



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 148 OF 2017

JSO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by F. O. Makoyo, SRM, in

Butere SRMC Criminal Case No. 227 of 2015 delivered on 4/12/2017)

JUDGMENT

1. The appellant was convicted of two counts of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code and sentenced to serve three years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal through the firm of M. Kiveu Advocate. The grounds of appeal are:-

- 1. That the learned magistrate erred in evaluation of evidence before him.*
- 2. That the learned magistrate grossly erred in not evaluating the evidence as a whole.*
- 3. That the learned magistrate grossly erred in holding that the prosecution had proved its case beyond reasonable doubt as required by law.*
- 4. That the learned magistrate erred in not making a finding that the prosecution evidence was contradictory, un-corroborative and incredible.*
- 5. That the learned magistrate grossly erred in not directing this matter to start de novo as per Section 200 (3) of the Criminal Procedure Code (CPC).*
- 6. That the learned trial magistrate exhibited actual bias against the appellant herein.*
- 7. That the learned trial magistrate was un-duly influenced by the probation report herein and took into consideration irrelevant factors in passing sentence.*
- 8. That the learned trial magistrate sentence was manifestly harsh and excessive in circumstances.*
- 9. That the learned trial magistrate final orders have occasioned a miscarriage of justice.*

2. The particulars of the offences were that on the 21st June, 2015 at 8 a.m. at Ebuyonga Village in Mundeku Sub-location of Khwisero Sub-County within Kakamega County the accused unlawfully assaulted GO (the complainant in Count 1) and at the same time unlawfully assaulted DA (the complainant in Count 2) thereby occasioning them actual bodily harm.

3. The state opposed the appeal through the oral submissions of the prosecution Counsel, **Mr. Ng'etich**.

Case for Prosecution -

4. The prosecution called 4 witnesses – GO (the complainant in Count 1) who testified as PW1 in the case, the son to GO who testified as PW2 in the case, the clinical officer who treated the complainants who was PW3 in the case and the investigating officer, PC Kirui PW4.

5. The evidence of the 4 witnesses was in summary that GO was a wife to the accused. That she was staying with her mother-in-law the complainant in Count 2, who was the mother to the appellant, after the appellant chased her from the main house after he had taken another wife. That on the material day at 8 a.m. G and her son PW2 were preparing tea in the house of her mother-in-law. The accused went to the house of his mother while armed with a panga and a rungu. He demanded to know why G had not gone back to her parents and was staying with his mother. He threatened to kill her. He threw the panga at her. She blocked it with the right hand. It cut her on the right hand fingers. His mother asked him why he was attacking his wife. He cut her with the panga on the forehead and hit her with the rungu on the right leg. G ran into another house and locked herself inside. The appellant then turned on his son JE PW2 and hit him with the rungu on the right eye. The appellant then went away swearing that he was going to kill G.

6. G then called the assistant Chief who went to the place. The assistant Chief called for a motorbike that took the three complainants to Khwisero Police Station where they reported the incident. They were issued with P3 forms. They were treated at Khwisero Health Centre. A clinical officer of the said facility completed the P3 forms for G and her mother-in-law. She found G with a cut wound on the right ring finger and injuries on the chest. Her mother-in-law was found with cut wounds on the forehead and small finger at the right hand, a bruise on the right leg and chest pains. The appellant was thereafter arrested and charged with the offences. He denied the charges. However at the time of the hearing the clinical officer who had treated the complainants had been transferred from Khwisero Health Centre. Another clinical officer PW3 who was working at the said Health Centre with the Clinical Officer who had treated the complainants produced the treatment notes and the P3 forms for the two complainants as exhibits, Ex.1-4 respectively.

7. The appellant's mother was unable to communicate to the court due to her advanced age and therefore did not testify in the case.

Defence Case –

8. The appellant gave sworn evidence and called two witnesses – his wife DW2 and daughter DW3. The appellant's defence was that on the material day he was in his house when his daughter DW3 went and told him that G was cutting down the life fence. He went outside. He saw G cutting the fence. When she saw him she ran into his mother's house. As she entered into the house, his mother was getting out of the house. G then knocked his mother down as she entered into the house. His mother hit herself at the door. G then pulled his mother into the house. She convinced his mother for them to scream claiming that the appellant was killing them. He called at the assistant Chief who went there with two elders. The assistant Chief found his mother with a cut wound on the forehead that had been occasioned by the fall. The assistant Chief called for a motor bike that took both of them to hospital.

9. The appellant's evidence was supported by his wife DW2 and his daughter aged 12 years DW3.

Submissions –

10. The advocate for the appellant, **M. Kiveu**, submitted that the police officer who testified in the case PW4 is not the one who investigated the case. That the clinical officer PW3 did not explain why the cut on the finger of G did not require stitching. That the panga and the rungu the appellant was said to have been armed with were not produced in court. That G did not explain how she could have seen the appellant cut his mother yet she stated in her evidence that she had locked herself in a house after the appellant had assaulted her. That the assistant Chief and the elders who were said to have gone to the place were not called to testify in the case.

