REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 62 OF 2014

JOSEPH NGUTHURI M'IBIRI ……...……APPELLANT

VERSUS

REPUBLIC .....…….....……. RESPONDENT

JUDGMENT

The appellant was charged and convicted of the offence of causing grievous harm contrary to section **234 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence were that on 4th November 2010 at Karama Location, he unlawfully did grievous harm to **Japheth Mutuma** by pushing him into a trench thereby fracturing his left leg. The appellant was tried, convicted and sentenced to serve 18 months imprisonment. The appellant was aggrieved by the conviction and preferred the instant appeal setting out the following grounds:

1. That there were the of glaring contradictions in the evidence of the prosecution witnesses;

2. That the appellant's defence of alibi was not rebutted by the evidence of the prosecution witnesses;

3. That the court failed to conduct a *voire dire* examination on PW2 and 3;

4. Whether PW1 was a hostile witness;

5. That sentence was excessive.

He therefore prays that the court do allow the appeal and quash the conviction.

The appeal was opposed by Mr. Mulochi, Learned Counsel for the State who submitted that the conviction was merited as it was supported by the evidence of PW1, 2 and 3; that even though PW1 was stood down so as to be declared hostile he later on continued to testify.

As required of the first appellate court, I will examine all the evidence adduced in the trial court afresh and arrive at my own findings and conclusions, but always bearing in mind that this court did not have the opportunity to see the witnesses to determine their demeanor. For that proposition, the court will be guided by the decision of ***Okeno v Rep (1972) EA 32***.

Briefly, the prosecution's case was as follows: On 4th November 2010 at around 6 p.m., **PW1 Joseph Mugambi** was looking for cattle feed in their shamba when an elderly person sneaked from behind and pushed him to a ditch fracturing his left leg. He raised an alarm and some villagers came and pulled him out of the ditch and assisted him to report the matter at Tigania police station. He was later taken to Meru General Hospital where he was admitted for 2 months. He further testified that it was the appellant who threw him into the ditch and that he was known to him prior to this incident having been his neighbour.

PW2 Paul Gatuma testified that on 4th November 2010 at around 6 p.m., they were looking for feed in the company of 5 colleagues including PW1 when the appellant arrived at the scene and pushed PW1 into a ditch whereupon PW1 raised alarm and they assisted him out of the ditch. One Miriti went and reported the matter and PW1's brothers came and assisted him to hospital.

PW3 Steven Muthuri testified that on 4th November 2011, at about 6 p.m., they were in the *shamba* fetching grass for livestock when one Mzee Joseph suddenly appeared and grabbed PW1 from behind and threw him in a dry river bed as a result of which he fractured his left leg. They assisted him and rushed home to inform family members who accompanied him back and assisted him to hospital. He later went home whereupon he was subsequently summoned to Tigania police station where he recorded his statement.

PW4 PC Justus Mosoti, the Investigations Officer in this case, received a report from PW1 accompanied by members of the public that he had been thrown into a valley by the appellant thereby fracturing his leg.

PW5 Catherine Mwende, a medical officer at Meru Level 5 Hospital filled a P3 form in respect of PW1. On examination PW1 had pain and swelling and the X-ray showed an obvious deformity and fracture of the left femur. The degree of injury was classified as grievous harm.

When the appellant was put on his defence, he opted to give sworn evidence and called 2 witnesses. The appellant denied having committed this offence and denied knowing PW1. He further testified that he was not at the scene and that he was at Karama Market with Thieuri Mugwika painting his house until 5:30 p.m. after which he went home.

DW1 James Theuri and **2 Francis Kareithi** all testified that they were with the appellant on the material day painting his house at Karama Market and that they did not leave the appellant's plot until 5:30 p.m. DW2 and 3 admitted that they knew PW1 prior to this incident.

PW1, 2, and 3 were all eye witnesses to this incident. They all testified that on the material day, they were in the *shamba* looking for cattle feed when the appellant suddenly appeared, grabbed PW1 and threw him to a ditch thereby fracturing his left leg. Indeed the doctor's evidence confirmed that PW1 had a fracture to the left femur. Even though the appellant denied having ever known PW1, PW1 stated in his evidence in chief that he knew the appellant prior to this incident as he was his neighbor. In cross examination, he stated as follows:

> "***I knew the accused well. He was putting on a checked shirt. It was whitish in colour. I can't tell the colour of his suit. He pushed me on the lower back."***

PW2 in cross examination stated as follows:

> "***I saw accused at the scene push the complainant" Mzee Joseph is the accused in the dock"***

PW 3 in his evidence in chief fondly referred to the appellant as "Mzee Joseph". In cross examination he stated as follows:

> "***I saw accused clearly"***

All these three witnesses were eye witnesses to the incident. They placed the appellant at the scene and the incident happened in broad daylight at 6.00 p.m. All these witnesses were minors and they had no

reason whatsoever to frame the appellant and I believe their evidence was credible and reliable and the Learned Trial Magistrate was right in holding so.

