



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 56 'A' OF 2011**

**CECILIA WANJIKU MURIITHI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Appeal from the judgment of the Hon.L.Mbugua Ag. Principal Magistrate in Karatina dated the 10<sup>th</sup> March, 2011 in Criminal Case No. 951 of 2009)

**JUDGMENT**

1. The Appellant, **Cecilia Wanjiku Muriithi**, was charged with the offence of Assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars of the charge were that on the 21<sup>st</sup> day of November, 2009 at Thengeini Village in Nyeri East District within the Central Province, the appellant unlawfully assaulted **Florence Gathigia Maina** and thereby occasioning her actual bodily harm.

2. After the trial, the Appellant was found guilty and was convicted and sentenced to a term of 18 months imprisonment.

3. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and the Grounds of Appeal are summarized as follows;

- i. The appellant was convicted on insufficient evidence;
- ii. The learned magistrate erred in not considering the relationship between the complainant and the appellant;
- iii. That the learned magistrate erred in rejecting the appellants defence;
- iv. The sentence meted out was harsh and excessive in the circumstances;

4. At the hearing the appellant was represented by Ms Kabethi and Mrs. Gicheha appeared for the State; both Counsel made oral presentations; hereunder are the respective parties rival submissions;

**APPELLANTS SUBMISSIONS**

- i. That there were gaps in the prosecution evidence in that the particulars of the charge are not supported by the evidence adduced; the Charge Sheet at the particulars section reads that the offence was committed on the 21/11/2009; the OB entry on the charge sheet is indicated as OB

20/26/11/2009; the Investigating Officer's evidence was that a report was made on the 22/11/2009 at 10.00am by the complainant that she had been assaulted; that this report was booked in the Occurrence Book and a P3Form issued to her to enable her to seek medical treatment; the evidence of **PW4** was that the complainant came to the hospital on the 21/11/2009 at 2.00pm;

ii. That there are different dates when the offence is said to have been reported; that the charge was fabricated as there is no evidence to support the charge;

iii. The trial court failed to take into consideration the relationship between the complainant and the appellant; and the existence of a grudge arising out of '**Chama**' issues;

iv. The trial court did not take into consideration the appellants mitigation pertaining to her health and that she had two (2) children who were dependent on her; that the sentence imposed was harsh and excessive in the circumstances; that the offence has an option of a fine which the trial court ought to have considered;

v. Counsel prayed for the conviction to be quashed and sentence set aside;

### **RESPONDENTS SUBMISSIONS**

i. In response to the issue of dates; counsel stated that the Charge Sheet read the 21/11/2009; the particulars of the Charge read that the incident occurred on the 21/11/2009; the evidence of **PW1**, **PW2** and **PW4** was that the incident happened on the 21/11/2009; **PW1** told the court that she was assaulted on the 21/11/2011; **PW2** and the medical officer **PW4** corroborated her evidence; that the contradiction by **PW3** was not the only evidence adduced and does not go to the core and is not fatal to the prosecutions' case;

ii. The existence of a grudge and frame up by **PW1** is a mere excuse; the appellant did not mention that **PW2** was privy to the sour relationship as she came to give evidence that was in support of the appellant;

iii. The trial court considered the appellants mitigation and even called for a Probation Officers Report when it arrived at the decision when considering a custodial sentence;

iv. The sentence was lenient as the law provides for a maximum of five (5) years; Counsel submitted that the conviction was safe and the sentence was reasonable; and prayed for the dismissal of the appeal.

### **ISSUES FOR DETERMINATION;**

5. After taking into consideration the respective submissions of both Counsel for the Appellant and Respondent this court finds the following issues for determination;

i. Whether the evidence tendered by the prosecution had material contradictions;

ii. Whether the trial court disregarded the appellants defence without giving sound reasons;

iii. Whether the sentence was harsh and excessive in the circumstances;

### **ANALYSIS**

6. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

**Whether the evidence tendered by the prosecution had material contradictions;**

7. The appellant contends that the particulars of the charge are not supported by the evidence adduced; the Charge Sheet at the particulars section reads that the offence was committed on the 21/11/2009; that the Investigating Officer's evidence was that a report was made on the 22/11/2009 at 10.00am by the complainant that she had been assaulted; that this report was booked in the Occurrence Book and a P3Form issued to her to enable her to seek medical treatment; the evidence of **PW4** creates further confusion on the dates as he stated that the complainant came to the hospital on the 21/11/2009 at 2.00pm; but the OB entry on the charge sheet indicates it as OB 20/26/11/2009;

8. Counsel submitted that the contradictory evidence and the particulars of the charges demonstrates that the charges were fabricated;

9. To counter this assertion Counsel for the State argued that it was only the evidence of **PW3** that was contradictory; that his evidence did not go to the core and was not fatal to the prosecutions' case; that the evidence of **PW1** on the date of the incident is corroborated by **PW2** and **PW4**.

