



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.182 OF 2016

MICHAEL KUHORA NJERI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment delivered by the Honourable E. Kelly, Resident Magistrate on 22nd November, 2016 in Nakuru Chief Magistrate's Court Criminal Case No.3535 of 2014)

JUDGMENT

The appellant **MICHAEL KUHORA NJERI** has filed this appeal challenging his conviction and sentence by the learned trial magistrate sitting at Nakuru Law court.

The appellant had been arraigned before the trial court on 15th October, 2014 facing a charge of **ASSAULT CONTRARY TO SECTION 251 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 6th day of December 2014 at Lake View Estate in Nakuru County unlawfully assaulted EDITH ADHIAMBO OPONDO thereby occasioning her actual bodily harm.”

The appellant entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced on 29/4/2015. The prosecution led by the learned state counsel called five (5) witnesses in support of their case.

PW1 EDITH ADHIAMBO told the court that on 6/12/2014 while she was cooking inside her house she heard a commotion from outside where the children were playing. She went outside to find that the appellant had slapped her child.

The following Saturday, **PW1** went outside to call her child to enter the house. The appellant took a stick and hit **PW1** hard on the side of the head. **PW1** made a report to her landlady.

PW2 EVERLYNE CHEPKURUI told the court that on 9/12/2014 at 6.30p.m she was inside her house watching T.V. She heard quarrelling from outside. **PW2** went out and found the appellant arguing with **PW1**. The appellant was holding a cane in his right hand and **PW1** was asking him why he had hit her.

PW3 JANE WANJIRU KARANJA told the court that on 9/12/2014 at 6.00p.m **PW1** came and told her that the appellant had assaulted her with a stick. **PW3** advised **PW1** to report the matter to the police.

The matter was reported to police after which the appellant was arrested. **PW1** went to see a doctor for medical attention. She obtained a P3 form which was filled and signed.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant opted to give an unsworn defence in which he denied having assaulted **PW1**.

On 2/11/2016 the learned trial magistrate delivered her judgment in which she convicted the appellant of the offence of Assault and thereafter sentenced him to serve three (3) years imprisonment.

Being aggrieved by both his conviction and sentence the appellant filed this appeal. **MR. GACHERU** Advocate argued the appeal on behalf of the appellant whilst **MR. CHIGITI** learned state counsel opposed the appeal.

This being a first appeal the court is obliged to re-examine and re-evaluate the prosecution case and to draw its own conclusion on the same (See AJODE Vs REPUBLIC [2004] 2 KLR 81). Likewise in the case of MWANGI Vs REPUBLIC [2004] 2 KLR 28, the court held that:

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.”

This is a case in which the appellant faces a charge of Assault

PW1 EDITH ADHIAMBO OBONDO told the court that there existed bad blood between herself and the appellant as on 6/1/ 2014 the appellant had slapped her child.

On the material day being 9/12/2014 **PW1** went outside to call her child. She met the appellant outside and he blocked her way. The appellant then began to attack **PW1** with a stick which he was holding.

PW2 told the court that she was a neighbor to **PW1**. On 9/12/2014, she heard a commotion outside, and on going to check **PW2** found the appellant and **PW1** arguing. The appellant was holding a cane in his right hand and **PW1** was asking the appellant why he had hit her. The appellants retorted that he has already hit **PW1** and she can do what she wants about it. **PW2** also told the court that she noted that the hand of **PW1** was swollen.

Under cross-examination **PW2** stated clearly;

“I saw you hit Edith PW1 I saw you hit her. You had a big stick in your hand.....”

PW3, JANE WANJIRU KARANJA was the landlady of both the appellant and **PW1**. She told the court that on the material day at about 6.00p.m **PW1** who was her tenant came and reported to her that the appellant had assaulted her. **PW3** advised **PW1** to make a complaint to the police.

