



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 32 OF 2019

EVANS MAROKO.....APPELLANT

- VRS -

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. M. O. Wambani – CM Nyamira dated and delivered on the 30th day of May 2019 in the original Nyamira Chief Magistrate’s Court Criminal Case No. 1264 of 2015}

JUDGEMENT

The appellant was convicted and sentenced to thirty (30) years imprisonment for the offence of **Grievous Harm contrary to Section 234 of the Penal code.**

The particulars of the charge were that: -

“On 22nd January 2015 at Nyakongo Sub-location in Manga Sub-county within Nyamira County the appellant unlawfully did grievous harm to Alfred Chuma Maroko.”

To prove its case, the prosecution called seven (7) witnesses and briefly the prosecution’s case was that on the material day at about 5pm the complainant, a brother of the appellant, was on his way home from work when he was accosted by the appellant who cut him several times with a panga before fleeing and leaving him lying on the ground unconscious and it was not until 25th October 2015 that the appellant was arrested at a place called Kaptembwa in Nakuru County. The prosecution adduced medical evidence to demonstrate that the injuries inflicted upon the complainant during the attack amounted to grievous harm and called witnesses who saw him immediately following the attack and who confirmed he indeed sustained injuries and was hospitalized as a result of the same.

On his part, the appellant denied he committed the offence and testified that on the day and time it is alleged he attacked the complainant he was in his house with people who were tiling the floor of his house. He recalled hearing noise outside but vehemently denied that he left the house. He testified that on the night of 25th October 2015 when he was arrested he was in his house in Nakuru when people broke into his house and attacked him. He stated that he reported the matter to Kaptembwa AP Post before seeking treatment and that he later learnt that the attack involved his family members. He stated that he reported this to Ng’ambo AP Line and was advised to make a formal report. He testified that when he was informed that some people were looking for him he called his brothers Kepha and James and that he spent the night in custody at Kaptembwa Police Camp. Then his brother told him he was required at home. The police told him to pick his logbook and other important documents after which they took him to Manga Police Station. He contended that his relationship with the complainant became icy when after the post-election clashes of 2007 he returned home from Kericho where he had settled. He alleged to have been assaulted by the complainant in 2012 and stated that the cause was family land left behind by their father who died in the year 2000. The appellant called four witnesses and of the four Dw3, Dw4 and Dw5 alleged to have been notified of a fight between the appellant and the complainant on 22nd January 2016. They alleged to have seen a lot of blood in the house of the accused where the fight allegedly took place. Dw4 stated that it is he who took the accused to Nyangena Hospital after finding him lying on the floor while screaming. Dw3 and Dw5 testified that although they did not witness the fight they found a lot of blood in the veranda of the appellant’s house and compound.

Parties canvassed the appeal by way of written submissions. Counsel for the appellant submitted that the evidence adduced by the prosecution was riddled with inconsistencies and contradictions and did not prove the charge against the appellant beyond reasonable doubt. Counsel also submitted that the rights of the appellant to a fair trial guaranteed under Article 50 of the Constitution were violated in that the appellant was only supplied with witness statements and charge sheet but not the other documentary evidence that the prosecution adduced at the trial such as the P3 Form and discharge summary. Secondly, that the appellant was not accorded time to prepare for his trial as he was compelled to give evidence upon his return from hospital and also because the documentary evidence he intended to adduce in his defence was in the possession of his brothers who were prosecution witnesses. Thirdly, that the trial was unfair for being commenced with a particular end in mind and the appellant was forced to attend and participate in the trial while sick. Counsel submitted that several

