



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 44 OF 2019

PETER NJUGI WAITHAKA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from original Conviction and Sentence dated 17/10/2019 in Nanyuki CM Criminal Case No 587 of 2017 – N Thuku – PM)

J U D G M E N T

1. The Appellant herein, **PETER NJUGI WAITHAKA**, was convicted after trial of *assault causing actual bodily harm* contrary to **section 251** of the *Penal Code*. It was alleged that on 13/02/2017 at 10:00 am, at *Corner Mbaya Farm* in Laikipia Central Sub-County within Laikipia County, jointly with others not before court, he unlawfully assaulted one **JAMES MWAI KINYUA**, thereby occasioning him actual bodily harm. He was sentenced to 1 year imprisonment on 11/10/2019.
2. The Appellant has appealed against both conviction and sentence. The conviction is challenged upon the evidence, to wit, that the two pieces of medical evidence tendered by the prosecution were conflicting; that the trial court misinterpreted the medical evidence tendered by the Appellants; that an eye witness called by the prosecution in fact corroborated the Appellant's defence; and that the trial court relied on matters that were not on record to reject the Appellant's defence.
3. Learned counsel for the Respondent supported the conviction
4. I have considered the submissions of the learned counsels appearing. I have also read through the record of the trial court in order to appraise the evidence tendered and arrive at my own conclusions on the same. This is my duty as the first appellate court. I have borne in mind however, that I did not see and hear the witnesses testify, and I have given due allowance for that fact.
5. The prosecution case was that there was a land dispute involving the complainant (PW1) and the Appellant that was already in another court. PW1 testified that upon the advice of his lawyer in the land dispute case he visited the land on 13/02/2017 where he found the Appellant (whom he knew well) and others working on the land. He greeted them from about 20 meters away upon which the Appellant started running towards him armed with a jembe and a panga.
6. The Appellant caught up with him as he was running away and hit him with the jembe on the ankle. He fell down and then caught the Appellant's jembe as he aimed another blow at him. He then started screaming. The Appellant in the meantime called the people he had been working with in the shamba. They came and joined in assaulting him.
7. After a few minutes other people from neighbouring farms came and saved the Appellant from the beating. He escaped limping and went and reported the matter to the police. He was then referred to a local dispensary and treated. Later he went to *Nanyuki Teaching and Referral Hospital* where he was further treated after an X-ray of his injured foot.
8. PW2 was one of the neighbours who responded to PW1's screams. He saw the Appellant (whom he knew very well) and 2 others chasing after PW1 though he did not witness the assault. He however said that the persons chasing PW1 were armed with jembes and pangas.
9. PW2 called to PW1 to cross over and come to him (and others with him) in order to escape the Appellant and the others chasing him. PW1 did so and the Appellant and the others went back. PW2 noted the injury on PW1's leg.
10. PW3 and PW4, respectively a clinical officer and a plaster-of-paris technician testified as to PW1's injury. Though PW3 had not noted a fracture, PW4 upon examining an X-ray of PW1's foot, noted that he had suffered a fracture. He therefore immobilized the injury with a plaster-of-paris cast to aid towards healing.

11. PW5 was the police officer who took PW1's complaint. She referred him to the dispensary and arrested the Appellant and another person for the assault; they were however released by her superiors. Later the Appellant was charged.
12. The Appellant testified under oath and called 2 witnesses. His defence was that it was in fact PW1 who assaulted and injured him, and that when he went to report the assault to the police, he was arrested instead. He denied assaulting PW1.
13. The Appellant's first witness (DW2) had been with the Appellant working in the shamba. He stated that PW1 came and started throwing stones at them and hit the Appellant in his eye. The Appellant fell down and PW1 started beating him. PW1 then ran away.
14. DW3 was a clinical officer. He produced in evidence a medical report (P3) of the Appellant. He stated that the Appellant had bruises on the left of the forehead and that his left cheek was swollen. His left eye was red. He had pains in the neck and chest. The P3 that he produced was completed 5 months after the alleged injuries of the Appellant. It was completed on 12/07/2017. DW3 stated that the P3 was issued on 07/07/2017.
15. The evidence laid before the trial court presented two opposing stories. The complainant's case, backed by the testimony of PW2, was that he was chased and injured by the Appellant and another person without provocation. The Appellant's case however, supported by DW2, was that the complainant was the aggressor who attacked the Appellant without provocation and injured him.
16. It ultimately depended on who the trial court believed. It chose to believe the complainant and PW2. There was good reason for that belief. PW2 was an independent witness who saw the Appellant and others, armed with jembes and pangas, chasing PW1. Although he did not see the Appellant strike PW1, he noted the injury on his leg and his limping. In this regard it must be remembered that PW1 started screaming after he had been injured, and that was when PW2's attention was attracted to the incident.
17. Secondly, PW1 made his report to the police immediately. He was referred to a dispensary and treated. He then went to a hospital for further treatment where it was discovered after an X-ray that his injury involved a fracture, for which he was further treated. His medical report (P3) was then completed in the normal course of business. It was later produced in evidence, along with the X-rays.
18. Contrary to the submissions made on behalf of the Appellant, there was really no conflict in the medical evidence produced by PW3 and PW4. Their testimonies complemented each other. Without the X-ray PW3 could not have detected the fracture which PW4 subsequently detected on the X-ray.
19. In these circumstances, the trial court was entitled to prefer the testimonies of PW1 and PW2, as I would have, had I been the trial court.
20. It is true as submitted for the Appellant, that the Appellant never offered a defence of *alibi*, and that the trial court went on and on about *alibi* defence for several pages in the judgment. This was a misapprehension of the Appellant's defence, and it is not apparent on the record what could have caused it. However, that misapprehension did not derogate from the strong case laid out against the Appellant by the testimonies of the prosecution witnesses. Had the trial court correctly apprehended the Appellant's defence, which was that it was in fact the complainant who had attacked and injured him on 13/02/2017 and not the other way round, it would still have rejected that defence in view of the overwhelming evidence by the prosecution.
21. I am satisfied that the Appellant was convicted upon good and sound evidence. The charge against him was proved beyond reasonable doubt. The conviction is safe.
22. As for the sentence of 1 year imprisonment, ground 5 of the petition of appeal merely states that the same was –

“harsh and excessive in *the circumstances*.”

That is not a sufficient reason for an appellate court to interfere. The sentence must be **manifestly** harsh and excessive for this court to have jurisdiction to interfere. That is not the case here considering the circumstances of the offence and the fact that the offence carries a maximum of five (5) years imprisonment.

23. In the event, I find no merit in this appeal. It is hereby dismissed in its entirety. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 11TH DAY OF MARCH, 2020

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 12TH DAY OF MARCH, 2020