



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.13 OF 2019

HENRY HALKANO BORU...APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Criminal case No.109 of 2019 of Hon. C. A. Ombija Resident Magistrate Marsabit Law Court delivered on 2.9.2019)

J U D G M E N T

The appellant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence are that the appellant on the 18th day of February, 2019 at Badasa township in Marsabit central sub-county within Marsabit County unlawfully assaulted Daki Dub Wario thereby occasioning her actual bodily harm.

The trial Court convicted the appellant and sentenced him to serve four (4) years imprisonment. The grounds of appeal are that:-

- 1. The appellant stayed in remand for six(6) months before the case was determined.**
- 2. The sentence is manifestly excessive.**
- 3. No weapon was recovered from the appellant.**
- 4. The dispute involves the appellant's family and the custodial sentence is excessive.**
- 5. The complainant is the appellant's wife.**

The appellant relied on his grounds of appeal. He contends that the investigations were shallow. There was another case that was withdrawn by the appellant's wife who was the complainant.

Mr. Ochieng, Prosecution Counsels, opposed the appeal on conviction but conceded that that the sentence is excessive. The appellant remained in custody for eight months. The complainant is the appellant's wife. For the interest of the children the appellant can be granted non-custodial sentence.

This is a first appeal. The court has to evaluate the evidence afresh before drawing its own conclusion. **PW1 Daki Dub Wario** is the complainant and she is the appellant's wife. On 18.2.2019 she was at her kiosk. The appellant went there and took 5kgs of flour. When she enquired he assaulted her. She called the appellant's brother to intervene. The appellant almost fought with his brother. Later in the evening the appellant went home with a panga. He assaulted her and she became unconscious. She reported the matter to the Police and was referred to hospital. She was issued with a P3 form.

PW2 Debora Jillo is the appellant's daughter. She was 11 years old. She testified that on 18.2.2019 the appellant assaulted her mother (PW1). **PW3 Dr. Boru Dida** filled a P3 form for PW1. She had injuries on the head, chest and inner right limb. The head was swollen. She had swollen chest and both legs were swollen as well. There was no cut wound or bruise. He classified the injuries as harm.

PW4 Corporal David Wanjohi was based at Laiyai Police post. He investigated the case and had the appellant charged in court.

The appellant tendered sworn defence. PW1 is his wife. There was another case that was withdrawn. His wife had ill will and vendetta

against him. The dispute was taken to the elders to be resolved. His wife fixed him so that he could be jailed.

The prosecution evidence is that PW1 was assaulted by the appellant. She sustained injuries that were classified as harm by PW3. PW2 who is the appellant's daughter witnessed the assault. The appellant's defence is that his wife (PW1) has vendetta against him and is out to have him jailed. It is clear that the defence evidence does not raise any doubt on the prosecution evidence. PW2 witnessed the assault. The evidence of PW1 is corroborated by that of PW2 and PW3. The conviction is proper.

On the issue of sentence, the appellant was arrested on 20.2.2019 and has been in custody since that time. He was sentenced on 2.9.2019. This being a dispute involving a family, I do find that The four (4) years imprisonment sentence is quite excessive. PW1 suffered minor injuries. I do hold that the period already served is sufficient punishment. Section 333(2) of the Criminal Procedure Code allows the Court to take into account the period spent in remand to be part of the sentence.

The appeal on conviction is disallowed. The four (4) years imprisonment is set aside and replaced with the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Marsabit this 10th day of December, 2019

S. CHITEMBWE

JUDGE