



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 37 OF 2016

OMAR BARISA KOMORA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Resident Magistrate

Court at Lamu Criminal Case No. 329 of 2016 by Hon. Njeri Thuku (SRM) dated 6th October 2016)

JUDGEMENT

1. The Appellant Omar Barisa Komora was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on 29th August 2016, at about 1:00 pm at Gadeni area in Lamu West sub-County within Lamu County he unlawfully assaulted Scholastica Muna occasioning grievous harm.
2. Four witnesses testified for the prosecution. The complainant (PW2) told the court that the Appellant was her boyfriend on and off. She narrated the events of the material day stating that the Appellant went to her house at 4:00am forced his way into her house and started demanding Ksh. 5,000/- from her. She tried telling him that the money was in her phone but he took a knife and threatened to cut her hair with it. He later put the knife down and started slapping her on the face and banging her on the wall before he left.
3. The complainant said that the Appellant came back to the house after half an hour and kicked the door open and started beating her again. She tried to escape through the door but the Appellant grabbed her left hand, twisted it until she heard a pop from her shoulder. The Appellant then ran away. Her neighbours who had gathered due to the commotion placed her on a bed in the veranda and went to look for a doctor from Langoni Hospital. When the doctor arrived, he examined her and informed her that her hand might be broken, but that she required to go for an x-ray. He then gave her painkillers. The next morning she was taken to hospital by her sister and the Appellant.
4. Joseph Nderitu (PW1), a clinical officer at Lamu Hospital testified that he examined the complainant and filled the P3 form [Exhibit 3]. He told the court that he sent her for an x-ray [Exhibit 2] which revealed she had a fracture in her left shoulder. He classified the degree of injury as grievous harm.
5. Mahamoud Yusuf (PW3) was the security guard at Gardeni where Scholastica lived. He recalled that on 19th June, 2016 at around 5:00am, the Appellant had gone to Scholastica's house where he heard him demanding for money from her and causing a lot of commotion. The Appellant then left hurriedly but came back after 20 minutes and demanded that the gate be opened. When PW3 refused to open the gate, the Appellant scaled the wall and proceeded to the complainant's house where he kicked the door open and fought with her.
6. According to PW3, the complainant tried to leave the house but the Appellant grabbed her left hand until he heard it pop, then the complainant fell down crying. PW3 and another neighbour rushed to Ibususina to get a doctor and the Appellant joined them. The doctor examined the complainant but advised he could not do anything to assist her and that she must go to hospital.
7. P.C. Leonard Kipkemei (PW4) was the investigating officer. He informed the court that on 20/8/2016 he received a call from the OCS informing him that there was someone at King Fadh hospital who had been beaten. He went to the hospital where he found the complainant who informed him that she had been beaten by her boyfriend, Komora. He recorded her statement and later issued her with a P3. P.C. Kipkemei also visited the scene and saw how the Appellant gained access. He later arrested the Appellant.
8. At the defence hearing, the Appellant gave a sworn statement. He told the court they did not fight on 20th August 2016 but that the complainant was stressed and angry. He admitted that they had an argument and that as the complainant was leaving the house she twisted her hand. He said that he called his neighbours, Yusuf (PW3) and Adu, and asked them to take him to Ibususina to get a doctor. The doctor gave the complainant an injection and medicine.

9. The Appellant further stated that the following morning, he took the complainant to King Fadh hospital with his boat where she was treated for her injury. According to the Appellant, he was arrested when he went to make a report at the police station and he was put in the cells and his fingerprints taken. During cross-examination, he stated that the complainant was injured as he restrained her from leaving.

10. Muruga Akulu (DW2) was the clinical officer at Ibususia. He told the court that he recalled the Appellant had gone to the clinic at around 3 or 4am accompanied by three other people. That the Appellant informed him that there was someone sick who had fallen down the stairs and could not walk or stand. When he went to the house, he found many neighbours and a lady who was holding her shoulder. He examined her and concluded that she had dislocated her shoulder. He administered a painkiller by way of injection and put her hand in a sling. He advised her to go to King Fadh hospital in the morning.

11. The Appellant was found guilty and convicted. He was sentenced to 10 years imprisonment.

12. Being aggrieved by the conviction and sentence the Appellant lodged this appeal on grounds, which are to the effect that the magistrate exaggerated the injury by classifying it as grievous harm; that he did not injure the complainant and that the sentence was too harsh.

13. The Appellant filed written submissions on 19th February 2019 in which he abandoned his grounds of appeal and sought for a reduction of sentence. He submitted that one of the objectives of sentencing was to rehabilitate offenders. It was his submission that since his conviction and sentence up to date, he had reformed and was remorseful for what he had done and he promised not to repeat the offence. He relied on the case of **Athman Hamis & 2 others vs Rep (2016) eKLR**. He prayed that the court reduce the sentence or place him on probation.

14. The Respondent opposed the appeal in its entirety by written submissions dated 10th June 2019 and filed on the same day. It was the Respondent's submission that the prosecution had proved each element of the offence through the evidence of the prosecution witnesses and asked the court to uphold the decision of the trial court. He relied on the case of **John Oketch Abonyo vs R (2000) eKLR**.

15. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions as was laid out in the case of **Okeno v R (1972) EA 32**. See also **Eric Onyango Odeng' v R [2014] eKLR**. Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and I can only rely on the evidence on record.

16. Having considered the record, grounds of appeal, and the respective submissions of the parties, I consider the only issue in this appeal to be whether the case against the Appellant was proved beyond reasonable doubt.

17. In the present case, the complainant narrated how the Appellant had violently asked for money from her by slapping her. He then left only to come back later and demand for the money again. When the complainant tried to leave the room, the Appellant held and twisted her left hand leading to the fracture. This was corroborated by the security guard (PW3) who saw the Appellant forcibly hold the complainant's hand until he heard it pop.

18. The medical evidence in the by P3 form adduced by the clinical officer (PW1) indicated that the complainant was tender on both cheeks, which were swollen and she was nose bleeding from both nostrils, a swollen left shoulder which was tender (severe) on touch. An x-ray revealed that the complainant had suffered a fracture of the clavicle. PW1 reached the conclusion that the complainant had suffered grievous harm.

19. Further, the Appellant in his defence stated that the complainant twisted her hand in the manner she had told the court. In cross-examination, the Appellant admitted that the complainant was injured when he tried to restrain her.

20. From the evidence, it is evident that the complainant fractured her hand when the Appellant twisted her arm trying to restrain her which proved the case against the Appellant.

21. On whether the injury was grievous harm, section 4 of the Penal Code defines it as:-

'means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense'

22. In **John Oketch Abonyo v Republic (supra)** the Court of Appeal stated that:-

"We are satisfied that the complainant's injury amounted to grievous harm as defined in the Penal Code. The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition." (Emphasis mine.)

23. In the present case, the complainant suffered a fracture on her shoulder, which though would probably heal, might have other long reaching effects. The complainant informed the court that she was not allowed to work for a period of 6 months, she felt pain when walking and that she hears the sound of her bone disconnecting.

24. From the evidence above, I am satisfied that the injury suffered was dangerous harm which injured the health of the complainant and therefore amounted to grievous harm.

25. On sentence, section 234 of the Penal Code provides that any person convicted of unlawfully committing grievous harm is liable to life imprisonment.

26. I must confirm from the outset that the 10 year sentence handed to the Appellant was lawful. Further, it is trite that sentencing is at the discretion of the trial court and an appellate court shall only interfere with the sentence under specific circumstances such as where the sentence was manifestly harsh and excessive or where it overlooked some material fact. **See Benard Kimani Gacheru vs Republic [2002] eKLR**

27. In the present case, the Appellant in mitigation asked for forgiveness saying that he would not repeat the offence. I note from the record that the trial Magistrate in sentencing the Appellant observed that :-

“However the Accused displays no remorse. Indeed in the course of trial he said “...This small matter has been greatly exaggerated.” He failed to appreciate the seriousness of this offence.”

28. In mitigation, the Appellant had asked for forgiveness. He had stated that he had a wife and children and that he also took care of his mother.

29. The importance of mitigation was laid out by the Court of Appeal in **Mohammed Hussein Mohammed v Republic [2019] eKLR** where it pronounced itself thus:-

“The essence of the Supreme Court’s holding in the Muruatetu case is that the principle of fair hearing extends to the sentencing stage wherein mitigation as an important congruent element of fair hearing comes into play. Mitigation is what enables the court to assess and apply its mind to the surrounding circumstances of each case for the sole purpose of meting out an appropriate penalty. The centrality and importance of mitigation in our criminal legal system is embraced under Sections 216 and 329 of the Criminal Procedure Code which require a sentencing court to hear and take into account mitigating factors before sentencing a convicted person.”

30. In this case the court, while taking into consideration the initial attitude of the accused, ought also to have considered his mitigation. In addition, despite acknowledging the Victim Impact Assessment report, the trial Magistrate failed to consider the same when sentencing the Appellant. In the report, the victim had indicated that she was disappointed that the trial magistrate had declined to allow the matter to be settled out of court on the ground that the prosecution had closed its case.

31. Having considered the evidence on record, the mitigation of the Appellant and the victim impact statement, I find that the 10 years imprisonment was manifestly harsh and excessive in the circumstances.

32. In the premises, I uphold the judgment of the trial court and confirm the Appellant’s conviction. The Appellant shall however serve 5 years imprisonment from the date of conviction and sentence.

Orders accordingly.

Judgment delivered, dated and signed at Garsen this 30th day of September, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

S.Pacho, Court Assistant

The Appellant in person

Mr. Mwangi for the Respondent