applications by the appellant to start the trial afresh were not heeded hence his suffering in the hands of the trial court is immeasurable. Counsel further stated that the prosecution did not prove the requisite *mens rea*. He contended that it was proved by the defence that the complainant attacked the appellant and that the evidence disclosed the question of self-defence and that the trial court failed to appreciate the prosecution did not establish the necessary malice. Counsel also argued that the trial court did not consider the evidence adduced by the appellant. He contended that the investigations were shoddy, that forensic analysis and/or DNA should have been carried out to establish if the blood on the jacket and panga found in the appellant's house belonged to the appellant or the complainant and that therefore the nexus between the appellant and the complainant was not established. Counsel further urged this court to find that in any event the evidence adduced pointed to assault causing actual bodily harm but not grievous harm and that therefore the sentence meted against the appellant was harsh and excessive. He faulted the trial Magistrate for relying on the presentence report by the probation officer without giving the appellant an opportunity to challenge it. Counsel urged this court to allow the appeal, quash the conviction and set aside the sentence.

On his part, Counsel for the respondent submitted that the evidence of the prosecution witnesses was weighty and it proved the case against the appellant beyond reasonable doubt. Counsel disputed that the rights of the appellant were violated and submitted that the tenets of a fair trial provided in Article 50 of the Constitution were observed. He submitted that Section 200 (3) of the Criminal Procedure Code was complied with and that the court considered the compelling reasons advanced by the prosecution is refusing to grant the appellant bond and further that the sentence meted by the trial was satisfactory considering the injuries suffered by the appellant. That moreover, the trial court considered the gravity of the offence, the presentence report and submissions of the parties prior to the sentencing. He urged this court to uphold the conviction and the sentence.

I have considered the rival submissions and the authorities relied upon carefully but as the first appellate court I am enjoined to reconsider and evaluate the evidence in the lower court so as to arrive at my own independent conclusion. In so doing, I must bear in mind that I did not benefit from seeing and hearing the witnesses giving evidence and to make provision for that (**see Okeno v Republic [1972] EA 32**).

The complainant was on his way home from work when he was viciously accosted by a panga wielding attacker. He had just passed by the river where his mother and sister were washing clothes and because it was raining he had been requested to go home with his little nephew. It was at around 5pm hence in broad daylight. The attacker cut him repeatedly with a panga and when he fell down unconscious the attacker fled leaving him for dead. That the attack occurred was corroborated by his sister (Pw2) and the testimonies of the clinical officer (Pw3) and doctor (Pw6) who confirmed that they saw him at the Kisii Teaching & Referral Hospital and Eldoret Referral Hospital respectively. The complainant's brothers Pw4 and Pw5 also confirmed that they visited the complainant in hospital and that he had injuries. Both the clinical officer (Pw3) and the doctor (Pw6) confirmed that the injuries suffered by the complainant were serious. According to Pw3, the complainant had already been admitted into hospital when he saw him. He described him as sick looking and stated that he would lose awareness in the course of their conversation. He described the various wounds the complainant had on the head and concluded by stating: **"the extent of injury was grievous harm."** On his part, Pw6 stated that the complainant had severe injuries on the head. It is my finding that these injuries are consistent with the cluster of injuries defined in the P3 Form as grievous harm which means: -

"any harm which amounts to maim, or endangers life, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ."

The clinical officer and the doctor who testified gave a first-hand account of what they saw when they themselves examined the complainant and I am satisfied that their evidence was relevant and proved beyond reasonable doubt the degree of injury inflicted upon the complainant by the attacker. I am also satisfied that the appellant was positively identified by the complainant as the assailant. The complainant and the appellant are blood brothers who lived in the same homestead. They knew each other well and as it was at 5pm hence in broad daylight the conditions were favourable to a positive identification. There was also evidence that the appellant disappeared from home following the attack and was not seen until ten months later when he was arrested in Kaptembwa in Nakuru. This conduct tells of one with a guilty mind.

In his defence, the appellant admitted he was at home on the material day. He claimed to have been supervising the tiling of the floor of his house by tilers Peter Mogaka and Mogambi. He was also with one Wesley Onsongo who he had hired to operate his posho mill and his cousin one Tom Ombati. He confirmed it was raining and that there was noise outside. I find that his admission that he was within the vicinity of the scene of the attack corroborates the complainant's evidence that he was the assailant. On his part, he called four witnesses two of who rather than support his evidence discredited it hence rendering it a sham. Dw1 and Dw2 were the Chief and Assistant Chief of his area whose only evidence was that they received reports regarding the attack and that they looked for the appellant in his home but did not find him. Dw4 and Dw5 are the two witnesses who rendered the defence a sham. Their evidence was that there was a fight between the appellant and the complainant. They alleged that the fight occurred in January 2016. Dw4 alleged to have gone to the appellant's house because he wanted to rent a house and as he approached the house he heard noise inside. He stated that he found a crowd of people there who told him the appellant fought with his brother. He claimed to have seen blood on the veranda and sitting room of the appellant's house and the accused was screaming while lying on the floor. He alleged to have taken the appellant to Nyangena Hospital in Kisii and paid Kshs. 2000/= for his treatment. Dw5 also claimed to have found a lot of blood in the accused's compound and veranda upon going there after hearing that the appellant had fought with his brother. These witnesses could not have been telling the truth for two reasons. First, according to the appellant, on the material day he remained in his house even as the noise outside continued. So according to him there was no fight between him and the complainant at all. It was indeed his evidence that the only other incident between him and the complainant occurred in the year 2012. Secondly, these witnesses if they meant a fight that occurred on 22nd January 2016 were lying because the record shows that since his arrest on 22nd October 2015 the appellant never left custody. The defence mounted by Dw4 and Dw5 to give the impression that he acted in self-defence was therefore clearly a sham. There was no fight between him and the complainant. To the contrary I find that it was he who ambushed the complainant as he came home from work and viciously attacked him with a panga and that this was not a case of self-defence. His defence does not offer any rebuttal to the prosecution's case as it was full of untruths. I am also satisfied that much as it was not necessary to prove both the *actus reus* and the *mens rea*, these were proved beyond reasonable doubt as he himself told the court that there was a grudge between them because of the land inherited from their late father. That clearly was the reason/motive for the attack. Evidence was also adduced that this was not the first time he had attacked the complainant. I am further satisfied that even without the forensic evidence the charge was proved beyond reasonable doubt. To assert that such evidence was mandatory would be to require a standard of proof beyond a shadow of doubt which is not the standard required for criminal offences in our jurisdiction.

As for the allegation that the rights of the appellant to a fair trial were breached my finding is that they were not. The record shows that the appellant was accorded sufficient if not more than reasonable time to conduct his defence and that whenever he required an adjournment because of illness that adjournment was granted. The trial court made sure that he was escorted to hospital for treatment and even to the bank whenever he wanted to transact. What the trial court did was to put its foot down whenever he wanted to circumvent the course of justice. The record shows that he instructed several advocates but his instructions to them were limited to trying to stall the case and when their applications to have the case start afresh, which in my view was unreasonable, were rejected, the advocates would disappear and not turn up at the next hearing. I am not persuaded therefore that he suffered immeasurable pain at the hands of the trial Magistrate: In fact, I find that he was treated with kids gloves.

Section 200 (3) of the Criminal Procedure Code was duly complied with and his election to proceed from where the other Magistrate left the case was confirmed by Learned Counsel Mr. Ondigo at the sitting of 18th September 2018 when he stated: -

“.....The accused person has agreed that we abandon the 2 appeals which are before the High Court. He has also agreed that the case do proceed from where it had reached and that we take a defence hearing date.”

It is my finding therefore that the appeal against conviction is not merited. The same is dismissed and the judgement of the trial court is upheld.

On the sentence, I am satisfied that given the circumstances of the offence, the nature of injuries inflicted upon the complainant and the appellant's attitude towards the offence, the sentence of thirty (30) years imprisonment was merited and just. The same is also upheld.

In the premises the appeal is dismissed in its entirety. Right of Appeal to the Court of Appeal is explained.

Signed, dated and delivered in open court this 12th day of March 2020.

E. N. MAINA

JUDGE