



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 6 OF 2017

JOHN MATIKO WAMBURAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original convictions and sentences of Hon. Sagero, Senior Resident Magistrate in Kehancha Principal Magistrate's Court Criminal Case No. 261 of 2015 delivered on 20/02/2017)

JUDGMENT

1. The Appellant herein, **John Matiko Wambura**, was charged with three counts; **Assault causing grievous harm** contrary to **Section 234** of the **Penal Code, Cap. 63** of the Laws of Kenya (hereinafter referred to as '**the Penal Code**') in respect to one Peter Chacha Wambura and two counts of **Assault causing actual bodily harm** contrary to **Section 251** of the Penal Code in respect to Mary Boke Chacha and R M C respectively.
2. He denied all the counts and he was tried, found guilty on all counts and convicted accordingly. He was sentenced to to 3 years imprisonment on the first count and 2 years imprisonment in each of the other two counts. The sentences were to run concurrently.
3. The three complainants testified as **PW1** (R M C aged 10 years), **PW2** (Peter Chacha Wambura) and **PW3** (Mary Boke Chacha) respectively alongside a Clinical Officer (**PW4**) and the investigating officer (**PW5**). PW2 is the husband to PW3. PW2 and PW3 are the parents of PW1. PW2 is also a step-brother to the appellant and are immediate neighbours whose homesteads are separated by live fences.
4. The prosecution's case was that in the morning of 27/05/2015 PW2's goats which had been tethered in the PW2's homestead strayed and entered into the farm of the appellant. PW1 rushed to get the goats out and found the appellant carrying a panga and a stick. The appellant attacked PW1 and repeatedly beat him using the stick until it shredded into pieces. PW1 raised alarm and called for help. PW2 who was at his home rushed to where PW1 was screaming from. PW2 saw the appellant standing next to PW1 who was lying down. PW2 asked the appellant why he had beaten PW1 but the appellant did not respond. Instead, the appellant attacked PW2 with the panga he had in his hand and cut him severally. PW2 fell down unconscious.
5. As PW2 was being attacked he raised alarm and PW3 rushed to the scene to rescue PW2. On reaching there, PW3 was also attacked by the appellant and cut using the panga. She returned to her house crying. Neighbours gathered and took the three injured persons to a hospital in Ntitaru and thereafter the three reported the matter at Ntitaru Police Station.
6. The police commenced investigations. They escorted the injured to Ntitaru Sub-District Hospital where they were treated by PW4. They also issued P3 Forms to the injured which were all filled by PW4. It was medically opined that PW1 and PW3 sustained injuries classified as '**harm**' whereas PW2 sustained injuries classified as '**grievous harm**'.
7. PW5 visited the scene and drew a sketch plan. He also took photographs. He then arrested the appellant and charged him accordingly. PW4 produced the P3 Forms as exhibits whereas PW5 produced the sketch plan and the photographs as exhibits.
8. At the close of the prosecution's case the appellant was placed on his defence. He gave a sworn statement and called two witnesses; **DW2** (Ann Robi Wambura, the appellant's mother) and **DW3** (Elizabeth Nyairabu Matiko, the appellant's wife).
9. The appellant stated that it was instead PW2 who jumped over the fence with a panga and attacked him as he sat in his homestead as PW2 alleged that the appellant had abused PW1. That, he had initially heard noise from PW2's house and someone saying '*leave what you want to do*'. That, a fracas ensued and the appellant overpowered PW2 but he was unable to disarm him. That, as they struggled the panga cut PW2 on the head, shoulder and the ribs. That, on being rescued by the neighbours he ran to and reported the incident at Ntitaru Police Station and was given an OB entry. That, a call was made while he was still at the police station and he was instead arrested and charged. That, he did not see PW1 and PW3 at the scene. He stated that he only learnt later that PW2's cows had damaged his crops.

10. DW2 stated that she heard some noise and then saw the appellant telling PW1 to get out the goats from his farm. That, she also saw PW2 jumping over the fence holding a panga and fought with the appellant whereof PW2 was injured by the panga he had. That she only saw PW1 being chased by the appellant with the goats but did not see PW3. She attributed the charges to the family misunderstandings.

11. DW3 only saw PW2 jumping over the fence while armed with a panga and immediately told the appellant about it. Sensing that there may be some fracas, DW3 took her son and ran into the house and locked the door from inside. She raised alarm. That, PW2 and the appellant fought and in the process PW2 was cut by the panga. That, a person emerged and separated the two, took the panga and escaped with it. That, she did not see PW1 and PW3 and that the genesis of the quarrell was that PW1 had been quarrelled since the appellant's crops had been eaten.

12. The trial court rendered its judgment on 20/02/2017, convicted the appellant in all the three counts and sentenced him accordingly.

13. Being aggrieved by the convictions and sentences, the Appellant timeously filed an appeal and preferred the following grounds: -

a. That I pleaded not guilty to the charge herein.

b. That the trial magistrate misdirected himself by coming into a harsh and excessive sentence despite of lack of sufficient evidence adduced by the prosecution.

c. That the trial magistrate erred in both law and facts by not considering the mitigating factors and other options before coming into this excessive sentence in the circumstances.

d. That the trial magistrate erred in both law and facts by failing to consider my defence.

