REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 55 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 575 of 2016 by the Senior Principal Magistrate's Court at Vihiga)

JACOB OMONDI ONDIEK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon. Jacinta A. Owiti, Principal Magistrate, on 28th February 2018, of maim contrary to section 234 of the Penal Code, Cap 63, Laws of Kenya, and was accordingly sentenced to serve four years imprisonment. The particulars of the charge against the appellant were that on 8th September 2016 at Kabunda village, Masana Sub-Location, South Maragoli Location, within Vihiga County, he did maim to Zachariah Ochieng Owiti.

2. The appellant pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called four (4) witnesses.

3. The complainant, Zachariah Ochieng Owiti, was the first to take the witness stand, as PW1. He testified as to how he met the appellant on 8th September 2016, who attacked him with a *panga*, cutting him on his head, left elbow, right index finger, and left hand next to the shoulder. He was taken to hospital and made reports to the police. He produced his bloodied clothes and medical records. PW2, Noah Odhiambo Onunga, testified how he overhead the appellant on 7th September 2016 talking about how he would cut PW1. Then he heard that the appellant had cut PW1 the following day, 8th September 2016. Dr. Nelly Wanjala (PW3) presented the medical evidence, a document prepared by her colleague, Dr. Olwala. PW1 had injuries on his left partial scalp and two lacerations on the left shoulder. He was attended to by the doctor on 20th September 2016. He was admitted in hospital for seven days. The injury was classified as maim. The left hand above the elbow had a fracture and was immobilized and a plaster of Paris was applied. He also had an open wound on the left hand. PC John Epal testified as PW4. He was the officer who investigated the matter.

4. The appellant was put on his defence. He gave a sworn statement and called a witness. He testified that on that material day they had a physical tussle with PW1. He characterized it as an attack from PW1, who was armed with knife. He said that overpowered and disarmed PW 1. His clothes got bloody. He went to Tigoi health centre and made a report at the Vihiga police station. DW2, Julius Mabare Kayasi, did not witness the fight, but he stumbled on the crowd that had gathered after the incident. He found PW1 but not the appellant. DW3, Margaret Otiende, did not witness the fight, but put both PW1 and the appellant at the scene. She testified that she saw PW1 with clothes that were torn and blood stained. Her evidence was not clear on injuries, but she did talk of hearing that it was the appellant who had injured PW1. DW4, Pamela Awiti, did not witness the fight, but she met PW1. His clothes were blood stained. She said that she did not see who had injured him.

5. After reviewing the evidence presented by both sides, the trial court convicted the appellant of the maim charge, and sentenced him as stated in paragraph 1 of this judgement.

6. Being dissatisfied with the sentence the appellant appealed to this court and raised several grounds of appeal. He averred that the trial court denied him a right to fair hearing contrary to Article 50 of the Constitution and section 150 of the Criminal Procedure Code, Cap 75, Laws of Kenya, that the trial court failed to appreciate that the evidence by the prosecution was wanting and insufficient to sustain a conviction, failed to analyse the ingredients of the offence of grievous harm, failed to weigh the evidence properly for if it had done so it would have emerged that it favoured him, failed to take into account the testimony of the defence witnesses and failed to take into account honoured legal principles.

7. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."

8. The appeal was canvassed on 13th June 2019. The appellant presented written submissions and also made oral submissions. In the written submissions, he argued that vital witnesses were not called. He mentioned that there was a nursery school near the scene of the fracas. He submitted that teachers and pupils from the school should have been called as witnesses. Secondly, he submits that the prosecution was riddled with inconsistencies and contradictions, which the trial court should have taken into account. Thirdly, he argued that the testimonies of his witnesses should have been considered. He reiterated the same arguments in his oral address in court. He submitted that there was an issue that he and PW1 had at Maseno court, and that he had also made a report at the Vihiga police station on the same incident.

9. In response, Mr. Ng'etich submitted that the incident happened in broad daylight. The two parties knew each other, and there was uncontroverted medical evidence of injuries that PW1 sustained.

10. The first issue the appellant raised is that some vital witnesses were not called who would have shed light on what exactly transpired. The prosecution is under no obligation to call any particular number of witnesses to prove their case. It is only required to call such number of witnesses, at their discretion, which they feel would be adequate to prove their case. There is equally no obligation on the part of the court to summon all manner of people that it feels would provide useful evidence. The case is that of the prosecution, it is not directed by the court. In any event, the system of justice in Kenya is adversarial, it is up to either side to call whatever witnesses that they feel would advance their case. It was open to the appellant to call such witnesses as left out by the prosecution that he felt would help his case.

11. The four witnesses that were called by the prosecution from the record before me, appear to have been adequate to establish the fact that PW1 was assaulted by the appellant on the material day and that he sustained the injuries that he did sustain, which were classified by medical personnel as maim. The appellant in his testimony conceded that he did meet PW1 on the material day. They had a scuffle. Blood stained his clothes. He did not spiffy whose blood it was, but he did not state that he incurred injuries in that tussle. His witnesses also placed him and PW1 at the scene. They talked of PW1 being injured and said they had heard that it was the appellant who had inflicted the injuries.

12. The second issue is that the evidence of the prosecution was wanting and contradictory. I have carefully scrutinized the record of the trial court. I have not found anything suggesting that the evidence was wanting or contradictory. The material on record is clear and consistent. PW1 was a person who knew the appellant. The events happened during daylight. I am not persuaded that his testimony was wanting or contradictory. In any event, even if there were any inconsistencies, the same were minor and did not change the overall picture.

13. The other argument is that the defence evidence was not considered. That cannot be true. In pages 2, 5 and 6 of the judgment, the trial court devoted itself to analyzing the defence evidence. I do note though that it did not review the sworn statements of the individuals the appellant called as witnesses, but going through those testimonies I am persuaded that they were more helpful to the prosecution case than to the defence. It cannot, therefore, be true that the trial court did not consider the defence case. Even if I were to find that the evidence of the defence witnesses was not analyzed, that would be of no moment, for I have reviewed it and found it to be unhelpful to the defence.

14. The trial court is accused of not analyzing the ingredients of the offence of grievous harm. It is true that the court did not get to discuss the provision defining that offence, but that of itself does not mean that the court did not apply the law properly. The medical evidence presented indicated that PW1 sustained a fracture on one of his arms which required immobilization through plaster of Paris. He has wounds and lacerations at various parts of his body. He was hospitalized for seven days. That would mean that the grievous harm occasioned was serious enough to warrant classification as maim. The medical evidence on record was sufficient for classification of the injury as such.

15. The appellant argued in his grounds of appeal that he was defending himself from attacks from PW1. That was his version of the story. However, the witnesses that he called did not support that version. None of them saw the scuffle, and, therefore, none of them positively told the court that the injuries sustained by PW1 were so caused by the appellant in an effort to defend himself from an assault by PW1. Even then, if the court were to accept that it was the appellant who initiated the scuffle, there would have been no justification to inflict such grievous injuries on PW1 and escape from it all unscathed.

16. In the matter of reports having been made by either of the two combatants at different police stations, that to my mind does not matter so long as there is overwhelming evidence that PW1 suffered grievous injury from the actions of the appellant, who does not appear to have had suffered any injury from the encounter, if one were to believe that it was him who had been attacked by PW1first.

17. In view of everything that I have said above, it is my finding that the appeal herein has no merits. I shall accordingly dismiss it, uphold the conviction and confirm the sentence.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF NOVEMBER, 2019

W. MUSYOKA

JUDGE