



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.43 OF 2016

BETWEEN

JOSHUA OTIENO OLWALO.....APPELLANT

AND

STATE..... RESPONDENT

(An appeal from original conviction and sentence of the SRM's Court at Ndhiwa in

Criminal Case NO.491 of 2014 dated 12.06.2015 – Hon. B.R. KIPYEGON, RM)

JUDGMENT

1. The appellant **JOSHUA OTIENO OLWALO** was convicted on two charges of assault contrary to **Section 251** of the **PC** and sentenced to serve 2 years on each count, which sentences were to run consecutively.
2. The appellant was convicted of assaulting **I A O** and **F O** on 25/10/14 in **NDHIWA**. The appellant denied the charges.
3. **I** (PW1) saw the accused armed with a panga and pointing at her, demanding that she explains something. She got scared, ran inside her house and locked herself therein. However the appellant cut the door, gained access and picked a walking stick which he used to hit **F O** (a boy aged 1 year 5 months) on the leg. The accused then cut PW1 on the head – she bled, fell down and lost consciousness. She woke up at **MAGINA** hospital before eventually being transferred to **NDHIWA** hospital.
4. The medical examination found that **F** had swollen feet and was crying, and his injuries were classified as harm.
5. **I** had a crushed wound on the posterior of the left head and a swelling on the right part of the eye region – the wound was stitched and her injury was also classified as harm – the P3 form were produced in support.
6. The appellant in his unsworn testimony claimed that Phillip (PW1's husband) had accused him of being a thief and warned him not to pass through his homestead. Phillip also threatened to cut him with a panga and a struggle ensued between them. I rushed to the scene while carrying a baby and a stick which she used to hit the appellant. The couple then chased after him, and in the process **I** fell down with the baby in her hands.
7. The trial magistrate upon considering the evidence rejected the defence as not being plausible, pointing out that the incident occurred in broad daylight, and the appellant was deliberately avoiding an explanation about his conduct and stated he had-

“assaulted a mother and a toddler.”
8. In mitigation the appellant alluded on his social obligations of paying school fees for school going students.
9. The trial magistrate called for a pre-sentence report confirming that the appellant had no criminal tendencies and the report recommended a non-custodial sentence. The trial magistrate considered social inquiry report and sentenced him to pay a fine of Kshs.20,000/= in default to serve 2 years imprisonment on each count to run consecutively.
10. In his petition of appeal, the appellant urged the court to order that the sentence runs concurrently instead of consecutive period.
11. **MR. OLUOCH** on behalf of the State opposed the appeal saying the only concession is for the sentences to run concurrently.

12. I think there isn't much to belabour – taking into consideration the circumstances under which the offence was committed, the nature of injuries inflicted and the social inquiry report, a consolidated sentence of two years imprisonment would be fair. It is only to that extent that I allow the appeal by setting aside the order for consecutively running of sentence and substitute it with an order that the 2 year sentence run concurrently.

Delivered and dated this 15th day of May, 2017 at Homa Bay

H.A. OMONDI

JUDGE