



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 8 OF 2019

(From Original acquittal in Principal Magistrate's Court Bomet Criminal Case Number 1684 of 2016 by Hon. P. Achieng)

REPUBLIC.....APPELLANT

VERSUS

JOEL KIPLANGAT MUTAL.....1ST RESPONEDENT

WESLEY CHERUIYOT MUTAL.....2ND RESPONDENT

JUDGMENT

1. The Accused (now Respondents) were charged with the offence of committing grievous harm contrary to Section 234 of the Penal Code. The particulars of the charge were that on 24th November 2016, at Kamusanga village in Chepalungu Sub County, within Bomet County, jointly with another not before court, unlawfully did grievous harm to Wilson Kipyegon Muge.
2. The second charge against the Respondents was that of Assault causing actual bodily harm contrary to Section 251 of the Penal Code.
3. The Respondents pleaded not guilty to the charges, and the trial court conducted a full hearing in which the prosecution called six (6) witnesses in support of its case. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the accused persons and they were accordingly put on their defence.
4. The Respondents gave sworn statements and called 4 witnesses in support of their defence.
5. At the conclusion of the trial, the trial court acquitted the accused persons in accordance to Section 215 of the Penal Code.
6. Being dissatisfied with the judgment, the Appellants appealed to this court on four grounds of appeal namely:-
 - i. **THAT** the trial court misdirected itself on the evidence presented by the prosecution witnesses.
 - ii. **THAT** the trial court failed to appreciate the corroboration accorded to the victim's testimony by the medic who treated him and produced the Medical Report.
 - iii. **THAT** the trial court erred in its analysis of the evidence of the Respondents.
 - iv. It is in the interest of justice to allow the appeal.
7. The Appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 26th March 2021 while the Respondent filed on 15th April 2021. The Appellant's main contention is that it proved its case to the required standard and therefore the trial court erred in acquitting the Respondents on both counts.
8. The Appellant submitted that it was clear from the record that the incident occurred at 11 am and that the Respondents were well known to the victims and all other prosecution witnesses. Thus, the Appellant submitted that the court erred in failing to take into account this obvious fact of positive identification. The Appellant further submitted that the injuries suffered by the victims were corroborated by independent witnesses being PW3 and PW4. That the medical reports presented by a medical officer who examined the victims corroborated the evidence of PW3 and PW4. The Appellant also submitted that the trial magistrate failed to observe the fact that she succeeded the case at defence hearing stage and therefore she had no capacity to doubt the demeanour of the witnesses and the integrity of their accompanying testimony.

9. The Appellant faulted the trial court for concluding that the Respondents committed the offence of affray provided by Section 92 of the Penal Code. The Appellant further submitted that an analysis of the totality of the evidence on record does not exonerate the Respondents from the commission of the offence of assault causing grievous harm and neither does it disclose an offence of affray or normal assault. That the 2nd Respondent failed to tender any evidence that he filed a case before court for assault against the 1st complainant. The Appellant relied on the case of **Paul Kipsigei Rono Vs Republic (2014) KLR** to support its case.

10. It was the Appellant's further submission that the Investigating Officer established that he saw the Respondents on the material day and they were in good condition and that there was no evidence that the Respondent's injuries were occasioned by the victims in this case.

11. In conclusion, the Appellant submitted that the trial court misappreciated the facts and misapplied the law. They prayed that the acquittal orders be set aside and substituted with an order for conviction. Further, the Appellant prayed that considering the serious nature of the offences and aggravating factors, the contemplated sentences be custodial.

12. In response, the Respondents submitted that the alleged items and or weapons of assault, being nuts and wooden handles were never produced in court as evidence. That the weapons used by the 1st complainant to occasion injuries upon the 1st and 2nd Accused persons and which were produced in court, fitted the description of a long cane. That the beating occasioned to the 2nd Accused person was corroborated by DW3 and DW4. That DW1 was also hit by the complainant using the same long cane occasioning injuries as stated in the proceedings.

13. The Respondents submitted that the behaviour of the 1st complainant after the alleged injuries does not depict or corroborate the charge of grievous harm and hence it creates doubt.

14. The Respondents submitted that the trial court analysed the evidence correctly and in accordance with the evidence on record. That PW4 (clinical officer) produced P3 forms and treatment notes for the 1st and 2nd Accused persons which clearly demonstrated that they sustained injuries on the 24th day of November 2016. That further, the doctor confirmed to the court that he examined both Accused persons and confirmed the injuries.

15. The Respondents further submitted that there was an independent eye witness, PW3 who saw the 1st complainant hitting a cow to prevent it from accessing the river. He also saw the 1st complainant hit the 2nd Accused person using a long cane. The Respondents further submitted that the state counsel informed the court in the course of the trial, that the case had been forwarded to the DCIO Chebunyo because there were discrepancies in the witness statements.

16. It was the Respondents' submission that if the complainants had been attacked using the weapons alleged, then the attack should have left them unconscious.

