



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 8 OF 2018

EDWARD MUSYEMI NCHOMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the Principal Magistrate's Court at Marimanti

in PM's CR.C No. 782 of 2016) delivered by (S.N. NYAGA - RM) on 27/7/2017

J U D G E M E N T

1. **EDWARD MUSYEMI NCHOMBA**, the Appellant herein was charged with the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars as per the charge sheet presented to the trial court were that on 23rd December 2016 at Ithanga village, Karocho Location Tharaka South, the Appellant unlawfully assaulted **SABASTIAN GITUMA MUNYUOKI**, the complainant occasioning him actual bodily harm. The Appellant denied committing the offence and the prosecution called five witnesses to prove their case.

2. A brief summary of the prosecution's case against the Appellant at the trial indicates that there was an initiation ceremony at the home of one Mugambi which was in the neighbourhood of both the Appellant and the complainant. It is apparent that the attendees were served with *inter alia* traditional liquor and the Appellant perhaps having consumed one too many cups of alcohol caused a commotion as a result of which he received some beatings which incensed him. He went and shortly came back armed with a bow and arrows and started shooting indiscriminately in a drunken state and one of the arrows landed on the head of the complainant and injured him. He was apprehended after he ran out of arrows and taken to Marimanti Police Station the following day on 24th December 2016 after being locked initially at Rungu A. P. Post. David Nyaga PW3, a clinical officer at Tharaka District Hospital tendered a P3 filed by one Emilio Gaicho who classified the injuries as "harm". The witness however tendered the medical evidence (P3 P. Exhibit 1) without establishing basis for its production but I will come back to that shortly in this judgment.

3. The trial court upon evaluation of the evidence tendered found that both the Appellant and complainant sustained injuries. The court relied on evidence of PW1, PW2 PW3 and the evidence of David Nyaga (PW4) the clinical officer who testified on behalf of Emilio Gaicho the clinical officer who attended to the complainant and filled the P3 form (P. Exhibit 1) in finding that the Appellant was guilty as charged. He was convicted and sentenced to serve 5 years imprisonment and a further 3 years supervision by Area DCIO.

4. The Appellant felt aggrieved by both the conviction and sentence and filed this appeal raising the following grounds namely;

- i) That the learned trial magistrate erred by not observing that the medical report did not properly classify the assault.*
- ii) That the trial court erred by not rendering itself on the P3 form in respect to the Appellant.*
- iii) That the culprit who assaulted him was not arrested despite his P3 form showing he was injured.*
- iv) That the Appellant was badly beaten and suffered serious injuries.*
- v) That the complainant had him charged for interior motives.*
- vi) That his defence was not properly considered.*

5. In his oral submissions at the hearing of this appeal, the appellant insisted that he had fought with the complainant and that he was arrested while unconscious because of the beatings he sustained. He complained that he was not produced in court at the earliest opportunity insisting that he was arrested and taken to police custody on 24th December 2016 which was a Saturday and that he was not produced in court until he complained to the OCS. The record shows that the Appellant was produced in court on 29th December 2016.

6. The Appellant further complained that his defence was closed prematurely after his 3 witnesses got the misfortune of being arrested in alcohol related offences and could not be available. This ground however appears to be an additional ground raised without leave of this court contrary to clear provisions of **Section 350 of Criminal Procedure Code**. This court will therefore disregard the same.

7. The Appellant has further blamed the complainant and his family for the woes he currently faces and submitted that he has had trouble with them in the past and that they are out on a revenge mission.

8. The Respondent through Mr. Momanyi, learned counsel for the Director of Public Prosecution has partly opposed this appeal. He submitted that he supports the conviction but conceded that the sentence meted out against the Appellant was manifestly illegal.

9. The State has supported the conviction of the Appellant by the trial court pointing out that the evidence of PW1 and PW2 indicated that the Appellant became unruly in a circumcision ceremony after consuming alcohol. He further submitted that the appellant was beaten by members of the public and accused him of giving various versions of why he was being framed by the complainant's family. The Respondent has contended that the Appellant's defence was a sham and that the evidence tendered was sufficient to found a conviction. He however conceded that the sentence beyond 5 years maximum sentence meted out was illegal and should be set aside.

