



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 73 OF 2017

ABEL MUSYOKA.....1ST APPELLANT

RHODA MISOI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction in Criminal Case No. 74 of 2017

in the Chief Magistrates Court at Eldoret by S. N. Telewa,

Resident Magistrate dated 20th November 2015]

JUDGMENT

1. **ABEL MUSYOKA** (1st Appellant) and **RHODA MISOI** (2nd Appellant) were convicted on a charge of grievous harm Contrary to **Section 234** of the **Penal Code** and each sentenced to serve 3 years imprisonment. The prosecution's case was that on **12th July 2013** at **KAPSOYA** estate in **UASIN GISHU**, jointly with others not before court, unlawfully did grievous harm to **LINAH KOMEN**. They both denied the charge.

2. The background to the matter is that **LINAH KOMEN** (PW1) a businesswoman in **ELDORET** and **NAIROBI** had borrowed money from **KENYA WOMEN FINANCE TRUST (KWFT)** and had an outstanding loan of Ksh.49,900/-.

On 2nd July 2013 at 7.00am while still in bed, she heard someone knocking at the door. She got out of bed, peeped outside and realized it was **RHODA** (2nd appellant) from **KWFT** who was pursuing a loan on her behalf. She let 2nd appellant into the house and who informed her that people from **KWFT** were looking for loan defaulters. PW1 said she had Ksh.20,000/- which she intended to pay as part of redeeming the loan.

3. The 2nd appellant asked PW1 to accompany her, whereupon the latter informed her that she had a parcel of land at Annex area which she intended to sell that day. To which the 2nd appellant said she had someone who was willing to buy the land.

The 2nd appellant then excused herself purporting to go and buy credit so as to call the intended purchaser. PW1 went to her house, just as she was dressing in her bedroom, she heard some movement of people inside the house. Upon going into the sitting room, she found the 2nd appellant standing by the main door's entrance while 6(six) others were seated down – among them being 1st appellant (who PW1 knew) plus 3 women.

4. PW1 welcomed them, but 1st appellant shouted that all they were interested in was money – PW1 told him the money she had was in the bank and requested them to accompany her to the bank, so that she could withdraw money for them. However the group insisted that they had to get money from her – The 1st appellant and another woman who was not known to PW1 continued shouting. PW1 left for her bedroom to continue dressing and when she returned to the sitting room she was the group removing 7 sets of her sofa settee, three mattresses, beddings, stools, and a carpet.

5. PW1 pleaded with them even as they hurled the items out of her house; urging them to handle the same carefully. She also tried to explain to the 1st appellant that the carpet was not hers, but he insisted on taking it. A brown lady assaulted her on the head using her fist, then the 1st appellant pushed and punched PW1 on the right check. She pursued 1st appellant pleading with them to give her back the carpet –

he pushed her – she got hold of him, and they both fell down. 2nd appellant and the others then set upon PW1, and Accused 2 pressed her right breast. She was also kicked all over the body, and dragged – that is when PW1 realized she was bleeding from the knee and felt pain on her right breast, and her cheek was also swollen.

6. PW1's daughter who had locked herself up in the kitchen then gave her First Aid before she sought treatment at Uasin Gishu District Hospital. A report was made to police and the appellants were arrested.

7. Apparently the initial P3 which had been issued to her went missing and she was issued with a second one which was filled at the hospital.

8. On cross examination PW1 confirmed that while making her report at the police station, the appellants presented themselves there although she was not aware that they had also gone to lodge a complaint but she heard 1st appellant complain that her knee had been injured.

She stated:

“Abel pushed me and I grabbed him and we fell down. Abel and I struggled while the two of us were on the ground. My statement does not show that Rhoda beat me up...”

9. PW2 (**EDA CHEBIWOTT KOMEN**) a daughter to PW1 told the trial court that she was woken up from her sleep by a knock on their door at about 7.00 am. Her mother opened the door and informed her that it was Rhoda (whom PW2 had seen before). PW2 heard 2nd appellant say “Leo ni kubaya.” (today is bad) and she listened to the conversation between her mother and 2nd appellant which was basically about the money she owed **KWFT** and her explanation about a plot she wanted to sell. 2nd appellant then left saying she had someone who could buy the plot.

10. Thereafter PW2 was sent to go and buy milk at the shops and while returning home, she saw a white pick-up at the gate and some 4 men alighted therefrom and entered into their house.

