



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 33 OF 2017

JACKSON MWAREMA KIZELA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 508of 2016

in the Senior Principal Magistrate's court in Wundanyi delivered

by Hon N.N. Njagi (SPM) on 6th February 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Jackson Mwarema Kizela alongside Alex Stanley Mwangi (hereinafter referred to as “his Co-Accused”), were jointly charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the 2nd day of September 2016 at about 1900 hours at Mgama Village within Taita Taveta County, they jointly and wilfully assaulted Jacob Ngoo (hereinafter referred to as “PW 1”) occasioning him actual bodily harm.

2. The Learned Trial Magistrate Hon N.N. Njagi, Senior Principal Magistrate convicted and sentenced each of them to three (3) years imprisonment.

3. Being dissatisfied with the said judgment, on 4th May 2017, the Appellant filed his Petition of Appeal and he relied on three (3) Grounds of Appeal. His Written Submissions were filed on 31st July 2017. He filed his Written Submissions in response to the State's Written Submissions dated 6th November 2017 and filed on 7th November 2017 on 22nd November 2017.

4. When the matter came up in court on 14th December 2017, both the Appellant and the State requested this court to rely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. As this is a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

6. It appeared to this court that the issues that had been placed before it for determination was:-

1. Whether or not the Charge Sheet was defective;

2. Whether or not the Prosecution proved its case beyond reasonable doubt:

7. The issues were therefore dealt with under the following distinct headings.

i. CHARGE SHEET

8. The Appellant did not list the issue of the defectiveness of the Charge Sheet as a Ground of Appeal. He raised the same in his Written Submissions. He argued that the Charge Sheet was defective because PW 1 told the Trial Court that he lost one (1) incisor yet he was charged with the offence of assault causing actual bodily harm contrary to Section 45 of the Penal Code. He did not elaborate his argument.

9. On its part, the State pointed out that the said Section 45 of the Penal Code was not applicable in the circumstances of the case herein as the same dealt with the trial of the offence of treason, an argument this court agreed with. This court did not therefore deem it necessary to interrogate the said provision of the law as the same was not relevant herein.

10. In any event, Section 382 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

11. Indeed, a charge sheet does not become defective merely because the evidence that has been adduced during trial does not prove the facts in such a charge sheet. If the evidence that is presented in court does not prove any offence, the trial court is obligated to acquit an accused person as envisaged in Section 210 and Section 215 of the Criminal Procedure Code Cap 75 as the prosecution will either have failed to demonstrate that a *prima facie* has been established or to prove its case beyond reasonable doubt.

12. In the absence of any demonstration by the Appellant of what prejudice he suffered during trial, this court was not persuaded to find that the Charge Sheet as drafted was defective.

13. In the circumstances foregoing, this court found and held that his submission that the Charge Sheet was defective had no merit.

ii. PROOF OF THE PROSECUTION’S CASE

14. Grounds of Appeal Nos (2), (3) and (4) were dealt with under this head.

15. The Appellant submitted that the Prosecution’s case was full of contradictions which raised doubts. He wondered why PW 1 never went to hospital the same night he said he was assaulted and why, Ngaando who PW 1 said he went to his house to inform him that he had been assaulted by him and his Co-Accused, was not called as a witness in the case herein.

16. He added that the panga and stick that were tendered in evidence as the weapons that were allegedly used to assault PW 1 were in PW 1’s custody the whole night. He also pointed out that in his evidence, PW 1 did not mention of having cried out aloud as Ronald Kimbio (hereinafter referred to as “PW 2”) had contended.

17. He further submitted that PW 2 contradicted himself when he said that he saw him at the Nando Mwalema’s kiosk and again that he saw him on the road. He averred that this portrayed an element of him and PW 1 having collaborated to frame him in the matter herein. He was emphatic that PW 2 testified that he never saw him assault PW 1.