14. The appellant prayed that the appeal be allowed, the convictions quashed and sentences set-aside accordingly.

15. The appeal was heard by way of written submissions. The appellant mainly challenged the sentences as harsh and reiterated his defence which he contended was not considered by the trial court. The prosecution did not appear during the hearing of the appeal.

16. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

17. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences of causing grievous harm and assault were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and the submissions.

18. The offences of causing grievous harm and assault have common ingredients. For a conviction to stand in any of such charges, the prosecution must prove the following ingredients:-

i. That the complainant was assaulted without any legal justification;

ii. That the complainant sustained actual bodily harm;

iii. It was the appellant who unlawfully assaulted the complainant and occasioned him harm.

19. I will hereunder consider all the said ingredients together.

20. The fact that PW2 sustained injuries is not in doubt since it was vouched by all the three complainants, the appellant and the two defence witnesses. PW4 as well as PW5 confirmed the injuries. Whereas the appellant and his witnesses deny that PW1 and PW3 also sustained injuries, that fact was confirmed not only by the complainants but also PW4 and PW5. Medical evidence was also produced to that effect. I therefore find and hold that there is sufficient evidence that all the three complainants herein, PW1, PW2 and PW3, sustained injuries on 27/05/2015.

21. As to how the complainants sustained the injuries, the record also speaks for itself. On revisiting the entire body of evidence, it is clear that the injuries the complainants sustained were inflicted and were not accidental. I have perused the P3 Forms and noted the nature of the injuries. They were inflicted by a sharp object and were variously serious whereby PW2 was even stitched severally. Those injuries are consistent with deliberate infliction as opposed to mere accidents.

22. The evidence of PW1, PW2 and PW3 was very consistent and corroborative. They unanimously and clearly described how their ordeal in the hands of the appellant was. Their evidences were further corroborated by the medical evidence and the evidence of PW5 who visited the scene. On the other hand, the defence evidence was not consistent. Whereas the appellant stated that he never saw PW1 and PW3 at the scene, DW2 stated that she saw the appellant ordering PW1 to remove the goats from the appellant's farm. DW3 as well stated that when he saw PW2 jumping over the fence with a panga she took her son and ran into her house and locked herself inside. How DW3 saw a person unknown to her intervene in the fight between PW2 and the appellant, disarming PW2 and disappearing with the panga remain highly doubtful. Was DW3 able to see what was happening outside? If so, how?

23. I have as well considered the issue of family misunderstandings in the context of this matter. The issue was not raised by the appellant but by DW2 and DW3. None of the prosecution witnesses was examined on the same either. The issue was also not brought to the attention of PW5 for possible investigation but only came up too late in the defence hearing and by the witnesses instead. I do not see how that line of defence can benefit the appellant.

24. It appears that the appellant was raising the issue of self-defence. As said, his evidence is wanting and if it is true that that the appellant never had any encounter with PW1 then how come that PW2 was angered with the appellant's dealing with PW1? And, how come that DW2 saw the appellant dealing with PW1? It all does not add up. The appellant also stated that he was the one who reported the incident to the police and he was even given an OB entry. Without being seen as shifting the burden of proof, that crucial evidence was not produced neither was PW5 examined on the same. The aspect of self-defence hereby fails. As the appellant has failed to establish that he acted in self defence, then he inflicted the injuries without any lawful justification.

25. There is the unchallenged medical evidence on the nature and gravity of the injuries sustained by the three complainants. PW1 and PW3 sustained injuries classified as 'harm' whereas PW2 sustained injuries classified as 'grievous harm'.

26. From the foregone analysis and by placing the prosecution's evidence and the defence evidence side by side, this Court finds that the prosecution evidence is more believable than the evidence of the appellant and his witnesses. I therefore find and hold that it was the appellant who variously and unlawfully attacked and injured PW1, PW2 and PW3. The appellant was rightly found guilty as charged and convicted. The appeal on conviction hereby fails.

27. On sentence, the appellant contends that the 3-year imprisonment term is excessive, harsh and very punitive and that he ought to be granted a non-custodial sentence. The offence of causing grievous harm attracts a sentence of upto life imprisonment on conviction while that of assault causing actual bodily harm attracts a sentence of upto five years imprisonment on conviction. The appellant was sentenced to 3 years imprisonment on the count of grievous harm and 2 years imprisonment on the count of assault causing actual bodily harm. The sentences were handed down after the sentencing court received mitigations and in considerations of the facts of the case.

28. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

29. Revisiting the circumstances surrounding the commission of the offence herein and the mitigations tendered, I do not see how the sentencing court can be faulted. The appellant mercilessly descended on the complainants and cut them using a panga. Any one who turned out at the scene fell a victim of the appellant's weapon. The appellant cannot call for leniency in such circumstances. Looking at the nature of the injuries the appellant inflicted on the complainants, the appellant seems to be a very dangerous person. Infact, the sentence on the count of grievous harm was too lenient in the circumstances of this case since PW2 sustained life threatening, permanent and life-long injuries. However, since there is no cross-appeal on sentence, I leave the matter there. The upshot is that the appeal on the sentence is unmerited as well.

30. The entire appeal is hence not merited. It is hereby dismissed, and the decision of the trial court is hereby affirmed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 08th day of March 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

John Matiko Wambura, the Appellant in person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant