



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 23 & 21 OF 2013 (CONSOLIDATED)

1. **PATRICK KIMILU MUIA**
2. **NDUKU KIMILU APPELLANTS**

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. M.O. Kizito Principal Magistrate delivered on 28/02/2013 in Makindu Principal Magistrate Criminal Case No. 607 of 2009)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The 1st Appellant, **Patrick Kimilu Muia** and the 2nd Appellant, **Nduku Kimilu** were charged with the offence of grievous harm contrary to **section 234** of the **Penal Code**.

The particulars of the offence were that on the 3rd day of January 2009 in **Makueni District** within **Eastern Province**, jointly willfully and unlawfully did grievous harm to **R K M**.

2. When arraigned before the trial court, the Appellants pleaded not guilty. After a full hearing, the Appellant were convicted and sentenced to ten (10) years imprisonment each. The Appellants were aggrieved by both the conviction and sentence and appealed to this court. Their separate appeals were consolidated and heard as one. This judgment is therefore in respect of both appeals.
3. The grounds of appeal can be summarized as follows:-

That the trial magistrate failed to comply with the provisions of section 207 of the Criminal Procedure Code Cap 75 Laws of Kenya.

That the evidence of prosecution witnesses was contradictory and inconsistent.

That the evidence by the prosecution lacked corroboration.

The prosecution case was not proved beyond reasonable doubt.

That the defence case was rejected without any reasons being given as required by section 169 (1) of the Criminal Procedure Code.

4. The appeal was opposed by the state. I have considered the submissions made by the Appellants and by the learned counsel for the State.
5. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
6. The case for the prosecution was that on 3/1/2009 at about 8.00 a.m., the complainant who was a standard eight drop out was at home with his parents and other members of his family. The 2nd Appellant who is a neighbour came to the home and made inquiries about five of her missing goats. The goats had not been seen there. The 2nd Appellant left.
7. The complainant was sent by the parents to the river to fetch water. The complainant left with his bicycle. On the way the complainant was stopped by the 1st and 2nd Appellants who he knew as husband and wife. The Appellants grabbed the complainant by the back, tied him up with a rope and tied him to a tree. They then blocked the complainant's mouth with a handkerchief and proceeded to pierce the eyes with a needle and tried to gouge them out with a knife. A boy from the neighbourhood who witnessed the incident raised an alarm.
8. PW 2 **J M** the complainant's father, and neighbours PW3 **Christine Kavene** and PW4 **Ruth Wambua** rushed to the scene. The complainant who was by then unconscious was rescued from the Appellants who were also armed with a catapult and a panga. The complainant was rushed to hospital. The complainant was examined and treated. A report was made to the police and a P3 form issued. The doctor confirmed that the complainant had suffered grievous harm. The complainant was referred to **Kenyatta National Hospital**. The Appellants were arrested and subsequently charged with the offence herein.
9. In his defence, the first Appellant stated that the complainant did not give his correct name to the police and went to make a report after 46 days. That on 1/1/2009 at about 2.00 p.m., his children were herding goats and after asking the children if they had seen his (complainant's) goats, the complainant held one of the children and strangled and defiled the child. The 1st Appellant produced the child's treatment notes as exhibits. An attempt made by the complainant to settle the matter of the defilement out of court on the material day failed and instead the 1st Appellant was assaulted by the complainant who hit him with a piece of wood. About 50 members of public gathered at the scene and demanded to know why the complainant had assaulted him.
10. The 1st Appellant made a report of the assault at **Sultan Hamud Police Station** and was issued with a P3 form and he was treated at **Kilome Nursing Home** where the P3 form was filled in. The Appellant was treated further at Machakos District Hospital. The Appellant produced the P3 form and the treatment notes as exhibits and stated that he was later arrested, kept in police custody for nine days then charged with the offence herein. The Appellant stated that the complainant went into hiding but the Director of Public Prosecutions recommended that the complainant be arrested and charged with the offence of defilement.
11. The 2nd Appellant described herself as a farmer and stated that police officers arrested her from her home and escorted her to **Sultan Hamud Police Station** without giving her the reasons. The 2nd Appellant was placed in police custody and was later charged with an offence that she knew nothing about.
12. On the day the complainant testified in court, he was a student at [particulars withheld] **School** for the blind. However, on the material day the complainant had full sight. His evidence was that he saw the 1st and 2nd Appellant who attacked him. According to the complainant's evidence, he knew the Appellants as his neighbours. It is noted that the offence took place in broad daylight at about 8.00 a.m.
13. The complainant's father (PW2) and neighbours (PW3 and PW4) gave evidence that corroborated the complainant's evidence. These three witnesses (PW2, 3 and 4) knew the Appellants well as neighbours. It was also the evidence of PW3 and PW4 that they arrived at the scene at about 9.00 a.m. in broad daylight.
14. The evidence of the complainant (PW1) and that of PW2, 3 and 4, establishes that they saw the 1st and 2nd Appellant piercing the eyes of the complainant and gouging them out with a knife. It also comes out that the complainant's hands were tied and his legs were tied to a tree. Some of the witnesses described the object used to pierce the eyes as a needle while others stated that the same was a safety pin. The complainant described the time of the offence as shortly after 8.00 a.m. while PW3 and PW4 stated that the time was about 9.00 a.m. These are however minor

- discrepancies which are immaterial have no impact on the case.
15. The Investigating Officer, PW5 **PC Alex Kinya** produced the safety pin used to pierce the complainant's eyes and the pieces of rope used to tie the complainant as exhibits. This clearly shows a safety pin was used and not a needle.
 16. The evidence of PW5 **Dr Hannington Mibei** confirmed that the complainant had a protrusion of the right eye ball and loss of vision in the right eye and a prolapsed left eye ball. The age of the injuries was described as three hours probably caused by a sharp object. The degree of the injury was assessed by the doctor as grievous. The doctor's evidence further corroborates the rest of the prosecution evidence.
 17. Nothing turns on the defence by the 1st Appellant that the complainant did not give his correct names to the police and that the complainant did not report to the police until after 46 days. It is clear from the record that the Appellant fell unconscious and was admitted in hospital. The complainant could not have managed to go to the police station in the state that he was in.
 18. The 1st Appellant raised the issue that his child had been defiled by the complainant and that he had reported the matter to the police. The Appellant ought to have left the issue to the police to investigate and take action. There was no justification for breaking the law. I am not persuaded by the 1st Appellant's contention that the dispute due to the alleged defilement led the complainant to frame up this case against the 1st Appellant. PW 3 and PW4 were neighbours and therefore independent witnesses. The injuries sustained by the complainant were real and were confirmed by the doctor.
 19. The 2nd Appellant's defence that he was arrested for an offence she knew nothing about does not cast any reasonable doubts on the strong prosecution case.
 20. Having evaluated the evidence on record afresh, I am satisfied that the conviction was based on sound evidence. The evidence reveals that the 1st and 2nd Appellant had a common intention and both of them participated in causing harm to the complainant. It does not therefore matter which appellant played exactly which role. As provided under **section 21** of the **Penal Code**;-

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

21. On the issue raised by the defence regarding overstay in police custody and not being informed of the reasons for the arrest, the remedy lies in a civil suit.
22. The sentence of ten years imprisonment meted out by the trial court is within the law. Although the Appellants are husband and wife, the sentence is reasonable and cannot be termed as harsh taking into account the grievous harm and the cruelty visited on the complainant. Consequently, I find the appeal has no merits and dismiss the same. The conviction and sentence by the lower court are held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 3rd day of June 2014.

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B. THURANIRA JADEN

JUDGE