



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.26 OF 2019

GILBERT KOROS.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment by HON. E. W. KARANI (RM)

in CMCC Case No.525 of 2018 delivered on 19/7/2019)

JUDGMENT

1. The Appellant was convicted with the offence of Grievous Harm Contrary to Section 234 of the Penal Code and sentenced to ten (10) years imprisonment.
2. The particulars of the charge were that on 25/11/2018 at **LESIRWO VILLAGE, KIPKELION** Sub-County within Kericho County the Appellant maimed one **ALFRED KIRUI**
3. The Appellant was charged with a Second Count of assault Contrary to Section 251 of the Penal Code in that on the same material particulars as in Count 1 (above), the Appellant assaulted **JOYCE KIRUI** thereby occasioning her actual bodily harm.
4. The Prosecution evidence in summary was that on the material day at 11 a.m. the Complainant was walking to the shopping centre when the Appellant who is a rider rode his motorcycle past him and stopped slightly ahead of him and parked his motorcycle and he assaulted the Complainant using his fist.
5. The Complainant was injured on his head and mouth and his teeth loosened and he lost consciousness. He was taken to Kipkelion Hospital by good Samaritans and after going back to his home, the Appellant pursued him with a panga and a stick and threatened to kill him but the Complainant was sneaked away from his home through the window to safety.
6. The Complainant's wife who was also assaulted by the Appellant said she arrived at her home and found the Complainant lying in bed with a bandage on his head and a swollen face. She said she was injured when the Appellant arrived with a panga and attempted to break into her house armed with a panga in a rage threatening to kill the Complainant. She was treated at Londiani Hospital.
7. The Clinical Officer from Kipkelion Sub-County Hospital examined the Complainant and produced Medical Examination Notes. He assessed the degree of injury as main due to loosening of the teeth.
8. The Appellant said he heard screams from the neighbourhood and rushed there and found David Kirui a brother to the Complainant with whom he had differences over sale of a tree. He said David Kirui had threatened him with unspecified action.
9. The Trial Court found the Appellant guilty as charged and convicted him with the offence of Grievous harm and sentenced him to ten (10) years imprisonment.
10. The Appellant has now appealed to this Court against conviction and sentence on the grounds that the Trial Court convicted him on inconsistent evidence which was insufficient and uncorroborated.
11. The Appellant also appealed on the ground that Section 151 as read with Section 165 of the Criminal Procedure Code was contravened and further that Article 50 (4) of the Constitution was contravened.

12. The parties filed written submissions which I have duly considered. The Appellant gave mitigation instead of submissions in writing that he is remorseful and he has learnt the hard way and currently he has converted to Christianity.
13. He further said that he is the Chief bread winner for both his young nuclear family and also his extended family which has a low standard of living.
14. He asked the Court to give him a lesser sentence or a non-custodial sentence or to set him at liberty.
15. The Respondent opposed the appeal and submitted that the Prosecution called seven (7) witnesses whose evidence was consistent, corroborative, cogent and watertight and the same was not displaced by the Appellant's defence.
16. The Respondent also submitted that after inflicting grievous harm on the Complainant, the Appellant again followed the Complainant to his home armed with a machete and threatened to kill him
17. The Respondent also submitted that Section 151 of the Criminal Procedure Code was not contravened as all the witnesses were sworn before testifying and further Section 165 of the Criminal Procedure Code was repealed by Act No.5 of 2003. Further, that Article 50 (4) of the Constitution was not contravened as there was no evidence obtained in a manner that violates any of the fundamental freedom in the bill of rights.
18. Finally, the Respondent submitted that Section 163 of the Criminal Procedure Code deals with persons of unsound mind and the same is not relevant in this case.
19. This being a first appeal my first duty is to re-evaluate the evidence adduced before the Trial Court and to arrive at my own conclusion bearing in mind that the Trial Court had the advantage of seeing the witness.
20. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

21. The issues for determination this appeal are whether the Prosecution proved the guilt of the Appellant to the required standard and whether Article 50 (4) of the constitution and Section 151 of the Criminal Procedure Code were violated by the Trial Court.
22. The Prosecution called Seven (7) witnesses whose evidence was corroborative and consistent. The incident occurred at 11 a.m. and although the Complainant was alone when he was assaulted by the Appellant, the two are neighbours and the Complainant knew the Appellant well.
23. After inflicting grievous harm on the Complainant, the Appellant again pursued the Complainant to his home and armed with a panga threatened to kill the Complainant.
24. There is no evidence that Section 151 of the C.P.C. was contravened since all the witnesses were sworn before they testified. There is also no evidence that Article 50 (4) was contravened since all the evidence was lawfully obtained.
25. I find that the Appellant appears to have abandoned the grounds of appeal and in submissions he gave mitigation instead of submitting on his grounds of appeal.
26. The injuries sustained by the Complainant were classified as maim and yet the Complainant's teeth did not fall off. The Clinical Officer said he classified the injuries as harm because the teeth loosened.
27. I find that the evidence disclosed a lesser charge of assault as opposed to Grievous Harm.
28. The court has power to substitute a conviction for a lesser offence which is proved. This is done under **section 179** of the **Criminal Procedure Code** which reads as follows: -

“179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it”.
29. I accordingly reduce the charge to that of Assault Contrary to Section 251 of the Penal Code.

30. I also reduce the sentence to the period already served.

31. I accordingly direct that the Appellant be released forthwith unless lawfully held for any other reason.

Delivered, signed and dated at Kericho this 22nd day of January, 2021.

A. N. ONGERI

JUDGE