



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 26 OF 2018**

**FATUMA SHEIKH ABDULLAHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from conviction and sentence in Wajir Senior Resident Magistrate**

**Criminal Case No. 40 of 2018 by Hon. A. K. Mokeross (SRM)**

**JUDGEMENT**

1. The appellant was charged in the Magistrate's Court at Wajir with grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on 17<sup>th</sup> December 2017 at Wagberi Location in Wajir East Sub-County within Wajir County unlawfully did grievous harm to Amina Sheikh Abdullahi.

2. She denied the charge. After a full trial, she was convicted of the offence and sentenced to three (3) years imprisonment.

3. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. Her grounds of appeal are –

**(1) The magistrate erred in convicting her as the case was not proved beyond any reasonable doubt.**

**(2) That the magistrate did not consider that the evidence of the prosecution witnesses was inconsistency and contradictory.**

**(3) That the magistrate did not consider that crucial witnesses were not brought to court to testify.**

**(4) The magistrate did not consider that her arrest was not conducted in accordance with the law.**

**(5) That the magistrate erred in not allowing her to mitigate and also not complying with section 200 of the Criminal Procedure Code.**

**(6) That there was an existing vendetta between her and the complainant since the appellant owed money to her mother.**

4. The appellant also filed written submissions which I have perused and considered.

5. At the hearing of the appeal, the appellant added that she was suffering in prison and did not know where her children were. In addition the two children she had in prison were suffering.

6. Mr. Okemwa the learned Principal Prosecuting Counsel submitted that PW1 the complainant was well known to the appellant. PW1 was attacked because of a debt of Kshs.120/= and injuries suffered were corroborated by PW4 a Senior Clinical Officer through the entries in the P3 form, and the injuries were assessed as grievous harm. Counsel added that the appellant poured hot water on the complainant and as such the prosecution had proved its case against the appellant beyond reasonable doubt. Counsel pointed out that the appellant showed no signs of remorse and felt that custodial sentence was justified. In addition, the appellant jumped bail before judgment and had to be arrested. Counsel contended that conviction was proper but urged this court to consider the sentence as the appellant had two children with her in prison.

7. This is a first appeal and as a first appellate court I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. In doing so, I am required to bear in mind that I did not have the opportunity to see witnesses testify in order to determine

their demeanor. See the case of **Okeno vs Republic [1972] EA 32.**

8. I have re-evaluated the evidence. The appellant has raised a number of grounds of appeal.

9. On the technical grounds, the appellant complained that she was not given an opportunity to mitigate before sentence. From the record, the appellant was sentenced in her absence. She was arrested later after a warrant of arrest was issued against her. Though she complained that she was not allowed to mitigate, she was the cause of her own misfortune. Having absconded from court, there is no way that the court would possibly give her opportunity to mitigate as the appellant had absconded.

10. The appellant has complained that the magistrate took over from the first magistrate who heard the case and section 200 of the Criminal Procedure Code (Cap. 75) was not complied. Section 200 of the Criminal Procedure Code applies only when the trial court has partially heard the evidence of the witnesses. In the present case Hon. Mokoross heard all the witnesses and delivered judgment. Hon. Nyaga only dealt with sentence. The law does not require compliance with section 200 of the Criminal Procedure Code where the succeeding magistrate deals with the sentence.

11. The appellant has complained that the case was not proved beyond reasonable doubt and that there were inconsistencies in the evidence of the prosecution witnesses. The evidence of PW1 the complainant was clear. The appellant was at the scene. The complainant was injured by hot water which was confirmed by PW4 Hashim Mohamud the Clinical Officer. The appellant claimed that the complainant fell on hot water while they were struggling or wrestling. From the evidence on record, I agree with the trial magistrate as if the appellant's version were correct, then atleast she herself could have suffered minor injuries. I agree with the learned trial magistrate's findings that the prosecution proved their case against the appellant beyond reasonable doubt. I will thus uphold the conviction

12. With regard to sentence, the sentence of three (3) years imprisonment is a lawful sentence as the maximum sentence for the offence is life imprisonment. The custodial sentence was also handed down as a lesson because of the absence of the appellant who disappeared from court. It is a justifiable sentence. She was sentenced on 16<sup>th</sup> April 2018 in her absence and was put in prison on 24<sup>th</sup> April 2018 which is slightly more than seven months now.

13. If she did not have children in prison, I would have sustained her sentence. However, because she has two young children in prison, I will order that the sentence already served by her is adequate punishment. This in my view will enable her take care of her children outside prison confinement.

14. Consequently, I dismiss the appeal on conviction and uphold the conviction of the trial court. With regard to sentence, I set aside the sentence of three (3) years imprisonment, and order that the appellant will serve the sentence she has already served in prison. She will thus be discharged from custody.

**Dated and delivered at Garissa this 4<sup>th</sup> day of December, 2018.**

**George Dulu**

**JUDGE**