



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO E027 OF 2020

CALVIN JONYO OLUOCH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon S. N. Telewa (SRM) delivered at Kisumu

Chief Magistrate's Court in Criminal Case No 873 of 2018 on 10th December 2019)

JUDGMENT

INTRODUCTION

1. The Appellant herein was jointly charged with another with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. However, the Learned Trial Magistrate, Hon S. N. Telewa, SRM was not satisfied that the Prosecution had proved the offence of robbery with violence beyond reasonable doubt and on 10th December 2019, she convicted the Appellant and his Co-Accused of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. She sentenced him to five (5) years imprisonment.

2. Being dissatisfied with the said Judgement, on 22nd December 2020, the Appellant lodged the Appeal herein. His Petition of Appeal was undated. He relied on six (6) grounds of appeal.

3. His undated Written Submissions were filed on 9th November 2021 while those of the Respondent were dated 21st September 2021.

4. This Judgment is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the said Grounds of Appeal, the respective Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

a. Whether or not the Prosecution proved its case beyond reasonable doubt.

b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.

8. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

9. Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) of the Petition of Appeal were dealt with together under this head as they were all related.

A. BODILY HARM

10. The Appellant submitted that No 88306 PC George Munala (hereinafter referred to as "PW 4") failed to visit the scene of the crime in order to take the clothing (**sic**) to the government chemists for the requisite tests to confirm his linkage to the alleged offence. He argued that this watered down the decision of the Trial Court.

11. He contended that Judith Awino Oluoch (hereinafter referred to as "DW 3") contradicted herself on the meal he was alleged to have prepared on the material night due to tension. He faulted the Trial Court for having failed to interrogate her further to ascertain the course of the discrepancy.

12. On its part, the Respondent submitted that the Prosecution proved its case against the Appellant herein beyond reasonable doubt. It contended that the Complainant, John Oduor (hereinafter referred to as "PW 1") testified that on 9th December 2018 at 8.00pm, he met the Appellant in the company of another, they assaulted him and took money from him.

13. It further contended that PW 1 testified that the Appellant, in the company of another, cut him severally, a fact which was corroborated by PW 2. It added that PW 1 was able to see and recognise his perpetrators since they were neighbors and he was assaulted near a building which had lights.

14. PW 1's evidence as was summarised by the Respondent herein. He spoke to his attackers and recognised them by name as they were his neighbours who were known as Ian and Aba. He was categorical that they stole a sum of Kshs 4700/= from him and cut him with a panga. He stated that he was rescued by a man called Bosco who gave out his motor bicycle for him to be taken to hospital. He averred that he forwarded his blood-stained clothes to the police. It was his further evidence that when the Appellant's Co-Accused was arrested by the Chief, he gave the Chief a sum of Kshs 1,000/= and sought for forgiveness.

15. Linda Omollo (hereinafter referred to as "PW 2"), a Clinical Officer at Nyalenda Health Centre produced the medical book and P3 form as PExhibit 1(a) and 1(b) respectively. She testified that PW 1 sustained a cut wound on the leg which was stitched, abrasions on the thigh of the right lower limb and a cut wound on the left lower limb. She averred that the injuries were classified as harm and the patient was placed on antibiotics.

16. PW 4 was the investigations officer. He testified that on 10th December 2018, he was at Nyalenda Police Post when PW 1 came and reported that on 9th December 2018 at about 2000hrs he was attacked and his money stolen. He testified that PW 1 had an injury on the head and on his two (2) legs. He produced PW 1's bloody jacket and a cape as PExhibit 2(a) and 2(b) respectively.

17. Olive Idagha (hereinafter referred to as "PW 3") corroborated PW 1's evidence. Her evidence was that on the material night at about 8.00pm, she heard people arguing about money and then heard someone call out her name. When she got to the scene which was lit with florescent lights from the balcony, she realised that it was PW 1, her former landlord.

18. She further testified that she saw two (2) people who were well known to her running away. She identified these persons as having been the Appellant and his Co- Accused. It was her further testimony that PW 1 had wounds which she tried to clean and assisted him to get to the hospital.

