



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 44 OF 2011.**

**[Arising from Original Webuye Criminal case No. 304 of 2009]**

**JOSEPH SIMIYU MUKWEI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

Joseph Simiyu Mukwei, the appellant herein was charged in the lower court with the offence of assault causing actual bodily harm, contrary to section 251 of the Penal code.

The particulars of the offence are that on the 13<sup>th</sup> day of February 2009 at Nang'oto village, Webuye location of Bungoma East District, within western Province, the appellant unlawfully assaulted Elizabeth Nakowa Lusioli, hereby occasioning her actual bodily harm.

The Prosecution case is that on 13/2/2009 at around 8.45 P.m, the complainant in this case, who gave evidence as PW1, was in her home at Maraka. She was in company of her children namely L(PW2), B and D. Someone knocked on their door saying he was a police officer. PW1 opened and noted it was Joseph Simiyu, the appellant herein, there was a paraffin lamp in the house which enabled her to see. The appellant was in the company of two other persons who remained outside. The appellant was armed with a stick.

He hit the complainant with it on the left arm and kicked her on the chest. She fell down and in the process injured her left leg. She shouted for help as well as her Children. Neighbours turned up. One of the neighbours who turned up is the PW3 in this case. As she approached, two persons disappeared and entered into a sugar cane plantation. When she got into the house, she found the complainant lying down and the appellant struggling with her. The appellant then left and ran into the sugar cane plantation. She, the complainant, reported the matter at Webuye Police station. The following morning she went to Webuye District Hospital for treatment. Her P3 form was filled by PW4 who found that she was in fair condition. The chest had tenderness as well as the right upper lateral leg. The weapon that caused the injuries was probably blunt. He assessed the degree of injury as harm. He signed the P3 Form.

PW5 Investigated the case by recording the initial report in the OB. He later recorded witness statements, caused the suspect to be arrested and charged. The appellant in his defence gave unsworn testimony and called 2 witnesses. His defence is that on 31/1/2009 he and one Dennis Wamocha (DW2) put up a fence in the land of DW2. The following day the complainant and 4 other persons went and cut the wire. The issue was reported to the police. On 13/2/2009, the police went to arrest the complainant and 3 other suspects. They were not found. The complainant and some other persons went to the appellant's house. They broke the door and entered in. They damaged boxes and other items therein. The appellant reported

the issue to the police. Police made no arrest. The complainant and her brother threatened the appellant. This was also reported to the police. The appellant established that he had several cases with the husband of the complainant, one Edward Smart. They have been harassing the appellant with court cases.

DW2 in his evidence confirmed the issue of his cut wire and that they reported to the police. On 13/2/2009, they went to arrest Quin. People got hostile and the police retreated without making the arrest.

DW3 is the appellant's wife. She confirmed in her evidence the issue of the alleged damaged fence by the complainant and her husband. She also confirmed that their house was broken into and some items damaged while others were taken away. They reported to the police but the assailants were not arrested.

The Trial Magistrate evaluated the evidence and found that the prosecution had proved the case beyond reasonable doubt. He convicted the appellant and sentenced him to serve 15 months imprisonment without option of a fine. The court observed that the offence was rampant and called for Deterrent sentence.

The appellant brought this appeal on the following grounds:

1. That the charged was not proved
2. That prosecution evidence was contradictory
3. That the Judgment was not based on the weight of the evidence.
4. That the burden of proof was shifted to the appellant.
5. That circumstances did not favour identification.
6. That provisions of section 200 of the C.P.C were not complied with.
7. That the Judgment did not comply with provisions of section 169 of the C.P.C.
8. That the defence case was not considered.
9. That fine should have been considered in Sentencing.
10. That appellant Mitigation was not considered.

Mr. Onyando Advocate argued the said grounds on behalf of the appellant. In doing so he mostly emphasized on some contradictions in the prosecution case. On injuries he alleged the complainant stated she suffered injuries in the arm, chest and left leg. The P3 form however indicated of no injury in the arm. He also averred that complainant in her evidence said she went to the Hospital the very same night and on cross examination said she went the following morning, while the P3 indicates she went on 15/2/2009. complainant indicated she reported to the police the following morning while P3 indicates she reported on 13/2/2009. The complainant said she was injured on the right leg while PW4 said it was the left leg. Complainant also said that the appellant ran into a neighbouring home while PW3 said he ran into a sugarcane Plantation.

Other issues raised by the defence is that the stick which was allegedly used as a weapon in the offence was left at the scene and was not produced as exhibit.

On appellants defence, the Advocate argued that when the Trial Magistrate indicated that the complainant could not have gone to report to the police having escaped from the police to evade arrest, he should have well analysed the circumstances.

The judgment is said to be lacking points for determination of which is mandatory under section 169 of

the C.P.C.

The state oppose the appeal on the grounds that all elements of the offence were established beyond reasonable doubt.

I have evaluated the evidence in the case. Some of the contradictions indicated by the appellant do exist as indicated while some do not. The complainant said she went to hospital the following morning. The P3 indicates she went on 14/2/2009 at 9.05 am. Given that the incident took place on 13/2/2009, she was right when she said she went to hospital the following morning.

The disclosed contradictions are flimsy in nature. They are those which would pass given that memory do fade and when such an incident takes place the witness do not register all details perfectly as at that point they do not percieve they will be called as witnesses and their testimonies tested. It's agreeable that there's no case where the evidence fits perfectly in all minute details. The court need weigh the evidence as a whole and find out whether the alleged offence actually did take place and whether the accused is the one who committed it. That's why the standard of proof is beyond "reasonable doubt". Unreasonable doubts can exist but should be ignored. The evidence of the prosecution witnesses shows that the the incident took place and the complainant was injured. The accused was recognized by PW1, PW2 and PW3 as the culprit. There's no doubt in that. The defence that the appellant was in bad terms with the complainant could as well have resulted to the said assault.

The points for determination were stated by the Magistrate in his Judgment. At the onset, he indicated:

The issue for determination are whether the Complainant sustained actual bodily harm on 13/2/2009 attributable to assault and if so whether it was he, the accused who unlawfully assaulted her. This to me is satisfactory for the offence of assault.

The Trial Magistrate unlike this court had the benefit of hearing and seeing the witnesses both for the prosecution and the defence. The court believed the prosecution witnesses and not the defence. There is nothing on record showing the opposite was deserved and had merit. I have no grounds to hold otherwise. I accordingly do find that the appellant was rightly found guilty of the offence of assault and convicted.

On the sentence, there could be an issue. The circumstances under which the offence was committed, the nature of injuries sustained by the complainant and appellant's Mitigation, should atleast have been weighed to give him a fine option. Given that our prisons are congested, custodial sentence is a burden to the state and the tax payer, where an offence is fineable, and the convict is a first offender, and there are no other aggravating circumstances, its always prudent and fair to consider fine as an option. Fine when paid is an income, while jail sentence is an expense to the state. I will however not give fine option given that the sentence was passed on 5/4/2011 and is already served.

**Judgment** Signed and dated this 14<sup>th</sup> day of **June** 2017 at **Bungoma**.

**S. GITHINJI**

**JUDGE.**