



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.104 OF 2016

SOLOMON TABU KHALILIAPPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

(Arising from conviction and sentence by Hon M.L. Nabibya, SRM, in Butali PM's Court Criminal Case No.858 of 2015 dated 26th October 2016)

JUDGMENT

1. The appellant was convicted of the offence of causing a person grievous harm and sentenced to a prison term of 7 years. He was aggrieved by the outcome and has appealed against both the conviction and sentence raising the following grounds:-

- 1. That the learned magistrate erred both in law and fact by holding that the prosecution had proved its case beyond reasonable doubt.***
- 2. That the learned magistrate erred in law and fact by rejecting the defence offered by the appellant.***
- 3. That the learned magistrate erred both in law and fact by giving an excessive sentence to the appellant.***
- 4. That the learned magistrate erred both in law and fact in analysing the evidence before her and hence arriving at a wrong finding.***

2. The charge against the appellant in the lower court was causing grievous harm contrary to **section 234** of the Penal Code. The particulars of the offence were that on the 12th September, 2015 at Mundorera area in Lukala West Sub-location in Kakamega North Sub-county within Kakamega County he unlawfully did grievous harm to **Getray Muronji Munanga** (herein referred to as the complainant.)

Case for prosecution:

3. The prosecution called 6 witnesses. The complainant's evidence was that the appellant is her neighbour and that they share a boundary. That on the material day at 7.30 am she was heading to her farm when she found the appellant erecting a wooden fence on her side of the boundary. She asked him why he had crossed the boundary. The appellant attacked her with a crowbar and a hammer. He injured her on the right hand and on the left knee. The right hand received a fracture. She screamed. Neighbours, Leonida PW2 and Clement PW3 went to the place. As Clement arrived there he saw the appellant hitting the complainant with the crowbar and the hammer. He snatched the crowbar and the hammer from him. Leonida arrived there and found Clement trying to snatch the instruments from the appellant. Clement took the hammer and the crowbar to Lukume AP camp. Peter Shitera PW6 who owns a motor cycle was called to take the complainant to hospital. He went to the scene and picked the complainant. He took her to Kakamega General Hospital. An x-ray was taken and she was found to have sustained a fracture on the right hand. A plaster of paris was applied. The complainant then went and reported the matter at Kabras police station. PC Chebii PW4 issued a P3 form to her.

4. The fracture did not heal well. The complainant continued with treatment at Kakamega Orthopaedic Hospital where surgery was done on the right hand and a metal implant inserted. A clinical officer at Kakamega County Hospital, PW5 completed the P3 form and classified the degree of injury as grievous harm.

5. Meanwhile on the matter being reported at Kabras Police station PC Chebii PW4 visited the scene of the assault and found a freshly erected fence. He found that the appellant had encroached by 2m into the complainant's shamba. He caused the appellant to be arrested. He charged him with the offence. During the hearing of the case in court PC Chebii produced the crowbar and the hammer as exhibits. The clinical officer PW5 produced x-ray films and the P3 form as exhibits.

Case for defence:

6. The appellant stated in an unsworn statement that on the material day he was weeding in his farm when he heard noises emanating from his home. He went to check and found that the noise was coming from the home of his neighbour, the complainant. He inquired from his wife as to what had happened and she told him that the complainant was going to her shamba with a jembe when she called at her and asked her as to who had erected a new fence. That his wife replied to her that she did not know. That the complainant started to pull down the fence. His wife told her to wait for the appellant but she ignored her. They started to struggle.

That on being informed as to what has happened, he the appellant, decided to go to the complainant to get her side of the story. On going to her place he found many people and a lady seated on the ground. The husband of the complainant, Clement Muniyalu was there. He was holding a crowbar. Clement told him that his (appellant's) wife had fractured his wife's hand. He ordered him to go away. He went back home. Later he was arrested by policemen and taken to Lukume AP Camp and then to Kabras Police Station. He was later charged.

7. The appellant further said that in the year 2013 the complainant's son had fractured her hand. Further that the land boundary was interfered with by the complainant's husband in the year 2001.

Judgment of the trial court:

8. The trial magistrate found that the evidence of the complainant that the appellant assaulted her with a crowbar and a hammer was supported by witnesses Leonida PW2 and Clement PW4. That the assault occurred in broad day light at 7.30 am and therefore that the witnesses identified the appellant. The magistrate found that the assault was supported by the findings of the clinical officer that the injuries amounted to grievous harm. The magistrate dismissed the defence of the appellant that it is his wife who had fought/struggled with the complainant as the appellant's wife was not called to testify in the matter.

Submissions:

9. The advocates for the appellant, Momanyi & Company advocates, submitted that the prosecution did not prove the case against the appellant. That the 2nd and the 3rd prosecution witnesses gave contradictory evidence in that he 3rd prosecution witness said that he found the 2nd prosecution witness at the scene while the 2nd prosecution witness says that she found the 3rd prosecution witness there. That this creates doubt about the credibility of the two witnesses.