19. The Appellant herein, denied having known his Co-accused and added that he only got to know him at the cells. He gave an *alibi* defence. He stated that on the material date, he was in the house cooking 'ugali and sukumawiki'. His mother, DW 3 confirmed that he was in the house but he was cooking 'ugali and omena'. The Trial Court had found this evidence to have been contradictory.

20. Having critically analysed the evidence on record, this court found that the evidence presented by the Prosecution supported the allegation made by PW 1. PW 1 and PW 3 positively identified the Appellant and his Co-Accused as the persons who attacked PW 1. The area was well lit with light florescent bulbs which was conducive for positive identification. Going further, PW 2 and PW 3 corroborated PW 1's evidence regarding the injuries that he sustained. The medical records showed that PW 1 sustained cut wounds.

21. The fundamental ingredients of the offence of assault causing actual bodily harm were spelt out in the case of **Ndaa vs Republic [1985] eKLR** which are the victim must have been assaulted and actual bodily harm occasioned. Further, in the case of **Alex Kinyua Murakaru vs Republic [2015] eKLR**, the court held that actual bodily injury was any physical injury to a person which was not permanent.

22. The Appellant's assertions that PW 1's clothing were not taken to a government analyst to find out if he had any linkage with the offence was neither here or there. His defence of *alibi* did not outweigh the Prosecution's case which was watertight and consistent.

23. This court was therefore satisfied that the Prosecution proved beyond reasonable doubt that indeed, Appellant herein and his Co-Accused inflicted serious injuries to PW 1 and occasioned him actual bodily harm.

24. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

B. SENTENCE

25. Notably, the Appellant did not appeal on sentence. However, he submitted on that and therefore this court found it prudent to determine the same.

26. The Appellant was convicted of assault causing actual bodily harm contrary to Section 251 of the Penal Code Cap 63 (Laws of Kenya). The said Section 251 of the Penal Code provides that :-

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.”

27. He was sentenced to the maximum five (5) years imprisonment. Whereas it was not mandatory for the Trial Court to sentence him to the maximum five (5) years imprisonment and it had the option of sentencing him from a day up to five (5) years imprisonment, this court was not persuaded that it should reduce the sentence of five (5) years for two (2) reasons. The Trial Court did not err when it sentenced the Appellant to five (5) years imprisonment because that was a lawful sentence stipulated by the law. Secondly, all the ingredients for the offence of robbery with violence were present.

28. According to Section 295 of the Penal Code, it is stipulated that:-

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

29. Section 296(1) and (2) of the Penal Code states that:-

1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

30. In this particular case:-

1. There was more than one person who attacked PW 1 herein;

2. He sustained actual bodily harm;

3. Both the Appellant and his Co-Accused were armed with a panga at the material time; and

4. They robbed PW 1 money. Whereas the Trial Court had argued that there was no proof that PW 1 was robbed, his evidence was corroborated by PW 3 who testified that there was an argument about money before PW 1 called out her name. This court was more persuaded by PW 1's evidence that the Appellant and his Co-accused robbed him of his money. There was nothing to show that they assaulted him without having had an ulterior motive.

31. Having said so, this court struggled greatly with the question of whether or not to set aside the conviction and sentence and substitute the same with a conviction of robbery with violence which attracts a mandatory death sentence. However, it opted not to disturb the conviction of the offence of causing actual bodily harm for four (4) reasons.

32. The first reason was that the Chief PW 1 said was given money by the Appellant's Co-Accused was not called to testify to corroborate PW 1's evidence that indeed the Appellant and his Co-Accused robbed PW 1 of his money. This could have buttressed PW 1's case that indeed the Appellant and his Co-Accused robbed him of his money. The second reason was that the Respondent did not ask for the substitution to robbery with violence. Notably, the court is a neutral arbiter and ought not to enter into the arena of a dispute between disputing parties.

33. Thirdly, the Appellant herein was charged with a co-accused. It was not clear to this court if his Co-Accused had appealed against his sentence. To avoid any inconsistencies between sentences that would be meted out to two (2) persons who were involved in the same offence, it was best that the conviction of the offence of actual bodily harm be left undisturbed.

34. Fourthly, the Appellant never appealed against the sentence and only submitted on the same.

DISPOSITION

35. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 22nd December 2020 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as it was safe to do so.

36. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH 2022

J. KAMAU

JUDGE