



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL CASE NO. 17 OF 2017

REPUBLIC.....APPELLANT

VERSUS

PERIS CHEPKIRUI..... RESPONDENT

(An Appeal from the Judgement of the Hon. S. Telewa Resident Magistrate in Eldoret CMCC No.240 of 2015, dated 27th January 2017)

JUDGMENT

PERIS CHEPKURUI, the appellant herein was charged in the lower court with the offence of Grievous harm, Contrary to *Section 234* of the *Penal Code*.

The particulars of the offence are that on the 18th day of October 2014 at Tapsaipoi Location in Eldoret West District, within Uasin-Gishu County, the appellant willfully and unlawfully did grievous harm to *Jael Chepchirchir*.

The prosecution case is that on 18th October 2014 at 8.00 a.m the complainant in this case was with *Rose Chepchirchir Kimbi* (PW-2) and another lady described to only as *Monicah*. They were playing with the child of the complainant. The child fell in the process and they laughed. The appellant who is their neighbor passed by. She heard them laughing and turned back. She exclaimed that she passed and some dogs laughed. The complainant stepped out and asked the appellant where the dog was. The appellant was hit with a brick by the complainant. The two started fighting. The appellant bit the complainant. PW-2 advised the complainant to go to the hospital. She headed there with *Monicah*. When they were along the road, the complainant's phone rang. She received it and was cut with a panga. *Monicah* screamed. PW-2 was attracted to the scene by the scream. She found the complainant already cut. She was with *Monicah*. The complainant and *Monicah* headed to the hospital. The complainant alleged when she was cut two men assisted her to the hospital. She had lost consciousness. She regained it later in the evening. The case was reported at Turbo police post. The complainant was issued with a P-3 form.

She was treated at Turbo Rural Health and Demonstration Centre. It was observed in the Turbo Primary Care Encounter Form that she had a Deep cut wound on face and had lost a tooth.

The deep cut wound extended from the nasal bridge to the lips and was very deep, causing loss of one of pre-molar teeth. The P3 form filled at the same Health Facility acknowledged the said injuries of which were caused by a sharp object and classified the degree of injury as grievous harm.

The appellant was then arrested and charged.

Her brief sworn defence is that on the material day she was not at the scene of the offence but in the church at 10.00 a.m. she denied commission of the offence.

The trial court evaluated the evidence and found the appellant guilty of the offence, she was consequently convicted and sentenced to serve life imprisonment.

Dissatisfied with the said conviction and sentence she appealed to this court on the grounds that:-

1. Prosecution never proved its case beyond reasonable doubt.
2. The testimonies of PW-1 and PW-2 were contradictory.

3. The complainant did not identify the person who cut her and PW-2 did not witness such.
4. Crucial witnesses were not called to give evidence and no reason was given for the failure to call them.
5. The evidence of PW-1 and PW-2 were wrongly analyzed, leading to an incorrect conclusion.
6. Complainant did not specifically state where she was cut and there is therefore a missing nexus between her evidence and that of the P3 form.
7. Larger part of the appellants defence was not recorded.
8. The appellant defence was not weighed in the judgement.
9. The appellant mitigation was not considered and was unfairly sentenced to life imprisonment.
10. Other vital factors which need be considered before sentencing were not weighed and the wrong sentence was passed.

The Appellant therefore urges this court to quash the conviction and sentence and order an acquittal and in the alternative a re-trial.

The appeal was opposed by the state. Ms Kegehi who appeared for the state argued that the prosecution 4 witnesses were reliable, consistent, cogent and well corroborative.

The appellant was a neighbour to PW-1 and PW-2 and the incident happened at 8.00am when there was ample day light. The two witnesses could not have made a mistake of her.

On cross-examination PW-1 made it clear to the appellant that it's the appellant who cut her with a panga. The evidence of the injuries sustained by the complainant were corroborated by PW-3. The missing tooth was recovered and produced as exhibit. The sentence given is lawful under Section 234 of the Penal Code. I was therefore urged by the state to dismiss the appeal.

This being the first appellate court, I have re-evaluated the entire evidence, considered the judgment passed and the sentence, the grounds of appeal and submissions by both sides.

The evidence of PW-1 and PW-2 shows the incident took place at about 8.00am. The initial physical encounter between the complainant and the appellant happened outside the complainant's home. Regarding it, PW-7 said;

“ Peris came back and said I heard a dog laughing. Peris stepped out, then Jael hit her with a brick. They started fighting. Peris hit Jael.”

The complainant was then cut with a panga on her way to hospital. She was at the time with *Monica*, who was not called as a witness. PW-2 went after she had been cut. Though PW-1 the complainant, in her evidence in chief does not disclose the person who cut her with a panga, she made it clear on cross-examination when she said,

“You followed me on the road and cut me”.

This statement when considered together with the fact that the complainant had hit the appellant with a brick and the two engaged in a physical fight in which the appellant bit the complainant, shows that the person who had a cause to injure the complainant was the appellant. This buttresses the complaint's evidence that it's the appellant who cut her with a panga.

The evidence of PW-3 leaves no doubt of the injuries she sustained, of which led to loss of one pre-molar tooth. The said tooth was even produced as an exhibit. The degree of injury was assessed as grievous harm.

The appellant in her defence raised an alibi in which she said she was in church at 10.00am. I do agree with the defence that the trial court did not well evaluate the defence in the judgement. I will therefore do so. The prosecution case shows the incident constituting the offence took place at 8.00am. The appellant's defence is that she was in church at 10.00am. This is two hours after the commission of the offence and the defence does not therefore show that she did not have an opportunity to commit the offence. She could as well have gone to church after its commission. She was seen by PW-1 and PW-2 at the scene at 8.00am. The two knew her well as a neighbor. PW-1 even spoke to her before they engaged in the physical quarrel. The two witnesses could not have made a mistake of her. If the appellant's defence had been properly evaluated by the trial court, the decision would have been the same.

The offence of grievous harm contrary to *Section 234* of the *Penal Code* was proved against the appellant by the prosecution beyond reasonable doubt. The appellant was rightly convicted of the offence.

I now turn to consider the sentence passed against the appellant. The maximum sentence provided for the offence is life imprisonment.

This is an expression that it's a serious offence.

However, its not a mandatory sentence and the court has discretion to impose a sentence shorter than it. The appellant has no previous record and is therefore a first offender. She is a mother as she said in mitigation;

“ I have children”. The trial court never gave reasons for imposing against her the maximum sentence and not any other. Given the circumstances under which the offence was committed, of which was immediately after a fight, and that she is a mother and a first offender, she did not deserve the maximum sentence. I'll vary the sentence and reduce it to 7 years imprisonment from the date of 27th January, 2017 when she was sentenced. The appeal therefore succeeds on sentence only. Appeal against conviction is unmerited and is accordingly dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 8th day of November, 2018.

In the presence of:-

1. Mr. Mutsotso Advocate for the appellant
2. Ms Kagali for State
3. Ms Anne - Court assistant