



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 143 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 184 of 2014 of Senior Resident Magistrate's Court at Hamisi)

JAFEZA KIDULA SENGENCE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. ML Nabibya, Senior Resident Magistrate, of grievous harm contrary to Section 234 of the Penal Code, Cap 63, Laws of Kenya, and was placed on probation for one year. The particulars of the charge against the appellant were that on 26th day of March 2014 at Vihiga County he did grievous harm to Emily Kalea by hitting her with a stone and in the process knocking out her tooth.

2. He pleaded not guilty to the charges and a trial was conducted, where four witnesses testified. PW1 was the complainant, she stated that the appellant threw a stone at her while she was working on a piece of land her husband had bought her. He had issued threats to kill just before then. She lost a tooth. PW2 was a doctor. He produced a P3 form, and testified that PW1 had lost a tooth after being hit with a stone. He classified her injury as grievous harm. PW3 was dropped as a witness after she became hostile. PW4 was the officer who investigated the matter. The appellant was put on his defence. He elected to give an unsworn statement. He denied the offence. He called two witnesses, who claimed that they were at the farm and saw PW1 wail about a case that was in court. In the end the appellant was convicted and sentenced as stated earlier.

3. The appellant was dissatisfied with the conviction and sentence, and he appealed to this court and raised several grounds of appeal. He averred that the trial court relied on the evidence of PW1 only to convict, that he was not given an opportunity to cross-examine PW1, there was no eyewitness, there were contradictions on the dates of the offence, PW4 was not at the scene of the offence and that the evidence of PW1, PW3 and PW4 was contradictory.

4. 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 in criminal appeals 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.”

5. The appeal was canvassed on 30th October, 2019. The appellant relied on written submissions that had been placed before me. Ms. Omondi, Prosecution Counsel, relied on the record of the trial court.

6. Ground 1 of the appeal is irrelevant as it merely states that the appellant pleaded not guilty to the charge. Grounds 2 and 4 can be taken together. They aver that the trial court relied only on the evidence of PW1 and that there was no eyewitness. That is true, but that of itself is not fatal to a case. There is no requirement that a particular number of witnesses be called to prove a charge. What matters is the quality of the evidence presented even if the same is from the complainant. Where that evidence can be corroborated by some other evidence then it would be good enough. In this case the testimony of PW1 was corroborated by the medical evidence presented by PW2.

7. Ground 3 is about the appellant not being given a chance to cross-examine PW1. I have perused the record, and it does appear that PW1 was not cross-examined. The other prosecution witnesses were all cross-examined. PW1 testified the same day with PW2, and the record

reflects that PW2 was cross-examined by the appellant. The record does not indicate why PW1 was not examined. It could be that there was a lapse on the part of the trial court that he forgot to let the appellant cross-examine PW1 Presiding officer. I doubt whether it was a case of the appellant not having any questions for PW1, for in such case the record ought to reflect so. It is highly unlikely that he would not have had no questions for her given that she was her accuser, and, therefore, the most critical witness in the circumstances.

8. The question then would be, what is the impact of such an omission? Under the fair trial provisions of the Constitution in Article 50, an accused person has right to adduce and challenge evidence. This is the right to face and confront one's accusers. It is critical in criminal proceedings and a breach of this right would render the proceedings a nullity. The right to being heard includes the right to cross-examine the accuser, for cross-examination serves the purpose of not only undermining the case of the other side but also extracting information from them useful to defence case. A failure to accord the accused an opportunity to cross-examine his accuser is a fundamental flaw in the proceedings.

9. Ground 5 raises issue with contradictions in the dates of the alleged offence. The charge talks of 26th March 2014, and that was the date that PW1 mentioned in her testimony. The rest of the witnesses, however, spoke of 26th February 2014. The case in the charge refers to an incident that happened on 26th March 2014. The appellant was expected to build his defence around the pleadings that were placed before the court. It is fundamental that the prosecution's case be presented on the basis of its pleadings. Any departure from the pleadings would no doubt fundamentally undermine their case.

10. The issue raised by the appellant is critical. I say so because the charge sheet indicates that the matter was brought to court 10th March 2014, and it would appear, therefore, the incident the subject of the trial could not have happened on 26th March 2014. Criminal cases are about accused person's rights. The sanctions that follow conviction could lead to loss of liberty or property. It is only fair that those responsible for mounting charges and conducting prosecutions be vigilant with the pleadings they file and the evidence they present. They ought not to trifle with the rights of others.

11. The last ground talks about contradictions in the testimonies of the witnesses. I have already talked about the inconsistencies in the dates. But there are also inconsistencies as to time. PW1 referred to 20.30 AM as the time of the incident. There is no such time. The rest of the witnesses talked of 8.00 AM. The issue with multiple minor inconsistencies is to suggest lack of flow in the story by the prosecution, which could lend credence to submission that the evidence was contrived to put the appellant into trouble.

12. Overall, it is my finding that the trial of the appellant herein was fundamentally flawed. In the first, he was not accorded his constitutional right to confront his accuser. Secondly, his trial was in respect of events that allegedly happened after the matter was brought to court. Thirdly, there are numerous unsettling minor inconsistencies in the evidence of PW1 and her supporting witnesses. I am persuaded that the appeal herein does have merit. The conviction of the appellant was not safe. I shall accordingly allow the appeal, quash his conviction and set aside the sentence imposed on him. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE