



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO 71 OF 2019

SHADRACK ORACHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgement and sentence of Hon. V.O. Amboko, RM, dated 18th December 2019 in Criminal Case No 379 of 2018 in the Principal Magistrate's Court at Kabarnet, Republic v Shadrack Oracha)

JUDGMENT

1. In his amended petition to this court, the appellant has appealed against his conviction and sentence of having been placed on probation for three years' in respect of the offence of grievous harm contrary to section 234 of the Penal Code (Cap 63) Laws of Kenya
2. The appellant has raised eleven (11) grounds in his amended petition to this court. In ground 1, 2 and 5 the appellant has challenged his conviction on the basis that the prosecution did not prove their case beyond reasonable doubt.
3. In the light of the foregoing, the prosecution evidence was as follows. They called Mark Lochomuk (Pw 1), who is the complainant. Pw 1 testified as follows. Pw 1 was a teacher at Tangelbey High School. On 2/12/2017 at 11.00 pm Pw 1 boarded his motor cycle. On his way from watching a football match at Chemolingot, he took his cousin Catherine and her friend from Msingi Bora as pillion passengers and dropped them 300 metres away at their destination. Pw 1 then escorted them to their house. He then boarded his motor and proceeded for a distance of 100 metres.
4. While en route Pw 1 saw a torch. Due to bright headlights from his motor cycle, he saw three AP police officers; whom he had known before. He slowed down and stopped. He identified these officers as the appellant, who was at the centre of the road. On his left hand side, there was an Ap police officer by the name Christopher Otieno, while on his right hand side there was another AP police officer by the name Eric Kiplangat. Pw 1 had known the appellant before this incident; the appellant had taken over from Pw 1 the training of a foot team at Chemolingot.
5. At that point in time the appellant asked Pw 1: "*Mwalimu tunaeza patana.*" Literally meaning "*Teacher we have been able to meet.*" In response the PW1 told the appellant that he was a resident of Chemolingot. Erick Kiplangat took the keys of the motor cycle of Pw 1 and told him to alight. Pw 1 alighted and the appellant told Pw 1 to push his motor cycle towards the AP camp.
6. Pw 1 pleaded with them to allow him carry them as pillion passengers since he had fuel in his tank. The appellant then told Pw 1 that "*unatupeleka kama nani, wewe in mabusu, unafikiri kama wewe in mwalimu unaweza funza kila mtu.*" Literally meaning "you want to carry us as passengers as who, you are a prisoner, you think that since you are a teacher, you can teach everyone."
7. They then took Pw 1 to the Chemolingot Ap Camp. Upon arrival the appellant then stepped upon the head of Pw 1. The appellant also kicked Pw 1 in the left chest in the ribs. Pw 1 told Sgt Cherutich that he was injured. The appellant told Pw 1 that even if he died he would be buried. Pw 1 was then taken to Nginyang police station; where he spent his night. The following morning he was released by the OCS on a free bond. Thereafter Pw 1 was taken to Nginyang health centre. He was then transferred to Nakuru Women hospital where he was admitted for 5 days and was discharged thereafter.
8. Pw 1 was able to see and identify the appellant due to the bright head lights from his motor cycle and due to moon light.
9. The evidence of Pw 1 is supported by that of Dancun Taramai (Pw 2). Pw 2 testified that his wife was arrested by police from their home. Pw 2 then followed them to the Chemolingot AP Camp. At that camp his wife was told to sit down. Pw 1 arrived at that camp in company of police officers.
10. Upon arrival at the camp Sgt Cherutich asked Pw 1 as to what happened. Before Pw 1 would reply, the appellant kicked him in the ribs. Pw 1 fell down after being kicked. Pw 1 started to cry in pain. Pw 1 also testified that he had known the appellant as he used to exercise and

play friendly matches at Chemolingot Boys.

11. Sgt Cherutich warned the appellant not to repeat in kicking Pw 1. Pw 2 also testified that he knew the appellant before this incident.

12. The evidence of Pw 1 is also supported by that of Sofia Kangoror (Pw 3). Pw 3 is the wife of Pw 2. Pw 2 followed the police who had arrested his wife to Chemolingot Ap police line. At that place the appellant kicked Pw 1 in the ribs. Pw 3 knew the appellant before this incident.

13. The prosecution also called PC Erick Kiplagat (Pw 4). Pw 4 had joined other police officers and went to patrol on 3/12/2017. Pw 4 further testified that after 30 minutes the appellant called Cpl Siro; since Pw 1 was resisting arrest. As at that time Pw 1 was walking unassisted.

14. In addition to the foregoing witnesses the prosecution also called Sgt Joseph Cherotich (Pw 5). He testified that he was ordered to go on patrol. He also testified that he was not told that Pw 1 was injured.

15. Christopher Rotich (Pw 6), was a clinical officer attached to Chemolingot sub-county hospital. He examined Pw 1. Pw 6 made the following findings. There was pain on the loin. He looked sickly. X-ray revealed fracture of the 6th and 7th ribs of the left side.

16. The injuries were 20 days old. They were caused by a blunt object namely human kicks. He classified the injuries as grievous harm.

17. Pw 6 produced his report of examination as exhibit 2.

18. The prosecution also called C. I. Joseph Ouma (Pw 7), who was the investigating officer. Pw 7 established that Pw 1 was arrested on 3/12/2017. He also established that the officers who were in company of the appellant denied seeing the assault upon Pw 1. The OB entry number 2/3/12/2017 showed that Pw 1 was booked and appeared fit.

19. The appellant testified on oath and called Brian Cheruiyot (Dw 2) and Isaac Oselu (Dw 3) as his defence witnesses.

20. The appellant (Dw 1) testified that his colleagues and himself were instructed to go on night patrol on 2/12/2017. At 11.30 am he saw a motor cycle. He had a report of a stolen motor cycle. Pw 1 was signaled to stop. He refused to stop. As a result his colleague took the ignition key of the motor cycle. Pw 1 then fled. He was chased for 150 to 200 metres. He then fell down. The appellant then took Pw 1 to Nginyang police station. Pw 1 was physically fit when he booked him at Nginyang police station.

21. The appellant testified that Pw 1 had a grudge against him.

22. The appellant called Brian Cheruiyot (Dw 2). Dw 2 testified that Pw1 resisted arrest and became violent. He fell down while running away from the police.

23. The appellant also called Isaac Oselu (Dw 3). Dw 3 testified that on 2/12/2017 at 11.30 pm he was instructed by Sgt Cherutich to form a patrol team. As a result, Dw 3 instructed 6 officers. The officers among whom was the appellant proceeded to patrol Chemolingot centre. He divided the officers into two groups with the appellant being in charge of the 2nd group.

24. Dw3 testified that he was informed by the appellant that Pw 1 had ran away after resisting arrest. After the arrest of Pw 1, Dw 3 asked Pw 1 why he was running away. The appellant told Dw 3 that he had earlier on arrested Pw 1 in connection to a pool table that he owned. Dw3 also testified that Pw 1 threatened to transfer the appellant and to terminate his employment after that earlier arrest.

25. This is a first appeal. As a first appeal court I am required to re-assess the entire evidence and proceed to make my own independent findings. I have done so.

26. I find as credible the evidence of the complainant (Pw 1) that he was arrested after dropping his cousin, who was his pillion passenger on 2/12/2017. I also find that the arrest was not justified since he had not committed any offence. I further find as credible the evidence of Pw 1 that he saw the appellant due to the bright head lights from his motor cycle. Additionally, I find as credible that he knew the appellant before this incident and that he was with the appellant for a long time that night which was lit by the moon. I therefore, find that the appellant was positively identified by Pw 1; which identification was free from error.

27. The evidence of identification of the appellant by Pw 1 was supported by the credible evidence of Dancan Taramai (Pw 2), who also knew the appellant before this incident. I further find as credible the evidence of Pw 2 that he knew the appellant through Chemolingot FC (Football Club).

28. Additionally, I find as credible the evidence of Sofia Kangoror (Pw 3) that he also identified the appellant that night; since he knew him before this incident. Pw 3 saw the appellant kick Pw 1 in the ribs.

29. I find that the appellant was positively identified by three witnesses (Pw 1, Pw 2 and Pw 3). Their identification of the appellant was free from error.

30. I therefore find the appellant's contention that he was not positively identified for lacking in merit.

31. Furthermore, I find as incredible the evidence of PC Erick Kiplagat (Pw 4) that PW1 was resisting arrest and that Pw 1 was walking without being supported. I similarly find as incredible the evidence of Sgt Joseph Cherotich (Pw 5) that Pw 1 was resisting arrest and that he was loitering. The appellant did not charge PW1 for stealing a motor cycle. PW4 did not charge PW1 with arrest or with the offence of loitering. I find that PW1 did not commit any of these offences; which I find shows that these police officers were incredible. I equally find as incredible that Pw 1 was not injured in view of the medical evidence of Pw 6, the clinical officer.

32. Furthermore, I find as credible the evidence of Christopher Rotich (Pw 6), who was a clinical officer that Pw 1 suffered fractures in the 6th and 7th ribs of the left side of the chest and that these injuries were caused by kicks.

33. I further find the evidence of the appellant to be incredible in view of the ample and credible evidence of the prosecution witnesses. Additionally, I find that there was no grudge between the appellant and Pw 1. I further find that the Pw 1 had not committed any offence that would have warranted his arrest. That is why he was not charged with any offence. I also find as incredible that he did not resist any arrest as alleged by the appellant and his witnesses.

34. In view of the ample and credible evidence of the prosecution witnesses, I find that the evidence of the appellant and his witnesses was considered and was rightly rejected. Additionally, I find that the findings of the trial court are supported by the evidence adduced in that court. I therefore find that there is no basis to interfere with the findings of the trial court.

35. In the premises, I hereby confirm the appellant's conviction. His appeal in that regard is hereby dismissed.

36. The appellant has also challenged his sentence of being placed on probation for three years. I find that the arrest and the detention of PW1 were totally unwarranted; since the complainant had not committed any offence. Furthermore, the attack upon the complainant was vicious and beastly. I also find that the injuries sustained were serious; which necessitated the complainant to be admitted for 5 days.

37. I find that the offence of grievous harm carries a sentence of life imprisonment. It is also clear that the appellant abused his trust as a police officer.

All of the foregoing are aggravating factors.

38. I further find that the appellant was a first offender. I also find that they have reconciled with the complainant and according to Mr. Chepkilot some monetary compensation has been paid to the complainant following a reconciliation agreement.

39. After taking into account all the foregoing matters, I find that the sentence imposed was too lenient. Although the court on its own motion or upon application under section 354 (3) (b) of the Criminal Procedure Code, would have enhanced the sentence, I find that this is not a suitable case to do so for the following reasons. First, the complainant and the appellant have reconciled; which reconciliation is recognized by the current 2010 Constitution in article 159 which mandates the court to promote alternative dispute resolution mechanisms. Second, the appellant has been on probation since 18/12/2019 to date.

40. It therefore follows the appeal against sentence is also hereby dismissed.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THIS 29TH DAY OF JULY 2021.

J M BWONWONG'A

JUDGE

In the presence of

Mr. Kemboi Court Assistant.

Mr. Kipkulei holding brief for Mr. Chepkilot for the appellant.

Mr. Mong'are for the respondent.