



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 83 OF 2018

CHAVDA KIRANBHAI RHAMBAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal against the Conviction and Sentencing by the Chief Magistrate's Court at Kisumu in CMCRCNo. 4 of 2015 (Hon. M. A. Agutu (RM) delivered on the 14th day of August 2018)]

JUDGMENT

The Appellant, **CHAVDA KIRANBHAI RAMBHAI**, was convicted for the offence of **Assault causing actual bodily harm**, contrary to **Section 251** of the **Penal Code**. He was then sentenced to a Fine of Kshs 10,000/=; in default One Month Imprisonment.

1. In the Petition of Appeal, the Appellant raised 7 grounds of appeal, which can be summarized in the manner following;

(1) The evidence was manifestly insufficient, inconsistent and had glaring gaps.

(2) The conviction was against the weight of evidence.

(3) The trial court did not give consideration to the evidence tendered by the accused, which proved that the complainant was nowhere near the scene of the alleged crime.

(4) The key witness, Jackton Mahero failed to testify.

(5) The trial court failed to warn itself about the danger of convicting the appellant on the evidence of one witness, whose evidence was not corroborated by independent witnesses.

(6) The trial court shifted the burden and incidence of proof, contrary to Sections 107 and 108 of the Evidence Act. (7) The Judgement was against the weight of evidence.

2. When canvassing the appeal the Appellant focused on the contention that the evidence which was adduced was so manifestly insufficient and inconsistent; and it also had such glaring gaps that it was incapable of sustaining a conviction.

3. Being the first appellate court, I am enjoined to evaluate all the evidence on record.

4. As the Appellant has reminded us, an accused person is presumed innocent until the prosecution will have adduced sufficient evidence to prove beyond any reasonable doubt, that he committed the offence. it therefore follows, that when the prosecution fails to discharge the burden of proof, the accused should not be convicted.

5. In this case, the Appellant pointed out that the written statement of Jacktone Mahero Inyangala contained assertions which were contradictory to the evidence tendered by the Complainant.

6. In particular, it was noted that the Complainant and the said Jacktone Mahero Inyangala had cited different dates in respect to the day when the offence was allegedly committed.

7. The Appellant also submitted that the trial court had shifted the burden of proof to him, by requiring him to prove his innocence.

8. I will bear in mind those submissions during and after my re-evaluation of the evidence on record.
9. The prosecution called 3 witnesses.
10. **PW1, VINCENT OTIENO OCHIENG**, was the Complainant. He testified that on the material date the Appellant hit him on the neck, using his fist. When that happened, the Complainant thought that it was a joke. His said thought emanated from the fact that the Appellant liked joking.
11. However, on the material date, when the Complainant turned round to look at the Appellant, he noted that there was “*seriousness*” on his face.
12. **PW1** then took a step forward. It was at that point when the Appellant got hold of him, and pushed him on the floor.
13. He was later treated at the Kisumu District Hospital, and then discharged.
14. During cross-examination, the claimant said that he was assaulted on 27th January 2017. However, he did not have any document to show that he was at work on that date.
15. The claimant denied the suggestion that he had been suspended from work on 26th January 2017, after he had been caught stealing.
16. He also denied the suggestion that he had written a letter of apology, after he had been caught stealing.
17. **PW2, PHILIP C. KILIMO**, is a Clinical Officer at the Kisumu County Hospital.
18. He examined the Complainant, who had presented himself at the hospital with a history of having been assaulted by a person known to him.
19. **PW2** testified that the Complainant had tenderness on the neck, without any physical injury seen. He also said that the Complainant had tenderness on the chest, without any physical injury seen.
20. Thirdly, the Complainant had a bruise on his thumb area; as well as a bruise on the left neck joint, which was tender.
21. **PW2** filled the P3 Form 4 days after the incident; which means that he did so on 30th January 2017.
22. His conclusion was that the type of weapon used was “*sharp and blunt object.*”
23. Notwithstanding the said use of the sharp and blunt object, the Clinical Officer said that there was no piercing on the Complainant’s body.
24. **PW3, PC GEOFFREY CHERENE**, was the Investigating Officer in the case. It is he who issued the P3 Form to the Complainant, which was thereafter filled in by the Clinical Officer.
25. **PW3** arrested the accused after the Complainant pointed him out.
26. During cross-examination **PW3** said that the incident took place before the Roll-call was taken at the place where the Complainant was employed.
27. He also said that the witness who recorded a statement during investigations had refused to testify in court.
28. After the prosecution closed its case, the Appellant was put to his defence. He testified and also called one other witness.
29. The Appellant (**DW1**) stated that he never assaulted the Complainant on 27th January 2017. His testimony was that he could not have done so, as the Complainant was not at work on that day.
30. **DW1** testified that the Complainant had been “*fired*” before the date of the alleged incident.
31. **DW2, KENNEDY OMOLLO KAGORO** was an employee of **STEEL CENTRE LIMITED**. He was the Human Resource Manager.
32. **DW2** testified that the Complainant worked at Steel Centre as a general labourer, whilst the Appellant worked as an In-charge of loading and unloading.
33. **DW2** said that the Appellant never assaulted the Complainant on 27th January 2017. His reason for so saying was that he (**DW2**) had ordered the Complainant not to report to work on that date. The said order was given by him on the evening of 26th January 2017.
34. **DW2** produced the Master Roll, to prove that the Complainant was not present at his place of work on 27th January 2017.

35. Having re-evaluated the evidence I find that the Complainant and the Appellant were not strangers to each other. Therefore, this was definitely a case of recognition. There cannot have been any mistaken identification.
36. But whilst the Complainant testified that he was at the place of work on the material day, the Appellant testified that the Complainant was not at work on that day.
37. The learned trial magistrate held that the “*Master Roll*”, which was contained in an exercise book, could be prepared and could also be altered at any time.
38. Therefore, the trial court did not find the said evidence to be sufficient proof.
39. The trial court also found fault with the Appellant for failing to produce evidence to prove that his employer had reported to the police, that the Complainant had been caught stealing a piece of metal, on the day before the date of alleged assault upon him.
40. By finding inadequacy in the evidence tendered by the accused person, the learned trial magistrate was imposing upon him, the burden of proving his innocence.
41. It must be emphasized that an accused person is not under any legal duty to prove his innocence. The law dictates that an accused person is presumed innocent until he is proved guilty.
42. In this case I note that the Investigating Officer was already aware that the name of the Complainant was not in the Master Roll for the employees, on the material date: That is why he stated that the incident happened before the roll was taken.
43. In the circumstances, as the prosecution was at all times aware that the name of the Complainant was not on the master roll of employees for that date, the prosecution should have adduced evidence to prove that the Complainant was present.
44. From the evidence on record, I find no basis for the trial court failing to accept the evidence tendered by the defence. In so finding, I am not turning a blind eye to the possible ease with which hand-written records could be manipulated. My finding is based on the absence of any evidence to show that the documents in this case were manipulated.
45. It is one thing to talk about possibilities, and quite another thing to make findings based upon evidence.
46. In this case there was no evidence that the master roll was manipulated at all.
47. Meanwhile, as regards the report about the Complainant’s alleged offence of stealing, **DW2** provided the court with the **OB** number, **74/26/01/17**.
48. Apart from the fact that the accused had no obligation to prove his innocence, I find that the accused actually made available evidence to back his case.
49. As regards the injuries about which the Complainant testified, the Clinical Officer found that the same were inflicted by sharp and blunt objects.
50. However, the Complainant did not testify about any sharp object which the Appellant had used.
51. Furthermore, I find it curious that although the Clinical Officer testified about the use of a sharp object, he also said that there was no piercing on the Complainant’s body.
52. Another notable issue is about the fact that when the Complainant was hit on his neck, he actually thought that the Appellant was joking. I believe that if the Complainant had been hit so hard that he sustained injuries, it is likely that he would not have thought of it as being a joke.
53. Indeed, the Complainant only started taking the matter seriously, when he turned around and saw that the Appellant was serious. To my mind, that means that whilst the “*hitting*” felt like a joke, it is the face of the Appellant which showed “*seriousness*”.
54. I cannot fathom how the “*joke*” turned into an injury which the Clinical Officer described as harm.
55. I also note that towards the tail-end of her judgment, the learned trial magistrate observed that;
- “The accused demeanour also portrayed him as a person who was consistent and truthful.”***
56. If that be the position; and because he categorically denied having assaulted the Complainant, I fail to understand why he was convicted.
57. For all those reasons, the conviction cannot be sustained. It is therefore quashed, and the sentence is set aside.
58. If the Appellant had paid the fine, the same ought to be refunded to the Appellant. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF MAY 2021

FRED A. OCHIENG

JUDGE