



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 142 OF 2015

JABUNGU OUYA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from Original Conviction and Sentence from TAMU SRMS Court S A. OPANDE – SRM

In Criminal Case No.199 of 2013.]

J U D G M E N T

1. The appellant, Jabungu Ouyo was together with another one not party to this appeal charged with the offence of assault occasioning actual bodily harm contrary to section 251 of the Penal code. The particulars of the offence were that on 11th of May 2013 at Menara village in Muhoroni sub-county within Kisumu County, jointly with others not before court unlawfully assaulted Christine Akinyi thereby occasioning her actual bodily harm. After considering the prosecution evidence and that of the defence, the learned trial magistrate in his judgment dated 15th October 2015, acquitted the appellant's co-accused but convicted and sentenced the appellant to pay a fine of Kshs. 20,000/- and in default a custodial sentence of 3 months. Aggrieved by that decision, the appellant has filed this appeal.

2. In his petition of appeal, the appellant has faulted the learned trial magistrate for failing to consider the fundamental question of evidence and the credibility of the witnesses thereof. He also faulted the trial court for disallowing the submissions and defence of the accused without any reasonable explanation. That the prosecution case was based on speculations and assumptions but not tangible facts. Further that trial magistrate erred by failure to appreciate the loopholes in the medical report produced by the prosecution.

3. The appellant through his counsel Mr. Amondi argued several grounds of appeal. The most prominent one was the issue of common intention. He argued that the trial magistrate erred in invoking section 21 of the Penal code in arriving at his decision. The section provides as follows:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

4. It was his argument that for section 21 to be invoked, there must be demonstrated a common intention and that an offence must be shown to have been committed following the common intention. Further that

for there to be a common intention, there must be a premeditated plan among the persons involved and a foreseeable unlawful outcome. He told the court that the prosecution had not established the element of common unlawful intention and it was therefore erroneous for the trial court to invoke the said section 21. It was his argument that the appellant and the other persons had only gone to the house of the complainant to mourn and there was no pre-arranged plan to assault and chase away the complainant. Counsel relied on the case of Dickson **MWANGI MUNENE& ANOTHER VS.- REPUBLIC CA CRIMINAL APPEAL NO. 314 OF 2011** to buttress her argument.

5. Counsel submitted further that the testimony by complainant was implausible and should never have been relied on in arriving at any decision. She told the court that the complainant gave false testimony regarding the 2nd accused whereas he was able to prove his alibi. That no one else saw her being assaulted by the appellant and it was therefore possible that she was giving false evidence concerning the appellant too. Counsel concluded by urging the court to disregard the evidence of the complainant for being insufficient and to allow the appeal.

6. The appeal was opposed. Ms Osoro appearing for the state submitted that the prosecution had proved its case beyond reasonable doubt. She argued that the complainant's evidence was corroborated by the evidence of PW2 who stated that when she came into the room she found the appellant holding a stool over the complainant. Further that the trial court had a chance to observe the demeanour of the appellant and even stated in its judgment that it was apparent that the appellant harboured contempt towards the complainant. Counsel was of the view that the prosecution case was buttressed by the medical report which clearly showed that the complainant had been assaulted and the degree of assault was harm. Counsel was of the view that the sentence meted out to the appellant was too lenient given that he (appellant) was given an option of fine and urged this court to enhance the sentence.

THE EVIDENCE

7. **CHRISTINE AKINYI(PW1)** testified that on 11th May ,2013 she was at her home in Menara together with her daughter and nieces mourning the death of her husband . At around 2:30pm, the appellant in the company of other ten people arrived at her home in a white probox car. Christine welcomed them into her sitting room and before she could sit down, the appellant asked her what had killed her husband. At that point she was hit from behind with a stool by one Onyango who was in the company of the appellant. The appellant and the others then pushed her to the floor and started hitting her with the stool and shoes.