11. The advocate submitted that the trial court did not consider the appellant's defence. That the sentence imposed on the appellant of three years imprisonment was manifestly harsh and excessive. That the probation report was tainted with falsehood.

12. The prosecution counsel, Mr. Ng'etich, on his part submitted that the assault on the complainants was supported by medical evidence. That the appellant was armed with a panga and a rungu. That the injuries were occasioned by both sharp and blunt objects. That the offence was committed during the day and therefore that identification was not in issue. He urged the court to dismiss the appeal.

Analysis and Determination –

13. This is a first appeal. The duty of the court is to analyse afresh the evidence adduced before the lower court, re-evaluate it 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 (1973) EA 32**.

14. The appeal is on the grounds that the trial court did not evaluate the evidence properly; that the evidence was contradictory and uncorroborative and that the prosecution did not prove the charge beyond reasonable doubt. Further that the trial magistrate was unduly influenced by the probation report.

15. The complainant in Count 2 did not testify in the case. The trial court all the same went ahead to convict the appellant of the offence in Count 2. Failure by the complainant in Count 2 to testify in the case meant that there was no complainant in the case. The trial court erred in convicting the appellant in Count 2 when there was no evidence of the complainant to support the charge.

16. G PW1 stated in her evidence that the appellant cut her with a panga on the right small and index fingers. Her son PW2 stated that his mother sustained a cut on the right index finger. In cross-examination he stated that she sustained an injury on the right ring finger. The clinical officer who treated G found her with a cut wound on the right ring finger. The trial court observed that the complainant had scars on the right index finger.

17. When this court was writing the judgment it noted that the treatment notes and the P3 forms that were produced in the case were missing from the magistrate's file. The court sent the file back to the trial court for the documents to be filed. The file was returned with comments that the said documents could not be traced. There is no doubt the said documents were produced in court during the hearing and the appellant cross-examined on them. The documents indicated that the complainant, G, had sustained a cut on the right ring finger. Though G

and her son PW2 testified of some injuries on the right small and index fingers, the clinical officer confirmed that the visible injury was on the right ring finger. The trial court itself observed some scars. The injuries on G were therefore corroborated by the findings of the clinical officer. The contradiction on the exact position as to where the injuries were did not displace the fact that the appellant assaulted his wife Grace and occasioned her injuries. The contradictions were not material in the case.

18. The appellant faulted the trial court for not considering his defence. This is far from the truth as the court dismissed the defence evidence on the grounds that the evidence of the appellant and that of his witnesses seemed to have been rehearsed. Indeed the defence evidence was so similar that it looked to have been rehearsed. The appellant did not cross-examine any of the prosecution witnesses on whether it is G who knocked down his mother as she ran into the house. The defence evidence can only have been an afterthought. The trial court was right in dismissing the defence.

19. The defence raised issue as to why the Assistant Chief and the elder who went to the place were not called to testify. True the prosecution should have called the two witnesses. However the prosecution is not under duty to call a plurality of witnesses where the evidence so far called is sufficient. See **Donald Majiwa Achilwa & 2 Others –Vs- Republic (2009) eKLR**. The evidence called in the case was sufficient even without the evidence of the Assistant Chief and the elder. The two would have added minimal value to the prosecution case.

20. On my own evaluation of the evidence I find that the appellant was convicted on cogent evidence for assaulting the complainant in Count 1, GO. His conviction on Count 1 is therefore upheld. As there was no evidence of the complainant in Count 2, the conviction on Count 2 is quashed.

21. The appellant was facing two counts of assault contrary to Section 251 of the Penal Code. It is a principle of sentencing that where an accused person is charged with two or more counts each count has to attract a separate sentence. The trial magistrate in the instant case imposed a sentence of 3 years without specifying the particular count it was meant for. This was an error on the part of the trial court.

22. An appellate court can interfere with a sentence imposed by a lower court if the sentence is manifestly excessive. In **Bernard Kimani Gacheru –Vs- Republic (2002) eKLR**, the Court of Appeal stated that:-

It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

23. The appellant was sentenced to a prison term of 3 years for assault. The clinical officer who testified in the case indicated that the injury sustained by the complainant G did not require stitching. It therefore means that the injury was a minor one. A sentence of 3 years imprisonment for such a minor injury was manifestly excessive and harsh. The appellant had served six (6) months of the sentence before he was released on bond pending appeal. I am of the considered view that the period served is sufficient sentence for the offence committed in Count 1.

24. The upshot is that the conviction in Count 1 is upheld but the sentence is reduced to the period already served before the appellant was released on bail pending appeal. As for Count 2 the conviction is quashed and sentence set aside.

Delivered, dated and signed in open court at Kakamega this 25th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Kibet for State

Appellant

Court Assistant - George

14 days right of appeal.