REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HCRA NO.49 OF 2015

(Consolidated with CRA No.48 of 2015)

EMILY CHEPKEMOI LANGAT……..…..1ST APPELLANT

LILY CHEPNGETICH BETT ……..……..……2ND APPELLANT

VERSUS

REPUBLIC……..……..……RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho Chief Magistrate's Court Criminal Case No. 1789 of 2013 (E.M. Ayuka) dated 24th April 2015)

JUDGMENT

1. The appellants, Emily Chepkemoi Langat and Lily Chepngetich Bett were charged with the offence of grievous harm contrary to section 234 of the Penal Code. The facts of the case were that on the 9th day of August 2013, at about 5.00 p.m. at Kaitui trading centre in Kericho District within Kericho County, the two appellants and one Kiplangat Arap Chemaget jointly and unlawfully did grievous harm to Mercy Cherono Kemei. The appellants had initially been charged with assault but the charge sheet was amended on 25th September, 2014.

2. The appellants were tried before the Senior Resident Magistrate in Kericho, found guilty and were convicted and sentenced to three years' imprisonment in the judgment dated 24th April 2015. The 3rd accused was acquitted.

3. Dissatisfied with both the conviction and sentence, the appellants filed separate appeals, being Criminal Appeal Nos. 48 and 49 of 2015. The appeals were consolidated on 14th September 2016, and canvassed before me on 27th October 2016

4. The appellants raise the following grounds of appeal in their Petition of Appeal dated 10th December 2015:

> ***1. That the learned magistrate erred in law and in fact in failing to consider the fact that the prosecution evidence lacked corroboration and that the evidence was fabricated to suit the complainant.***

2. That the learned Resident Magistrate erred in law and in fact that he shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the real person who may have accosted and caused grievous harm to the complainant.

3. That the learned trial magistrate erred in law and in fact in that he failed to consider the fact that the defence raised an alibi which was never discounted or challenged by the prosecution.

4. That learned magistrate erred in law and in fact in convincing the appellant yet the charge sheet is at variance the facts of the case.

5. That the learned magistrate erred in law in considering the evidence of a single witness (PW1 the complainant) to arrive at his judgment.

6. That the judgment was bad in law and never considered the defence of the appellant. It was biased and never analyzed evidence before court.

7. That the sentence of 15 years awarded was harsh and excessive in all the circumstances of the case.

5. Mr. Motanya presented the case for the appellants. With respect to the first ground of appeal, his submissions were that there were contradictions in the prosecution evidence which should have been resolved in favour of the appellants. He pointed out that the evidence of PW1 was that the 1st accused slapped her in the face and hit her on the head with a stone with the effect of knocking out one of her teeth. He noted that this contradicts the evidence of PW2 who stated that accused 1 hit PW1 with a sugarcane on the waist, and that accused 2 had a stone.

6. According to Mr. Motanya, from the evidence of PW2, it was not accused 1 who had a stone but accused 2 whom she claimed hit PW1 on the mouth. With respect to the evidence of PW4, the appellants' submissions were that his evidence was that it was accused 1 who was armed with sugarcane and accused 2 with a stone. His submission was that the evidence was contradictory as it was not clear who had what and who hit who with what.

7. Counsel also pointed out what he termed contradictions as they emerged from the evidence of PW5, the investigating officer. In his view, the trial court erred in finding the prosecution evidence consistent, credible and as not having been challenged, rebutted or contradicted by the accused. His submission was that the evidence of PW1 was contradicted by all the prosecution witnesses.

8. With respect to the second ground, Counsel's submission was that it was not clear who knocked out the complainant's tooth, which resulted in the charge of assault causing grievous harm. It was argued on behalf of the appellants that the trial court seemed to have shifted the burden of proof to the accused persons.

9. On the appellants' third and fourth grounds, Mr. Motanya submitted that the inconsistencies revealed in the prosecution evidence should have cast a shadow of doubt in the prosecution case and should have been to the benefit of the accused person. In his view, the conviction of the accused persons was not founded in fact or law. He urged the Court to re-evaluate the evidence and come to a conclusion that is to the benefit of the accused, quash the conviction and set aside the sentence. He did not address himself to grounds 5, 6 and 7.

10. The state opposed the appeal. Ms. Keli submitted that there was overwhelming evidence from the prosecution, the proceedings were proper, the conviction safe and the sentence lawful and should not be disturbed.

11. On the appellant's first ground of appeal that the evidence was inconsistent, it was submitted on behalf of the state that PW1's evidence was corroborated by the evidence of PW2, 3 and 4, and was confirmed by PW6, the Clinical Officer, who testified with respect to the injuries sustained by the

complainant. The prosecution witnesses, PW1, PW2, PW3 and PW4 were at the scene and what they stated in court is what they saw.

12. With respect to the contention that the burden of proof was shifted to the appellants, Ms. Keli submitted that the prosecution discharged its burden of proof with respect to who was responsible for the assault on the complainant, noting that there had been three accused persons but the third accused was acquitted. To the complaint that it was an afterthought to have the charge sheet amended, the State's response was that this was within the law as section 214 of the Criminal Procedure Code provides that a charge sheet can be amended at any time.

13. On the appellant's complaint that the sentence of fifteen years (the sentence imposed on the appellants was 3 years) that the appellants were sentenced to was excessive, the State's position was that section 234 of the Penal Code provides for a life sentence for the offence, and the term of 3 years meted out was well within the law and was lenient taking into account the serious nature of the injuries sustained by the complainant.

14. Ms. Keli relied on the decisions in Nairobi **Court of Appeal Criminal Appeal No.95 of 2014- Paul Adhiambo Asanya vs Republic** in which the issue of the defence case not having been considered by the trial court was raised and dismissed, and **Nakuru High Court Criminal Appeal No. 175 of 2010- Fred Welisha vs Republic** in which the Court upheld a conviction where the issue of corroboration and consistency had been raised. She urged the Court to dismiss the appeal and uphold the conviction and sentence.

15. In his reply to the submissions on behalf of the State, Mr. Motanya distinguished the authorities relied on. His submissions with respect to **Cr. App. No.95 of 2014** was that the main issue in the case was the issue of recognition rather than identification. In his view, it was not relevant to the present case. With respect to the second authority, **Fred Welisha vs Republic,** he submitted that the issue that arose was one of admission by some of the appellants of having committed the offence, and it was therefore distinguishable as the Court in that case had alluded to the issue of corroboration under section 124 of the Evidence Act, while there was no corroboration in the present case.

16. I have read and considered the appellants' petitions of appeal, as well as the record of the trial court. As the first appellate court, I am under a duty, as was held in the case of **Kiilu & Another vs. R (2005) 1 KLR 174**, to subject the evidence before the trial court to a fresh and exhaustive examination and draw my own conclusions. In doing so, I must make allowances for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

17. The prosecution called six witnesses. PW1 was the complainant. Her evidence was that on the material day and time, she was at her stall at Kaitui where she sells milk. The appellants, accompanied by their father, the third accused before the trial court, attacked her. The 1st appellant, who was the 1st accused, slapped her and hit her with a stone, while accused 2, the 2nd appellant, hit her on the waist. One of her teeth was knocked out and was produced in court in evidence. She was rescued by people who came from the shops, among them one Irene and Johnson. She was treated at Kaitui health centre, and reported the assault at Kipsitet Police Station.

18. PW2 was Irene Chelangat. Her testimony was that on 9th August 2013, she had gone to Kaitui centre to buy milk from PW1. That people came and attacked PW1. She identified the attackers, whom she stated she had seen at the centre before, as the appellants. Her evidence was that the 1st accused hit PW1 with a sugarcane on the waist, while the 2nd hit her in the mouth with a stone. She further testified that PW1 bled from the teeth and one tooth in the lower jaw came out.

19. Johnston Rop, PW3, told the Court that he was at Kaitui at about 5.00 p.m. on the material day where he had gone to buy airtime. He heard there was a fight where Mercy, who was his neighbour, sells milk. He found Mercy, who was bleeding from the mouth, and the appellants who were beating her while she tried to shield herself. The 3rd accused, according to PW3, was holding the complainant by the neck.

PW3 also saw blood oozing from the complainant's mouth.

20. PW4, also a milk vendor at Kaitui, testified that she was at her stall when the two appellants came and attacked the complainant. Accused 1 was armed with a sugar cane and accused 2 with a stone, and accused 1 hit the complainant with a stone in the mouth.

21. PW5, PC Harman Echakara, received the complaint from PW1 on 10th August 2013. That she had reported that she had been attacked by the accused person who had inflicted injuries on her. That she said she had been beaten with a sugarcane stick. The degree of injury was initially harm but was later classified as grievous harm when the complainant lost a tooth.

22. The last prosecution witness was Misoi Isaac, the clinical officer who examined the complainant. He testified that three of her teeth were lose, and that one tooth came off. The complainant complained of chest, back and abdominal pains. He classified her injuries as grievous harm.

23. After the close of the prosecution case, the Court found that the accused had a case to answer, and he placed them on their defence. They all elected to give unsworn evidence, and called no witnesses. The 1st appellant, Emily Chepkemoi Langat, stated that she did not assault the complainant and closed her case. The 2nd appellant also denied assaulting the complainant and stated that the witnesses lied to court. The 3rd accused also denied assaulting the complainant, and that she had not told the truth. He also stated that the prosecution witnesses were not consistent.

24. In its judgment, the trial court set out and analysed the evidence adduced before it. The trial magistrate noted that the prosecution witnesses PW2, PW3 and PW4 were categorical that they witnessed the appellants assault the complainant, and that they positively identified the two as the persons who assaulted the complainant. The Court also noted that the P3 form showed that the complainant had sustained injuries, that she had three loose teeth and one came off. The Court also found that the prosecution evidence from the other witnesses corroborated that of the complainant. The conclusion of the Court with respect to the evidence of the appellants was that it was incredible, far fetched and diversionary.

25. That, then was the evidence before the trial court, on the basis of which the Court found the appellants guilty of the offence of assault causing grievous harm and sentenced them to 3 years imprisonment. It has been attacked by the appellants on 7 grounds, which I now turn to consider, and in the process, re-evaluate the evidence before the trial court.

Whether the Sentence meted out was excessive

26. I will deal first with the last ground, which is easily disposed of. The appellants complain that the sentence of 15 years awarded was harsh and excessive in all the circumstances of the case. However, it is apparent from the judgment of the Court that the appellants were sentenced to a term of three (3) years, while the penalty provided under section 234 of the Penal Code is a maximum of a life sentence. In the circumstances, should the conviction be justified, this sentence is by no means excessive. See **John Muendo Musau vs Republic Criminal Appeal No.365 of 2011,** on the circumstance under which a court will interfere with the discretion of the trial court on sentencing.

Whether the prosecution evidence lacked corroboration and was fabricated to suit the complainant

27. I have set out above the evidence that was before the trial court. PW2, PW3 and PW4 were at the scene where the alleged assault occurred. They all testified that they saw the appellants attack the complainant, they saw her bleeding from the mouth, and they testified that she lost a tooth. They all identified the appellants as the persons who attacked the complainant. There was, in my view, clear and consistent evidence before the Court with respect to the assault on the complainant, and the injuries she sustained, which were corroborated by the evidence of PW6, the clinical officer. There was also clear evidence with respect to the perpetrators.

28. While there was indeed inconsistency, as submitted by Mr. Motanya, with respect to who was wielding a stone and who a sugarcane stick, the evidence points to an assault on the complainant by the appellants, and the contradictions were not material to the essential fact that was established by the evidence before the trial court, namely that the appellants jointly assaulted the complainant and occasioned her grievous harm. As noted by the Uganda Court of Appeal in **Twehangane Alfred vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA6** cited with approval by the Court of Appeal of Kenya in **Criminal Appeal No. 5 of 201-Erick Onyango Ondeng' vs Republic** not every contradiction or inconsistency warrants rejection of evidence:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

29. Taking all the evidence before the trial court into consideration, and in light of the authorities cited above, I am unable to find that there were such inconsistencies in the prosecution case that warranted rejection of the evidence, nor can I find a basis for the contention that the prosecution evidence was fabricated to suit the complainant. I therefore find no merit in this ground.

Whether the Trial Court erred in shifting the burden of proof on the appellants

30. It is not clear from the appellants' submissions precisely how the trial court made this error. The judgment of the Court with regard to the appellants' defence is that it was incredible, far-fetched and diversionary. The appellants' defence was that they did not assault the complainant, and the 2nd appellant added that the prosecution witnesses were lying. I have considered the defence put forward by the appellants against the prosecution evidence. I find that the prosecution evidence was clear and consistent with regard to who assaulted the complainant, and the injuries she sustained, and in my view, it was overwhelming and displaced the appellants' defence. I am therefore unable to find any merit in this ground,

Whether the trial court erred in failing to consider defence's alibi defence

31. As the summary of the evidence before the Court set out above demonstrates, the appellants, in their unsworn statements, denied assaulting the complainant, and closed their cases. They did not call any witnesses, nor did they raise an alibi defence. It is not clear what the basis of this ground is as it does not emerge from the proceedings before the trial court. At any rate, it has no merit.

Whether the Trial Magistrate erred by considering the evidence of a single witness (PW1 the complainant) to arrive at his judgment.

32. One gets the uneasy suspicion that this ground, like the previous one on an alibi defence, relates to a different appeal and found its way to the appellants' petition of appeal by error. This is because, as the summary of the prosecution case above illustrates, the trial court in this case relied on the evidence of no less than four prosecution witnesses, three of whom were at the scene when the appellants assaulted the complainant, to arrive at his decision. The Court cannot find any point at which the trial court relied solely on the evidence of the complainant in reaching its decision.

Whether the judgment was bad in law

33. Ground 6 is a composite ground that attacks the judgment of the trial court on two grounds: that the trial court never considered the defence of the appellants, and that the judgment was biased and the Court did not analyse the evidence before the Court. I have read the proceedings and judgment of the trial court, and I am at a loss to understand the basis on which this ground is raised, I note that the defence of the appellants was that they never assaulted the complainant, and as noted earlier, an allegation by the 2nd appellant that the prosecution witnesses did not tell the truth. In the face of the prosecution evidence from

eye witnesses who were present when the assault occurred, and medical evidence that confirmed the injuries sustained by the complainant, it is difficult to find any merit in this complaint, and in my view, there is none.

34. In the circumstances, I find no merit in the appellants' appeal. It is therefore dismissed, and the conviction and sentence of the trial court upheld.

Dated, Delivered and Signed at Kericho this 5th day of December 2016.

MUMBI NGUGI

JUDGE