Secondly, DW 2 and 3 parted with appellant at 5.30 p.m. and they have no idea what he did at 6.00 p.m. or where he was. Besides, DW2 and 3 did admit that though the appellant lives at Karama Market, he has a plot at Uuru where the incident allegedly occurred. The appellant was clearly placed at the scene and I have no doubt in my mind that it was the appellant who threw PW1 into a ditch thereby fracturing his left femur and occasioning him grievous harm.

Whether PW1 was declared a hostile witness; As was rightly submitted by counsel for the appellant, it was not in dispute that when PW1 gave his evidence in chief 3rd October 2011, the prosecution made an application that he be stood down so that he could have him declared a hostile witness. The application was allowed and the court stood him down to 28/11/2011 when he gave his evidence afresh. It was not however clear from the record if the PW1 was eventually declared a hostile witness.

The Court of Appeal in ***Maghanda vs Republic [1986] KLR 255*** **at page 257**discussed the manner in which the evidence of a hostile witness should be treated by a trial court. That court held:

> ***"Halima was called to testify for the prosecution. She was declared a hostile witness. The magistrate said that therefore her evidence could be safely disregarded for, being the appellant's girlfriend, it was but natural that she would testify as a defence witness. The first part of the magistrate's statement strictly was misdirection. The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the court."***

In the case of ***Abel Monari Nyanamba & 4 Others v Rep (1996) e KLR*** the court made the following observation in regard to evidence of a hostile witness;

> *"**the evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt"**.*

Furthermore in the case of ***Batala v Uganda (1974) E.A. 402*** the court stated in relation to evidence of a hostile witness;

> ***"The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable it enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight".***

In the instant case, though the prosecution intended to declare PW1 a hostile witness, it seems that was never done because after he was recalled, the prosecution did not go ahead to cross examine him on his statement as required. Due process for declaring one a hostile witness was not followed. Instead, PW1 just continued to testify and Counsel who was on record never revisited that issue. PW1 was never declared a hostile witness.

Whether the evidence of the prosecution witnesses was proved contradictory; whereas it is indeed true that there were minor contradictions in the prosecution evidence witnesses for example as the number of persons who had accompanied PW1 and whether he was thrown into a ditch, trench or dry river bed or otherwise, I am of the opinion that these contradictions were not material and fatal to the prosecution's case and the appellant was in no way prejudiced by the said contradictions.

Whether a *voire dire* examination should have been conducted on PW2 and 3; PW2 and 3 stated in their evidence in chief that they were 14 and 15 years respectively. In the instant case PW 2 and 3 were not children of tender years and therefore a *voire dire* examination was not necessary. See ***Muiruri v Rep***. The Learned Trial Magistrate in his judgment inter alia observed as follows:

"***The evidence of PW1, 2 and 3, though that of children was clear and consistent".***

No one was better placed to make this observation of the witnesses other than the trial magistrate. This ground of appeal must as well fail.

Whether the trial court considered the accused's alibi defence; when the accused raises an alibi defence, it does not in any way mean that the onus of proof shifts to him but it always remains with the prosecution. All that the court needs to do is analyse the entire evidence on record and determine whether or not the alibi raised casts any doubt in the prosecution evidence. The trial court observed as follows:

> "***The accused person told the court that he spent the material date at Karama market with DW1 and DW2 where they were painting his plot. DW1 said that he was with the accused person from 9 AM to 5:30PM. The offence is alleged to have occurred at 6PM and therefore whatever accused did after 5:30 DW1 cannot eplain. The evidence of DW2 the accused son does not support the accused defence. Although DW2 said he spent the whole day with the accused person the accused in his defence says that DW2 was at his shamba. It is not clear at what time DW2 went to the shamba which he claims is about 2km from where they were painting the accused's plot. My finding is that the accused person is the one who injured the complainant by pushing him to a ditch."***

In my view, the court took into account the appellant's alibi defence and disbelieved it. See ***Uganda v Sebyala & Others 1969 EA 204***. The appellant's defence could not possibly have been true and the same was an afterthought and the magistrate was right in rejecting the same.

After a careful evaluation of the evidence on record and the grounds of appeal, I am satisfied that the conviction was well founded.

As regards the sentence, accused was said to be about 80 years old and sickly. In my view, the trial court should have considered non-custodial sentence. For the above reason, I hereby set aside the sentence of 18 months imprisonment. Instead, I hereby call for a Probation Officer's report on the appellant to guide the court in imposing another sentence.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF APRIL, 2016.

R.P.V. WENDOH

JUDGE

14/4/2016

PRESENT

Mr. Mulochi for State

Mr. Gitonga for Accused

Ibrahim/Peninah, court Assistants

Present, Appellant