18. In respect of PW 3’s evidence, he pointed out that Michael Kimbichi (hereinafter referred to as “PW 3”) contradicted PW 1’s and PW 2’s evidence because he testified that he went to the scene on 3rd September 2016 where he found PW 1 to have been assaulted by both him and his Co-Accused and allegedly took the stick, hammer and panga that was alleged that they used to assault PW 1.

19. He also tore into the evidence of the Investigating Officer, No 91432 PC Samwel Wekesa (hereinafter referred to as “PW 4”) who did not indicate the date PW 1 reported the incident herein to Mwatate Police Station. He contended that from PW 4’s evidence, it appeared that PW 1 did not go to hospital or police station voluntarily but rather that it was PW 4 who referred him to hospital and PW 3 who took him to Mwatate Police Station.

20. It was his further submission that the Clinical Officer of Mwatate Sub-County Hospital (hereinafter referred to as “PW 5”) contradicted the evidence of PW 1, PW 2 and PW 3 because she did not find any injury on PW 1 to have been caused by a panga. He therefore averred that the Learned Trial Magistrate erred when he failed to consider his defence that the evidence that was adduced against him was intended to fix him in the matter herein.

21. On its part, the State admitted that there were several contradictions in the Prosecution’s case but termed the same as minor and curable under the provisions of Section 382 of the Criminal Procedure Code. It was its submission that there was no existing grudge between the Appellant and PW 1 that would have resulted in the Prosecution witnesses having fabricated the evidence against him.

22. It pointed out that PW 1 positively identified the Appellant and his Co-Accused as having been the persons who assaulted him and that PW 2 was the one who took him to hospital the following day, 3rd September 2016. It stated that PW 5 confirmed having examined PW 1 on

the said date and that PW 3 received a report of the assault on 3rd September 2016 and collected the panga, stick and hammer on the same date, which it said, corroborated PW 1's and PW 2's evidence.

23. It averred that the Appellant's evidence was weak and did not overshadow the evidence that had been adduced by the Prosecution witnesses. It pointed out that the Appellant did not state where he was on 2nd September 2016 but had only denied having committed the offence. It therefore submitted that the Learned Trial Magistrate acted within his discretion when he sentenced him to two (2) years imprisonment (**sic**) as a person convicted under the provisions of Section 251 of the Penal Code was liable to five (5) years imprisonment.

24. According to PW 1, on 2nd September 2016 at about 7.00pm, he was walking home when he met with the Appellant and his Co-Accused who he said, he owed Kshs 70/=. They demanded that he repay the money and when he failed to do so, they hit him on the head with a stick, cut his shoulder with a panga and hit his legs with a metal bar. He pointed out that the Appellant herein hit him with a panga on the shoulder and on his legs with a metal bar while the Appellant's Co-Accused hit him with a stick on the head. As a result, his teeth came out and he suffered injuries to his shoulder and legs. He was emphatic that he recognised the persons who assaulted him as having been the Appellant herein and his Co-Accused.

25. He testified that the Appellant and his Co-Accused refused to take him to hospital and that he went to Mwatate Hospital. He also said that he went to his neighbour's home, Ngaando and the following day, the Appellant and his Co-Accused were arrested by Mwakazi.

26. In his evidence, PW 2 stated that on 2nd September 2016, he was in his house when he heard screams of a person saying he was being killed. He came out of his house and went to the kiosk of Nando Mwalema from where he asked who was screaming. PW 1 responded and told him that it was him who was being assaulted by the Appellant and his Co-Accused.

27. He said that PW 1 had been cut on the shoulder with a panga and his legs had been hit with a metal. He said that he was the one who took PW 1 to hospital and that the Appellant and his Co-Accused refused to compensate PW 1 for the injuries. During his Cross-examination by the Appellant, he said that he was at the kiosk. When he was Cross-examined by the Appellant's Co-Accused, he admitted that he never saw them hit PW 1.

28. According to PW 3, he went to the scene on 3rd September 2016 and found PW 1 had been cut on the left shoulder with a panga and that he took the panga, stick and metal and took them to the Police Station. He arrested the Appellant and his Co-Accused and took them to the Police Station.

