



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CORAM: D. S. MAJANJA, J.**

**CRIMINAL APPEAL NO. 94 OF 2018**

**BETWEEN**

**GEORGE ONYANGO OWINO .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. M. I. Shimenga, RM, dated 26<sup>th</sup> June, 2018 in Butere Magistrates Court Criminal Case No. 806 of 2016)*

**JUDGMENT**

1. The appellant, **GEORGE ONYANGO OWINO**, was charged and convicted of the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were that on the 15<sup>th</sup> October, 2016 at Mahoni Village, Masamba Sub-location in Butere Sub-County within Kakamega County, he unlawfully assaulted Josephine Mukwana thereby occasioning her actual bodily harm.
2. The appellant was convicted and sentenced to 1-year imprisonment. He now appeals against conviction and sentence. The thrust of his appeal is that the prosecution failed to prove the offence beyond reasonable doubt and that the evidence was marred by inconsistencies.
3. As this is a first appeal, I am required to review the entire evidence and reach my independent conclusion bearing in mind that I never heard or saw the witnesses testify to enable me make an assessment of their demeanour.
4. The prosecution relied on the direct evidence of the complainant, Josephine Mukwana (PW 1) and her step daughter, Rachel Atieno (PW 2). PW1 testified that on 15<sup>th</sup> October 2016 at noon she was tethering two cows on her in-laws shamba when the appellant came and demanded that she removes them. He came towards her and cut her left arm with a panga and ran away.
5. PW 2 recalled that she heard noise from her grandmother's home and when she went there, she found PW 1 and the appellant quarreling over a cow. She recalled that she saw the appellant cut PW 1 with a panga.
6. The Clinical Officer, Abdulraman Etaba (PW 3) testified that PW 1 was attended to at Manyala Sub-County Hospital on 15<sup>th</sup> October, 2015. She came with her arm bleeding and had a cut wound on the left arm which was stitched. The P3 medical report form was filled after 3 weeks. PW 5 classified the injury as harm.
7. The Investigating Officer, PC Fredrick Wanjau (PW 4) testified that PW 1 reported the incident of assault on 17<sup>th</sup> October 2016 whereupon he issued the P3 form. He told the court that when the appellant was arrested for another offence, he was called whereupon he arrested and charged the appellant.
8. In his unsworn defence, the appellant denied the offence. He stated that on the material day, he woke up early to go to Sabatia at 8.00 a.m. and returned at 5.00pm. He told the court he never met the complainant or assaulted her.
9. I have reviewed the evidence and the testimony of PW 1 and PW 2 is clear, credible and consistent. PW 1, PW 2 and the appellant knew each other and the incident took place during the day. Although the appellant pointed to inconsistencies in the evidence, I do not think those are material as they relate to the colour of the clothes and distances between the parties and where the incident took place. I note that PW 2 was a child aged 12 years and in a rural setting, her familiarity with colours may not be good. What is clear is that an assault took place and PW 2 happened upon it. The assault was corroborated by the evidence of PW 3.

10. It is worth noting that PW 3 confirmed that PW 1 was treated on the date of the incident although the P3 form was issued and indeed filled much later. PW 3 explained in cross-examination that she did not have money to pay for the P3 form and that is why it took some time.

11. The alibi defence proffered by the appellant when considered alongside the credible testimony of PW 1 and PW 2 is worthless. There was no suggestion put to PW 1 and PW 2 by the appellant to show that that he was a businessman and was away on that date. In light of the totality of the evidence, I affirm the conviction.

12. As regards the sentence, I find the sentence of 1-year imprisonment appropriate in the circumstances. The appellant submitted that the sentence should run concurrently with a sentence entered in another case. I reject that plea as the other sentence was not part of the transaction in this case and the file of that case was not before this court. The sentence is also affirmed.

13. The appeal is dismissed.

**DATED and DELIVERED at KAKAMEGA this 3<sup>rd</sup> day of September 2019.**

**D. S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.