REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HCCRA NO.81 OF 2017

BETWEEN:

FERDINAND MWACHONGO MWADIME.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. N.N. Njagi SRM at SRM's Court

Wundanyi CR. Case No.175 of 2017delivered on 22nd August 2017)

J U D G M E N T

Background

1. This Appeal is brought by Fedinard Mwachongo Mwadime (hereinafter "the Appellant"). The Appellant was convicted of the offence of causing grievous harm contrary to ***Section 234*** of the ***Penal Code***. The particulars of the offence were stated to be that "*On the 16th day of April 2017 at about 1730 at Mwatungu Village in Mwatate Sub-County within Taita-Taveta County [the Accused] willfully and unlawfully did grievous harm to Paul Mwangima*.

2. The Accused was found guilty by the learned Trial Magistrate on 22nd August 2017. The Learned Trial Magistrate stated that "The defence by the accused us just but a mere denial of the offence and has not challenged the prosecution case at all. The evidence is all corroborated. I find the accused guilty as charged under 234 of penal code. Accused stands convicted.". In relation to the sentence, the Judgment then goes on to state that "Accused has not mitigated at all. In my humble view he does not look remorseful at all. I find no reason why had assaulted the complainant for demanding for change that the accused was to give after buying the chips. This court shall sentence the accused to 10 years imprisonment.".

3. On 2nd November 2017 the Appellant was granted leave to file his appeal out of time. The Appellant filed a Petition of Appeal against conviction and sentence. The Grounds relied upon, as contained in the Memorandum Grounds of Appeal filed on 2nd October 2017 are:

> (1) That the learned trial magistrate erred in law and facts by relying on the evidence of a single witness which was not sufficient to sustain a conviction.
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> (2) That the learned trial magistrate erred in law and facts by relying on incredible prosecution's evidence which otherwise rendered the conviction unsafe
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> (3) That the learned trial magistrate erred in law and facts by failing to consider that the prosecution failed to discharge the burden of proof to their case beyond reasonable doubt c/s 109 and 110 of the evidence act.
>
> (4) That the learned trial magistrate erred in law and facts by failing to consider my defence was firm and unrebutted to create doubt on the prosecution case.

4. After receiving a certified copy of the lower court proceedings, the Appellant applied to amend his grounds to include what he believes to be "more strong grounds". There are set out as follows:

(1) The learned trial magistrate erred in both law and fact fail to note there was none disclosure of all the evidentiary materials by the prosecution in disregard of application for the same by appeallant.

(2) That the learned trial magistrate erred in both law and fact in convicting and sentencing me while not considering that, I the appeallant was not assigned an advocate by the state as required by the law since I am a layman in law.

(3) That the learned trial magistrate erred in both law and fact failed to note that the benefit of doubt was not discharged beyond reasonable doubt.

(4) That the learned him trial magistrate erred in both law and fact in basing my conviction and sentence on the prosecution witnesses evidence without humbly considering that, I the appealant was a first offender he [hence] deserved an alternative sentence.

(5) That the learned trial magistrate erred in both law and fact in not considering that my defence evidence which created reasonable doubt to the prosecution whereby the benefit ought to have been given to me.

5. The function and duties of the Court on a first appeal are well known and oft-repeated. However, there is always benefit in restating them. The duty of the Court was set out succinctly in ***Criminal Appeal No 145 of 2013*** . The Court said:

> 8. This being the first appeal this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that neither saw the witness nor heard the evidence when parties were testifying to see their demeanor. See the case of **MARK OIRURI MOSE –VS- REPUBLIC [2013] e KLR Criminal Appeal No.295 of 2012** where the Court of Appeal stated: "It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate 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 to give allowance for that." See also the well known case of **OKENO –VS- REPUBLIC [1972] E.A. 32** which sets out the same principle.

6. In summary the Appellant is appealing against his conviction and sentence. The documents prepared and filed on his behalf present the argument that the accused was not afforded a fair trial for the reasons set out. The issues that therefore arise are as follows:

(1) Was the Appellant provided with all of the "evidential material" before the Court. This Court interprets the phrase "evidential material" as the copies of the witness statements and exhibits.

(2) Was the Appellant provided with an advocate at public expense?

(3) Do any omission of (1) and (2) above give rise to a good ground of appeal?