17. In conclusion, the Respondents submitted that there was no clarity on what happened based on the evidence on record. That P3 forms were issued to the complainants and the Accused persons by the same police station and that both medics confirmed the injuries sustained by their respective clients. The Respondents urged the court to dismiss the appeal and uphold the findings of the trial court.

18. Being a first appellate court, this court has a duty to re-evaluate the evidence on record. This duty was stated by the Court of Appeal case of **Okeno – Vs – Republic (1972) EA 32** as follows:-

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.

19. I have considered evidence presented before the trial court, the grounds of appeal and the submissions of the parties.

20. The Appeal raises two issues for determination:-

(i) Whether the Prosecution case was proved to the required legal standard.

(ii) Whether the acquittal should be upheld.

21. Section 234 of the Penal Code on which the first count was based provides:-

A person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

22. Section 251 of the Penal Code on which the second count was based provides:-

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

23. The complainant, Wilson Kipyegon Muge testified that on 24th November 2016 at around 11 am he met the 2 accused persons and one

other person at the gate to his homestead. That the complainant moved a few metres and the 2nd Accused person hit him on the head and the 1st Accused person hit him also. The complainant testified that both accused persons had wooden handles that had nuts. That upon being hit, he fell down and when he tried to stand up, Cosmas joined them and hit him with a walking stick. When the complainant screamed for help, Mary Chepngetich and Sharon who were nearby began screaming too. Cosmas Cheruiyot and Gilbert Koskei responded to the screams and were the first to arrive at the scene.

24. The complainant ran home to remove his clothes that had been soaked in blood. His white vest was produced as P. Exhibit 1 (a) and the blue and white checked shirt produced and marked as P. Exhibit 1 (b). The walking stick was produced and marked P. Exhibit 2. As he came out of the house, he saw the 2nd Accused person with a bow and arrows. The 2nd Accused person tried to shoot him with the arrow but it fell on the ground. The two arrows were produced and marked as P. Exhibit 3

25. PW2 corroborated the account of events that PW1 stated. In addition, she testified that upon screaming, the two accused persons and Cosmas came towards her and hit her on the waist and on the back with the sticks they had. PW2 was an eye witness as she testified that she saw the complainant lying down while being beaten by the 2 accused persons and Cosmas.

26. PW3 testified that on 24th November 2016 she arrived at their gate and met the two Accused persons and Cosmas. They had surrounded the complainant. Then suddenly the 2nd Accused person hit the complainant with a rungu. The other two joined in beating him. She also testified that she saw the 2nd complainant being beaten as she was running away.

27. PW4 testified that on 24th November 2016 he heard screams as he was in the farm. He ran towards the direction from which the screams emanated and found Cosmas beating up the 1st complainant. That the 2 accused persons had nuts with wooden handles while Cosmas had a walking stick. That he took the 1st complainant home to change clothes and that's when the 2nd accused person came with a bow and arrow.

28. PW5, a clinical officer testified that the 1st complainant came to their facility with complaints of having been assaulted by persons well known to him. He examined the patient physically and read through the treatment notes and filled and signed the P3 form on 28th November 2016. The P3 form was produced and marked as P. Exhibit 4. PW4 also testified that he had a P3 form filled in respect to the 2nd complainant. The same was produced and marked as P. Exhibit 5.

29. PW6 testified that the case was reported on 24th November 2016 by the complainant. He was present at the time of the report and observed that the complainant was bleeding from his head. The complainant was advised to seek treatment and the witness statements were taken thereafter.

30. The prosecution's case was that the 1st and 2nd complainant were injured by the 1st and 2nd Accused persons and another person named Cosmas who was not presented before the trial court. PW2 and PW3 witnessed the accused persons beating the 1st complainant on the head with sticks which had nuts. PW3 also witnessed PW2 being beaten by the accused persons using the same sticks which had nuts. It is also important to note that PW4 placed PW2 at the scene of the fight. It is this court's finding that the testimony of the 1st complainant was corroborated by the other prosecution witnesses which to a large extent supported the prosecution case.

31. I must however analyse the prosecution evidence alongside that of the defence.

32. DW1 testified that on the material day i.e. 24th November 2016 he heard screams from the side of the river. He rushed towards the river and upon reaching, he found the 2nd Accused lying unconscious near the river. He further testified that he never saw the 2nd complainant at the scene. He then asked the 1st complainant who was standing near what was wrong and he said that he had hit the 2nd Accused with a long cane.

33. According to DW1, he was hit by the 1st complainant as he tried to assist the 2nd Accused person. DW1 was given first aid on his left hand that kept on swelling. DW1 produced a soiled brown coat that had blood on the right hand sleeve and it was marked as D. Exhibit 1. A torn shirt was produced and marked as D. Exhibit 2. Treatment Notes were produced and marked as D. Exhibit 3 and a P3 form was produced and marked as D. Exhibit 4. DW1 further testified that he did not injure the complainants and that the allegations against him were fabricated.

34. On cross examination, DW1 stated that he did not witness when the 2nd accused was injured and that members of the public took the long cane from the 1st complainant.

35. DW2 testified that on the material day he met the 1st complainant with his grandmother and that the 1st complainant had a long cane, a nut and a knife. After a disagreement regarding cows, the 1st complainant hit him on his left side of the head and that he used the long cane that he had. The long cane was produced and marked as D. Exhibit 5. A white shirt with black stripes was produced and marked as D. Exhibit 6. Treatment Notes were marked for Identification but were not produced. A P3 form was produced and marked as D. Exhibit 8. DW2 further testified that he did not beat up the complainants.

36. On cross examination, DW2 stated that he did not know how the 1st accused person got injured but that he saw his injuries. That he also saw Peter Sang who is DW3 and Kipyegon passing the road near the river before he was hit. DW2 also stated that he lost consciousness after being hit.

37. DW3 testified that on the material day he found the two accused persons in the river. He saw the 2nd Accused person with his cows and also saw the 1st complainant hitting the cow to stop it from accessing the river. DW3 also testified that he saw the 1st complainant using a

long stick to hit the 2nd accused person. That he saw Gilbert who came running to the scene armed with a knife, nut and stick. DW3 testified that when Gilbert saw them, he went back to a nearby home and came out with a spear and then they left the scene.

38. On cross examination, DW3 confirmed that he only saw the 1st complainant and the second accused at the scene. He stated that the 2nd accused person was hit on the head and he had only a stick that he used to herd the cows. DW3 further testified that when the 2nd Accused person was hit, he heard someone screaming. He did not see who was screaming on the other side of the fence. He saw the 1st Accused person jump over the fence after someone had screamed. He stated that the voice that was screaming was that of a child. DW3 stated that he did not see the 1st complainant beating up the 1st Accused.

39. DW4, a clinical officer at Siongiroi Health Centre testified that he examined the 2nd Accused person. The clinical officer produced a P3 form that was marked as D. Exhibit 8. He also produced a P3 form for the 1st accused person and it was marked as D. Exhibit 4

40. It is clear to me that from my analysis of the evidence that both the Accused and the complainants engaged in a fight in which both the complainants and the Accused were injured. The medical evidence produced support this position. I observe however that the defence case had some inconsistencies as demonstrated below.

41. The accused persons contend that the 2nd Accused person was hit by the 1st complainant and he became unconscious. DW1 who was the first one to the scene testified that he did not see the 2nd Accused person being injured or beaten. That he found the 2nd Accused person already lying on the ground unconscious. DW1 also testified that he did not see the 2nd complainant at the scene. DW2 (the 2nd Accused person) placed the 1st complainant and the grandmother at the scene of the fight. Interestingly, DW3 who testified that he found the 1st complainant and the 2nd accused person at the river stated that he saw the 1st complainant hit the 2nd Accused person with a stick. How can that be when the 1st Accused person who is alleged to be in the river next to the second Accused person did not witness it? DW3's testimony in itself is full of contradictions as he again states upon cross examination that he did not see the 1st complainant beating up the 2nd Accused person. Additionally, DW1 and DW2 place their grandmother at the scene but saw it fit not to include her as a witness in their Defence. She would have been a material eye witness to corroborate the evidence produced by the Accused persons.

42. It is clear from the above that the defence case had material inconsistencies. However it must be remembered that there was no onus on the defence to prove their innocence. What is critical is whether or not the defence raises doubt in the prosecution case.

43. In this case both the complainants and the Accused acknowledged that they were related and lived side by side on their family land. The complainant (Wilson Kipyegon Muge) stated that Wesley (2nd Accused) and Joel (1st Accused) were the sons of his brother. He denied that the Accused were watering their cattle on his portion of the land. PW2 Mary Chepngetich who is the 2nd complainant and sister to the Accuseds' father said that the family land had been apportioned and that there was no land dispute and that the Accused were not watering their cattle when they attacked PW1.

44. The Investigating Officer No. 52436 CPL Maurice Ngoya (PW6) testified that according to the statement of the complainant, the Accused attacked the complainant when he asked them why they were taking their cows to drink his water and that instead of answering, they attacked him. It appears to this court therefore that the witnesses were not forthright and although there is no doubt that the complainants were injured, they were economical with the truth on how the incident occurred and any role they may have played in injuring the Accused.

45. It is my conclusion that the totality of the evidence creates a strong suspicion in the mind of the court that indeed the Accused (now Respondents) may have caused grievous harm to the complainants. The evidence however does not meet the legal threshold of proof beyond reasonable doubt. As the law requires, I must give benefit of the doubt to the Respondents.

46. I agree with the trial court that there was insufficient evidence to secure a conviction. Consequently, the appeal is dismissed.

47. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIS 29TH DAY OF JULY, 2021.

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of Mr. Murithi for the Appellant, Mr. Kipngetich holding brief for Mr. Kenduiwo for the Respondents, and Kiprotich (Court Assistant).