REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 27 OF 2015

ROBERT WACHIRA NJUE.....1ST APPELLANT

PETER MWANIKI MAINA.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The 1st appellant Peter Mwaniki Maina and the 2nd appellant Robert Wachira Njue were convicted of causing Grievous Harm contrary to section 234 of the Penal Code and sentenced to 15 years imprisonment in the Senior Resident Magistrate's Court at Wanguru Criminal Case No. 150 of 2015.

Peter Mwaniki Maina filed Criminal Appeal No. 25/2015 while Robert Wachira Njue filed Criminal Appeal No. 27/2015. The appeals were consolidated. The appellants filed six grounds of appeal and pray that the appeal succeeds in its entirely.

The appellants fault their conviction and sentence on the ground that the trial Magistrate erred in convicting them while relying on the evidence of PW-1- which was not corroborated and therefore not credible. They fault the mode of arrest, inconsistencies in the evidence of the prosecution witnesses and their conviction on charges which were not proved to the required standards. They also fault the court for rejecting their defence which was not challenged by the prosecution.

The appellant Robert Wachira Njue filed Supplementary grounds of Appeal while Peter Mwaniki filed amended grounds. The additional grounds raised by Robert Wachira are that the trial Magistrate failed to observe that his right to fair trial were violated, essential witnesses were not summoned and the trial Magistrate failure to consider that there existed a grudge between him and PW-1-.

Peter Mwaniki in addition to what is stated above states that the trial Magistrate erred by relying on investigations which were shoddy.

The state opposed the appeal and filed responses to the grounds of appeal and the submissions. Through E. P. O Omooria Assistant Director of Public Prosecutions, it was submitted that the evidence was well corroborated, sufficient and credible evidence was tendered and was enough to sustain a conviction. The sentence of 15 years was very lenient and proper in the circumstances.

I have considered the grounds of appeal and all the submissions from both sides. This is a first appeal and this court has a duty to analyse the evidence evaluate it and come up with its own independent finding but to bear in mind that unlike the trial Magistrate, it had no opportunity to see the witnesses and assess their demenour and leave room for that. The appellants have legitimate expectation that this court will evaluate the evidence and make its own finding. In ***Okeno –v- R (1972) E. A. 32.*** It was stated:-

> ***"An appellant on a 1st appeal is entitled to expect the evidence as whole to be subjected to a fresh and exhaustive examination and to appellate court own decision on the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusion - (Shantilal Ruwala –v- R (1957)E. A 570). It is not the function of the first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court finding and conclusions, it must make its own finding and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

See also ***Peters –v- Sunday Post 1958 E. A 424***.

The evidence tendered before the trial Magistrate is that Samson Kinyua Weruna (PW-1-) who is the complainant was on 25/2/15 at about 1.36 accosted by the two appellants at Thiba Butchery where he was selling meat and washing utensils. The two alleged that he had stolen a radio. After he took the two to his house they did not find anything. The two appellants then took the complainant to the house of Wachira where they hanged him on the roof using a rope. The two assaulted him using a panga. The two then slashed off his index finger with a

panga.

PW-1- screamed and members of the public went for his rescue. PW-1- was taken to Kutus Health Centre Dispensary but he lost consciousness and came to while at Kerugoya Hospital where he was admitted for two weeks. He reported to the police and was issue a P.3 form which was filled. The doctor's opinion was that the degree of injury was grievous harm. ***P.3 Exhibit -2***. The two appellants were known to the complainant.

The prosecution called PW2, 3 & 4 who corroborated the evidence of the complainant in all material particulars. PW5 P.C. Peter Njathi from Wang'uru Police Station confirmed that he received the report and referred the complainant to hospital. While PW6, Stephene Ngigi is the Clinical Officer who examined the complainant and filled the P3 form showing that the injury sustained was grievous harm.

The 1st appellant Peter Mwaniki gave his defence on oath. He denied that he committed the offence. He alleged that the complainant owed him Kshs 3,500/-. However this was not put to PW-1- when he testified. In cross-examination he admitted that he knew the witnesses in the case and were not his enemies. The defence was a mere denial.

As for Robert Wachira he gave unsworn defence and denied the charge. The defence was a mere denial and the allegation that complainant had a loan of Kshs 3,500/- from appellant which he had not repaid was an afterthought. This allegation cannot possibly be true as it was not put to the complainant during cross-examination.

Having considered the evidence, I am of the view that the evidence was overwhelming and sufficient to convict the appellants. The complainant who the appellants admitted that they knew him very well, gave an account of what transpired. The evidence was credible and reliable to support a conviction.

The appellants have raised various grounds of Appeal and I will now analyse the issues.

Issues arising;

1. Right to fair hearing violated.

The 2nd appellant Robert Wachira appellant claimed that he was denied the services of an interpreter. That he understood Kimbere but he was subjected to use Kiswahili and English which he vaguely understands.

The proceedings of the trial court were conducted in English/Kiswahili. He was able to follow the proceedings and even cross-examine the witnesses and in addition he gave his unsworn defence in Kiswahili. In that regard, he cannot claim that he could not understand the language.

In Munyasia Mutisya –v- Republic [2015] eKLR

The Court in dealing with a similar issue stated;

I however note that the appellant participated fully in the trial by cross examining witnesses. He cross examined PW1. He cross examined PW2. He cross examined PW4, 5, 7, 8 and 9. In my view therefore he understood the proceedings and the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses……..

The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court.

It is very clear from the proceedings that the appellant fully participated. He never at any stage bring to the attention of the court that he could not follow the proceedings. The records shows the language was indicated as English/Kiswahili. There was no violation or denial of constitutional right to fair hearing. The ground is without merits and must fail.

2. Essential witnesses not summoned.

The appellants claimed that the good Samaritan, co-tenants, landlord or neighbour were not called to confirm that they saw them. PW-1- testified that the witnesses were not ready to testify and did not record statements.

In **Alex Lichua Lichodo v Republic [2015] eKLR**

The Court of Appeal held in a binding decision.

On the subject of whether the prosecutor failed to call crucial witnesses, we do concur with the trial court and the 1st appellate court that the evidence of the complainant was sufficient and convincing and there was no need for the prosecution to call any more witnesses on the said issue.

Section 143 **of the Evidence Act, Chapter 80, Laws of Kenya provides,**

"***No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact."***

Further, in *Julius Kalewa Mutunga vs Republic* - *Criminal Appeal No. 31 of 2005*, this Court held,

" ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

PW 2 – PW 4 all claimed that after the door was opened, they saw the appellants coming out and also PW 1 was hanging on the roof. Therefore even though the rest of the witnesses were not called, those called were able to give sufficient evidence.

The circumstances of this case are such that even the evidence of PW-1- would be sufficient as he gave a motive of the attack and he knew the two appellants and the offence was committed in broad daylight. However, the prosecution called evidence to support the testimony of the complainant. The defence was a mere denial and contradictory on the allegation of a debt and was an afterthought. The trial Magistrate stated on this issue at Page 35 –

"Nevertheless, when the complainant testified in court on the happenings of the material date, he impressed me as a truthful witness through his demeanor and consistency both in chief and cross examination. According to his evidence the two accused persons were known to him before, indeed he told the court that the 1st accused used to be his friend whereas the 2nd accused a friend of 1st accused."

The trial Magistrate had the opportunity to see the demeanor of the complainant and she was satisfied that he was credible. It was safe to rely on his testimony. I find that where the trial Magistrate has observed a witness and made a finding on his or her demeanor an appellate court has to go by that finding as the opportunity to observe the demeanor was exclusive to the trial Magistrate. This is what the Court of Appeal State in ***Okeno –v- Republic*** which I have quoted above. My view is that failure to call the said crucial witnesses was not fatal to the prosecution's case. The prosecution adduced sufficient evidence which supported the charge and the conviction. The ground is without merit.

3. Contradicting and uncorroborated evidence

The appellants claimed PW 1 gave the following contradicting evidence

a. The injury

PW 1 stated that his pointing finger on the right hand was cut.

b. The 3 people who came to the scene

PW 1 stated that he did not know the people who came to the scene but PW 2 (PW 1 younger brother) stated that Samuel Muturi and himself hang PW 1.

c. Who took him to hospital.

PW 1 stated that a good Samaritan took him to hospital but PW 2 stated that Samuel Muturi and himself took PW 1 to hospital.

The alleged contradictions were not material since it was confirmed that the PW 1 was injured and the appellants were identified as the attackers.

In **Daniel Njoroge Mbugua v Republic [2014] eKLR**

The Court of Appeal stated;

"From the record, we find that the evidence of PW1 and PW2 was consistent and their testimonies corroborative. Any discrepancies or inconsistencies in the evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record."

The evidence of PW-1- was corroborated by the medical evidence adduced by PW6 the Clinical Officer who examined the complainant and found that there was traumatic excision of the right index finger and the degree of injury was grievous harm. The testimony of PW-1- was confirmed and was supported by medical records in discharge Summary and P3 form exhibit 1 & 2. The contradiction were minor and did not cast doubts in the prosecution's case.

4. Prosecution failed to prove charge beyond reasonable doubt.

The appellants claimed that the prosecution relied on the evidence of a single witness of PW 1 and that their investigation was shoddy.

The prosecution relied on the evidence of PW 1 who was an eye witnesses but also on PW 2 – PW 4 who saw the appellants emerge from their house which had been locked from the inside and PW 1 was hanged with a cut on his finger. They also relied on the evidence of 6 who confirmed the injuries sustained.

Section 234 of the Penal Code provides:

> *Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.*

The code further defines grievous harm under section 4 as follows:

> ***"Grievous harm means any harm which amounts to a maim or dangerous harm or seriously or permanently injures health, or which is likely so to injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense."***

There is evidence of PW-6- which proves beyond any reasonable doubts that the complainant sustained injury which was grievous harm.

5. <u>Dismissed defence without sound reason.</u>

The appellants claimed that their defence that PW 1 owed them money and their alibi defence were unchallenged.

However, the court duly considered their alibi defence at page 33.

The court stated:

> ***"The defence raised by the accused persons suggesting that they were not at the scene as on the material date and time is in my view an afterthought and does not contain an iota of truth. Indeed considering the tone of the evidence given by the complainant in cross-examination, the accused persons did not raise any meaningful suggestion during the trial to the effect that they were not at the scene on the material date."***

Page 35 from Line 10.

The court finally stated at Page 38 that the defence was mere denials. The contention by the appellants that the trial Magistrate did not consider their defence is without basis. That is far from the truth in view of what the trial Magistrate stated above. The trial Magistrate concluded that the two appellants had shared a common intention to harm the complainant allegedly because he had stolen their radio. Criminal liability against the appellants was established.

<u>In Conclusion:</u>

The evidence tendered was sufficient and reliable and proved the charge against the appellants beyond any reasonable doubts. The Court properly addressed its mind to the facts and the law and arrived at the inevitable conclusion, that of the guilt of the appellants. The complainant suffered severe injury with permanent disfiguring of his right hand with the severing of index finger. The appellant intentionally and with common intention severed the complainant's finger. The sentence meted out was deserved. I find that the Appeal is without merits and is dismissed.

Dated at Kerugoya this 27th Day of September 2018.

L. W. GITARI

<u>JUDGE</u>