REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 39 OF 2016

(From Original Conviction and Sentence in Criminal Case No. 657 of 2014 of Chief Magistrate's Court at Kakamega)

PATRICK AMUTSA IKOHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by J Ong'ondo, Senior Resident Magistrate, Kakamega, of maiming contrary to Section 234 of the Penal Code, Cap 63, Laws of Kenya, and was sentenced to ten (10) years imprisonment. The particulars of the charge against the appellant were that on 2nd December 2011 at Vihiga Village Khayega Location, Kakunga East District in Kakamega County he unlawfully maimed Richard Litaala.

2. He had pleaded not guilty to the charges before the trial court, which compelled the primary court to conduct a full trial. The prosecution called four (4) witnesses. PW1 was the complainant, Richard Litunda. He described how the appellant chased him on the material day and assaulted him with a walking stick on his right knee and left hand. A group of people came to his rescue. He thereafter reported the matter to the police, who took him to hospital. PW2, Patrick Mambili, was the clinical officer who treated PW1 and prepared the P3 form that was placed on record as evidence of the injuries sustained. The injury sustained was classified as maim. PW3, Hudson Livoni, was at the scene, when the assault occurred. He described how the appellant attacked PW1 with a *rungu*. PW4, No. 93405 PC Wamae Sarah Adela, was the last witness. She was the police officer who investigated the matter. The appellant was put on his defence. He denied assaulting PW1 and maiming him, saying that the witnesses had been paid to testify against him. After reviewing the evidence, the trial court convicted him of the charge of maiming contrary to Section 234 of the Penal Code, and sentenced him to ten (10) years imprisonment.

3. The appellant being dissatisfied with the conviction and sentence appealed to this court and raised five (5) grounds of appeal-

a. That the trial court had convicted him of an offence that had not been proved;

b. That the trial court erred in finding that the trial court had proved their case beyond reasonable doubt;

c. That the trial court erred in convicting when all the ingredients of the offence of maim had not been proved;

d. That the evidence adduced was contradictory and did not link him to the offence; and

e. That the trial court did not consider that the appellant and PW1 were close relatives, and did not consider the prevailing circumstances giving rise to the offence.

4. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited in criminal appeals on this issue. In its pertinent part, the decision is to the effect that:-

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

5. The appeal was canvassed on 27th September, 2018. The appellant relied on written submissions that he had placed before me. Mr. Juma,

Prosecution Counsel, opposed the appeal through his oral address to me. The appellant's written submissions largely breathed life to the grounds of appeal set out in the petition of appeal. Mr. Juma submitted that the prosecution had proved all the elements of the offence charged to the required standard. He stated that it had been proved that the complainant was injured, had suffered serious injuries and it was the complainant who had inflicted the injuries.

6. Looking at the issues raised by the appellant in his petition of appeal and his written submissions, it is my considered view that there are only three issues for me to consider. The first relates to the offence tried, whether it should have been simple assault or maim or any other. The second relates to the element of proof, whether there is proof beyond reasonable doubt that any offence was committed by the appellant on the date and at the time alleged. Finally, whether the trial court should have given premium to the fact that the appellant and PW1 were close relatives.

7. On the first issue, the offence charged was maim, the appellant argues that the evidence disclosed a lesser offence. The offences relating to assaults, whether or not causing harms of varying degrees, are provided for in sections 234, 250, 251, 252 and 253 of the Penal Code. Common assault is provided for in section 250, it essentially refers to an assault that leads to no injury or harm or to minimal injury or harm. Section 251 provides for assaults that cause actual bodily injury or harm. Both are misdemeanours, attracting a maximum penalty of five years imprisonment. Where the offence is more serious, and may be described as grievous or maim, the same is charged under section 234, and attracts a maximum penalty of life imprisonment. The interpretation to these terms is given in section 4 of the Penal Code. 'Harm' is defined as any bodily hurt or disease or disorder whether temporary or permanent. 'Grievous harm' is defined as harm which amounts to maim or dangerous harm, or which seriously or permanently injures health or is likely to so injure health. It also refers to permanent disfigurement or any permanent serious injury to any external or internal organ, membrane or sense. 'Dangerous harm' is said to refer to endangering life, while 'maim' means destruction or permanent disabling of any external or internal organ or membrane or sense.

8. When PW1 testified on 9th July 2014, he did not define the nature of the injury or harm that he suffered. He merely said that he was assaulted on his right knee and left hand, and that he was injured on his right hand. He then produced the P3 form duly filled and the x-ray image. PW2, who had treated PW1 and made the P3 form, said that PW1 had cut injuries to his right hand, the wrist joint. He said other injuries were on his left leg. An x-ray was done, a copy of the image was produced in evidence, but the witness did not give a narrative of what the image was about. By way of treatment, it was said that PW1 was put on painkillers and 'plastered.' What was meant by 'plastered' was not defined, and the purpose of plaster was not disclosed, and where the plaster was placed was not stated. He classified the injury or harm as amounting to maim, but he did not explain to the court why or how he came to that conclusion. PW3, the eyewitness, who saw the appellant assault PW1, and who assisted PW1 at the scene, did not describe the injuries allegedly suffered, he merely said that he saw PW1 bleeding from his left hand.

