



IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 73 OF 2013

PETER MUCHANGI NYAGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in CR 1296 of 2014 at Embu Chief Magistrate's Court by V.O. Nyakundi - RM on 30th March, 2015)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of seven (7) imprisonment in respect of the offence of grievous harm contrary to section 234 of the Penal Code (Cap 63) Laws of Kenya. imposed upon him by the court of the Senior Principal Magistrate on 6th November, 2013 at Embu.
2. The respondent/state has supported both the conviction and sentence.
3. This is a first appeal. As a first appeal court according to *Peters v. R Sunday Post Ltd (1958) EA 424* I am required to re-assess the evidence upon which the appellant was convicted and thereafter arrive at my own independent conclusions. At the same time, I am required to generally defer to findings of fact as found by the trial court. The reason being that the trial court had the advantage of seeing and hearing the witnesses, an opportunity that this court does not have.
4. The appellant was convicted on the direct evidence of the complainant (PW 1), which was supported by that of Linet Kaleba (PW3) and Faith Wawira George (PW4). According to the evidence of the complainant he had gone to the hotel premises, which were being guarded by the appellant. He had gone there to look for accommodation and found that the main gate had been closed. He entered the premises through another gate and met the appellant in uniform.
5. The appellant told him to stop and called him a thief and threatened to shoot him with an arrow. In response the complainant sat down and the appellant blow a whistle and shouted thief! thief!!. the appellant then whipped the complainant. The complainant in response introduced himself as a police officer. Other employees of the hotel namely PW 3, and PW4 responded. They asked the appellant as to why he was beating the complainant and yet he had not injured anybody. In the process of being beaten, they cut the complainant's index figure and also injured him in the private parts. The complainant became unconscious and was thereafter taken to Embu Provincial General Hospital. According to him he sustained injuries in the head, in his private parts, the left index figure and both hands were fractured.
6. These injuries were confirmed by the examining doctor who produced the medical report (P3) as exhibit 1.
7. when he was put in his defence, the appellant made an unsworn statement. He testified that he was a security guard with garden angle security services. According to him, he was on duty at Salkan Hotel

during the night of 8th and 9th April, 2013. He denied assaulting the complainant but admitted having arrested him because he mistook him for a thief. According to him, he protected the complainant from mob justice who wanted to kill him. When he contacted his colleagues, they told him to call police. This was done and they therefore handed the complainant to the police. It is also his evidence that the police did not arrest the person who assaulted the complainant.

8. In his grounds of appeal, the appellant has stated the unchallengeable fact that he pleaded not guilty in ground 1. In ground 2, he faulted the trial court for not finding that he had been detained in police custody beyond the 24 hours limit, which is in violation of his constitutional rights. This is not true. It is clear from the police charge sheet that he was arrested on 17/04/2013 and taken to court on 18/04/2013. This ground of appeal is without merit and is therefore dismissed. In ground 3, he has faulted the trial for relying on prosecution evidence which was inconsistent and uncorroborated. The evidence of the complainant is consistent with that of PW3 and PW4 who corroborated the evidence of the complainant. This ground of appeal is without merit and is therefore dismissed.

9. On ground 4 the appellant has faulted the trial court for failing to consider that the initial report to the police did not reflect the description of the appellant as the person who had assaulted the complainant. This ground of appeal is covered by the evidence of the complainant who identified the appellant as his assailant, which evidence was supported by the evidence of PW3 and PW4. There is further supporting evidence in the unsworn evidence of the appellant himself. In the circumstances, the identity of the appellant was not mistaken at all. This ground of appeal is without merit and I hereby dismiss it.

10. Ground 5, the fact that the complainant entered the area without following the procedure did not justify the brutal attack by the appellant. The ground of appeal is hereby dismissed.

11. In ground 6, appellant has faulted the judgment of the trial court for rejecting his defence without cogent reasons. It is clear from the judgment that the trial court considered the appellant's evidence and found that it was not truthful.

12. Having re-assessed the entire evidence, I have come to conclusion that the conviction of the appellant is sound and I hereby confirm it.

13. As regards sentence, the court took into account that the appellant was a first offender and was not remorseful. He also took into account the serious injuries sustained by the complainant. I agree with the trial court that this was a beastly attack. In the circumstances the sentence imposed of 7 years imprisonment was merited which I also confirm.

14. The appellant's appeal is hereby dismissed in its entirety

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **31st** day of **MAY 2016**

In the presence of the applicant and Ms Mbae for the state.

Court clerk Njue

J.M. BWONWONGA

JUDGE

31.05.16