



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 58 OF 2018

JOSEPH MUTHAURA KAURA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant, **Joseph Muthaura Kaura**, was charged with assault causing actual bodily harm contrary to **Section 251 of the Penal Code**. The particulars of the offence were that on 29th day of April 2013 at Karachine Market in Tigania East District within the Meru County, unlawfully assaulted Patrick Mutia by cutting him on the right hand with a panga thereby occasioning him actual bodily harm.
2. The appellant was convicted for the offence and sentenced to pay a fine of Kshs. 100,000 in default 2 years imprisonment. He now appeals against the conviction and sentence on the grounds set out in the petition of appeal dated 8th May 2018. The appellant contended that the Learned Magistrate erred in law and facts in convicting him on insufficient and contradictory evidence, failing to consider his defence and sentencing him excessively under the circumstances of the case.
3. In his submissions, the appellant submitted that there was another person at the scene whom the complainant was fighting with before the appellant appeared at the scene. His defence was that the complainant was fighting with his brother of which he was not apprehended nor called as a witness. The other two witnesses who came after the event cannot be trusted to tell the truth.
4. M/s Mwathi, counsel for the respondent, supported the conviction and sentence. She submitted that according to **Section 251 of the Penal Code** the sentence given is five years of which the appellant was given two which is safe. That they met all the ingredients required to be proved in an assault case as stipulated in the case of **Alex Kinyua Murakaru v Republic [2015] eKLR**. Therefore, the conviction and sentence should be upheld.
5. This being a first appeal, the court is to re-evaluate, re-assess and re-analyze the evidence on the record and to make its own determination having in mind that it did not have the advantage of hearing nor seeing the witnesses testify. (**See: Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123**). To deal with the grounds of appeal I shall set out the evidence as it emerged from the trial court.
6. **PW1 Patrick Mutia** testified that on the material day at 7.00PM he was at his hotel at Karachi Market. While there his wife sent for him since there was a man by the name Ben throwing stones at her. He went to the scene and when he tried to ask what the problem was the appellant came and hit him with a *rungu* and he fell down. While on the ground the accused cut him with a panga on the hand as he tried to protect himself. Then he lay on him and started assaulting him with his fist. His neighbor Harrison heard screams and came to scene which made the accused and his brother to ran away. Harrison took him to the nearby clinic where he was treated.
7. **PW2 Christine Kananu** wife of the complainant confirmed that on the material day the accused's brother started throwing stones at her. She screamed and her colleagues went and called **PW1**. When he came and held the said Ben but then the accused came armed with a stick and panga. He hit **PW1** on the shoulder and attempted to cut him but **PW1** raised his hand of which he was cut.
8. **PW3 Harrison Kobia** confirmed that he arrived at the scene where he found the accused holding a panga and **PW1** lying on the ground. He took **PW1** to the clinic as he had been cut.
9. **PW4 Kenneth Kimathi** a clinician at Muthara Sub- County Hospital produced the P3 form and treatment notes. He averred that the injuries were classified as harm and the patient was placed on anaesthetics, antibiotics and antitetanus toxoid.
10. **PW5 NO. 11705 PC Kibet Rono** told the court that he took over investigations from PC Saumu Salim who had recorded witness statements and issued the reportee with a P3 form. After the investigations the accused was arrested and charged with the instant offences.
11. The appellant was accused of assault of causing actual bodily harm contrary to **Section 251 of the Penal Code** which states:

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”

The fundamental ingredients of the offence of assault causing actual bodily harm were spelt out in the case of *Ndaa v Republic [1984] KLR* which are:

(i) *Assaulting the complainant or victim,*

(ii) *Occasioning actual bodily harm.*

12. Concerning the first ingredient, the complainant (**PW1**) himself asserted that it was the appellant who assaulted him. This was confirmed by **PW2** and **PW3** who were at the scene and they saw the appellant assaulting **PW1**. The court established that the appellant had a *prima facie* case to answer but he chose to remain silent and call no witnesses. The evidence presented by the prosecution supported the allegation made by the complainant but the appellant refused to provide any defence for himself. His failure to do so cannot be regarded as a failure on the part of the trial Magistrate for he provided the appellant with a chance to defend himself of which he opted to remain silent. Thus, there was no defence for the trial Magistrate to consider but that does not mean the trial Magistrate could not convict based on the evidence presented to him. Consequently, I am of the view that the appellant did assault the complainant.

13. With regard to the second issue, occasioning actual bodily harm. In the case of *Alex Kinyua Murakaru v Republic [2015] eKLR* John M. Mativo held that :

“Thus, actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic. To make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (*mens rea*) and the assault must have taken place (*actus reus*).”

14. **PW4** Clinical Officer at Muthama Hospital examined PW1 and observed he had averred that the patient had a bruise on the left paean and a deep cut wound on the right radio-ulnar. He also had a human bite on the left forearm. The probable weapon used was both sharp and blunt. He categorized the injuries as harm.

15. From the foregoing, I am of the view that the respondent did discharge their burden of ensuring that all the ingredients were met. Therefore, the conviction was valid.

16. Regarding the sentence, the appellant was sentenced to a fine of Kshs. 100,000 in default 2 years imprisonment, of which he stated that it was excessive. According to **Section 251 of the Penal Code** the penalty given is five years. Accordingly, the appellant was given an equally lenient sentence for if this court was to implement the law strictly then he would be sentenced to maximum five years imprisonment. However, where a trial court decides to meet out a fine and in default a fine the penal court provides for alternatives to fines. Similarly, the sentencing policy and guidelines give guidelines on how to go about passing out sentences and where sentence passed is upto 3 years the trial magistrate is enjoined to consider non-custodial sentence by 1st calling for social inquiry report. S.28 (2) of the penal code is relevant in the circumstances that where a fine exceeding Ksh. 50,000/= is imposed the alternative should be 12 months.

17. This court therefore upholds the conviction but varies the sentence as follow: - Fine of Kshs. 100,000/= in default 12 months imprisonment.

HON. A.ONG'INJO

JUDGE

31.1.2019

Before Adwera J

CA:-Kinoti

Mr. Rimita holding brief for Kimathi Advocate for Appellant

Ms Mwathi for state Appellant – Present in person.

Judgement Delivered, Dated and Signed This 31st Day of January 2019

HON. A.ONG'INJO

JUDGE

Mr. Rimita Advocate for Kimathi advocate

Most Obliged.

HON. A.ONG'INJO

JUDGE