



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 10 OF 2015

PATRICK GITONGA MBOGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in CR 1177/14 at Embu Chief Magistrate's Court by V.O. Nyakundi – RM on 28th January 2015)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of three years imprisonment imposed by the court of the Resident Magistrate on 28th January 2015 in respect of a charge of assault contrary to section 251 of the Penal Code (Cap 63) Laws of Kenya.
2. The respondent has opposed his appeal in respect of both conviction and sentence.
3. This is a first appeal. As a first appeal court according to *Peters v. Sunday Post Limited (1958) EA 424*, I am required to assess the entire evidence tendered in the trial court and come to my own independent conclusions, while at the same time deferring to findings of fact based on the credibility of witnesses. The reason for this is that the trial court had the advantage of seeing and hearing the witnesses, which advantage is not enjoyed by this court.
4. The appellant was convicted on the eye witness evidence of Lucy Wanjira Mbogo (PW 1), who is his sister. According to the complainant (PW 1), the appellant went to the house where she was, opened it and demanded his title deed from her. The appellant then told her that he was aware that the complainant intended to dispose off his land. She denied having his title deed. The appellant who was then armed with a stick hit her on the head and the left arm. She screamed and as a result the appellant went out of the house. The appellant threatened that whoever was going to intervene would face consequences. In response to that threat the complainant went inside the house and locked herself therein. This forced the appellant to break the windows of the house and he then threatened that he was going to kill her.
5. Patrick Ndwiga Njagi (PW 2), the Assistant Chief responded to the screams of the complainant. He rushed to the scene of the assault and found the mother of the accused outside the house. He found that PW 1 had locked herself inside the house. The complainant then opened the door and showed the assistant chief where she had been hit on the head and the arm. The complainant narrated to the chief what had happened and told him that their relationship was bad. I should mention here that Rose Gicugu Mbogo (PW 3) who is the mother of the appellant had also gone to the scene and was outside the house in which the complainant was.
6. PW 3 on arrival at the house found the appellant breaking the house. It is in that house where the complainant used to sleep. As at that time, the complainant was screaming from inside.
7. The matter was reported to No. 32074 PC Edward Hisilo Mule (PW 5) who arrested the appellant and in addition he also produced the stick that was used in hitting the complainant as exhibit 2.
8. The complainant was taken for medical examination and Dr Godfrey Njiru examined her.

- According to the doctor, the complainant had a cut at the back of the head. She also had ragged margins and had swelling on the left upper limb with multiple lacerations. He found that the weapon used was a blunt object. The doctor produced his medical report which was put in evidence as exhibit 1.
9. In his defence, the appellant gave sworn evidence and stated that what her sister had told the court were matters that were not true. He went further to state that he had had problems with her sister because she used to take his belongings. This matter he says was reported to the area Assistant Chief. According to him, the complainant used to take his axe, chicken, maize and other household goods. He also says that the Assistant Chief used to resolve the disputes between them but the complainant used to repeat taking his properties. Finally, the appellant stated that he was charged with this offence because he sought to claim his properties from his sister (PW 1) and the Assistant Chief (PW 2).
 10. In his petition of appeal filed by his counsel, the appellant has raised five grounds of appeal. In ground 1 the appellant has stated that the trial court failed to appreciate that the matter involved a brother and a sister and therefore there was a likelihood of malice and fabrication. In ground 2 the appellant has stated that the trial court failed to conclude that the prosecution had not discharged its burden of proof required to secure a conviction. In ground 3 the appellant has stated that the trial court failed to appreciate the circumstances of the offence. And in ground 4 the appellant stated that the trial court failed to reckon that there was no direct evidence to prove the offence of assault. And finally in ground 5 the appellant has stated that the trial court failed to apply the threshold required for the offence of assault and therefore reached an erroneous conclusion of law and fact.
 11. I have re-assessed the evidence produced in trial court. I find that the evidence of the complainant was consistent and cogent. I also find that the evidence of the mother of the complainant (PW 3) and that of the area assistant chief (PW 2) clearly show that the appellant was in the aggressor and had attacked her sister without provocation. The mother found him breaking the window of the house. The evidence of the doctor clearly shows that the complainant sustained injuries at the back of her head and multiple lacerations on her arm. This was a case that depended on the credibility of the witnesses. I find that the conclusion reached by the trial court was supported by ample evidence.
 12. In ground 1 the issue raised is that one of credibility. The trial court believed the evidence of the complainant and other prosecution witnesses. The contention that the appellant and the complainant were a brother and a sister was not proof of malice and fabrication. I therefore reject this ground of appeal. In ground 2 it is clear from the judgement that the trial court found that the offence had been proved beyond reasonable doubt. This is a finding of fact that is supported by the evidence. I therefore reject this ground of appeal as well. It is also clear that the trial court appreciated the circumstances of the case and arrived at the proper conclusion. For this reason, ground 3 of the petition of the appeal is also rejected.
 13. The appellant was convicted on the eye witness evidence of his sister. I find that this is direct evidence. And for this reason I also reject ground 4 of the appellant's petition of appeal which states that there was no direct evidence. And finally, I find that the trial court found that the prosecution had proved all the ingredients of the offence of assault beyond reasonable doubt. And for this reason also I find that the trial court reached the proper conclusion both on the facts and the law. I therefore find that the appellant's ground number 5 which stated that the trial court reached an erroneous conclusion in law and fact is without merit and I therefore dismiss it.
 14. The appellant was sentenced to three years imprisonment. In sentencing the appellant the trial court took into account that he was a first offender. It also took into account that the offence was very common in that particular locality and went further to find that there was need to warn the society to desist from committing similar offences in future. These matters were properly taken into account. It appears that the trial court intended to impose a sentence that was deterrent in nature. Unfortunately, the trial court stated that the appellant had a record of committing similar offences and found him to be an incorrigible offender and then proceeded to conclude that a custodial sentence was called for to assist in reforming the appellant. By virtue of those circumstances, the appellant was sentenced to three years imprisonment. This was a misdirection in law on the part of the trial court. The reason is that the appellant was a first offender. If there were other similar offences committed, the prosecution ought to have produced the previous

- convictions of those offences. This was not done.
15. According to ***Wanjema v. R (1971) EA 493*** sentencing is a matter of discretion for the trial court. It should not be interfered with unless the trial court acted on a wrong principle of law. And in this case it is clear that the trial court acted on the wrong principle of law in imposing the three years custodial sentence. However, it is clear from the evidence that the appellant is a very violent person and notwithstanding that misdirection in point of law the appellant deserved the sentence imposed upon him. He attacked his sister without provocation.
16. The upshot is that I uphold the conviction and the sentence imposed upon appellant and the appeal is therefore dismissed in its entirety.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **19th** day of **APRIL 2016**

In the presence of the Appellant and Ms Mbae for the State

Court clerk Njue

J.M. BWONWONGA

JUDGE

19.04.16