



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO. 6 OF 2018

ROBA JILLO KUNO APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 395 of 2018 of the S.M. KIMANI Senior Resident Magistrate's court at Moyale)

JUDGMENT

The appellant was charged with two counts of Grievous harm Contrary to Section 234 of the Penal Code. The particulars of the offence are that the appellant on the 30th day of September, 2015 at Walda Location, Sololo sub county within Marsabit County, unlawfully did grievous harm to BUKE JILLO (Count 1) and HALIMA SASURE (count II). He was convicted on both counts and sentenced to serve ten (10) years imprisonment for each count. The sentence is running concurrently.

The grounds of appeal are THAT:-

- 1. The trial Magistrate erred in law and fact by failing to note that presentation of the exhibited items fell short of the required standard in law.**
- 2. The learned trial magistrate erred in law and facts by failing to observe that the evidence adduced by the witnesses was inconsistent, not corroborating and contradicting.**
- 3. The learned trial Magistrate erred in law and facts by failing to note that the vital witness (ABDUBA) vide page 43 lien 5-6 who was mentioned was not availed to court during the trial to give his testimonies regarding this instant matter.**
- 4. The appellant's defence was rejected without giving sufficient reasons.**
- 5. The learned Magistrate erred in law and facts by failing to note that all the witnesses and the complainant are from the same family who wanted to eliminate the appellant from his 13 room's house and plot.**
- 6. Despite being a first offender the trial Magistrate passed a sentence that is harsh and excessive.**
- 7. The learned trial Magistrate refused to consider the appellant's mitigation**
- 8. The complainants were attacked at night this obviously could not make the victim to identify their assailant very well.**

The appellant submit that he was not accorded a fair trial. He was arrested on 17.9.2017 and arraigned in court on 25.9.2017. This period is more than the twenty four (24) hours permitted duration. The second complaint's evidence is not credible. She testified that she could not tell whether the appellant had shoes, shirt and trouser. Whereas PW1 testified that the appellant used a knife to attack her, PW3, Dibo Jillo alledged that the weapon used was a slasher. PW4, Garbole Godana is PW1's fiancée.

The appellant further submit that the witness statements of the two complainants are different from their evidence. The witnesses stated that they had never disagreed with the appellant who is their in-law. One of the witnesses testified that the appellant had no weapon. Other witnesses described the weapon as a knife, a slasher or a panga. The witnesses could also not describe the clothes the appellant was wearing. The appellant is 63 years old and the bread winner for his fifteen children. The appellant is a first offender and was framed.

The prosecution opposed the appeal. Mr. Mwangangi submit that the evidence against the appellant is consistent and clear. The two complainants suffered injuries. The appellant was identified as there was security lights. The victims are the appellant's in-laws. The incident occurred at 8.00pm at the complainant's home. That is why the witnesses are family members. The alledged existence of a grudge with a third party could not justify the attacks. The appellant's defence was an afterthought. The appellant disappeared for two (2) years and was arrested in 2017 in Marsabit. The sentence is lawful as section 234 of the Penal Code provide for life imprisonment.

This is a first appeal. The court has to evaluate the evidence afresh and make its own conclusion. **PW1 BUKE JILLO** was the complainant in Count 1. She testified that the appellant was previously married to her sister. On 30.9.2015 at 8.00pm she was at her home with her mother and children. The appellant went there, removed a panga from his jacket and assaulted her. She saw the appellant as there was security light. They screamed and neighbours went to the scene. The appellant ran away. Together with PW2, they were taken by an ambulance to Sololo Mission hospital and later referred to Kijabe hospital where she was admitted for two months. The appellant disappeared. PW1 denied having any interest on the appellant's property.

PW2 HALIMA SASURA is the second complainant. She is PW1's mother. On 30.9.2015 she was at PW1's home. At about 8.00pm the appellant went there and attacked them with a panga. She knew the appellant. There was moonlight as well as security lights. The appellant is his son in law. She was treated at Sololo hospital and later at Kijabe hospital.

PW3 DIBO HALAKE is PW1's daughter. She is a secretary at Walde complex High school. On 30.9.2015 she was at home at about 8.00pm. The appellant went there and attacked PW1 and PW2. Her cousins who are the appellant's children were also present. There was security light and she saw the appellant. PW1 and PW2 were taken to hospital in an ambulance.

PW4 GARBOLE GODANA was at PW1's house on 30.9.2015. At about 8.00pm he went for a short call at a different plot. While leaving PW1's home he saw the appellant. PW4 then heard screams and went back. He saw the appellant leaving PW1's home. PW1 had a broken hand and pW2 had a cut on the head and hand. They called for an ambulance. He knew the appellant and identified him through the use of security lights.

PW5 IBRAHIM MOHAMED is a medical doctor. He was the medical superintendent, Moyale sub County hospital. He produced two P3 forms for PW1 and PW2. PW1 had an old surgical scar on the left hand. He assessed the injury as main. PW2 had a scar on the forehead and healed scar with deformed hand. He classified the injuries for PW2 as grievous harm.

PW6 CORPORAL SAMMY YAA was attached to the Sololo Police station. On 20.9.2017 he was at the station and got information that the appellant had been arrested. The offence had occurred on 20.9.2015 and the appellant was at large. The appellant was taken to the station. The complainant had reported the case earlier. He investigated the case and had the appellant charged with the offence.

The appellant tendered sworn defense. He stated that he does not have any grudge with the complainants. He had not differed with them. There were people who were building at PW1's plot. They used to smoke bhang. They were complaining that PW1 was not paying them. His wife died in Ethiopia and he went there for fifteen days. He was later informed that the complainants had been attacked. He went to Sololo and was told not to go to Walde as PW1's friend wanted to fix him with grievous harm. He decided to go to Marsabit where he stayed for two years until when he was arrested. It is his evidence that PW1 and PW2 were attacked by the fundis they had hired.

The Prosecution evidence does prove that indeed PW1 and PW2 were attacked and suffered serious injuries. The issue for determination is whether it is the appellant who caused them the injuries. According to PW1 and PW2, they were at home on 30.9.2015 at about 8.00pm when the appellant went there and attacked them. They knew the appellant. The appellant removed a panga from his jacket and attacked them. PW3 was present during the attack. According to PW1, PW2 and PW3, there were lights in the house and they saw the appellant clearly. PW4 was also present and he saw the appellant entering PW1's compound. PW4 heard screams and when he went back to check, he found PW1 and PW2 had been injured. PW4 also saw the appellant leaving PW1's home.

The appellant contends that he did not attack PW1 and PW2. He heard about the attacks and was warned not to go to the scene as PW4 wanted to connect him with the attacks. It is his evidence that PW1 had builders (fundis) at her place and these are the people who attacked her.

From the evidence on record, it is established that PW1 and PW2 saw their attacker. The attacker was not any of the alledged fundis. The appellant did not see the fundis attacking PW1 and PW2. His defence is that he was informed about the attacks. The source of information is not given. The appellant further maintains that PW4 wanted to fix him as he is a fiancee to PW1. The relationship of PW1 and PW4 is immaterial. What is important is that PW1 and PW2 were attacked. The question is "**who attacked them?**" PW1 testified that she is not interested in the appellant's property. Why would PW1 create a story on the attack so that she takes the appellant's property. I do find that the appellant's allegations are an afterthought. The appellant disappeared for two years after the attack. His explanation that he moved to Marsabit because PW4 wanted to fix him cannot be true. Why didn't the appellant go to the local Police station and report that he had nothing to do with the attack. His defence does not raise any doubt on the prosecution case.

Although the incident occurred at night, I am satisfied that PW1, PW2, PW3 and PW4 positively identified the appellant as the assailant. All vital witnesses testified. The incident occurred at PW1's homestead and it is only logical that those who were present were the crucial witnesses. The appellant's contention that all the witnesses are from the same family is misplaced. The evidence of PW3 is that even the appellant's own children were present. The prosecution evidence is consistent and proved the case beyond reasonable doubt.

The record shows that although the appellant is an elderly man, he is not ready to accept his mistake and seek forgiveness. He told the Court that he is 64 years old. He has put up a case of being the victim of some third parties who are out to take his properties. No one is out to take his properties. Before the trial court, the appellant indicated that he has five children. Before this court he stated that he has fifteen children. The evidence shows that PW1 was living with some of the appellant's children. The applicant seems to have ignored all the assistance PW1 and PW2 have done in taking care of his children and went on to attack them. It is clear to me that the appellant is thankless and despite his age, he deserves a custodial sentence. The appellant attacked two innocent women without any provocation. The victims sustained serious

injuries and had to undergo medical treatment.

The trial Court imposed a ten (10) years imprisonment sentence on each count. Taking into account the appellant's age, I do set aside the ten (10) years imprisonment sentence and replace it with six(6) years imprisonment.

The appeal on conviction is hereby disallowed. The sentence imposed by the trial Court is set aside and replaced with six (6) years imprisonment for each count. The sentence shall run concurrently meaning the appellant shall serve one six (6) years imprisonment sentence.

Date, Signed and Delivered at Marsabit this 29th day of January, 2019

S. CHITEMBWE

JUDGE