9. From that material there is no doubt that there was an assault on PW1. There is also sufficient proof that placed the appellant at the scene and it would appear the assault was by the appellant. There is also evidence that PW1 sustained some form of harm or injury. The question to be determined is whether that harm or injury amounted to maim, the offence charged and tried. To establish maim it must be shown that the injury was dangerous to life or life threatening, or caused a permanent disfigurement. What the prosecution placed before the trial court did not, in my view, prove that the harm amounted to maim. Indeed, the P3 form put in evidence only demonstrates that PW1 sustained a cut to the upper limb and a bruise to the lower limb. There is no mention of a fracture or any other serious injury that may qualify classification as maim. An x-ray image was also put in evidence, however, PW2, the witness who produced it did not explain what the image was about. He just literally threw it before the court and left it to the court to interpret it. It behooved PW2, as the maker of that document or as the person producing it ,to explain it to the court. Witnesses ought not place documents before the court without any narrative and leave it to the court to interpret the documents. A judicial officer presiding over a criminal trial should be presumed to be unversed with medical evidence and it should be up to medical personnel called as witnesses to give narratives of whatever documents that they would like the court to look at. It was foolhardy in this case to produce an x-ray image without explaining or bespeaking the image. Consequently, as there was no narrative on the x-ray image the same was of no probative value. The net result therefore is that there was no proof that the harm inflicted on PW1 amounted to maim. I agree with the appellant that the offence of maim was not proved. Cuts and bruises are soft tissue injuries that amount to no more than actual bodily harm, the offence defined in section 251 of the Penal Code, which attracts a maximum penalty of five years imprisonment. I believe that that is the offence with which the appellant should have been charged with or convicted of.

10. On the second issue as to whether the prosecution proved its case against the appellant beyond reasonable doubt, I note that the appellant is pointing to contradictions or inconsistencies in the evidence of the witnesses as to the exact date and time when the offence was allegedly committed. He submits that PW1 talked of the offence having been committed in 1943 on 2nd November 2011 at 3.00 pm, while PW3, the eyewitness, alleged that the offence was committed on 3rd December 2011, and PW4, the investigating officer, testified that PW1 reported an assault of 3rd December 2011. I have perused the record, and I have noted that the dates on the record tally with the appellant's submissions. The key witness was PW1. He was the victim of the alleged offence. He was the one who caused the charges to be brought against the appellant. His evidence was that the appellant assaulted him on 2nd November 2011. He does not mention any other date, and therefore it cannot be said that there was a slip of the tongue. Two of his witnesses gave a uniform date, 3rd December 2011, while the other, PW2, produced a document that talked of an assault on 2nd December 2011. The inconsistency or contradiction is material, for it suggests that the assault that PW1 referred to was different to that which PW2, PW3 and PW4 testified on. I agree with the appellant that the contradiction goes to the heart of the matter. It cannot be said that the prosecution had established a case beyond reasonable doubt of the maiming of PW1 by the appellant when PW1 says that the same occurred on 2nd November 2011, while his eyewitness and the medical records refer to different dates, 2nd and 3rd December 2011. I would have been prepared to consider the inconsistencies minor if the difference was just one day, so that PW1 talked of 2nd November 2011 while his witnesses talked of 3rd November 2011. No doubt the inconsistency in the date the alleged offence was committed, in my opinion, was fatal to the prosecution's case.

11. On the issue of the parties being related, that the court ought to have taken that into account. I trust that the appellant is referring to the trial court taking that into account at sentencing, in terms of being mindful of the fact that the offence was precipitated by a land dispute, and that a stiff penalty imposed on one party would serve to harden the heart of the person punished, and that would worsen the situation. Looking at the evidence taken at the trial, it would appear that there was a simmering land dispute between the parties. However, the appellant did not make an initiative to have the court give the parties a chance to reconcile or resolve the matter out of court. The trial court cannot be faulted for not considering the relationship between the parties as at the time of sentencing.

12. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Kakamega CMCCRC No. 657 of 2014 was unsafe. I shall accordingly allow the appeal, quash the conviction of the appellant of the offence of maiming contrary to Section 234 of the Penal Code and set aside the sentence imposed on him of ten years imprisonment. The appellant shall be set free from prison custody unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF DECEMBER 2018

W MUSYOKA

JUDGE