(4) Does the evidence before the Court justify the findings reached by the learned trial magistrate bearing in mind that he had the advantage of observing the demeanour of the witnesses?

(5) In all the circumstances of this case was the Appellant afforded a fair trial.

7. Both the Appellant and the Prosecution have filed and exchanged their written submissions and the Court has considered them closely. Starting with the Appellant's first issue. He says he was not provided with copies of the witness statements. In response, the Respondent's Written Submissions argue that "*the appellant's constitutional rights were never infringed. The appellant took plea on 26/4/17 and the court directed that he be supplied with witness statements."*. Thereafter it is said the matter was listed and the Appellant said he was ready to proceed. The Submissions also state that throughout the Prosecution's case there was no indication by the appellant that he had not received the statements "thus he cannot claim his right was infringed". Those statements must be assessed in line with the documents and evidence on the Court file. The Court file contains 3 different lists of Witnesses and Exhibits. None are dated. In order of filing, the first refers to two prosecution witnesses, the Complainant (Paul Mwagima) and Leah Bakari. There is no reference to any witnesses from the Police whether arresting officer or investigating office. Only one exhibit is listed, the P3 Form for the Complainant. The original P3 is on the file. There is then a second list which names Daniel Goona - clinical officer as a witness and the P3 form as an exhibit. Again that form is not dated. There are no witness statements or any records taken by the investigating officer on the Court File. The Witnesses that attended and gave evidence for the Prosecution were the Complainant, Paul Mwagima (PW1), Leah Mwanaisha Bakari (PW2), David Ngona, Clinical Officer (PW3). On 29th June 2017, the Prosecutor indicated that he would be calling the investigating officer PC Masinde who was then bereaved. The trial was adjourned to allow for his attendance. Although the Accused opposed the adjournment it was granted. About a month later, the matter resumed and the witness called as PW4 was not PC Masinde but a Faraj Hamis Masoud who's rank is not recorded there. He stated that he took over the case on 10th May 2017. He bonded the witnesses and he brought the exhibits. That raises the question why the matter was adjourned for PC Masinde to attend when it was already known that he was replaced by Faraj Hamis Masoud (rank unknown)? However, at p J2 of the Judgment, the Learned Trial Magistrate states; "The case was taken over by PW4 PC Masoud Faraje of Mwatate police station. The case had been PC Kiptoo's who had been assigned other official duties away from the police station. The Learned Trial Magistrate then proceeded to recite the evidence of PC Faraj saying that "It was his evidence that the accused pushed the complainant, hit him and injured him.". That recitation of the evidence records details that are not contained in the record of evidence. The glaring inconsistencies are that the evidence of PC Faraj is recorded as if it was first hand evidence, in other words the events were observed by PW4. In fact PW4 was either the third or later investigating officer on the case. There is no record of whether he obtained that information verbally or from earlier reports. If from earlier reports they are not identified. There are no statements or reports from any police officer on the Court file. Therefore, where was the narrative contained in the judgment obtained from?

8. There is no record on the file of whether and if so when any witness statements and/or the P3 were produced to the Accused. It is the responsibility of the trial court to ensure those documents are made available, if the prosecution fails to provide them (***Joseph Ndungu Kagiri v Republic [2016] eKLR)***. The same applies to the P3 and the alleged weapon. In the proceedings there is nothing to denote that the learned trial magistrate made any inquiry to ensure that his order was complied with. Submissions for the Prosecution argue that the Appellant did not raise the issue again and stated he was ready to proceed with the trial. Within that Submission there are two separate assertions, firstly that the Appellant understood that he should have received the Witness Statements by that stage and secondly, that he acquiesced in the default by agreeing to proceed to trial. That argument has been raised and accepted by Courts of equal jurisdiction with some success (see ***JO v R HCCRA 145 0f 2013 [2016] eKLR]***. However, the circumstances of this case are different. The Appellant also a first offender. In the circumstances, is this Court to infer that an accused standing in the dock for the first time and unrepresented is so completely conversant with court procedures that he was able to give his **informed consent** to the failure to provide him with witness statements. It is also readily apparent that he would need time and assistance to consider them and prepare his defence. ***Article 50(1) and (2)*** of the ***Constitution of Kenya (COK2010)*** provides:

> "50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of, if appropriate, another independent and impartial tribunal or body.
>
> (2) Every accused person has the right to a fair trial, which includes the right-
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> a. To be presumed innocent until the contrary is proved;
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> b. To be informed of the charge, with sufficient details to answer it;
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> c. To have adequate time and facilities to prepare a defence;
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> d. To a public trial before a court established under this Constitution;
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> e. To have the trial begin and conclude without unreasonable delay;
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> f. To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
>
> g. To choose, and be represented by, an advocate and to be informed of this right promptly;
>
> h. To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
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> i. To remain silent, and not to testify during the proceedings;
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> j. To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

Particular emphasis is on (c) and (j).

10. Moving onto the second exhibit which appears to have been produced only at trial. It has not been recorded at all but appears in the evidence. PC Faraj produced a club as the weapon. The Appellant challenges this because he says it was not tested for finger prints. Again, there is no evidence or record showing where the club was seized or recovered. There are no photographs of it on the record. There is absolutely no reference to a club in the evidence of PW1 and PW2 who are the primary witnesses who are able to give first hand evidence. Their evidence is consistent that the accused pushed the complainant and hit him with "a piece of wood". That piece of wood was not described nor was there any examination as to its shape and dimensions. What is clear is that there was no reference to a club. If the learned trial magistrate accepted the evidence of PC Faraj that a weapon was used and the weapon was a club, why did he prefer the evidence of one witness over the evidence of two others, he has not explained. The Appellant raises this in his written submissions. They state, "*The piece of wood which is sayed was used, it did not appear before Court to proove that the appellant...".*

11. Although the Appellant appeals on the grounds of the findings of identity and what transpired, he did not call any witnesses and chose to give evidence on oath. He said (in kiswahili) "I know the charge that I am facing. I deny it. I did not assault him. I was seeking for my change. He was drunk, I know the complainant got injured on the left ear. I pushed the complainant and he got injured...". From that evidence it was clear that the Appellant was admitting an altercation but not the use of a weapon. In the circumstances, the learned trial magistrate's preference of the evidence of PC Faraj has not been sufficiently explained or explicable.

12. The arresting officer was not called. There is no evidence of the injuries suffered from someone who observed them at the time. The medical officer who was called, only saw them the following day. There were several officers involved in the investigation but the mode by which they shared information was not shared with the Defendant or even the Court.

13. An analysis of the evidence is that the three principal witnesses agree the date time and venue of the alleged offence. Thereafter their evidence digresses. The Complainant said that the accused grabbed his shirt and pushed him and thereafter used a piece of wood to strike him. He said he was hit repeatedly, however the medical evidence records only an injury to the left ear. The shirt PW1 was wearing was not seen by the medical officer nor produced. The medical analysis of the injury was that it was caused by a blunt object. The Court had to make a finding of which blunt object. Instead of a "piece of wood" a club was produced. There was no forensic analysis of that club to ensure it had any connection with this crime.

14. In relation to the sentence the findings of the learned trial magistrate are somewhat inexplicable. It was the evidence of the complainant/PW1 that the Appellant wanted to buy a cigarette. PW2 stated in her evidence that she sold boiled potatoes. She did not specify whether the Accused purchased cigarettes or boiled potatoes or anything else. She said the "accused ate the potatoes" and then demanded PW1 pay for them. The learned trial magistrate does not explain why given three versions none of which is corroborated, he preferred one. The only common evidence was that "there was a quarrel". In addition, it is surprising to note the words of the learned trial magistrate finding that the Accused had assaulted the Complainant when the Complainant demanded change from the accused "after buying the chips". There is no mention of chips anywhere in the recorded evidence and as a consequence that finding cannot be based on anything before the Court.

15. The Appellant also complains of the lack of representation. The record does not contain any request from him for legal advice and/or representation. The charge was not a capital offence, therefore the Appellant could have had no expectation that he would be provided with an advocate at public expense See **Karisa Chengo and 2 others v. Republic [2015] eKLR.** He nevertheless chose to proceed with the trial. Therefore, that ground of appeal is not made out.

16. In the circumstances, an objective assessment of the proceedings leads this Court to the conclusion that the Appellant was not afforded a fair hearing within the parameters of Article ***50(2)(c) and (j).***

17. In the circumstances t is ordered that the conviction be set aside. The matter to be referred to the Senior Principal Magistrate's Court Wundanyi for re-hearing.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 28th day of June 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: In Person

Respondent: Ms Anyumba