Although **PW3** did not witness the actual assault, she did shed light on the reasons behind the assault. **PW3** told the court that the appellant had a problem with **PW1** on account of her tribe. In her evidence at page 6 line 23 **PW3** stated;

“I pray court reminds accused that he need not hate everyone because of tribe. They do ask me why I let my house (I am the landlady) to other tribes than Kikuyus. He hates PW1 because she is a Luo”.

PW4 P.C. JOSPHAT WAMBUA confirms that a report was made to the police about the assault. The police issued **PW1** with a P3 Form.

PW5 DR. NJOROGE KANYETU produced the said P3 form. Upon examination the complainant was found to have soft tissue injuries on the head and shoulder. **PW5** produced the duly filled and signed P3 form as an exhibit in the case - **P.exb.1**.

From the evidence on record I find that the fact of the assault has been proved beyond reasonable doubt. **PW2** was a witness to the assault. She confirms having seen the complainant swollen hand. **PW3** confirms that the complainant did report the incident to her as their landlady. There would be no reason for **PW1** an adult woman to report an assault on her person to her landlady and to the police if no such assault actually occurred.

PW5 the doctor has by this evidence confirmed the fact of the assault. The injuries noted on the complainant were consistent with her having been hit with a stick.

The witnesses have all positively identified the appellant as the person who assaulted the complainant. The incident occurred at 6.30p.m. It was broad daylight and visibility was good. **PW2** told the court that she found the appellant still holding the stick he had used to hit the complainant.

The appellant took issue with the failure to produce this stick as an exhibit in the case. The omission to produce the stick in my view is not an omission which is fatal to the prosecution case and does not in any way negate the evidence of the witness.

The appellant was a man who was well known to all the witnesses. To the complainant and **PW2** he was a neighbor and to **PW3** he was her tenant. Thus there is clear evidence of identification by way of recognition. In the case of ANJONONI OTHERS Vs REPUBLIC (1980) KLR 59, it was held that:

“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

I am satisfied that there was a clear positive and reliable identification of the appellant as the man who assaulted the complainant.

In the written submissions filed by counsel on behalf of the appellant, it was submitted that the trial court erred in accepting the evidence of **PW5** yet he was not the doctor who actually examined the complainant nor was he the one who filled and signed the P3 form. This

complainant was never raised by the appellant during the trial. At no time during the trial did the appellant demand to have the doctor who actually examined the complainant (Dr. Matara) called as a witness in the case. This submission is clearly an afterthought. (**Section 77 (1) of the Evidence Act Cap 80, Laws of Kenya**, provides:-

“77(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in Evidence.”

Therefore the failure to call the actual doctor who examined the complainant did not render the medical evidence inadmissible. The P3 form was in any event admissible under Section 77 of the Evidence Act.

Counsel for the appellant also submitted that the learned trial magistrate failed to consider the defence of the appellant. Here again I find this submission to be factually incorrect. A look at the judgment clearly reveals that the trial magistrate did address her mind to the defence raised by the appellant but dismissed the same as a mere denial. I have myself considered the appellant's defence. He denied having assaulted the complainant and further claimed that **PW2** had lied against him. There was no reason advanced by appellant as to why **PW2** would have wanted to lie against the appellant. There was no allegation or evidence of a pre-existing grudge between the two. **PW2** was not related to either appellant or the complainant. She was merely a neighbor to the two and in my view was an objective witness. Therefore I do concur with the learned trial magistrate that the appellant defence was nothing more than a mere denial which merited dismissal.

Finally in seeking to challenge the conviction of the appellant it was submitted that the learned trial magistrate showed open bias against the appellant. The comments made by the trial magistrate that the appellant exhibited **‘arrogance’** was claimed to be a demonstration of this bias.

In making a determination in a criminal trial a court would rely on the evidence adduced by the witnesses but a court is also at liberty to note and take into account the demeanour of any witness in a case. The word demeanour is defined in Collins Concise Dictionary as follows: -

“The way a person behaves towards others (2) bearing or mein’

Black's Law Dictionary 8th Edition defines **‘demeanor’** in the following terms:-

“demeanour – outward appearance or behavior such on facial expression, tone of voice, gestures and the hesitation or readiness to answer questions. In evaluating credibility the jury (court) may consider the witnesses (or accused's) demeanor”.

