REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
APPELLATE SIDE
CRIMINAL APPEAL NO. 375 OF 1998

(From Original conviction and Sentence in Criminal Case No. 46 of 1997 of the Resident Magistrate's Court at Gatundu: J.L. Wanjohi Esq.)

MARY MUTHONI WAITHAKA.....APPELLANT
-Versus-
REPUBLIC.....RESPONDENT

Coram: Osiemo J.

Mr. Mohammed for the appellant

Mr. Gikonyo for the State

Mr. Onduma - Court Clerk

JUDGMENT

The appellant was charged in the Resident Magistrate's Court in Gatundu with 2 offences. Grievous harm contrary to Section 234 of the Penal Code and giving false information to a person employed in the Public Service contrary to Section 129 (b) of the Penal Code. He was convicted and for the first offence he was sentenced to 4 years imprisonment and 3 years for the second offence. Her appeal to this court is against both conviction and sentence.

Briefly the prosecution case was that on 16.6.96 at about 7.30 p.m. the complainant left his home and went to Mundoro, the home of his brother to collect his tea picking baskets which he had earlier given to his brother. On arrival he called the children but there was no response. He pushed the door open. In the house he found the son of the appellant called Ngunjiri and 2 daughters called Naomi and Ruth. The appellant then came in through the rear door. He asked them why they did not respond and open the door for him when he knocked. The appellant who was around with a panga asked him to leave.

The appellant then asked his children to scream. He decided not to leave until members of the public came and he explained to them what was happening. When members of the Public came and listened to the story, they advised him to leave.

As he was leaving and after he had made about 3 steps, someone cut him from behind. He recognised the person who had cut him as the appellant. He was also hit with a stone and he fell down unconscious. He regained consciousness after about half an hour and went and reported to APC Karuri. When he arrived at the Chief's camp he met the appellant there. She had reported to APC Karuri, PW4 that the PW1 had broken the door of her house which was the basis of the 2nd count. He was taken to Gatundu hospital where he was admitted for 18 days.

The appellant in her defence denied to have assaulted PW1. In her evidence she stated that she is married to the brother of PW1 but she had domestic problems with her husband, and he deserted her and the children. The animosity between her and her husband extended to PW1. On the material date PW1 came to her house at about midnight. He knocked at the door but she declined to open for him. PW1 broke the door and entered. PW1 was alone. She screamed and went and reported the matter to PW4. But PW4 did not take any action because he used to drink with PW1. She said she did not know who injured PW1.

Counsel for the appellant submitted that the prosecution had not proved the case against the appellant

beyond any reasonable doubt as required in criminal cases and the learned state counsel concedes. PW1 alleged that he was cut outside the house by the appellant. It was dark and he did not state how he managed to identify the appellant as the one who cut him. PW1 said when he was cut there were more than 10 members of the public who had heeded the screams by the appellant and who had asked him to go away from the house of the appellant. But none of those members was called to testify.

> "The prosecution must make available all witnesses necessary to establish the truth, even of their evidence may be inconsistent" BUKENYA AND OTHERS V. UGANDA 1972 E.A. 549.

The evidence against the appellant in respect of count 1 was far below the standard required to warrant a conviction in a criminal case.

In count 2 the appellant was convicted with the offence of giving false information to a person employed in the public service contrary to Section 129 (b) of the Penal Code. The particulars of the alleged false information were that when PW1 forcefully entered her house, at about midnight, she went and reported to PW4, APC Karuri that PW1 had damaged her door. PW1 had admitted in his evidence that he went to the appellant's house at night and called PW1 refused to open for him. He then forced the door open and asked the complainant why she had refused to open for him. Obviously if the door was locked from inside and was forced open, damage must have been occasioned. So when the appellant went and reported to PW4 that PW1 had forced her door open and in the process damaged it, she did not give false information. This count two was not proved.

All in all and as I have stated above it would be unsafe to allow the conviction to stand.

I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated, delivered and signed at Nairobi this 20th day of July, 1998.

J.L.A. OSIEMO
JUDGE

20.7. 1998