



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 130 OF 2018

ELIJA WAFULA WALUTSACHIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(from the original conviction and sentence in Butali SPMC Criminal Case No. 1244 of 2016 by E. K. Kwambai, RM, dated 4/9/2016)

JUDGMENT

1. The appellant was convicted of the offence of occasioning a person grievous harm contrary to Section 234 of the Penal Code and sentenced to a fine of Ksh. 50,000/= in default to serve three years imprisonment. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:-

- 1. The learned magistrate erred in fact and in law in reaching a verdict of guilty against the appellant in the absence of sufficient evidence to prove the prosecution case.***
- 2. The learned magistrate erred in fact and in law in shifting the burden of proof to the appellant.***
- 3. The learned magistrate erred in fact and in law in arriving at a decision that is likely to occasion miscarriage of justice.***
- 4. The learned magistrate erred in fact and in law in failing to take caution that the prosecution failed to call the eye witness.***
- 5. The learned magistrate erred in fact and in law in basing his conviction on assumption.***

2. The particulars of the offence against the appellant were that on the 20th October, 2016 at Matsakha Market in Kakamega North Sub-County within Kakamega County with another not before court they unlawfully did grievous harm to Joseph Barasa (herein referred to as the complainant).

3. The state through the prosecution counsel, **Mr. Juma** conceded to the appeal.

4. The prosecution case was that the complainant who was PW1 in the case was a caterpillar earthmover operator. Joseph Oduor Jakwa PW2 was his assistant. That on the material day they had been engaged to grade the Butali-Matsakho road. At 1.30 p.m. two people went to the place and tried to stop them from doing the work. They attacked the complainant's colleague PW2. The complainant who was aboard the earthmover alighted to find out why the people were attacking PW2. Before he proceeded to the place where PW2 was being attacked one of the attackers threw a stone at him which hit him on the left side of the cheek thereby knocking out three of his teeth. He also sustained a deep cut wound on the left side of the cheek. He reported the incident at Masakha AP Camp and at Malava Police Station. He went for treatment at Royo Clinic. He was issued with a P3 form that was completed by a clinical officer PW3 at Malava Sub-County Hospital. He was found with a swollen left cheek, two cut wounds at the said place, one premolar knocked out on the upper left jaw and two premolars knocked out on the lower left jaw. The clinical officer classified the degree of injury as grievous harm. The appellant was later arrested and charged with the offence. He denied the charge. During the hearing the clinical officer produced the treatment notes from Royo Clinic and from Malava Sub-County Hospital as exhibits, P.Ex.1 and 2 respectively. He also produced the P3 form as exhibit, P.Ex.3.

5. When placed to his defence the appellant gave sworn evidence in which he stated that he lives at Masakha. That the complainant was a person known to him. That on the material day he was attending a church service at the home of David Shikuku Wanangwe, DW2. That he went to the home of the said person at 9.30 a.m. and left for home at 5.30 p.m. After one week he was arrested. He denied that he assaulted the complainant on 20/10/16. He said that he did not go to Masakha market on that day.

6. The appellant's witness David Wanangwe DW2, testified that on the material day the appellant was attending a church service at his home. That he arrived for the service at 10 a.m. and left at 5 p.m.

7. The advocate for the appellant, **Mr. Onsando**, submitted that the prosecution did not prove that the appellant was one of the people who assaulted the complainant. That the appellant's name is Elijah Walutsachi yet the name the complainant gave to the police is Nicholas Walutsachi. Therefore that the appellant was wrongly convicted of the offence.

Analysis and Determination -

8. This is being a first appeal the duty of the court is to to analyze and re-evaluate the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – see **Okeno –Vs- Republic (1972) EA 32**.

9. It was the evidence of the complainant that he never knew the appellant before the date of the incident. That he later learnt that the people who had assaulted him were Sammy Simitsi and Nicholas Walutsachi. That after the appellant was arrested he, the appellant, approached him and wanted them to reconcile. That at that time is when he learnt the name of the appellant as Nicholas Walusatchi.

10. Josiah Oduor Sakwa PW2 similarly testified that he had not known the appellant prior to the date of the incident. That they were told the names of the attackers by members of the public who came to the scene. That he came to know the name of the appellant when he, the appellant, took plea in court.

11. The policeman who testified in the case PW4 stated that he took over the file from PC Sudi who had been transferred from Kabras Police Station. That PC Sudi had recorded statements of witnesses. That the complainant in his statement to the police had stated that:-

“Suddenly two men who I cannot recall assaulted me.... I later learnt that the accused persons are known as Sammy Simiyu and Nicholas Walutacho.”

That PW2 similarly stated in his statement that:-

“... I later came to know that they are known as Sammy Simiyu and Nicholas Walutacho.”

12. It is then apparent from the evidence of the complainant and his colleague PW2 that they did not know the people who attacked them. They were given the names of the people who attacked them by members of the public. The name of the appellant that appears in the charge sheet is different from the name that the witnesses gave to the police. The name given to the police is Nicholas Walutacho while the name of the appellant as contained in the charge sheet was Elija Waluthacho. There was no evidence that the two names referred to the same person.

13. Further to this the members of the public who told the complainant the identity of the people who had attacked him were not called to testify in the case. The police did not conduct an identification parade to ascertain whether the complainant and PW2 could identify the appellant as one of the people who had attacked them. The trial court relied on dock identification to convict the appellant of the offence. Evidence of dock identification is very weak evidence that should not be relied upon as the basis of a conviction as was held by the Court of Appeal in **John Mwangi Kamau –Vs- Republic (2014) eKLR** that:-

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade.”

14. The appellant raised an alibi defence that he was not at the scene of the attack on the material day as he was attending a church service at the home of DW2. In a criminal case the burden of proving falsity of an accused's defence of alibi lies on the prosecution – See **Karanja – Vs- Republic (1983) KLR 501**. An accused person bears no burden of proving his alibi. In face of the fact that the prosecution witnesses did not identify the appellant as one of the people who attacked them the alibi defence of the appellant carried some weight.

15. The upshot is that the prosecution had not proved the charge against the appellant beyond all reasonable doubt. The trial court wrongly convicted the appellant of the offence. The State concedes to the appeal. The conviction is therefore quashed and sentence set aside. The fine of Ksh. 50,000/= paid by the appellant is hereby ordered to be returned to him.

Delivered, dated and signed in open court at Kakamega this 26th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Kibet for State

Appellant

Court Assistant - George

14 days right of appeal.