REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 133 OF 2015

RAPHAEL NZOVU GONA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An appeal from the Judgment delivered by V.Yator, Resident Magistrate and ensuing sentence meted out by Hon. I. Ruguru on 7th July, 2015 in Mombasa Chief Magistrate's Court Criminal Case No. 1586 of 2014)

JUDGMENT

1. The appellant, Raphael Nzovu Gona was on 2nd September, 2014 charged with the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars of the charge were that on the 31st day of August, 2014 at Mikindani area in Changamwe within Mombasa County, unlawfully assaulted and did grievous harm to Bahati Mwaka Mganza.

2. He was found guilty and sentenced to 25 years imprisonment. The appellant being aggrieved by the sentence and conviction against him filed a petition of appeal and grounds of appeal on 17th July, 2015. He amended his grounds of appeal with leave of the court at a later date. In the said grounds of appeal he states that:-

(i) The charge was fatally defective for failure by the prosecution to indicate the time the offence was committed in violation of Section 137(f) of the Criminal Procedure Code;

(ii) That the Learned Trial Magistrate erred in law and in fact by convicting and sentencing him to 25 years imprisonment without considering that the complainant's evidence tendered in court did not tally with the findings recorded in her treatment notes and P3 form;

(iii) That members of the public and the Village Elder who allegedly arrested him never testified to clear doubts on the circumstances surrounding his arrest;

(iv) That the Learned Trial Magistrate erred in law and fact by failing to see that the panga alleged to have been used to cut the complainant was not produced in court;

(v) That the Learned Trial Magistrate erred in law and in fact by considering the confession statement and sentencing him without noting that it was unsafe for the same to be taken into account; and

(vi) That the Learned Trial Magistrate erred in law and fact by not considering his reasonable defence statement.

3. In his written submissions, the appellant stated that the charge leveled against him was fatally defective as the time the alleged offence was committed was not disclosed. He was therefore of the view that the particulars of the charge were insufficient for failure to disclose the time the incident occurred.

4. The appellant submitted that there were contradictions in the evidence of PW1 and PW2 as to the time the offence was committed. PW1 said that it happened at 12:00 p.m., but PW2 said that it happened at 10:00 p.m. He referred to the case of **Augostino Njoroge Ritho vs Republic**, Criminal Appeal No. 99/86 to the effect that contradictory evidence in unreliable.

5. The appellant also submitted that PW1's evidence as to the date the offence occurred was at variance with the date reflected on the P3 form and treatment notes from Mikindani Medical Centre. He stated that PW1 said she was attacked by the appellant on 31st August, 2014 at

12:00 p.m., and that she went to hospital on the same day. On the other hand, the treatment notes and P3 form indicate that the date of the alleged attack was 1st September, 2014 at 1:00 p.m. Further, that the P3 form indicates that PW1 was sent to Hospital on 14th September, 2014 and the approximate age of the injuries she had, was 21 days. The appellant therefore argued that PW1 could not have been assaulted on either 31st August, 2014 or 1st September, 2014. He relied on the case of **Ndungu Kimanyi vs Republic** [1979] eKLR on the issue of credibility of witnesses.

6. The appellant further submitted that the medical notes from Mikindani Medical Centre were not produced by the author of the same and he therefore was not accorded an opportunity to cross-examine either the author of the said document or an expert from the said Medical Health Centre.

7. The appellant took issue with the statement that was recorded from him by PC Oseko, PW3, for he was not authorized under the provisions of Section 29 of the Evidence Act to record confessions from accused persons. The appellant therefore urged this court to disregard the said statement.

8. The appellant contended that his source of arrest was not proved as no witness went forth in court to testify about his arrest save for PW1 who said that the appellant was arrested by the Village Elder, who was not called, with other witnesses, to testify in court. He relied on the cases of **John Keya vs Republic**, Appeal No. 118 of 1984 and **James Kuloba Walushe vs Republic** [2008] eKLR.

9. The appellant stated that the panga that was mentioned by PW2 was not taken to the Police Station as an exhibit as well as the clothes PW1 wore at the time of the incident. He also stated that apart from PW1, no other witness talked of having seen blood everywhere in her house. The appellant submitted that the prosecution failed to prove its case beyond reasonable doubt and urged this court to allow the appeal.

10. Ms Marindah, Prosecution Counsel filed written submissions on 30th November, 2018 on behalf of the respondent to oppose the appeal. She relied on the case of **Alivi vs Republic** [1990] KLR 188, where the court held that it is not every defect or omission that renders a charge defective and that a mere technical defect in the charge sheet which is not fundamental and does not cause failure of justice is curable. She therefore submitted that failure in this case to indicate the exact time the offence happened does not render the charge defective.

11. With regard to PW1's evidence that she was attacked at 12:00 p.m., and PW2's evidence that the incident happened at 10:00 a.m., Ms Marindah submitted that it was a minor contradiction which did not negate the occurrence of the assault and that the time given by the witnesses was an estimation of the time. It was submitted the wording of the charge sheet enabled the appellant to understand the charge against him and no prejudice was occasioned.

12. On the injuries sustained by PW1, it was submitted that they were consistent with what was captured on the P3 form. Ms Marindah stated that the P3 form was filled at Changamwe Police Station on 1st September, 2014, and the patient was escorted to Hospital for filling of the P3 form on 14th September, 2014 after she had recovered. It was explained that due to a Doctor's strike, the P3 form was not filled until the 22nd September, 2014, which was 21 days after the incident.

13. With regard to the medical treatment notes, it was argued that the appellant did not object to production of the same by PW1 and that he cross-examined her on the same. As for the P3 form, it was stated that it was produced by PW4 and the appellant cross-examined her on the same.

14. It was contended that no confession statement was produced in court but the Investigating Officer answered questions put across to him by the appellant about a statement under inquiry which he recorded at the Police Station.

15. In regard to the witnesses who were not called to testify, the Prosecution Counsel referred to the provisions of Section 143 of the Evidence Act which states that the prosecution is under no obligation to call a particular number of witnesses unless the law otherwise provides. She stated that the witnesses who testified proved the prosecution's case beyond reasonable doubt. She prayed for the appeal to be dismissed.

ANALYSIS AND DETERMINATION

16. The duty of the first appellate court is to consider the evidence tendered before the lower court, analyze and re-evaluate it, while bearing in mind that it has neither seen nor heard the witnesses testify and give an allowance for that. In **Okeno vs Republic** the court stated as follows:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

17. PW1, Bahati Mwaka Shana testified of how on the 31st of August, 2014 at 12:00 p.m., was sleeping on her bed. She was by then 8 months pregnant. The appellant who was her neighbour for a long time went and cut her on the right hand, she tried to protect herself and he cut her on the left hand and on her back. She screamed and the appellant left and locked the door from outside. One Mama Amina as well as other neighbours went and assisted her. PW1 further testified that after the attack there was blood everywhere in her house. She was taken to Coast Province General Hospital (CPGH) but the Doctors were on strike. She was taken to a dispensary at Majengo and in the evening taken to Mikindani Medical Centre where the injuries were stitched. She was admitted to the said Medical Centre for a week. She stated that she was injured on both hands, on the face and on the left shoulder. The Hon. Magistrate noted that PW1 had a stitched scar on her right palm,

left palm, face and long scar on her left shoulder and the hands were disabled.

18. It was PW1's evidence that the appellant was arrested by a Village Elder when she was in Hospital. She produced her treatment notes as P. exhibit 1. She indicated that she later went to Changamwe Police Station where she was issued with a P3 form which was filled at CPGH. It was her evdence that the appellant had at one time told her that he loved her but she rebuffed him because she was married.

19. PW2, Saumu Ghaza's evidence was that on 31st August, 2014 as she was washing utensils outside her house, she heard her sister (PW1) shout. When she looked towards PW1's house she saw the appellant getting out of PW1's house. She saw him locking the said house and that he was carrying a bloody panga. She went to her sister's house and found her on the bed. Her hands, face and shoulder had been cut. She indicated that the appellant was arrested in another village by a Village Elder.

20. PW2 testified that PW1 was taken to Bomu Hospital but she was not treated as they had no money and she was thereafter taken to Mikindani Medical Centre where she was admitted for a week. PW2 stated that she knew the appellant who used to live near her and PW1. PW2 further stated that he was alleging that PW1's husband was peeping into his house when he was having sex with his wife.

21. PW3 was No. 76742 PC Harrison Oseko attached to Changamwe Police Station. It was his evidence that on 31st August, 2014 he was assigned this case to investigate. The following day he did a follow up on the complainant had been admitted to Mikindani Medical Centre where he recorded her statement. She explained to him that the appellant had injured her on 31st August, 2014 at 12:00 p.m. He saw that PW1 had injuries. He stated that the appellant was arrested by members of the public at a neigbouring village. He later took PW1 to CPGH for the filling of her P3 form.

22. PW4, Dr. Anthony Njuguna from CPGH produced the P3 form as exhibit 2, on behalf Dr. Ngone, whose handwriting and signature he was familiar with. PW4 stated that Dr. Ngone used documents from Mikindani Medical Centre dated 1st September, 2015 (sic). On examination by the said Doctor, he established that PW1 had a cut on the forehead, a cut on the left shoulder, on the left hand and on the right hand she had cut wounds as well. She was found to have a broken left hand and fractured bones on her right and left fingers. The probable type of weapon used was a sharp object. The degree of injury was assessed as maim. PW4 indicated that the P3 form was filled on 22nd September, 2014.

23. In his defence, the appellant denied having any knowledge of the offence he was charged with and stated that on 31st August, 2014 he left home for a building site where he got into differences with some workers therein. On the way home, someone grabbed his shirt and they started struggling. He saw that his attackers were the people he had differences with at work. He was beaten and thereafter arrested by the Police.

24. The issues for determination are:-

> **(i) If the charge was fatally defective for failure to indicate the time when the offence was committed;**
>
> **(ii) If the evidence of PW1 was at variance with the findings on her P3 from and medical treatment notes.**
>
> **(iii) If failure to call the witness who arrested the appellant was fatal to the prosecution's case;**
>
> **(iv) If the Hon. Magistrate was influenced by a confession statement which was not produced in convicting the appellant; and**
>
> **(v) If the Hon. Magistrate failed to consider the defence given by the appellant.**

If the charge was fatally defective.

25. It is evident that the charge did not indicate of time the offence was committed. The provisions of Section 137(f) of the Criminal Procedure Code (CPC) provides as follows:-

> ***"Subject to any other provision of this section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to."***

26. On the other hand, Section 134 of the CPC provides as follows with regard to the drafting of charges:-

> ***"Every charge or information shall contain, and shall be sufficient if it contains, <u>a statement of the specific offence or offences as may be necessary for giving reasonable information as to the nature of the offence charged</u>." (emphasis added).***

27. In this particular case, save for the time when the offence was committed, all the other necessary particulars were reflected on the charge sheet. I do not see any prejudice that was occasioned on the appellant due to failure to indicate the time the offence was committed. The time can be garnered from the evidence of PW1 and PW2 that the offence was committed during day time.

28. PW1 testified that the offence occurred at 12:00 p.m., whereas PW2 testified that it happened at 10:00 a.m. The fact that there was a contradiction as to the time given by the two witnesses, it is not a major contradiction as the time span between 10:00 a.m., and 12:00 p.m., is 2 hours. Secondly, PW2 said that the incident happened at about 10:00 a.m., which means that she estimated the time. It is my finding that the said contradiction cannot be resolved in favour of the appellant.

If PW1's evidence was at variance with the P3 form and medical treatment notes.

29. The appellant's claim is that PW1 went to Mikindani Medical Centre on 1st September, 2014 for treatment and not 31st August, 2014 as per PW1's evidence. The original medical notes from the said Medical Centre shows that PW1 went there on 31st August, 2014. Beneath that date, another date is written as 1st September, 2014. It is evident from any layman looking at the report that the date of 31st August, 2014 was written by the same person as the one who wrote the medical notes as the handwritings are similar. If the appellant wanted to find out more about the other date that appears as 1st September, 2014, nothing stopped him from informing the Trial Magistrate that he wanted the author of the document to attend court for cross-examination. He can therefore not belatedly raise the issue of the said date.

30. The appellant also took issue with regard to the fact that the P3 form indicates that the date and time of the alleged offence was 1st September, 2014 at 1:00 p m., and not on 31st August, 2014. This court notes that the P3 form was issued by Changamwe Police Station and the Investigating Officer, PW3 attended court and testified. His evidence was that the report by PW1 was that she was attacked on 31st August, 2014 and that it was on the said date that the OCS Changamwe Police Station assigned him this case to investigate. With respect to the discrepancy on the date appearing on the P3 form showing that the offence occurred on 1st September, 2014, the appellant should have cross-examined the Investigating Officer on the same.

31. On the issue of the PW1 having been sent to CPGH on 14th September, 2014, the evidence of PW1 and PW5 is that she was admitted to Mikindani Health Centre for 5 days. When she was attacked, she was at first taken to CPGH for treatment but Doctors were on strike and that is how she ended up being admitted to Mikindani Medical Centre for 5 days. The P3 form shows that she was sent to CPGH on 14th September, 2014.

32. It is not clear what transpired on that day as the appellant did not cross-examine PW1 on it. It is also not clear for how long the Doctor's strike persisted. It is however evident that the P3 form was filled on 22nd September, 2014 which would have made the approximate age of the injuries PW1 sustained to be 21 days. Although the P3 form indicates that PW1 did not receive any treatment prior to examination by Dr. Ngone, the medical treatment notes produced as P. exhibit 1 and the evidence of PW1 and PW2 was consistent that she was treated at Mikindani Medical Centre on 31st August, 2014 and admitted for 5 days. This court notes that Dr. Ngone is not the one who treated PW1. His work was to assess the injuries PW1 sustained and to fill the P3 form. The said discrepancy can therefore not be resolved in favour of the appellant.

If failure to call the persons who arrested the appellant was fatal to the prosecution's case.

