



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 125 OF 2015

FRANCIS WANYONYI MARUMBU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was arraigned in Court on 7th of August, 2013 and charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars were that the appellant Francis Wanyonyi Murumbu assaulted Evans Barasa Ndiyo causing him bodily harm on 22nd July, 2013 at Lutaso village in Bungoma West.

2. The appellant pleaded not guilty and the matter proceeded to hearing. He was placed on his defence where he gave an unsworn statement and called two witnesses.

3. The Prosecution Case was that PW1 the Complainant was with PW2 assisting him when the accused emerged asked for Paulina PW1's grandmother and on missing her he assaulted the Complainant with a club injuring him. The appellant on seeing PW3 quickly left the scene.

4. On his part the appellant denied the allegation stating that on the day he is alleged to have assaulted the Complainant he was in hospital as he had been attacked and he was then receiving treatment.

5. This being the first appellate Court it has considered the evidence afresh, analysed and evaluated the same in order to arrive at an independent opinion.

6. In his memorandum of appeal the appellant's ground are several and may be summarized as follows;

- ***The Prosecution Evidence was contradictory and insufficient.***
- ***The defence of alibi was not considered.***
- ***The trial Magistrate shifted the burden of proof from the Prosecution to the defence.***
- ***The sentence was unlawful.***

And he sought for setting aside of the conviction and sentence.

7. At the hearing of the appeal the appellant urged the ground on his alibi urging that at the alleged time of the offence he was sick and had attended hospital as he had been assaulted.

Secondly, he was denied witness statements. Thirdly there was a difference in names in the charge sheet and that given by the Complainant.

8. The State opposed the appeal on grounds that the Case was proved beyond all reasonable doubt, secondly there was evidence that the appellant entered the premises where PW1 resided and violently assaulted him, that the defence case and the alibi were considered by the trial Court and the same were not found to be credible and not corroborated.

That DW3, a defence witness discredited the evidence, neither did DW2 corroborate the alibi, further the incident happened at 9a.m. and therefore the alibi could not exonerate the appellant.

9. As the first appellate this Court has the duty to reconsider the evidence afresh, evaluate and analyse the same in order to arrive at an Independent opinion. See **Okeno Vs R (1972) E.A.**

10. From the evidence of PW1 he was hit by the appellant on the head and had a visible scar. PW2 reiterates the same with an addition that PW1 bled profusely.

PW3 said that when she got to the scene she found PW3 bleeding and also witnesses PW1 being slapped by the appellant. She went further to say she found the two struggling.

PW5 stated that on 22nd July, 2013 he saw PW1 with a bandage on the head. PW6 a clinical Officer at Sirisia Sub-District hospital informed the Court that on 20th July, 2013 at around 8a.m. he treated PW1 who had a deep cut on the forehead, injuries on the thorax, abdomen and right forearm, while the Complainant was stitched and given pain killers.

11. There is no doubt that PW1 sustained injuries. This was witnessed by to PW1, PW2 and PW3 which injuries the said were inflicted by the appellant.

12. On the other hand in his evidence the appellant stated that he was assaulted and he went to hospital. DW2 confirmed the attack.

DW3 on his part confirmed that the appellant had been at the Chief's Office in Busura at 10a.m. requesting for a letter to go to hospital.

13. What is interesting is that the appellant was attended to in hospital on the same day at 12.26p.m. as the Complainant and his hospital book says he was assaulted by 3 people. It concurs with the evidence of DW3, further it gives time of attack as 7a.m. He had a wound on the head, bruise on the elbow, swollen wrist, swollen shoulder, face and his shirt soaked in blood.

14. If indeed the Appellant was assaulted at 7a.m. and had such serious injuries how then did he attack the appellant at 9a.m.?

15. Before granting the appellant bail a pre-bail report was prepared and it gave circumstances of the offence as having been an assault inflicted by the Appellant on the Complainant and a result the appellant was assaulted by the Complainant's parents.

All the above was from pre-bail the above and did not come to the hearing probably out of fear.

16. What is clear though is that the appellant did not complain over assault and upon him and this case was on the wrong doing on his part 'assault' on the Complainant. The Prosecution evidence is that he beat up the Complainant and there is ample evidence that he indeed did so.

If he was assaulted later that is not before Court.

His alibi cannot stand either as he went to hospital at 12.26p.m. after the assault occurred.

17. The Prosecution having proved its case I find that the conviction by the trial Court was proper.

18. As for the sentence the appellant got the fairest deal due to his circumstances and one could not have done better I see no reason to interfere.

19. Appeal fails.

DATED and DELIVERED at BUNGOMA this 15th day of February, 2018

ALI-ARONI

JUDGE