11. PW2 followed them inside the house and by the time she got into the kitchen, she realized that their household goods were being carried out by two men. Meanwhile another motor vehicle had brought three women. She noticed that their property was being thrown out of the house and she heard her mother protest when the carpet was taken. PW2 stated:

“...She asked them to leave it. My mother protested. Abel who is the appellant herein slapped my mother on the left cheek. I was standing in the kitchen. A brown lady slapped on the back of the head, and they managed to take the carpet. On reaching the door, Abel Musyoki held my mother and he pushed her down. Both fell down outside the door while they were on the stairs... Rhoda grabbed my mother's right breast. The other people joined in and started kicking mum at the back and on the ribs. The people who were with Abel separated them from mum. My mum was bleeding on the right knee.”

On cross examination PW2 confirmed that she locked herself inside the kitchen once the fracas begun although she was peeping through the kitchen door to see what was going on.

She maintained that she saw other appellants assaulting her mother saying the 1st appellant pushed her mother, then a struggle ensued between them.

SOPHIA TOROITICH (PW3) a Clinical Officer at Uasin Gishu District Hospital examined PW2 and found that she had pain in the chest with superficial fractures on the 8th rib, bruises on the left knee classified the degree of injury as main.

12. In his sworn defence, the 1st appellant an employee of **KWFT** confirmed that PW1 owed money to **KWFT** which she was not repaying consistently, so he alongside 2nd appellant decided to go to **PW1's** house and recovered the chattels she had provided as security. They had removed most of the items, but when they touched the carpet, a scuffle ensued over it. It was his evidence that since they were many, they overpowered **PW1**, who then returned to the house and came out with a hoe she which used to hit the 2nd appellant. He rushed to the latter's aid and got hold of the hoe, assisted by one James, in the process he and PW1 fell down. PW1 then got back arrived with a panga, before locking herself up inside the house. He got injured and went for treatment. Later PW1 repaid the loan and her property was released to her.

13. The 2nd appellant confirmed accompanying the 1st appellant to PW1's house to distrain her property as she had defaulted in the loan repayment. She confirmed that a struggle ensued when the carpet was being removed. It was her evidence that:

“I was not injured in the scuffle since I was expectant she came with a hoe to stab me but she was disarmed. She staggered and fell with Abel... I did not assault her.”

14. **CLEOPHAS ODOYO** (DW3) who had accompanied the appellants in the loans recovery mission confirmed that a scuffle ensued when the carpet was being taken away as PW1 had objected to that. According to him, PW1 got a jembe and wanted to strike the 2nd appellant but they disarmed her and they fell on the steps. He claimed that PW1 pulled the 1st appellant's testicles.

15. The trial magistrate in his judgment rejected claims that PW1 had attempted to attack 2nd appellant with a hoe saying that was an afterthought which had never been put to PW1 and PW2 during cross examination.

16. The trial magistrate accepted the evidence by prosecution witnesses and convicted appellant saying the medical evidence was consistent with what PW1 and PW2 stated regarding how the injuries were inflicted on her.

The findings are challenged on grounds that:

- a) The trial suffered procedural irregularities,
- b) The trial magistrate failed to comply with provision of Section 200 (3) of the CPC.
- c) There were contradictions in the evidence presented by prosecution witnesses
- d) The evidence was uncorroborated
- e) The medical evidence was admitted without the trial magistrate warning himself of the possibility of mischief
- f) The trial magistrate created his own evidence and failed to appreciate that the complainant was the author of her own injuries.
- g) The trial magistrate took into account irrelevant factors.

17. At the hearing of the appeal, **MR LANGAT** appeared for the appellant and submitted in writing that the trial magistrate failed to consider that the minor (PW2) may have been biased in her testimony as it was clear she was not in the same room with her mother during the incident. It is argued that no evidence was led to confirm that there were any openings at the door, and that PW2's evidence was contradicted by that of her own mother (PW1) who said that PW2 locked herself inside the kitchen once the commotion began.

18. Counsel also argued that the sequence of assault as narrated by PW1 was contradicted by PW2. He also poked holes at the medical evidence saying it was on record that the initial P3 form got lost and the Clinical Officer was not able to ascertain how the injuries suffered by the complainant. That in any case the injuries would not be classified as maim.

This court is urged to find that there was no way in which the complainant's injuries could have been confirmed 11 days after the incident without medical/clinical treatment notes.

19. It is also argued that the prosecution failed to offer any evidence regarding the intention of the appellants as they lacked the necessary mens rea; and their defence was unreasonably dismissed without considering that in fact the 2nd appellant being pregnant could not have reason the attack the complainant. The appellant's counsel also faulted the trial magistrate for failing to conduct voir dire examination in respect of PW2 to establish whether she understood telling the truth. It was also submitted that the matter was heard by different magistrates, yet there was no compliance with Section 200 (3) CPC to enable the appellants make an election on how the matter ought to proceed. In this regard counsel urged the court to be guided by the decision in **Rebecca Nabutola and Another V R** where the court held that **Section 200 (3) CPC** is mandatory in nature and it is for the accused to incarnate how they wish a matter to proceed.

20. Counsel further pointed out the trial magistrate in his judgment took into account irrelevant factors by faulting the appellants found that employees for proceeding to attach goods the complainant had pledged as security instead of pursuing other avenues, saying if they had not distressed, then the scuffle would never have arisen. It is his contention that whereas the trial court concluded that there was a scuffle yet when the appellants used that in their defence it was rejected as an afterthought. The sentence was also contested as harsh, and **MR LANGAT** submitted that the trial magistrate failed to consider that in their plea in mitigation the appellants expressed remorse and regretted the incident, so sentencing them to 3 years imprisonment was harsh.

21. In opposing the appeal, **MS ODUOR** on behalf of the State submitted that complainant testified how the appellants had taken away the carpet which did not belong to her, and when she protested a scuffle ensued, and the appellants assaulted her resulting in the injuries she sustained. Counsel pointed out that the significant injury was the fracture to the 8th rib which was confirmed by the medical findings who was an independent witness.

As regards the voir dire examination Ms Oduor submitted that such is only necessary for children of tender years/age, and lack of conducting the examination did not render her evidence untrue, because even without her evidence, the medical evidence still proved that the complainant was injured on the date in question.

22. It was further contended that the trial magistrate considered the appellants plea, mitigation and defences and even captured in his judgment that although the 1st appellant claimed to have sustained injuries during the incident, there was no evidence to support that claim, and then this is why the trial magistrate disregarded their defence, describing it as an afterthought.

The sentence is described as legal as under Section 234 the prescribed maxim sentence is life imprisonment and 3 years was too lenient.

23. **MR LANGAT** in reply maintained that the P3 form ought not to have been relied on, in isolation to prove the injuries which were examined 11 days later yet there were not treatment notes on X-rays availed. It was his contention that the injuries were grossly exaggerated as the complainant did not suffer any disability.

24. There is no dispute that a scuffle ensued involving the complainant and the appellants who had decided to laying distress on her property for an unpaid loan balance. It was also not disputed (in fact the 1st appellant confirmed that since they were many, they overpowered PW12) I did not detect anything in the record to suggest a denial that in the cause of this struggle PW1 did sustain injuries. The contention here is that

the injuries were grossly exaggerated and that the appellant had not intention to harm PW1.

What needs to be addressed first are basically procedural issues which the trial magistrate is faulted for failing to observe.

(a) Voire Dire examination

(b) Compliance with Section 200 (3) CPC.

The other three limbs of the appeal are:

(c) Was there an exaggeration as to the degree of injuries sustained by PW1

(d) Did PW1 provoke the situation, and therefore get what she deserved? That infact she was not assaulted, but sustained the injuries when she and 1st appellant fell down in the course of the struggle

(e) Did the trail magistrate unfairly disregard their defences and mete a harsh sentence

VOIRE DIRE EXAMINATION: The contention here is that PW4 was a minor and fitted within the definition of a child of tender years who ought to have been subjected to voire dire examination. In the area of **KIBANGENYI Arap KOLI** (1959) EA 92 cited with approval in **GAMALDENE ABDI ABDIRAHMAN Vs R** [2013] Eklr, a child under the age of 14 years. **MR LANGAT**'s definition of what constitutes tender years, which ought to guide this court.

Rather than split haris, I will consider what the statutory definition of a child of tender years means – infact **MR LANGAT** is completely aware to this and has acknowledged as much I his written submissions.

A child of tender years is defined:

“Child of tender years “means a child under the age of ten years.”

Of course the decision in **KIBANGENYI Arap Koli** is useful jurisprudence, to the effect that it discourages courts from totally disregarding good jurisprudence developed over the years, and it also points out certain parameters that guide a child's physical and intellectual development, including social, cultural and economic factors. However that case did not state that it is mandatory to examine a child over 10 years to voire dire examination, indeed the court stated thus.

“... In our view, the jurisprudence established over a long period of time is still god jurisprudence despite the definition provided by the Children Act. In saying so, we are guided by the fact that a child's development both physically and intellectually is governed by the social cultural and economic environment under which the particular child is brought up. Some children are slow developers, while others are fast learners, it would therefore be prudent to test the intellectual capacity of a child witness before putting the child in the witness box ... it follows that acceptance of the evidence of the complainant by the trial magistrate without conducting a voire dire examination on the witness was fatal to the prosecution case. The child that testified in our view was one of tender years and voire dire ought to have been administered on the witness. While I respect that view, it would be myopic of me not to take into consideration the child's docile and academic environment. This was a 14 year old girl in a secondary school in the urban area of no less a town than Eldoret (which is cosmopolitan). Further under the Kibagenge case, she was not (a) the complainant, (b) the sole witness.

