellant assaulted his wife in the dark. She sustained a broken mandible plus other injuries which were classified by Noah Nzioki (P.W.4) as maim. With all this the appellant was convicted on proper evidence.

10 Coming to sentence the maximum under S.234 Penal Code is life imprisonment with or without strokes. Here the Learned Trial Magistrate meted out 7 years imprisonment plus 3 strokes of the cane.

The Learned Trial Magistrate observed that this attack was not provoked at all. The appellant waylaid the complainant in the dark and inflicted the injuries he did. The two had in fact separated.

Although the appellant thought this sentence harsh, it was not manifestly so in the circumstances of the case. It remains undisturbed.

In sum this appeal I dismissed in its entirety. 20

Judgement accordingly.

Delivered on 4th December 2000.

J. W. MWERA

JUDGE