



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 311 OF 2012**

**STEVEN MUSEVE LWENYI ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the judgment of [L. M. NABIBYA. R.M.] from the original Criminal Case No.809 of 2011 in Butali Senior Resident Magistrate's Court.)*

**J U D G M E N T**

The appellant was charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The particulars were that the appellant and another *on the 30.10.2011 at Bukhakunga village in Salala sub-location, Kakamega North District within Western Province jointly and unlawfully assaulted CATHERINE SHILWATSO thereby occasioning her actual bodily harm*. The appellant was convicted of the offence and sentenced to serve two years on probation.

The grounds of appeal are that the case was not proved to the required standard, the prosecution case was full of contradictions, the appellant's evidence was rejected, the conviction is based on circumstantial evidence, the decision is based on matters that were not brought up in the evidence, the trial court failed to analyze the evidence properly and the magistrate did not consider the appellant's submission and rejected his defence.

Mr. Onsando, counsel for the appellant argued all the above grounds together. Counsel submitted that there was contradiction on an issue related to some herbs that were allegedly found by the complainant and it was conceded that the appellant and PW1's father in law were not in good terms. The injuries allegedly were caused by a slap and twisting of the neck but the doctor noted injuries on the right cheek near the right eye and shoulder. The P3 form was filled on 13.12.2011 while the complainant was injured on the 20.12.2011. The person who filled the P3 indicated that the injuries were one and half hours old. No treatment notes were produced. Counsel relies on the case of CHARLES KOLI ANYOSO V REPUBLIC Kakamega Criminal Appeal No.90 of 1998.

Miss Opiyo, State Counsel, opposed the appeal. Counsel submitted that the complainant was treated as an outpatient and the outpatient number was given. The medical officer testified that he relied on the treatment notes to fill the P3 form and therefore the evidence was corroborated. The appellant was identified by the complainant and PW2.

The record of the trial court shows that three witnesses testified for the prosecution. PW1 CATHERINE SHILWATSO testified that the appellant is a brother to her father in-law. On the 29.10.2011 at about 6.00 a.m. her husband found some herbs at their door. These were roots and thorns. In the evening she took them to her eldest father in-law who promised to convene a family meeting. The eldest father in-law informed the appellant who is his brother and the appellant went to the complainant on 30.10.2011 at 8.00 a.m. and started quarrelling her. The appellant assaulted her using firewood alleging that PW1 was destroying his son's house and she should leave him alone. PW2 went to the scene and assisted her. She was slapped on the back and right hand on the wrist. Her neck was also twisted. She also sustained injuries on the head. The family tried to resolve the matter at the chief's office but the negotiations did not materialize. She was treated at Malava district hospital on the 30.10.2011 and her P3 form was filled.

PW2 JAMES MWENJE testified that on the 30.10.2011 at about 9.00 a.m. he went to PW1's house to collect his bicycle that was to be repaired by PW1's husband. PW1's husband was not at home but the bicycle had been repaired and it was given to him by the children. He saw the appellant hitting the complainant using a stick and also boxing her. PW2 separated them and PW1 went to hospital. He knew the appellant as a father in-law to the complainant. PW3 SIFUNA KIZITO was a clinical officer at Malava district hospital. On the 30.10.2011 PW1 went to the hospital at about 9.00 a.m. alleging to have been assaulted by her in-laws. On examination she had swollen hematoma on the right cheek near the right eye, tenderness on the left ear involving the left cheek, haematoma on the anterior shoulder back and swelling of the right wrist joint. PW1 was put on antibiotics and analgetics. According to PW3 the injuries were about one and half hours old. He classified the injuries as harm.

The appellant was put on his defence and gave sworn testimony after he was affirmed. He testified that on the 30.10.2011 his brother by the name **WILSON SHAKAVA** called him and informed him that the complainant had found some witchcraft materials at her home that were planted by him. The materials included some roots. He tried to inquire from Wilson and the complainant also went there and nothing happened. He later heard that he had assaulted PW1. He was arrested after a long period and charged in court. Under their customs if he had committed the offence he would have been fined by the clan. He further testified that he is not in good terms with PW1's father in-law who is his brother. They tried to resolve the matter at home but PW1 abused him. He denied committing the offence.

The main issue for determination is whether the prosecution proved its case against the appellant. Counsel for the appellant contends that the P3 form was filled after a long time. It is clear from the medical evidence that PW1 went to hospital that morning and she was attended at the hospital. That is not unusual. Under normal circumstances the P3 form will not be filled until the complainant has fully recovered. The P3 was issued by the police on the 30.10.2011 and it indicates that the matter had been reported to the police at 11.20 a.m. The P3 form was filled the 13.12.2011. This was a period of about one and half months. It is on record from both the appellant and the complainant that parties were trying to resolve the matter at home. There is nothing wrong in the fact that the P3 was filled after one and half months had elapsed. The outpatient number at the hospital was given and it is clear that P1 was treated at Malava district hospital. PW3 was cross-examined and it cannot be held that he filled the P3 form without having seen the treatment notes. I therefore find that the complainant was indeed treated at the hospital and the Pw3 form was properly filled.

The next issue is whether the appellant assaulted the complainant. According to the complainant she took some herbs to her elder father in-law. I presume this was Wilson Shakava. The appellant went to her house in the morning and started quarrelling her. He started assaulting her. PW2 testified that he also saw the appellant assaulting PW1 with a stick and boxing her. Counsel for the appellant contends that the alleged injuries suffered by PW1 were different from those noted on the P3 as PW1 alleged that her neck was twisted but that was not the case. From the evidence of PW2 it is clear that PW1 was assaulted using a stick and fists. PW2 did not describe where PW1 was specifically assaulted. PW1 herself indicated that she was injured on the right wrist, neck, head and back. According to PW3 the complainant had injuries on the back of the shoulder, tenderness on the left ear involving the left cheek and swelling of the right wrist joint. I do find these injuries to be consistent with those described by PW1. The treatment was also consistent to the injuries. Counsel contends that only painkillers were issued but there was no fracture or a cut that could have called for dressing of the same. The medical evidence is not hearsay as alleged.

From the evidence on record, it is clear that the appellant got annoyed as he concluded that PW1 was referring to him as a witch. He decided to confront PW1 yet his brother had promised to call for a meeting. It is also clear that there is animosity between the appellant and the complainant's father in-law. The evidence is clear as it is established that PW1's husband was not at home and also her father in-law was not at the scene. There is no evidence that the complainant was trying to assist her father in-law in settling his scores with the appellant. The appellant concedes that the issue of herbs and roots was raised by the complainant. The defence evidence does not raise doubt on the prosecution evidence. The prosecution evidence did establish that PW1 sustained injuries and was treated at Malava district hospital. It is also established that PW2 saw the appellant assaulting PW1. There is no evidence that nothing happened as alleged by the appellant. The incident occurred at PW1's house and it is normal that

family members would avoid getting involved in such a dispute. PW2 was an independent witness and was subjected to cross-examination by counsel for the appellant. Given the evidence on record I am satisfied that the incident occurred and the appellant assaulted PW1. The case was proved beyond reasonable doubt and the conviction is proper.

In the end I do find that the appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 10<sup>th</sup> day of July 2014

**SAID J. CHITEMBWE**

**J U D G E**