



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 50 OF 2019

BENJAMIN KIPKORIR BETT.....APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

(Being an appeal from the judgment of Honorable D. Alego Senior Principal Magistrate in Kapsabet Principal Magistrate's

Court Criminal Case No. 1419 of 2017 delivered on 18th March, 2019)

JUDGMENT

BENJAMIN KIPKORIR BETT was charged in the lower court with the offence of grievous harm, contrary to *Section 234* of the *Penal Code*.

The particulars of this offence are that on the 25th day of January at Mosobecho village in Meswa Sub-Location within Nandi County, the accused jointly with another not before court assaulted David Keny by hitting him on the forehead with a metallic bungle and kicking him on the groin, thereby occasioning him grievous harm.

The prosecution case is that on 25/1/2015 in the evening the complainant in this case was looking for a casual labourer. He met the appellant and his

brother Shadrack. They started beating him ruthlessly without any provocation. The assailants said they had been looking for him for a long time. Shadrack had a pen knife. They tied him. The complainant ran to his neighbor, Anne Mengich, the PW-2 in this case. PW-2 knew the appellant and the complainant as they are her neighbours. The appellant was holding the complainant by the collar and beat him up so badly. He was bleeding profusely. PW-3 who is also a neighbour was attracted to the scene by a distress call from PW-2. At the scene she found Shadrack and the appellant had beaten the complainant injuring him seriously. He was bleeding. The appellant was holding the complainant by his trouser. The complainant was treated at Kapsabet Referral Hospital. He had a deep cut wound on the forehead. The right eye was very red. The left scrotum was swollen. He also had bruises on the right inguinal region. He was treated and discharged. On 2/2/2015 he returned to the hospital complaining of headache. He was referred to Mediheal Hospital for a CT Scan. It revealed subdural haematoma and was admitted for an operation between 23/3/2015 and 25/3/2015. The P-3 form was filled on 24/4/2015 where the degree of injury was settled as grievous harm. It was produced by PW-4 as an exhibit. On history, it reads that the complainant was assaulted by one well known to him on 25/1/2015 at 7.00 p.m. PW-5 was the third investigating officer in the matter. He took over the case after some witnesses had testified and only bonded the doctor to attend court.

At the close of the prosecution case the court found that the appellant had a case to answer and accordingly placed him on his defence.

The appellant in his defence gave a brief unsworn testimony. He alleged that on 1/2/2015 he was on crutches and was unwell. At night he saw someone outside his house. He raised alarm. His brother went to his rescue. He chased David, the complainant in this case. His brother Shadrack was a co-accused person and was released in court 2.

The trial court evaluated the evidence and found that the prosecution had proved the offence against the appellant beyond reasonable doubt. He was consequently convicted of it and sentenced to serve life imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the ground that:-

- (1) The imposed sentence is harsh, unfair and unjust, hence unconstitutional.
- (2) The appellant was not accorded a fair trial.

- (3) Investigation was shamble.
- (4) The case was not proven by the prosecution beyond reasonable doubt.
- (5) Appellant defence was dismissed for no good reason.

The appellant canvassed the grounds by way of written submissions, of which I have considered.

The prosecution submitted orally that the appellant was well identified as a neighbour to the complainant. The P-3 reveals grievous harm and the evidence by the prosecution witnesses is strong and consistent. They further averred that the sentence is justifiable given the injuries the complainant sustained. They urged the court to dismiss the appeal.

I have weighed all that was presented before me in this case. To start with, the facts in the prosecution case do not support the particulars of the offence as disclosed in the charge sheet. The particulars in the charge sheet states that the appellant herein jointly with another not before the court assaulted David Keny by hitting him on the forehead with a metallic bungle and kicking him on the groin, thereby occasioning him grievous harm.

The complainant in his evidence does not disclose details of what he was attacked with and how. He only discloses that he was beaten ruthlessly and tied up. Shadrack had a pen knife. PW-2 the other eye witness disclosed that the appellant held the complainant by the collar and beat him up so badly. He bled profusely. PW-3 went after the beating. She found the appellant holding the complainant by his trouser. Complainant was bleeding.

It is therefore not clear where whoever drafted the charge sheet got the information contained therein from. No witness mentioned a kick as a way in which the complainant was attacked and the alleged metallic bungle. The said bungle was nowhere as an exhibit. The law is that the facts of the case should disclose an offence as charged and the charge should be correct in all its particulars. In *Sigilani -vs- Republic [2004] 2 KLR*, the court held that, the offence charged should be disclosed and stated in clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

The discrepancy between the facts disclosed in evidence and the facts disclosed in the particulars of the charge is significant and renders the charge defective.

The complainant indicated in his evidence- in- chief that the incident took place in the evening. The actual time was not disclosed by any of the prosecution witnesses. The history part of the P-3 form indicates it was at about 7.00p.m. It is not clear from the evidence what informed indication of this specific time. "Evening" as we know it in English is the period of time at the end of the day, usually from about 6:00 p.m to bedtime. Under the Penal Code, "night" or "night-time" means the interval between half-past six O'clock in the evening and half-past six O'clock in the morning. Going by the facts presented in the case, there is a possibility that the incident took place at night. PW-1, PW-2 and PW-3 did not disclose the source of light that enable them see and recognize the appellant herein. In the case of *Wamunga -vs- Republic (1989) KLR 424*, the court held that:-

"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

In this case where there is a possibility of the incident having taken place at night, the prosecution were under an obligation to disclose how the eye witnesses were able to see at night and recognize the appellant. Such having not been disclosed renders the evidence of recognition doubtful and therefore unreliable.

The appellant herein is alleged to had attacked and seriously injured the complainant while in company of his brother Shadrack. There are discrepancies in the evidence of the three eye witnesses, that is PW-1, PW-2 and PW-3. PW-1 indicates that he was beaten by the two. PW-2 however talks only of the accused person. PW-3 does not indicate whether she saw Shadrack. She says she went after Shadrack and the appellant had beaten the complainant. She further said the appellant was holding complainant by the trouser. On the same PW-2 says he was holding the complainant by the collar. None of the three witnesses gave a meticulous account of what each of the alleged attackers did, of which when weighed together with the disclosed discrepancies raises doubts as to whether the circumstances favoured reliable witness of the incident.

During cross-examination of the three alleged eye witnesses, PW-1 disclosed that the assailants were from a drinking spree which suggests that they were drunk. For PW-2 and PW-3 it was disclosed that the appellant herein was in crutches of which for certain limited his movement and agility. Given the circumstances there was need to explain in details the role the appellant played in attacking the complainant. Such is not convincingly disclosed in the prosecution case.

The onus is always on the prosecution to establish the charge beyond reasonable doubt. An accused person need be convicted on the strength of the prosecution case but not shortfall of his defence.

The trial court erred in weighing the evidence generally without necessary attention to details of which leads to fundamental difference in the outcome. Having said so, I do find the appeal merited. It is allowed as prayed. The conviction and sentence are not safe. They are hereby quashed and the appellant set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of December, 2020.

In the presence of:-

The appellant (virtually in prison)

Ms Limo for state

Ms Gladys - Court assistant