REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.18 OF 2020

IRENE CHEPKEMOI MAIWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original conviction and sentence of 2 years imprisonment imposed upon by Hon. E. W Karani (RM) in Kericho Chief Magistrates Court Criminal Case No.66/2018 delivered on 19/2/2020)

JUDGEMENT

1. The Appellant was convicted and sentenced to 2 years imprisonment for the offence of grevious harm contrary to section 235 of the Penal Code after the charge was upgraded from one of assault contrary to section 251 of the Penal Code which the Appellant was initially charged with.

2. The particulars of the charge were that on 3/12/2017 at Ngesumin village in Bureti subcounty within Kericho County, the unlawfully did grevious harm to Racheal Chepkorir Kirui.

3. The Appellant pleaded not guilty and the prosecution called 5 witnesses. The prosecution evidence in summary was that the Appellant attacked the complainant on 3/12/2017 at 7pm while the complainant was walking home from work. The complainant said they had a grudge.

4. The complainant who testified as PW1 said she was able to recognize the Appellant who was her neighbour. The complainant was hit thrice on her left hand just below the shoulder.

5. PW2, the complainant's daughter and PW3, the complainant's husband rushed to the scene upon hearing the complainant shouting for help and they both saw the Appellant standing beside their gate.

6. PW2 said she asked the Appellant what was wrong and the Appellant what was wrong and the Appellant said the complainant had insulted her child.

7. The complainant was rushed to hospital where she was treated and discharged. PW4 who examined the complainant and produced a P 3 form said the complainant had a sling and an x-ray which showed that she had suffered a fracture of collateral bone. The clinical officer assessed the degree of injury as maim.

8. The Appellant in her defence before court said on 3/12/2017 she was at Kapkoros in Bomet and she did not go to Ngesumin which is her birth place. She denied that she assaulted the complainant.

9. The trial court found the Appellant guilty and convicted her with the offence of grievous harm and sentenced her to 2 years imprisonment.

10. The Appellant has now appealed against both conviction and sentence on the following grounds;

i) THAT the prosecution witnesses gave contradictory evidence and did not prove their case to the required standard.

ii) THAT the prosecution shifted the burden of proof in the alibi defence to the Appellant.

iii) THAT the trial court took into consideration extraneous matters.

iv) THAT the prosecution did not prove that there was a grudge between the Appellant and the complainant.

v) THAT the Appellant was not positively identified.

vi) THAT the Appellant's mitigation was not considered.

vii) THAT the sentence meted upon the Appellant was harsh and excessive.

11. The parties filed written submissions in the appeal which I have duly considered. The Appellant submitted that PW1, the complainant said the Appellant hit her because of a grudge that existed between them while PW2 the complainant's daughter said the Appellant said she attacked the complainant because she had insulted her child.

12. The Appellant further submitted that there were contradictions on the evidence on the manner the P3 was filled and also the nature of injuries which the complainant sustained.

13. The Appellant also submitted that the court while convicting the Appellant said that the complainant had organized a visit but the Appellant campaigned against it when no such evidence was adduced.

14. The Appellant also testified that there was no grudge between her and the complainant and further that she was not at the scene of crime at the time the offence was committed.

15. The Appellant further submitted that the sentence meted upon her was excessive.

16. The respondent opposed the appeal and submitted in writing that prosecution proved their case beyond reasonable doubt.

17. The respondent further submitted that the Appellant made a belated attempt to raise an alibi during defence hearing but the evidence of PW1, PW2 and PW3 displaced the same by placing the Appellant at the scene or crime.

18. The Respondent also submitted that the Appellant was properly identified by PW1, PW2 and PW3 and her mitigation was considered as captured on page 39 lines 24 – 25 of the record of appeal.

19. The prosecution denied that the sentence meted upon the Appellant was harsh or excessive and they served the Appellant with a notice to enhance the sentence as the sentence provided by the law for grievous harm is life imprisonment.

20. This being a first Appellate Court, the duty of the 1st appellant court was explained by the Court of Appeal in the case in the case of **KARIUKI KARANJA VRS REPUBLIC [1986] KLR 190** that:

> **"On first appeal from a conviction by a Judge or Magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the Judge or Magistrate with such materials as it may have decided to admit**."

21. The issues for determination in this appeal are as follows;

i) Whether the prosecution proved the charge of grievous harm to the standard required in criminal cases.

ii) Whether the Appellant's alibi defence and mitigation were taken into account by the trial court.

iii) Whether the sentence meted upon the Appellant was excessive.

22. On the issue as to whether the prosecution proved the charge of grievous harm to the required standard, I find that the testimony of PW1 is corroborated by that of PW2 and PW3 who rushed to the scene and were able to identify the Appellant as the person who assaulted the Complainant.

23. The attack took place at 7pm in the evening and all the witnesses were able to recognize the Appellant who was a neighbour.

24. PW2 talked to the Appellant and she said she had assaulted the complainant because the complainant had insulted her child.

25. There is evidence that the complainant sustained injuries which the clinical officer assessed as grievousharm. However, the Complainant said she was not sure she suffered a fracture.

26. I find that the evidence on record proved the offence of assault contrary to section 251 of the penal code as opposed to grievousharm contrary to section 235 of the penal code and I reduce the charge under Section 179 of the Criminal Procedure code.

27. Section 179(2) of the Criminal Procedure Code reads as follows:

> **"179.**
>
> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of**

the minor offence although he was not charged with it".

28. On the issues as to whether the Appellant's alibi defence and mitigation were considered. The recorded of appeal clearly shows that the trial court said the alibi was dislodged by PW1, PW2 and PW3 who placed the Appellant at the scene of crime.

29. In **JUSTUS KIRUTHU MWANGI VS REPUBLIC NYERI CRIMINAL APPEAL NO. 70 OF 2015,** the court stated as follows:

> **"The role of the court when it comes to the determination as to the admissibility or otherwise of an alibi defence is to weigh such a defence(s) against the totality of the prosecution's evidence to determine whether it is dislodged or not."**

30. I find that the alibi by the Appellate was raised too late in the trial but the same was weighed by the Trial court and found wanting.

31. In the case of**Wangombe v Republic [1980] KLR 149**,the Court of Appeal held as follows;

> **"When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible; but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution."**

32. On the issue of mitigation, I find that the trial court also took into account the Appellant's mitigation at page 39 and noted that the Appellant was not remorseful.

33. The Appellant submitted that the sentence meted against her is excessive.

34. The prosecution filed a notice to enhance the sentence. However, it is not clear whether the notice was served upon the Appellant and even if it was served, the same would not be acted upon since the charge has been reduced to one of assault.

35. The Appellant was initially charged with assault contrary to section 251 and the charge was enhanced to one of grievous harmcontrary to section 235 of the penal code. If the complainant had sustained grievous harmshe would have been sure about it from the onset of the case.

36. I accordingly convict the Appellant with assault contrary to section 251 of the penal code.

37. The Appellant has been in custody since 19/2/2020 when she was sentenced to two (2) years imprisonment.

38. Since this court has reduced the charge from grievous harm to assault, the sentence is reduced to the period of seven (7) months she had been in jail.

39. I order that the Appellant be set free forthwith unless lawfully held for any other reason.

Delivered, signed and dated at Kericho this 2nd day of October 2020.

A. N. ONGERI

JUDGE