8. **CYNTHIA AKOTH(PW2)** was in her bedroom with her cousins when they heard her mother screaming and they rushed out to ascertain what was going on. They found the appellant and the others beating her mother. Cynthia told the Court that she saw the appellant holding a stool over her mother. She began shouting and on seeing her the appellant and Onyango ran after her and her cousins and chased them out of the compound. Cythia tried to scream for help but it was raining and thus no one could hear her. She and her cousins decided to go to the police station which was nearby but there was no one there and Cynthia went looking for them in their house at the camp.

9. Mean while back at home, the appellant chased Christine out of her home and told her never to return. She went to the Police Inspector's house where she met with Cynthia and her cousins. They were escorted by three police men to their home where Christine picked her bag and they left.

10. The Investigating Officer, **MULI NGUMBAO(PW3)**, told the Court that on the material date, he was on duty at Muhoroni Police post when Christine came and complained that she had been assaulted at her home by the appellant and others. He recorded her report and issued her with a p3 form. On cross examination, the investigating officer stated that he received all the information from Christine and that Christine informed him that the appellant commanded the others to beat her up. PW3 told the Court that on visiting the scene of crime the following day, he did not find the assault weapons. He also stated that he did not include Christine's treatment notes in the police file.

11. **ROBERT OMUSULA (PW4)** a Clinical Officer from Muhoroni Sub District Hospital produced the

P3 form prepared by one Alice Langat as an exhibit in the matter and stated that the nature of injury was harm. The P3 form showed that at the time of treatment, Christine had a bleeding wound on her upper lip of the mouth, she had injuries on her right knee and chest. The probable type of weapon used was a blunt object.

12. After the close of the prosecution case the trial magistrate found that a prima facie case had been established against the Appellants. The trial magistrate put the Appellants on their defence and they all elected to give sworn statements.

13. The appellant stated that it was true that he and six other members of his family went to Christine's house at Menara to mourn the death of his brother. That at the house they prayed together and afterwards one Naftali Ngoe asked Christine how the deceased had died and she explained. The appellant told the court that they all sat peacefully and non assaulted Christine. After a while and after it had stopped raining they all left the house of Christine peacefully. In his testimony however, the appellant also admitted that his relationship with Christine was rocky as he had refused to accompany the deceased to Christine's maternal home for dowry payment and he insisted that Christine was not the deceased's wife but a girlfriend. On cross examination, the appellant stated that he suspected that there was foul play in the death of his brother. He also stated that he did not see Cynthia at Christine's house when he went to mourn his brother.

14. DW2 was the area senior chief. He is a relative of the appellant. He told the court that he adjudicated over the issue of assault between the appellant and Christine having been authorized to do so by the District Commissioner of Muhoroni Sub-county. It was his testimony that during the adjudication, Christine stated that the appellant did not beat her. However, on cross examination he admitted that he could not know for sure that the appellant had not assaulted Christine. He also admitted that Christine's belonging had been burned.

15. The defence also called the Health Records and Information officer as a witness(DW4). It was their case that Christine's name did not appear on the hospital register on 11th May 2013 when she alleged to have gone to the hospital. DW4 stated that on 11th May 2013, only 15 patients were registered and Christine was not one of them. The register also did not indicate what sought of treatment she received at the hospital. On cross examination, DW4 confirmed that Christine's name appeared on 16th May 2013. He also told the Court that it was possible for a patient to have been treated on 11th May 2013 and the data entered on 16th May 2013.

16. On close of the defence case, the trial magistrate convicted the appellant and acquitted his co-accused on the basis of alibi evidence wherein he stated that at the time of the alleged assault he was in Nairobi. He produced M-pesa records showing that he withdrew some money from an M-pesa shop in west lands Nairobi on the evening of the material date. It is however worth noting that the M-pesa record clearly indicates on its face that it is not to be used as evidence in court or by the police. Also that the same was produced by the accused himself and the trial magistrate readily accepted the same as evidence.

ANALYSIS

17. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (**see Uganda Court of Appeal Criminal Appeal No. 122 of 2005 Silagi Buroro Gordon v. Uganda and Okeno v. Republic [1972] E.A 32**).

18. With these principles in mind, and having considered the rival submissions and carefully read the record of appeal, it is clear to me that some aspects of the case are not in dispute. It is not in dispute that at about 2:30pm on 11th May 2013 the appellant in company of others who were his relatives went to the home of Christine. It is also not in dispute that the appellant was not in good terms with Christine and that Christine was assaulted. The question is whether the appellant assaulted or played a role in Christine's assault.

19. The evidence on this issue is mainly from Christine(PW1), her daughter Cynthia(PW2) and the clinical Officer(PW4). Christine stated in her testimony that the Appellant fell her on the ground and hit her with a stool while the rest punched her and hit her with shoes. Cynthia stated that she came into the room and found the appellant lifting a stool but she did not see him hitting her mother. The clinical officer produced a p3 form showing the extent of the harm caused on Christine.

20. On the other hand the appellant in his sworn testimony placed himself at the scene but denies assaulting Christine. Counsel for the appellant was of the opinion that Christine was not a credible witness and thus her testimony should not have been relied on. Counsel based her argument on the fact that the appellant's Co-accused had been acquitted based on his alibi which placed him in Nairobi at the time of the ordeal yet Christine claimed he was among the ones who assaulted her. According to counsel, her evidence could be false as well as that of Cynthia(PW2).

21. As already stated it is not in question that PW1 was assaulted and at her home. I say so because PW2 corroborated the evidence of her mother(PW1) that she entered the sitting room and found her mother being assaulted and the appellant was present. This evidence was not controverted. The question therefore is: Did the appellant play a role in the whole ordeal? Counsel for the appellant argued that the prosecution had not established a case for the doctrine of common intention and it was thus erroneous for the trial magistrate to have invoked it.

22. The law on common intention is now well settled. The Court of Appeal in **Njoroge vs.- Republic [1983]KLR 197** stated

"If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavour to effect the common object of the assembly."

23. The court of appeal in **Dickson Mwangi Munene (Supra)** while borrowing from **R vs.- Tabulayenka s/o Kirya (1943) EACA 51** stated that Common intention may be inferred from the accused presence, their actions and the omissions of either of them to disassociate himself from the assault.

24. Going back to the facts at hand, when PW2 went into the sitting room he found the appellant lifting a stool, she(PW2) shouted and the appellant went after her and chased her out of the house. Thus even assuming that the appellant did not hit PW1, his actions clearly demonstrate that he was a participant in the ordeal . It is also a wonder why the appellant stood holding a stool over PW1 if his intention was not to assault her and why he chased PW2 away. Counsel for the appellant argued that the evidence of PW1 and PW2 is implausible since Accused 2 was acquitted having proved his alibi yet Christine claimed that he assaulted her. I find that the trial magistrate was wrong in accepting the M-pesa record as evidence whereas it was clearly indicated on its face that it was not to be used in court or by the police and the same was produced by the accused himself and not its maker.

25. Consequently I find that the case against the appellant was proved beyond reasonable doubt.

26. The learned state counsel has asked this court to enhance the sentence of the appellant. The Penal Code as section 251 prescribes the sentence to be imposed if a case for assault occasioning actual bodily harm is proved to be 5 years. The act does not provide for an option of fine. Apparently the appellant did not take this issue of the enhancement seriously. Its now settled that the courts can enhance sentence provided that the state issues adequate notice to the appellant.

27. The notice by the state is dated 11.3.2016. The appellant did not dispute that they were not served.

28. Consequently and taking into totality the evidence adduced by the prosecution I shall disallow the appeal. The appellant being the Local Assistant Chief of the area and more so a relative to the complainant ought to have exercised great care and caution and to ensure security of the complainant.

29. The appeal is dismissed. The sentence of 3 months imprisonment or in default to pay a fine of Kshs.20,000/= is set aside. The same is substituted with a custodial sentence of 5 years against the said appellant. The same is to run from date herein.

Dated, signed and delivered this 24th day of March, 2016,

H. K. CHEMITEI

J U D G E

In the presence of:

.....**for state**

.....**for appellant**