



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 91 2016**

**(From original, conviction and sentence Criminal Case NO. 143 of 2014 in the CM's Court at Isiolo on 23/3/2015 by R.M.S. MUNDIA - RM)**

**H M ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that the appellant on the 18<sup>th</sup> March 2014 at Isiolo township area in Isiolo County within Eastern region, assaulted J K thereby occasioning her actual bodily harm.

The appellant was convicted of the charge and sentenced to three years imprisonment. The grounds of appeal are that the evidence of PW1 and PW3 was cooked in order to punish the appellant, that the prosecution case was uncorroborated, that there was existing grudge between the complainant and the appellant, that the trial court erred in law by failing to impose a non custodial sentence and that the prosecution failed to prove its case beyond reasonable doubt. In his written submission the appellant submit that the case was framed by the complainant against him. The incident occurred in a residual area but apart from the landlord no other witness went to the scene. PW3 is a friend to the complainant. PW3 alleged that she had gone to the complainant's house to collect her child yet that evidence is not supported by the complainant's evidence. PW3 was not living in the same compound as the complainant. The incident allegedly occurred at 6.00am and PW2 was sleeping. PW2 did not give physical description of the appellant to the police. It is further submitted that the circumstances of the case warranted a non custodial sentence. No probation report was availed to the trial court.

Mr. Namiti opposed the appeal. Counsel submit that the evidence is overwhelming and consistent. PW1 narrated how she was attacked by the appellant who was armed with a knife. The appellant used to be PW1's husband. Medical evidence was produced which show that PW1 sustained serious injuries. A pre-sentencing was produced which showed that the appellant had another case. Under section 251 of the Penal Code the maximum sentence is five years imprisonment. The three years sentence is proper.

This being a first appeal the court is duty bound to evaluate the evidence afresh and make its own conclusion. PW1 J K testified that the appellant is her former husband. On the 18<sup>th</sup> March 2014 she woke up at around 6am. She found the appellant on the door armed with a small knife. He stabbed her on the head using the knife. She was dragged outside the house and the appellant started stabbing on her. She was bleeding and the appellant left. She went to report at the Isiolo police station. she had left the appellant because he had a habit of beating her up. The appellant was not living with her at that time. PW2 Martha Karimi was sleeping on the 18<sup>th</sup> of March 2014 at around 6.00am. she heard screams coming from PW1's house. She saw a tall person whom she did not know. She found the complainant bleeding and there was blood on the floor. PW1 told her that her husband had attacked her. PW1 had lived in the plot for 2 months. PW2 did not know the appellant.

PW3 Eunice Gatwiri testified that on the 18<sup>th</sup> March 2014 her child had slept at PW1's house. She went to take the child at about 6.00am. Upon reaching PW1's house she found the appellant whom she referred

to as K hitting PW1 on the head. PW1 was bleeding. The incident was taking place outside the house. She talked to the appellant who informed her in Kiswahili “sipe chuguri. PW3 took her child to school and left. She later advised PW1 to report the matter to the police. PW4 PC Titus Keen was stationed at the Isiolo police station on the 18<sup>th</sup> of March 2014 at around midday the complainant went to report that she had been assaulted by her former husband. The report had been booked earlier and assigned to him. By that time PW1 had already gone to hospital and got treatment. He investigated the case and charged the appellant with the offence.

PW5 Mohamed Duba is a clinical official. He produced the P3 form. It is his evidence that pW1 sustained a deep cut around the skull and soft tissue injuries on the chest.

The appellant was put on his defence but opted to remain silence.

The issue for consideration is whether the prosecution proved its case beyond reasonable doubt. According to PW1, she knew the appellant as he is her former husband. The incident took place at about 6.00am. According to PW2 it was still dark. PW1 knew the appellant and confirmed that it was the appellant who was standing on the door. She saw the appellant holding a knife and she was stabbed on the head. According to PW2, she heard screams coming from the complainant’s house. She went there and found the complainant bleeding. PW3 testified that she saw the appellant assaulting PW1. The appellant did not testify and the prosecution evidence remains unchallenged. The appellant submit that it was a framed up case and the evidence does not prove the case. It is clear from the evidence of PW1 that she knew who was attacking her. It is also clear from the evidence that pW1 sustained injuries. PW5 produced the P3 form which confirmed that PW1 sustained injuries.

From the prosecution evidence, I do find that the appellant was positively identified by both PW1 and PW3. PW3 referred to the appellant as “K”. She talked to him but the appellant ignored her. PW2 informed the court that she saw a tall person at the scene but did not know him. It is established that PW2 knew the appellant and saw him attacking PW1. The appellant’s contention that PW3 colluded with PW1 to frame him is not proved. The case was reported to the police on the same day. PW4 confirmed that the complainant reported the matter to the police. That cannot be a framed case. It is PW1’s evidence that she left the appellant because he used to assault her. The appellant was positively identified and he is the one who assaulted PW1.

On the issue of sentence, I do find that the sentence is reasonable. The maximum sentence is five years. The trial court imposed a three year sentence. Given the circumstances of the case a custodial sentence was the most ideal sentence to impose. I do find that the conviction is proper. The sentence is also fair. The appeal lacks merit and is hereby disallowed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF JULY 2017**

**SAID CHITEMBWE**

**JUDGE**