10. The advocates submitted that the learned trial magistrate was wrong in rejecting the defence offered by the appellant. Further that the trial magistrate failed to take note of the appellant's defence that the complainant had an injury from a previous accident. Further that the trial magistrate did not take into consideration the mitigation of the appellant when sentencing him. That the appellant was entitled to a non-custodial sentence.

11. The state prosecutor, Mr Ng'etich, on the other hand submitted that the charge against the appellant was proved beyond all reasonable doubt. That the appellant was a neighbour to the complainant and he was properly identified as the person who assaulted the complainant. That her evidence was corroborated by PW2 and PW3. That the clinical officer PW5 proved that the complainant had sustained injuries amounting to grievous harm. That the defence of the appellant was an afterthought as there was no evidence that the complainant was involved in a previous accident. The prosecutor urged the court to dismiss the conviction and the sentence.

Duty of first appellate court:

12. This is a first appeal. It is the duty of a first appellate court to examine the evidence and draw its own conclusions while being in mind that it did not see or hear witnesses testify – see *Okeno vs Republic* (1972) EA 32 and *Kiilu & Another vs R* (2003) IKL 174.

ANALYSIS AND DETERMINATION:

13. The complainant in her evidence was categorical that it is the appellant who assaulted her with a hammer and crowbar after she found him fencing inside her land. Leonida PW2 and Clement PW3 placed the appellant at the scene of the offence in that they said that they found the appellant at the scene after they were attracted to the place by screams. Leonida said that Clement PW3 arrived there just as she arrived at the scene and she found Clement struggling to snatch a crowbar from the appellant. That the complainant had already been injured. Clement on his part stated that he and Leonida arrived there almost at the same time. That he found the appellant having hit the complainant on the left hand but he saw him hitting her on the right hand and on the knee. Clement said that the appellant was the only person at the scene. There is thereby no contradiction between the evidence of Leonida and Clement as to who arrived at the scene first.

14. Upon re-examination of the evidence adduced before the court there was no doubt that the appellant assaulted the complainant with a crowbar and a hammer. The appellant was found at the scene by Leonida PW2 and Clement PW3. The appellant was the only person at the scene. He was armed with crowbar and hammer. Clement PW3 snatched the implements from him. The complainant was at the time lying on the ground injured. There was thereby overwhelming evidence that the appellant is the one who assaulted and injured the complainant. There was no truth in the appellant's defence that the complainant had fought with the appellant's wife. The witnesses who arrived there did not find the wife to the appellant there. The appellant never questioned the complainant during cross-examination that she had fought with his wife. The appellant did not call his wife as a witness in the case. The complainant denied in cross-examination that she had previously sustained a fracture on the hand. The trial magistrate was justified to reject the defence of the appellant. The defence was an afterthought. The appellant himself admitted that he was at the scene.

15. It is apparent that the appellant had erected a fence into the land of the complainant. Leonida and Clement saw the newly erected fence. The investigating officer went to the scene and saw the fence that had crossed the boundary into the complainant's side. It is clear that the appellant assaulted the complainant after she asked him why he had trespassed into her land. The trial magistrate was correct in finding that

the appellant assaulted the complainant.

16. The complainant was treated of the injuries at Kakamega County Hospital and at Kakamega Orthopaedic Hospital. At the latter hospital a metal plate was inserted into the fractured hand. The clinical officer who completed the P3 form PW5 classified the degree of injury as grievous harm. The trial magistrate was correct in finding that the complainant had sustained grievous harm. The appellant had fractured the hand of the complainant with a crowbar and occasioned her grievous harm. The charge against the appellant was proved beyond all reasonable doubt. The appeal on conviction is dismissed.

Sentence:

17. The sentence provided by section 234 of the Penal Code for causing grievous harm to a person is imprisonment for life. The appellant in his mitigation stated that he was 39 years of age. He said that he had a wife and 9 children who depended on him. That he was doing casual work with West Kenya Sugar Company. A probation report called before sentence indicated that the appellant's family and the complainant's family has had a long standing boundary dispute that culminated to the commission of the offence.

18. Sentencing is a discretion of the trial court. In ***Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No.253 of 2003*** (cited in ***Arthur Muya Muriuki vs ~Republic*** (2015) eKLR), the Court of Appeal stated the following on principles of sentencing:-

“Sentencing is essentially an exercise of discretion of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”

19. In ***Ambani vs Republic*** (1990) KLR 161, the court stated that a sentence imposed on an accused person must be commensurate to the moral blame worthiness of the offender and that it is not proper exercise of discretion in sentencing for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence.

20. I have considered the facts and the circumstances of this case in its entirety. The appellant was a family man with 9 children all who at the time of the sentence were in primary school. On the other hand the complainant received serious injuries that necessitated her to undergo an implant on the fractured hand. She has to live with this. The appellant has resulted to violence instead of solving the boundary dispute. Considering that the maximum sentence for grievous harm is life imprisonment, the sentence of 7 years in the circumstances of the case cannot be said to be excessive.

In the foregoing and for the above said reasons, the appeal is dismissed.

Delivered, dated and signed at Kakamega this 14th day of December, 2017.

J. NJAGI

JUDGE

In the presence of:

Manyoni . for appellant absent

Miss Tarus . for State

George court assistant

Appellant .. present

14 days right of appeal