



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO. 23 OF 2012**

**[FORMERLY NYERI HCCRA NO. 220 OF 2010]**

**BETH WANJIRU MURITU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[Appeal against the conviction and sentence in Criminal Case No. 2831 of 2009 at Murang'a by E. K. Usui, Senior Resident Magistrate, dated 10<sup>th</sup> August 2010]*

**JUDGMENT**

1. The appellant was adjudged guilty of *causing grievous harm* to the complainant contrary to section 234 of the **Penal Code**. She was sentenced to *eighteen months* imprisonment.
2. The particulars were that on the 9<sup>th</sup> April 2009 at Mathariti village in Murang'a, jointly with her two co-accused, *unlawfully did grievous harm to James Maina Muritu*.
3. The petition of appeal is dated 18<sup>th</sup> August 2010 and raises ten grounds. They can be compressed into five. Firstly, that the charge was defective. Secondly, that the evidence by the prosecution was contradictory or insufficient to found the charge. Thirdly, that the learned trial magistrate disregarded the evidence by the appellant and shifted the burden of proof to her. Fourthly, that the trial court erred by failing to consider the overall circumstances including the relationship between the appellant and the complainant. Fifthly, that the sentence meted out was draconian.
4. Learned counsel for the appellant relied wholly on written submissions filed on 25<sup>th</sup> August 2020.
5. The appeal is contested by the Republic. The submissions by the State were lodged on 17<sup>th</sup> September 2020. It was submitted that the appellant, who is a sister to the complainant, was positively identified as one of the attackers. The case for the Republic is that the charge was proved beyond any reasonable doubt. Regarding the sentence, learned Prosecution Counsel submitted that the appellant was let off with too lenient a sentence.
6. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. There is a caveat because I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
7. Like I have stated, the complainant (PW1) is a brother of the appellant. He testified that on the material day, he went to their mother's house to try to resolve a domestic problem. He found his mother, the appellant and their farmhand.
8. The discussion with the mother did not end well. His mother, the appellant and the farmhand stepped outside. The latter came back and attacked him with a *panga* on the head. He tried to shield himself but got more injuries. He said that the appellant then hit him on the face with a plank of wood. The trio dragged him outside and continued to assault him.
9. PW2 and PW3 were neighbours. They responded to the complainant's screams. They found him lying down and bleeding from nose and legs. PW2 said he was the first one to get to the scene and saw the appellant and her mother outside the house. PW2 and PW3 arranged to take the complainant to Murang'a Hospital. But they first made a report at Kahuro Police Station.
10. The complainant was admitted at the hospital for 5 days before he was transferred to Kenyatta National Hospital. According to Patrick Mwangi, a clinical officer at Murang'a Hospital, the complainant had a plaster on both legs and a cut wound on the left temporal region. He had suffered fractures on both the left tibia and fibula. In his opinion, the injuries were caused by both sharp and blunt objects. He assessed

the degree as *grievous harm*.

11. When the appellant was placed on her defence, she gave sworn testimony. According to her, the complainant attacked her and their mother. They screamed attracting members of the public who beat up the appellant. She said she could not identify the person(s) in the mob who assaulted the complainant. She added-

*On 9th April 2009 he [complainant] came home at about 10.00 p.m. I was with my daughter Nyoia Wanjiku.....He said he wanted to speak with my mother to find out why they chased away Kamau's wife.....He woke up and wanted to fight me.....I screamed as my hair was held by the complainant, my daughter ran out screaming. Many people responded. It was at night. I did not recognize them they pulled me from where I was. I did not know what was happening. Maina [complainant] was beaten. I do not know who beat him and how.....*

12. From my re-appraisal of the evidence, I have no doubt that the complainant *identified* the appellant. She was his sister. She admitted in her defence that she had an encounter with the complainant. She was placed at the scene by PW2 and PW3. Fundamentally, the complainant immediately told both witnesses that he was assaulted by the appellant, his mother and their farmhand.

13. I concur with the learned trial magistrate that the complainant was assaulted by the trio. The theory of a mob that attacked the complainant is a red herring.

14. PW2 and PW3 who responded to the screams found the complainant writhing on the ground with gruesome injuries. From the medical evidence, the injuries were consistent with an attack by sharp and blunt objects. The complainant said he was attacked with a *panga* by the farmhand; and, was hit by the appellant with a *plank of wood*.

15. True, there were some contradictions between the evidence of PW2, PW3 and PW4. For instance, PW4 (Police Constable Jonathan Kyalo) said that the initial statement to the police indicated that the complainant was "*attacked by a gang arranged by his mother*". There were also discrepancies on the time of the attack.

16. I find that the incongruities are immaterial. In any trial, there are bound to be such discrepancies. ***Joseph Maina Mwangi v Republic***, Court of Appeal, Criminal Appeal No. 73 of 1993.

17. Learned counsel had submitted that the complainant was the only eye witness to the alleged attack; and, that it was his word against that of the three accused persons. That submission is awkward because under section 143 of the **Evidence Act**, no particular number of witnesses is required to prove any particular fact.

18. The appellant had also contended that the charge sheet was defective. No serious submissions were taken on this point. I have closely examined the charge sheet dated 15<sup>th</sup> September 2009. It clearly sets out the penal provision, the date of the offence and the particulars. I have not seen any material variance between the particulars and the evidence.

19. On the totality of the evidence, I cannot also say that the burden of proof was shifted to the appellant. In the end, I find that the conviction was *safe*.

20. I will now turn to the appeal on sentence. The learned trial Magistrate considered that the appellant was a *first offender*. He also took into account the *mitigation* by the appellant that she had "*a problem with [her] bones*".

21. Section 234 of the code provides that any person who commits grievous harm to another is liable to imprisonment for *life*. Considering the vicious attack and the grisly injuries, the sentence meted out of *eighteen months* was a mere slap on the hand. But since there no notice to enhance it was served, I will let it stand.

22. In the end the entire appeal is hereby *dismissed*. The bond granted by the lower court on 10<sup>th</sup> September 2010 pending appeal is hereby *cancelled*. The appellant shall now be arrested and taken to prison to serve the remainder of her sentence.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 6<sup>th</sup> day of October 2020.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Appellant.

Mr. B. Mwangi for the appellant instructed by Kirubi, Mwangi Ben & Company Advocates.

Mr. S. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.