10. The appellant creates the impression that the anomaly on the dates is indicative that there the charges may have been of fabricated as they do not relate to the alleged incident of assault;

11. Upon re-evaluating the evidence on record it is noted that; the Charge Sheet reads that the incident is said to have occurred on the 21/11/2009; in her testimony **PW1** told the court that the incident occurred on the 21/11/2009 at about 10.00am; she then made a report to the police on the same date and was issued with a P3Form; she proceeded to hospital for examination and treatment; **PW2** corroborates the date of the incident being 21/11/2009 and that it occurred in her compound; **PW4** in her testimony confirms having examined the complainant on the 21/11/2009;

12. This court has perused the P3Form at length; and notes that at the section signed by the Police the document makes reference to OB entry number OB26/21/11/2009; which means that the matter was actually reported as stated by **PW1** on the 21/11/2009; the police have indicated on the document that **'21/11/2009 at 13.00 hours was the date and time of the alleged offence'**; this then dispels the notion tendered by the appellant that the offence was reported on the 22/11/2009 and or the 26/11/2009; the Doctor has also indicated thereon that the Complainant presented herself on the 21/11/2009;

13. This court is satisfied that any inconsistency and or contradiction relating to the OB entry number and the date of the reporting of the incident is resolved by the evidence of **PW4** and the P3Form produced as an exhibit;

14. That the crucial and material date relates to when the incident occurred; and this court finds no contradictions or inconsistencies relating to the date of the incident;

15. This ground of appeal is found lacking in merit and is hereby disallowed;

**Whether the trial court disregarded the appellants defence without giving sound reasons;**

16. The appellant states that the trial court did not take into consideration her defence on the sour relationship and the existence of a grudge arising out of **"Chama issues"**; which led to her being framed by **PW1**.

17. This court notes that the trial court in its judgment made the following finding;

**"I find that even if there had been misunderstanding between PW1 and the accused before incident, I am inclined to believe that the incident did occur. PW2 appears to be an independent witness. If she (PW2) had been told to state something favourable to implicate accused surely she could have said that she saw accused hitting PW1.**

**After all, incident occurred in her (PW2's) compound. But as the matter stands PW2 only states what she observed and that PW1 was bleeding on the head and averring it is accused who injured her.”**

18. The trial court is found to have taken the appellants defence into consideration and found that there was no frame-up; and found **PW2** to be an independent witness otherwise she would have given unfavourable evidence against the appellant; but only gave evidence that she heard the screams and what she observed;

19. It is noted that the appellant did not put or raise the issue of the existence of a grudge to **PW1** or **PW2** during cross examination; and further notes that the evidence she tendered was only an attendance register of the so called '**Chama**' which is found not to be supportive evidence of the existence of any grudge;

20. This court is satisfied that the trial court considered the defence of the appellant and had good reason in rejecting it as it did not raise any doubts in the prosecutions' case;

21. This ground of appeal is found lacking in merit and is disallowed.

**Whether the sentence was harsh and excessive in the circumstances;**

22. The appellants contention was that the sentence meted out was harsh and excessive and submitted that due to her health problems and also being a mother of two very young children the trial court ought to have considered imposing a fine or a non-custodial sentence which would have been reasonable in the circumstances;

23. Counsel for the state responded and stated that the trial court had called for a Probation Report which proved unfavourable; that the trial court in imposing the sentence of 18 months was lenient as the maximum provided in law was 5 years;

24. The question is whether this sentence passed is manifestly harsh and excessive in the circumstances? As held in the case of **R V. Mohamed Ali Jamal**, (1948) EACA the Court of Appeal observed:

**‘..... It is well established that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive...’**

25. This court is guided by the above decision and concurs that the issue of sentencing is a discretion exercised by the court seized of the matter; the record shows that the trial court took into consideration the mitigating circumstances before passing sentence; and even called for a Probation Report which proved not to be in the appellants favour;

26. Section 251 of the Penal Code provides for a maximum sentence of five (5) years; having taken the above factors into consideration the trial court was indeed lenient in imposing the eighteen (18) month sentence;

27. This court reiterates that as an appellate court will interfere with the sentence only when it is found to be manifestly and or grossly inadequate; in this instance it is this courts view that the sentence passed of eighteen (18) months cannot be described as harsh and excessive; and that the trial court is found not to have applied wrong principles of law.

28. This ground of appeal is found lacking n merit and is hereby disallowed.

**FINDINGS**

29. In the light of the forgoing this court makes the following findings;

- i. The inconsistency and contradiction relating to the date the report was made is found to be immaterial and any contradiction is resolved by the P3Form produced as an exhibit by **PW4**.
- ii. The trial court is found to have taken into consideration the appellants defence and gave good reasons for rejecting it.
- iii. This court is disinclined to interfere with the sentence imposed as there are no valid reasons for so doing.

**DETERMINATION**

30. The appeal is found to have no merit and is hereby dismissed.

31. The conviction and sentence is affirmed.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 9th day of February, 2017.**

**HON.A.MSHILA**

**JUDGE**