25. From the evidence recorded, and even her answers on cross examination, there was nothing to suggest that she had failed to understand the nature and effect of her testimony or that she exaggerated any of the details she gave or that she had been coached.

I also note that at a later stage in the course of the proceedings, the applicants engaged an advocate who applied to recall prosecution witnesses, including PW2 for cross examination conducted, although this was only for purposes of cross examination. Yet even if the failure to conduct the voire dire examination was fatal, it is significant that it doesn't challenge there sequence of events as narrated both by PW1 and even the applicants, and that on the course of the confrontation, PW1 sustained injuries.

Non compliance with **Section 200(3) CPC**, it is a fact that when the matter begun, it was heard by C. G. Mbogo (then a Chief magistrate) where PW1 and PW2 testified.

Thereafter C. Obulutsa (then a Senior Principal Magistrate) took over and on 24.07.2015 heard PW3, PW1 and PW2 (who had been recalled for cross examination) and PW4. It is a fact that at the point of taking over the succeeding magistrate did not record that the provisions of **Section 200(3) CPC** had been complied with.

Section **200(3) CPC** provides as follows:

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand any witness to be re-summoned and re-heard, and the succeeding magistrate shall inform the accused person of that right.”

26. I agree with the appellant's counsel that the record does not indicate whether the trial magistrate explained to the appellants the

provisions of **Section 200 (3)** and whether they made an election on how they wanted the matter to proceed. The case of *Rebecca Mwhiki Nabutola V Republic* [2012] eKLR Court of Appeal stated:

“... The requirement to comply with the provision thereof is mandatory. The record of the trial court must of necessity contain the fact that the trial court, in this case the succeeding magistrate has informed the accused person of the right to recall or review any witness. The reply by the accused person must also be placed on the record and the order relating thereto should be signed by the succeeding magistrate. It is not enough court for counsel to state that they have taking instructions because ... the duty of the court is to the accused person and not the advocate...”

27. The record shows that the appellant’s counsel applied for recall of PW1 and PW2 for purposes of cross examination – my question is whether this then covered the omission by the trial court, since the succeeding magistrate had an opportunity to observe the demeanor of the two witnesses.

“...In my view the situation prevailing in the instant case can be distinguished from the Nabutola (supra) case, because in that one, the court recorded that he matter was to proceed from where it had reached, thus denying the succeeding trial magistrate an opportunity of observing the demeanour of the witnesses. In the present case there was an undoing of motions – the recall of PW1 and PW2 in my view carried that omissions.

28. **MEDICAL EVIDENCE:** The contention on the medical evidence is from a lay person’s perspective – that a broken rib cannot amount to grievous harm, but the appellant’s did not have a 2nd medical report from a different source to support their contention. PW1’s evidence and description of how she was assaulted, which body parts were targeted fits in with the injuries noted by the medical personnel who testified and that limb cannot stand.

29. **Irrelevant Factors and defence:** of course the trial magistrate observed that if the appellant had applied the legally recognized procedure of debt recovery, the whole incident would not have occurred – that is a fact and is not irrelevant. Infact it became a factor in considering whether the appellant’s subsequent conduct, and whether the entire incident was excusable.

The whole hoe story was termed an afterthought as it was never raised during cross examination of any of the prosecution witnesses and only spring up during defence hearing. Indeed the defence was duly considered and properly rejected.

30. As regards sentence, the offence carries a maximum life imprisonment, the appellants in mitigation said they regretted the incident and sought leniency saying they were on duty having been sent by their senior. I think to the extent that a custodial sentence was meted – I cannot fault that – a message must be conveyed that debt collect is not and must never be an opportunity to mete physical violence, humiliate the debtor and create unnecessary harassment – so yes a custodial sentence was sell observed.

Was it harsh? Given the scenario to that the whole incident begun when PW1 begun to struggle over the carpet that I thin a year 1^{1/2}. Sentence would have been more appropriate and 3 years was rather harsh. It is only to that extent that I would set aside the 3 year sentence and substitute it with 1^{1/2} years to run from date of conviction.

If the period has already been served then that would entitle the appellants to be set a liberty forthwith unless otherwise lawfully held.

DELIVERED and DATED at ELDORET this 4th day of OCTOBER 2018.

H. A. Omondi

Judge

04.10.18