29. On his part, PW 4 was at the Mwatate Police Station when PW 1 came and he referred him to hospital. He said that PW 3 came with the Appellant and his Co-Accused and he put them in the cells.

30. In her evidence, PW 5 stated that on examining PW 1 on 3rd September 2016, she found that he had tenderness on the left eye, missing incisors on upper jaw, loosening of other teeth, tenderness and swelling on the right ankle joint and tenderness cut on the left distal tibia. She attributed the injuries to a blunt weapon and classified the degree of injury as "harm."

31. As was rightly pointed out by the Appellant and conceded by the State, the evidence by the Prosecution had many contradictions. This court did not find the same to have been minor contradictions. In fact, the manner in which the evidence was tendered made it difficult to properly understand which events took place on 2nd September 2016 and which occurred on 3rd September 2016. This is because PW 1, PW 2, PW 3 and PW 4 never gave the dates of the occurrences. The most that this court could do was to presume what could have happened.

32. In one instance, it was not possible to understand if PW 2, who came out after hearing the PW 1's cries on 2nd September 2016 spoke to PW 1 because PW 1 said that he went to his neighbour's house, Ngaando. This court could also not understand why the said Ngaando was not called as a witness herein. It could be argued that Section 143 of the Evidence Act Cap 80 (Laws of Kenya) gives the Prosecution the discretion to decide how many witnesses to call to prove a fact.

33. However, the said Ngaando was a crucial witness because he could have explained in what state PW 1 was. Indeed, it was not clear from PW 2 if he saw PW 1's injuries on the said night. He merely stated that PW 1 was cut on the left shoulder and that he was hit on the legs with a metal bar. He added that he was told that a panga and stick was used to injure PW 1.

34. Clearly, PW 2's evidence was heresay. He in fact admitted that he never saw the Appellant herein hit PW 1. His evidence was silent as to whether he assisted PW 1 after the attack before PW 1 went to the said Ngaando's house or the action he took after the said attack.

35. In addition, PW 1's, PW 2's and PW 3's evidence that PW 1 had been cut on the left shoulder with a panga was not corroborated by the medical evidence of PW 5 and the P3 Form that showed that PW 1 did not suffer any injuries on the thorax, upper limbs or abdomen. It was not clear to this court whether PW 1, PW 2 and PW 3 exaggerated the injuries PW 1 sustained so as to ensure that the Appellant herein was convicted. The fact that PW 5 did not mention of any injury on the left shoulder with a sharp object like a panga caused this court to ask itself what really transpired on the material date.

36. From the P3 Form, PW 1 reported the matter at Mwatate Police Station on 3rd September 2016 at 1409 hours raising questions why he never went to hospital after he was allegedly assaulted by the Appellant and his Co-Accused on 2nd September 2016 at 7.00pm. It did not come out clearly from PW 5's evidence if PW 1 lost the teeth the day before she examined him.

37. This led this court to ask whether there was a possibility of PW 1 having sustained the injuries prior to the incident herein. It was the considered view of this court that PW 1 ought to have tendered in evidence the medical treatment notes from Mwatate Sub-County Hospital to show the extent of the injuries he presented with when he went to the said hospital as the said Ngaando to whom PW 1 said he went to his

house was not called as witness in the case herein.

38. Having said so, it was also not clear to this court who showed PW 3 where the scene of the incident was because according to PW 2, it was along the road. It was difficult for this court to understand how PW 3 went to the scene and collected the stick, hammer and metal bar a day after the incident occurred.

39. If the incident happened on a public road, the Prosecution ought to have led evidence to demonstrate that no other person had access to the said road other than the Appellant and that there was no possibility of any other person having placed the stick, hammer and metal bar at the scene to ensure that PW 3 retrieved the same from the scene of the incident.

40. There was also a huge gap in PW 1's and PW 3's evidence of how the Appellant was arrested. PW 1 stated that the Appellant and his Co-Accused were arrested by Mwakazi while PW 3 said that he was the one who arrested them which was corroborated by PW 4 who said that they were brought to the police station by PW 3. The contradictions and inconsistencies led this court to question itself whether PW 1 was being truthful or if he had genuinely forgotten some material facts.

