



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MIGORI

CRIMINAL APPEAL NO. 57 OF 2014

(FORMERLY KISII HCCRA NO. 50 OF 2013)

BETWEEN

SARAH MASERO.....APPELLANT

AND

STATE.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 688 of 2012

at Principal Magistrate's Court at Kehancha, Hon.T. A. Sitati, Ag SRM dated 29th January 2012)

JUDGMENT

1. The appellant was charged with the offence of causing grievous harm contrary to **section 234** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. According to the charge, she unlawfully did grievous harm to Susan Nchangwa by fracturing her left hand on 26th July 2012 at Ngukumahando Village, Kuria West District within Migori County.

2. After trial she was convicted of the lesser but cognate offence of causing actual bodily harm contrary to **section 251** of the **Penal Code** and sentenced to 5 years imprisonment. She now appeals against the conviction and sentence on the grounds set out in the petition of appeal filed on 14th June 2013. She contends that there were material contradictions in the evidence, that the evidence of the arresting officer was critical yet he was not called to testify and that the learned magistrate failed to consider her alibi defence. In her submissions, the appellant stated that she was arrested because the police did not find her son who had committed the offence. Ms Owenga, learned counsel for the State, opposed the appeal on the ground that the prosecution proved the assault and that the sentence reflected the gravity of the offence. She stated the testimony of the witnesses was clear and consistent.

3. As this is a first appeal, I am required to review the evidence and come to an independent conclusion as to whether or not to uphold the conviction making an allowance for the fact that I neither heard nor saw the witnesses testify. In order to proceed with task, it is necessary to outline the evidence as it emerged before the trial court.

4. It is not in dispute that the complainant (PW 1) and the accused are co-wives. PW 1 testified that as she was about to erect her house with her son DM (PW 2) on 26th July 2012 at about 12.30 pm, she met the

appellant and with her son, DMM. The appellant had a jembe while DMM had a panga. They questioned her why she had come to build on the plot. Without warning, the appellant hit on the hip with the blunt side of the jembe whereupon she fell while DMM hit her several times with the flat side of the panga and when she attempted to shield herself from being cut by him, DMM cut her left arm leaving her bleeding profusely.

5. PW 2 testified that when he saw what happened, he immediately raised alarm and called for help while the appellant and DMM fled the scene. PW 3, a brother to PW 1, came and found PW 1 lying on the ground with a cut wound on her left hand and bruises on the back of her head. He testified that he saw the appellant and DMM walk away. He organized for a motorbike to take PW 1 to Isebania District Hospital where she was stitched. She was later taken to Ombo Mission Hospital.

6. PW 5, a clinical officer at Kuria District Hospital, produced the P3 form and treatment notes on behalf of his colleague who could not testify. He confirmed that PW 1 was attended to at the hospital and that she sustained a deep cut wound on the left hand which was stitched and dressed up.

7. PW 4, the investigating officer, recalled that he received the PW 1's complaint regarding the assault on 28th July 2012. He investigated the matter and issued the P3 form. He concluded that the appellant and her son had assaulted PW 1 and that the appellant's son had evaded arrest.

8. When the appellant was put on her defence after the close of the prosecution case, she elected to make an unsworn statement. She denied having assaulted PW 1 and stated that between 2nd July 2012 and 30th July 2012, she was on a journey and only came back after the incident had taken place. She accused PW 1 of framing her. She called DW 1, a retired chief and farmer, who testified that the appellant and PW 1 were co-wives and that PW 1 had complained in March, 2012 that she was being prevented from cultivating the parcel of land allocated by their husband. Thereafter a clan meeting took place and each wife was shown where to cultivate. He also testified that at the meeting the PW 1 was asked to apologise to the clan as she had deserted her husband for a period of 5 years before she returned. DW 2, a farmer, testified on the appellant's behalf and stated that on the material day at about noon, he heard a scream and when he followed, he found PW 1 and PW 2. He saw that PW 1 hand was wrapped in *leso* as it was injured.

9. There is no dispute that the PW 1 was assaulted. Apart from the testimony of PW 1, PW 2 and PW 5, there is also the evidence of DW 2 which confirms that she sustained serious injuries on her left hand as a result of the assault. The appellant's defence was that she could not have committed the offence as was not present on the material day. She also contended that she was being framed by her co-wife.

10. In approaching the issue of the defence of alibi, it must always be recalled that the burden remains on the prosecution to prove the allegations made against the accused person beyond reasonable doubt. In ***Kiarie v Republic* [1984] KLR 739**, the Court of Appeal held that:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

11. In the case of ***Wangombe v Republic* [1976-80] 1 KLR 1683**, the Court of Appeal addressed itself to the treatment of defence of alibi by a court trying a case and held that even where the accused does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused.

12. The appellant's case of alibi was suggested in the cross-examination of PW 1 and PW 5. As

regards the alibi, the learned magistrate found as follows;

I therefore do not find merit in her alibi defence though it was raised at an early stage of the proceedings it was fully rebutted by the answers of all those who were witnesses at the scene. DW 1 was nowhere near the scene. When PW 2 started getting to the scene shortly after the incident, he did not explain seeing or not seeing the accused at the scene even after stating that her son was present.

13. The appellant was firm that she was away between 2nd July 2012 and 30th July 2012. PW 4, the investigating officer, gave evidence of how he issued an arrest order which was extended to Ikerege AP Camp and how the accused on had evaded arrest. He stated that it is the accused son who had evaded arrest. By the time the trial commenced he had not be arrested. He did not state how and when he arrested the appellant. The manner and time of arrest would have discounted the appellant's alibi conclusively. The learned magistrate failed to consider this aspect of the evidence. Furthermore, I note that the charge sheet does not state the date of arrest but it shows that she was brought to court on 6th August 2012 which 6 days after the day she stated that she had returned. This evidence taken together with the evidence of a family dispute and the fact that the appellant's son seems to have been the perpetrator of the offence, lends credence to the appellant's defence.

14. In the circumstances, I find the conviction unsafe as the prosecution failed to prove beyond reasonable doubt that the appellant was the malefactor.

15. The appeal is allowed. The conviction and sentence quashed and the appellant set free unless otherwise lawfully held.

DATED and **DELIVERED** at **MIGORI** this 6th day of March 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.