



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 26 OF 2018**

**FANCY CHESENGEI TOO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Sotik PM's Court Cr Case No. 1120 of 2017 – Hon Oruo – RM)*

**JUDGMENT**

The appellant herein was convicted and sentenced to five years imprisonment in absentia for the offence of grievous harm C/S 234 of the Penal Code.

The particulars are that on the 1<sup>st</sup> day of October 2017 at Kenya One in Sotik sub county, unlawfully did grievous harm to Cythia Bella Achieng.

This is the first appellate court. It has a duty to re-evaluate and consider a fresh the evidence on record so as to arrive at its own conclusions.

**Okeno –V- R 1972 EALR**

The prosecution in this case called 5 witnesses and the Accused calling one (herself).

**Brief Facts**

Hilary Koech (PW1) is a neighbour of the complainant and the appellant. They stay together in one plot at Sotik. He testified of how the two (Cynthia and Fancy) exchanged bitter words after Cynthia's child had defecated in the house of Fancy(the accused).

He heard Cynthia scream and he went to check. He found Cynthia on the ground with the accused on top strangling her. He went and pulled the accused away. Cynthia was claiming that her eye had been injured. The following morning, he noticed that it was swollen.

PW2 (Irene Chesang) also a neighbour of the two (Fancy and Cynthia) testified to have seen them quarreling at around 8.00 p.m. Cynthia was being strangled by Fancy. PW1 went to separate the two. Cynthia was saying that she had been injured on the eye by Fancy. The quarrel ensued after Cynthia's child defecated in the house of Fancy.

The complainant testified to the effect that the accused is her neighbour at Kenya One Sotik. A quarrel ensued between the two over her child who had defecated at the door of the accused. The Accused wrestled her to the ground and hit her eye and the head. Her daughter joined her. The accused got hold of her neck. She was rescued by Alice and Koech. Her eye got swollen and she was

not able to see. The following day her mother took her to Kaplong Hospital for treatment. The matter was reported to police at Sotik. She was issued with a P3 form which was later filled at Longisa Hospital. She further testified that she was unable to see with the eye that was injured.

PW4 Jackline Chepkemoi is a clinical officer. She examined the complainant on 5/10/2017 for a history of assault on 1/10/2017. She had sustained injuries to the right eye. Anterior aspect of the neck.

She referred the matter to the Ophthalmologist. The right eye was damaged and was completely blind.

On 24<sup>th</sup> day of November she amended the degree of injuries to read grievous harm from the initial one of assault.

In her defence, the appellant testified that the complainant was her neighbour at Kenya One –Sotik. She further testified that the complainant's child went to play with hers and later defecated at the door.

The complainant's house girl went and cleaned the stuff (feaces). Later the complainant went and started hurling insults to her stating that she was chased from Cheruiyot estate because she was a witch and that she should have licked the mess dropped at her doorstep. She threw a stone and a jerrycan which missed her. The appellant conceded to have pushed the complainant who fell down and the landlord intervened and the complainant ran away. 9 days later police officers went and arrested her.

I have perused the submissions by the appellant's and in particular the allegation that the prosecution amended the charge sheet in the middle of the proceedings without producing in court an expert medical report to justify the amendment.

A perusal of the petition of appeal does not disclose this to have been one of the grounds of appeal. It is also submitted that the appellant was not given an opportunity to mitigate. This is also not one of the grounds of appeal.

A perusal of the proceedings shows that on 6/12/2017 the prosecutor did indicate that they were desirous of amending the charge sheet.

Counsel for the accused Mr. Birech is shown to have stated that he did not have any objection as regards the amendment.

The amended charges was read over to the accused who stated that it was not true.

Counsel for the accused made an application to recall PW1 and PW3. The court allowed the application for the recall of the three witnesses who had testified. These witnesses were re-called and they were cross-examined. There was no prejudice caused to the accused.

The Doctor who examined the complainant was of the view that complainants injury to the eye was permanent by reason of being unable to see.

A P3 form was produced which showed that the degree of injuries sustained by the complainant was that of grievous harm.

It is apparent that the accused was sentenced while in absentia. A warrant of arrest was later issued. It is apparent that she was not given the opportunity to mitigate. It is apparent that the accused after she was sentenced in absentia decided to find ways to defeat the ends of justice by trying to bribe some court officials but this was not helpful to her as she was later arrested. Investigations revealed that the accused had given Kshs.20,000/- to Korir to give to Kemei so as to defeat the ends of justice. The money was later recovered and given to the accused in court.

Korir was to be investigated and charged if found culpable.

Clearly the accused has not come to court with clean hands more so on the issue of sentencing. There was overwhelming evidence against her. The conviction was safe. As for the sentence, the offence of causing grievous harm carries a maximum sentence of life imprisonment. She was sentenced to five years imprisonment. This sentence is not harsh nor is it excessive. The appeal has no merit. I would have been minded of reducing the sentence but the act of bribing or attempting to bribe court officials must be

abhorred. Both conviction and sentence are upheld. Appeal is disallowed.

**Judgment delivered dated and signed in open court this 17<sup>th</sup> December 2018** in the presence of learned counsel Miss Kariuki. Mr Kandet holding brief Birech for appellant present.

Court Assistant Mr. Rotich.

**M. MUYA**

**JUDGE**

**17/12/2018**



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