41. It was therefore the considered view of this court that failure to call the said Ngaando and Mwakazi or to proffer a plausible reason explain why they were not called as witnesses in this case, the contradictions regarding the injuries that PW 1 sustained, the circumstances relating to the Appellant's arrest, which remained hazy, were not minor contradictions. Their inconsistencies and contradictions of the Prosecution witnesses went to the root of the Prosecution's case that dealt it a fatal blow.

42. Notably, failure by the witnesses to give time lines made it difficult for this court to establish whether it was possible for the alleged weapons to have been found at the scene the following day or if PW 1 would have been able to withstand the pain from the injuries that he sustained on the night of 2nd September 2016 until the afternoon of 3rd September 2016.

43. Most importantly, this court took the view that the Prosecution did not prod PW 1 to establish how he knew that one of the persons who attacked him was the Appellant herein. Appreciably, the incident was said to have occurred at 7.00pm when his identification would have been difficult due to the lighting conditions.

44. There was no indication how he knew that it was the Appellant and his Co-Accused who were demanding the money from him. This is because he had stated that they were not together but they met on the road. It was also not clear to this court how he knew with so much precision who hit him on the head and who hit him on the shoulder with a panga because it was dark.

45. There was therefore need for the Prosecution to have interrogated the lighting conditions prevailing at the material time to satisfy this court that indeed PW 1 and PW 2 were able to identify the Appellant and his Co-Accused as the perpetrators of the assault against PW 1 herein.

46. If PW 1 identified the Appellant through voice recognition, then this ought to have come out clearly in his evidence as there was no indication that prior to the said attack, he had been with the Appellant arguing about the Kshs 70/= which he and his Co-Accused had allegedly demanded that he repay. The evidence of whether or not the Appellant and his Co-Accused identified themselves by telling him their names was also critical.

47. Such evidence would have persuaded this court to find that PW 1 could not have been mistaken about the Appellant's identity even if the lighting conditions were poor because the chain of events would not have been broken.

48. Further, in view of the distance PW 2 had been standing at Nando Mwalema's kiosk when he engaged with the Appellant and his Co-Accused, it would have assisted this court if the Prosecutor had brought sufficient evidence to demonstrate that PW 2 recognised and identified them either through sight, voice or their giving out of their names to him when he enquired who they were because it was dark and the lighting conditions could not be verified.

49. Appreciably, there was a high possibility that the Appellant assaulted PW 1 on the material date. However, criminal cases must not and cannot be determined on a balance of probability. This is because the standard of proof in criminal case is proof beyond reasonable doubt. While the Appellant's defence was weak, the burden of proof had not shifted to him because the Prosecution's case left this court with more questions than answers.

50. Accordingly, having considered the evidence that was adduced in the Trial Court and the submissions by the Appellant and counsel for the State, this court came to the conclusion that the Prosecution did not prove its case against the Appellant herein beyond reasonable doubt and because the case was poorly investigated and prosecuted, the Learned Trial Magistrate therefore erred in convicting the Appellant herein.

51. In the premises foregoing, this court found Grounds of Appeal Nos (2), (3) and (4) were merited and the same are hereby upheld.

DISPOSITION

52. For the foregoing reasons, this court found that the Appellant's Petition of Appeal that was lodged on 4th May 2017 was merited and the same is hereby allowed.

53. In view of the fact that the evidence that was adduced before the Trial Court created doubt in mind of this court, that benefit of doubt leads it to quash the conviction and set aside the sentence that was meted upon the Appellant by the Learned Trial Magistrate as it would be clearly unsafe to confirm the same.

54. The court hereby orders that the Appellant be set free forthwith unless he be held or detained for any other lawful reason.

55. It is so ordered.

DATED and **DELIVERED** at **VOI** this **13th** day of **March** 2018

J. KAMAU

JUDGE

In the presence of:-

Jackson Mwarema Kizela - Appellant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk