REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 164 OF 2012

DAVID NJAGI MWANIKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief

Magistrates Court Criminal Case No. 347 of 2011

(Hon. J. Wambilyanga, SRM) on 13th September, 2017)

JUDGMENT

The appellant was charged and convicted of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code (cap.63). The particulars were that on the 18th day of October, 2010 at Mbiriri trading centre within the Nyeri County he unlawfully assaulted Richard Mwaniki Munene thereby occasioning him actual bodily harm.

Though he entered a plea of not guilty, the trial court held that the prosecution had established its case against him beyond reasonable doubt and convicted accordingly; he was fined Kshs.50, 000/= or, in default, to serve 7 months in prison.

Being dissatisfied with the decision of the trial court, the appellant appealed against both the conviction and sentence and in his petition of appeal, he faulted the learned magistrate on seven grounds; these grounds are as follows:

1. The learned magistrate misdirected herself in fact and in law by failing to subjectively evaluate in totality the whole evidence on record.

2. The learned magistrate erred in fact and in law by disregarding the evidence of the prosecution witness, Christopher Rwengo who was also present at the scene during the alleged commission of the offence and who the prosecution had failed to call to testify despite the fact that he had recorded a statement with the police.

3. The learned magistrate misdirected herself in fact and in law by not appreciating that the evidence of David Luganji (PW7), the investigating officer, who clearly confirmed the fact that his investigations revealed that the prosecution witnesses were biased against the accused because of the grudge that was not related to the case against the accused.

4. The learned magistrate erred in law and in fact by totally disregarding the evidence tendered for the accused person and labeling it a “sham”.

5. The learned magistrate misdirected herself in fact and in law by not appreciating that the prosecution witnesses’ testimony was inconsistent with their statements to the police.

6. The learned magistrate misdirected herself in fact and in law in convicting the accused and in meting out a sentence against the accused that is harsh and excessive in the circumstances.

7. The learned magistrate misdirected herself in fact and in law by not applying the standard of “beyond reasonable doubt” required of in criminal cases when evaluating the evidence on record and by not finding that it was not safe to convict the accused on the basis of the evidence on record.

As usual in proceedings such as this, it is mandatory for this honourable court, in exercise of its jurisdiction as the first appellate court to look at the evidence on record afresh, evaluate it and come to its own conclusions. In taking this course, this court may depart from the findings of fact of the trial court if, in its view, that court clearly misapprehended the facts or, based on the established facts, no reasonable court or tribunal could make similar findings. The only caveat this court must be cautious of is that, as much as it has the liberty to deviate from the findings of the trial court, it is this latter court that has the advantage of seeing and hearing the witnesses and therefore it is always ideally placed to appreciate such vital aspects of evidence as the candour, demeanour or disposition of the witnesses. This position has been emphasised in the Court of Appeal decision in **Okeno versus Republic (1975) EA** at page 35.

The complainant's case was that on 8th October, 2010 at about 4.00 PM, he was at Mberere shopping centre together with one **Samson Mwai (PW3)** and **David Ngethe (PW2)** apparently whiling away their time when the appellant confronted him and assaulted him on the allegations that the complainant had made defamatory remarks about him. It was the complainant's evidence that he was hit on his back, shoulder and on the head; he was injured on the left eye in the process. The appellant was briefly restrained by those who were at the scene; however, he proceeded to his car from where he picked a whip and came back. One John Maina who saw him confront the complainant the second time asked him to stop. It is then that he went back to his car and drove away. The complainant went to the hospital for treatment and also reported the incident to the police.

The motive of the attack, according to the complainant, was two-fold; in the first place, he alleged that the appellant had defrauded Ndathi Umoja Men Self Help Group of its money. As one of the members and the interim chairman of the group, the complainant was seeking the recovery of the money through a court case, apparently against the appellant. The complainant also alleged that there was a long standing feud between him and the appellant over a parcel of land and the complainant's wife.

In his sworn evidence, the appellant himself testified that he had had disagreements with the complainant for a long time. According to him, the disagreements arose from his assistance of the complainant's wife to lodge a caution on the complainant's land.

Perhaps to demonstrate the root of the differences between the appellant and the complainant, the complainant's wife testified in the appellant's defence and claimed that the complainant had alleged that the two of them had had a sexual contact. It is no wonder that the appellant found it necessary to confront the complainant.

From the available evidence there is no doubt that there was some confrontation between the complainant and the appellant on 18th day of October, 2010 at Mbiriri trading centre in Nyeri County.

The appellant himself alluded to this confrontation and testified that he was at this centre when Christo Ruengo (DW2) approached him while he was seated in his vehicle. Ruengo's message to him was that he had been sent by the complainant to inform him that he, the appellant, had been cited at the complaint's home on three different occasions on what the complainant suspected to have been an illicit affair between the appellant and the complainant's wife. He therefore warned the appellant that he was going to harm him.

According to the appellant, he asked the complainant's emissary to tell the complainant to present his case himself; when the complainant declined to do so, the appellant took the initiative and went to where the complainant was seated together with three other persons.

It was the appellant's evidence that he went back to his car when the complainant started insulting him; he denied that he ever assaulted the complainant.

The people with whom the complainant was seated and who the appellant himself acknowledged as having been with the complainant at the time he confronted him testified that the appellant only went back to his car after he had assaulted the complainant. One of them, David Migwi Gikuju (PW2), recalled that on the material date he was seated on a bench together with the complainant and Samson Mwai (PW3) when the appellant approached the complainant menacingly; it was his evidence that he held the complainant and punched him in the face and on the head. The appellant only stopped assaulting the complainant when Gikuju and other people started screaming. The appellant went to his car and came back with a whip and threatened to attack the complainant even further; however, he was stopped in his tracks by one of the people who were present.

In what appeals to me to be corroboration of this evidence, Samson Mwai Githinji (PW3) confirmed that he saw the appellant assault the complainant; he was seated with the complainant and Migwi (PW2) at the time. It was his evidence that the complainant was injured on his left eye as a result of the assault. Like Migwi (PW2) he saw the appellant pick a whip from his car apparently with the intention of assaulting the complainant even further.

The two witnesses controverted the appellant's testimony that one Christopher Ruengo was at the scene at the time of the attack.

The third person who was at the scene at the material time was Robert **Riri Muriithi (PW4).** He also witnessed the appellant kick and punch the complainant and that he stopped when they screamed. He also confirmed that the appellant took a whip from his car to whip the complainant with it but he was stopped by a person he identified as John Fundi.

David Theuri Muthee (PW5) was also an eye witness of the attack on the complainant. He saw the appellant hit the complainant in the face and also pick a whip from his car.

It cannot be a coincidence that none of these witnesses ever saw Charles Ruengo(DW2) doing errands between the appellant and the complainant. In this regard, I agree with the learned magistrate for dismissing the appellant's suggestion and the evidence of Charles Ruengo(DW2) that the latter was not only at the scene but also that he had been some sort of contact person between the appellant and the complainant before a physical confrontation ensued between them. The appellant and his witness were simply not truthful.

The medical evidence showed that the complainant sustained some injury on 18th October, 2010. According to Dishon Mtuku Mutiso(PW8), a senior clinical officer who filled and signed the complainant's medical report, the complainant complained of painful eyes, headache, photophobia and pain on the back. He had reddened eyes and could not see in the light. He had tenderness on the back and shoulders. According to the clinical officer, the weapon used to injure the complainant was blunt and the degree of injury was assessed as 'harm'.

These injuries were sustained on the material day that the complainant was attacked and in my view the medical evidence is yet another piece of corroborative evidence that he was assaulted as alleged. The nature of his injuries and the kind of weapon employed the assault were consistent with the appellant's attack on him.

On his part the investigations officer Chief Inspector of Police David Luganji (PW9) confirmed that the report to the police was made immediately after the assault. As a matter of fact, the complainant was advised by the police to go to the hospital soon after he made his report.

In his view, the investigations officer thought that the appellant's case could be dealt with as a disciplinary issue; however, the learned magistrate overlooked this opinion and rightly so since it was not for the investigations officer to decide whether the appellant should be subjected to disciplinary proceedings once it was established that an offence known in law had been committed. No doubt that the Director of Public prosecutions disregarded the investigations officer opinion and recommended the appellant's prosecution.

I am satisfied, as the learned magistrate was that the prosecution proved beyond reasonable doubt that the appellant committed the offence of assault occasioning actual bodily harm as understood under section **251 of the Penal Code; that section says:**

> ***Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years***.

I find nothing on the record that suggests that the learned magistrate ought not to have believed the prosecution witnesses whose testimony was, in my humble view, consistent and credible; their testimony as eyewitnesses coupled with the medical evidence and the investigations officer's testimony leaves no doubt that the complainant was assaulted by the appellant in the manner envisaged under this provision of the law and as particularised in the charge sheet.

The suggestion that the prosecution witnesses were biased in the testimony because of being friends with the appellant is not supported by the evidence on record; it never came out during the cross-examination and neither did it come out in the appellant's defence.

As far as the sentence is concerned, the maximum sentence prescribed is five years imprisonment; the appellant was fined Kshs.50, 000 or in default to serve 7 months in prison. I do not find any fault with this sentence. In any event, as much as the appellant appealed against conviction and sentence no submission whatsoever was made on the legality or otherwise of the sentence.

In the final analysis, I do not find any merit in the appellant's appeal. It is hereby dismissed.

Signed, dated and delivered in open court this 16th March, 2018

Ngaah Jairus

JUDGE