The demeanor of a witness or of an accused person will include that person's behavior bearing and **attitude** towards others. This attitude of arrogance noted by the learned trial magistrate formed part of the demeanor of the appellant which the court was well within its rights to take note of. This in my view was not any evidence of bias by the court. In **GATIRAU PETER MUNYA Vs DICKSON MWENDA KITHINJI & 2 OTHERS Supreme Court Petition No.213 of 2014**, the Supreme Court reiterated the fact that demeanour is a matter of fact one which is only the trial court who heard and saw the witness testify may properly gauge. In that case it was held:-

“The issue of credibility or implausibility of witness testimony is a question of fact and was not open to the court of Appeal to consider.....

We cannot overemphasize the common place (sic) that the trial court is alone the custodian of true knowledge of witnesses and their quirks, and can pronounce on issues of credibility.....”

This arrogant **‘attitude’** was noted by the trial magistrate who saw and heard the appellant testify before her. As an appeal court I did not have a similar opportunity to see and hear the appellant testify. I have no reason to dispute the observation of the trial court regarding the demeanor of the appellant. I therefore dismiss this ground of the appeal.

Based on the foregoing, I am satisfied that the prosecution mounted a water tight case against the appellant. The charge of assault was proved beyond reasonable doubt. The appellant's conviction was sound and I do uphold that conviction.

The second limb of the appeal is against the sentence. Following his conviction the appellant was accorded an opportunity to mitigate. In his statement in mitigation the appellant said

“I leave it to court.”

The court proceeded to sentence the appellant to serve three (3) years imprisonment without the option of a fine. Counsel for the appellant submits that this sentence was in the circumstances very harsh and excessive.

Counsel has referred the court to several authorities and to the Judiciary Sentencing Policy Guidelines in support of his plea for a reduction of the sentence.

I have carefully considered all the material referenced. The appellant was charged under section 251 of the Penal Code which provides for a maximum sentence of five (5) years upon conviction.

In this case the court prosecutor indicated that the appellant was a first offender. The Judiciary Sentencing Policy Guidelines enjoin a court to

take into account both aggravating and mitigating circumstances in deciding on which sentence to impose upon a convicted person. Paragraph 23.8 of the Guidelines provides a list of the mitigating factors while paragraph 23.7 provides an inexhaustive list of aggravating factors a court may take into account.

Paragraph 23.7 (17) provides:-

“Aggravating circumstances warrant a stiffer penalty than would be ordinarily imposed in their absence. They include (17) Commission of Offences motivated by ethnic racial and gender bias.”

Though this was a simple assault one in which the injuries sustained by the complainant were not grave or life threatening, it is clear from the evidence that the motivation for the assault was ethnic hatred. The appellant attacked the complainant because he did not like or disapproved of her tribal extraction. He did not want to live in the same compound as persons from the Luo Community. There can be no doubt that tribal hatred is one of the major cancers affecting our country Kenya. Ethnicity as the motivation for an offence is certainly an aggravating factor. As such, a stiffer sentence than normal is warranted in the circumstances of this case.

The sentence imposed was three (3) years which fell way below the five (5) years maximum sentence provides for by law. Given the circumstances of this case I find that although a stiffer sentence was called for the trial court ought to have considered a fine which would equally serve to punish and caution the appellant against the commission of a similar offence in the future. I also take into account the fact that the appellant having been sentenced in November, 2016 was already spent about one (1) year behind bars.

I therefore allow the appeal against sentence. I set aside the three (3) year term of imprisonment imposed by the trial court. In its place I substitute a sentence the appellant to pay a fine of Kshs.60,000/= (sixty thousand only) in default to serve two (2) years imprisonment. Those are the orders of the court.

Dated and Delivered in Nakuru this 30th day of October 2017

Mr. Ombati holding brief Mr. Gacheru

Mr. Motende for DPP

Maureen A. Odero

Judge