10. This court has considered this appeal, the grounds raised and the response made. There is no dispute going by the evidence tendered at trial that the Appellant and the complainant and perhaps other people had an altercation at a circumcision ceremony after indulging in too much alcohol. There is evidence that both the Appellant and the complainant perhaps due to the altercation suffered injuries.

11. From the medical evidence tendered at the trial it is apparent that PW4 David Nyaga tendered evidence on behalf of one Emilio Gaichu, the author of P3 form tendered as P.Exhibit 1. The record of proceeding however shows that contrary to the rules of evidence the said David Nyaga laid no basis to tender the P3 form. Although this ground was not raised or argued in this appeal, this issue is so critical that this court as an appellate court cannot disregard for the interest of justice.

12. Under the provisions of **Section 33 of the Evidence Act** the law provides as follows:

".....statements, written or oral or electronically recorded of admissible facts made by persons who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible in the following cases....."

13. The above provisions clearly indicates that for the court to form an opinion for example that a witness cannot be procured without unreasonable delay or expense, basis by the prosecution and/or the expert witness who intends to testify on behalf of an absent colleague must lay sufficient basis before the court can admit the evidence.

14. Furthermore the same provision when read together with **Section 48 of the Evidence Act** really requires expert, witnesses to lay basis of their expertise before adducing expert opinions or evidence. **Section 48(1)** provides:

" When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in question as to identity or genuineness of handwriting or fingerprints or other impressions."

15. Going by the evidence tendered by David Nyaga (PW4) it is apparent that his evidence as an expert was wanting for 3 reasons;

i) He did not give the trial court his professional qualification to enable the trial court form an opinion about his expertise given that he was called by the prosecution as an expert witness.

ii) He did not give the trial court information about how long he had worked with the author of the P3 (P.Exhibit 1) if at all and whether he was familiar with his handwriting.

iii) He did not give any information as to whether Emilio Gaicho was competent and qualified to fill the P3 and whether he had known him as such. The only information he gave to the trial court was;

" the P3 was filled by my colleague on 28th December 2018. That is all."

16. The trial court in my considered view fell into error by relying on the evidence of the said PW4 to render a conviction without the absence of adherence to the law by ensuring that;

i) The witness was an expert through giving his professional background and qualifications pursuant to **Section 48 of Evidence Act** and

ii) Laying firm basis under **Section 33** of the same **Act** to testify on behalf of the author of the P3.

In the absence of proper adherence to the law, the evidence of PW4 was rendered hearsay evidence and by law such evidence is inadmissible. To the extent that the conviction of the appellant basically hinged on the evidence of David Nyaga (PW4), this court finds that the conviction was bad in law and erroneous.

17. It is not necessary to address the other grounds raised but just in passing, the Appellant may have felt aggrieved by not being taken to court within 24 hours of his arrest or if the day fell on a day not an ordinary court, the next court day. His grievance though legitimate should be addressed in a separate avenue other than this appeal because this appeal is about conviction and sentence.

18. This court also notes as conceded by the prosecution that the sentence imposed by the trial court was beyond the prescribed sanction under **Section 251** of the **Penal Code**. The maximum sentence prescribed is 5 years and anything beyond 5 years even if it is probation is certainly unlawful because it is not provided in law. This court would have set it aside and imposed a proper sentence but in view of my finding on conviction, that is now purely academic.

The upshot of this is that this court finds merit in this appeal. This court finds that for the reasons aforesaid the conviction of the Appellant was clearly erroneous. The conviction is hereby quashed and the sentence imposed is set aside. The Appellant shall be set free forthwith unless lawfully held.

Dated, signed and delivered at Chuka this 22nd day of April 2020 via Zoom in view of the measures taken to combat COVID - 19.

R.K. LIMO

JUDGE

22/4/2020