33. The evidence on record is that after PW1 screamed, PW2 went to assist her and that members of the public chased the appellant who was arrested at a neighbouring village and taken to Changamwe Police Station by a certain Village Elder who did not testify. Under the provisions of Section 143 of the Evidence Act, the prosecution is not under obligation to a particular number of witnesses, in the absence of any evidence to the contrary to prove any fact. In **Keter vs Republic** [2007] eKLR, the court held as follows with regard to failure by the prosecution to call some witnesses:-

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."***

34. A superfluity of witness in this case would not have assisted much as the Village Elder who is said to have arrested the appellant was not an eye witness to the commission of the offence. There was no value addition he was going to give to the prosecution's case. I therefore hold that the prosecution's failure to call the person who arrested the appellant was not at all prejudicial to the appellant.

If the Hon. Magistrate was influenced by a confession statement which was not produced in convicting the appellant

35. PW3 in his evidence stated that the appellant admitted having attacked PW1 on the assumption that the person whom he was attacking was PW1's husband. The Hon. Magistrate should not have permitted PW3 to introduce the element of a confession that was allegedly made at the Police Station without having any confession made produced in court, after ensuring that such a statement was recorded in conformity within the safeguards provided under the provisions of Section 25A(1) of the Evidence Act. In her Judgment, the Trial Magistrate took into account the issue that the appellant admitted having committed the offence. It is my finding that the Hon. Magistrate misled herself in considering the foregoing as the evidence of a confession statement having been recorded as required, was not produced before her. I however hold that even after disregarding the part of the said evidence, there was overwhelming evidence against the appellant that he committed the offence he was charged with.

36. On being cross-examined, PW1 stated that the appellant had been alleging that her husband used to peep into the appellant's house as he and his wife were having sex. PW2 also supported what PW1 said in that aspect. It is thus clear that the appellant had a grudge against PW1's husband, which he took out on PW1.

Defence raised

37. In his defence, the appellant denied that he knew PW1 or that he was at the scene of crime on the material day. He denied committing the offence. The evidence of PW1 and PW2 was that the appellant used to live in the same house with them but in different rooms. The evidence does not disclose what type of a house it was. The appellant's defence that he did not know PW1 was displaced by her evidence that he had been their neighbour for a long time. His alibi defence of not being at the scene of crime was also displaced by PW1 who was categorical and consistent in her evidence that she was attacked by the appellant.

38. In addition to the foregoing, PW2 testified that when she heard screams coming from PW1's house, she saw the appellant locking PW1's

house as he held a bloody panga. The said evidence placed the appellant squarely at the scene of crime. The appellant's defence was considered by the Trial Magistrate who found it to be untruthful. I too find the said defence to be farfetched and full of falsehoods.

Other issues

39. On the issue of the sentence, the Prosecution Counsel filed a notice of enhancement of sentence but failed to address the court on the reasons as to why she was seeking substitution of the sentence from 25 years to life imprisonment. I will therefore not consider the issue of enhancement of sentence since it was not submitted on.

40. The evidence adduced by PW1 was that after she was attacked by the appellant, there was blood everywhere in her room. The appellant challenged the fact that PW2 did not testify about it. In this court's view, that is immaterial as the person who was under attack was PW1. PW2's work was to assist and take PW1 to Hospital. He also challenged the fact that the panga that was used to cut PW1 was not produced as an exhibit. The evidence on record is that after the appellant assaulted PW1, he left with the bloody panga he had used. There is no evidence that the panga was ever recovered. The prosecution could therefore not produce an exhibit it did not have.

Conclusion

41. The medical evidence adduced through medical treatment notes and the P3 form indicates that PW1 sustained very serious injuries. At 8 months of pregnancy, PW1 suffered multiple fractures on her left and right hands. Both forearms were immobilized with full casts to aid in recovery. Tendons and several vessels on her right and left hands were severed as the cut wounds were deep. The cut wounds on her forehead and shoulders were also deep. All the cut wounds were stitched to aid in recovery. Dr. Ngone in the P3 form assessed the degree of injury as maim. The P3 form defines the word **"maim"** as destruction or permanent disability of any external or internal organ, member or sense. The injuries sustained by PW1 indicate that she suffered a very vicious attack in the hands of the appellant.

42. When sentencing the appellant, the Hon. Magistrate took into account the mitigation he offered but noted the gravity of the offence and the injuries sustained by PW1. The Hon. Magistrate however did not indicate if she took into account that the appellant was a first offender. I do take that fact into consideration and substitute the sentence of 25 years imprisonment with a sentence of 12 years imprisonment. The said sentence shall run from the 7th of July, 2015, being the date when the appellant was sentenced by the Trial Court. The appeal succeeds only to the said extent.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **30th** day of **April, 2019.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Marindah - Prosecution Counsel, for the respondent

Mr. Oliver Musundi - Court Assistant