



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL 78 OF 2014

(From the original Criminal Case No. 196 of 2014 at Wajir- B. ROGOCHO –R.M).

IBRAHIM BISHAR ADAN APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the magistrate's court at Wajir with assault causing actual bodily harm Contrary to Section 251 of the Penal Code. The particulars of the offence were that on 23rd May 2014 at Wajir GK Prison in Wajir East District within Wajir County, unlawfully assaulted Ibrahim Issac thereby occasioning him actual bodily harm. He denied the offence. After a full trial, he was convicted and sentenced to serve five (5) years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial petition of appeal in person in September 2014. However during the same month, he filed another petition of appeal through Stephen Wanyoike Advocates. The initial petition of appeal filed in person was headed as mitigation of sentence, but the petition of appeal filed by the advocate covers both conviction and sentence covers both conviction and sentence and is on the following grounds:-

1. Learned magistrate erred in law and facts in convicting the appellant on the evidence of a single witness.
2. The learned magistrate erred in law and in fact in failing to recognize the fact that there existed a clan animosity between the complainant's clan and that of the appellant and the alleged offence is deemed to have happened during tribal clashes between the two clans.
3. The learned magistrate erred in law and in fact by not addressing his mind to the reason which prompted the Investigating Officer failure to give evidence in court notwithstanding the fact that the Wajir Police Station is just 15 metres away from the court.
4. The learned magistrate erred in law and facts in failing to address his mind to the fact that the alleged offence took place in a remand prison where both the complainant and the appellant were under the supervision of prison wardens who ought to have been summoned to court to shed light as to whether such an offence actually took place.
5. The learned magistrate erred in law and in fact in relying on an credible report which failed to corroborate the complainant's allegations of the injuries sustained as a result of the alleged assault.
6. The learned magistrate erred in law and in fact in holding that the appellant was a dangerous person who ought not to be brought to court regularly and therefore making a prejudgment against the appellant before convicting and sentencing him to serve a 5 year custodial sentence.
7. The learned magistrate erred in law and in fact in holding that the appellant was a habitual

offender and to support his claim referred to criminal cases No. 116 of 2014 and 91 of 2014 which cases were still pending before the Principal Magistrate Mr. Linus Kassin and had not been determined, as every accused person was deemed innocent until convicted in a court of law.

8. The learned magistrate erred in law and in fact in holding that the appellant confessed not having witnesses when the appellant confirmed that his witnesses were his co-remandees and were present in court on that material day.
9. The learned magistrate erred in law and in fact in passing a severe and excessive sentence upon the appellant notwithstanding that the appellant was a first offender and he had no previous past criminal record.

In prosecuting the appeal, learned counsel for the appellant Ms Kamende filed written submissions. Counsel also highlighted the written submissions in court and the day of hearing of the appeal.

Counsel stated that the magistrate erred in not making a finding that a prima facie case had been proved before putting the appellant on his defence as required under Section 211 of the Criminal Procedure Code Cap 75. According to counsel, this omission was a fatal mistake on the prosecution case against the appellant.

Counsel further added that the court did not make a finding in the judgment that the prosecution had proved its case beyond reasonable doubt which, according to counsel was also fatal to the conviction. Counsel relied on the case of **David Muasya Wambua -vs- Republic Criminal Appeal No. 173 of 2012 at Machakos**.

Counsel submitted further, that it was wrong for the learned magistrate to have convicted the appellant on the evidence of one witness. According to counsel, since the incident occurred in the prison remand, it was imperative for the prosecution to have called the prison officers to support their case. The failure of the prosecution to call the prison officers to testify was a fatal mistake.

Counsel argued also that the person who tendered the medical evidence a Mr. Asiyo merely said that the complainant was bleeding. Counsel was of the view that since the evidence of the single prosecuting witness was that the complainant had lost his toe nail, the same should have been produced in court as an exhibit which was not done. In addition counsel submitted the metallic bowl which was allegedly used to injure the complainant was not produced in evidence as an exhibit.

Counsel added that an alleged eye witness Sgt. Nyaga was not called to court to testify and instead, the learned magistrate made a pre judicial statement in court and ordered the closure of the case. That according to counsel action by the trial court was a show of bias on the part of the magistrate.

Counsel submitted further added that the Investigating officer was not called to testify.

With regard to sentence, learned counsel for the appellant submitted that in determining sentence, the magistrate erred by violating the provisions of Article 49 of the Constitution of Kenya 2010, by presuming the appellant guilty of other offences on which trial was then in progress. Counsel emphasized that the Constitution provided that an accused person was presumed innocent until convicted, and as such the sentence of 5 years imprisonment ordered by the trial court herein was illegal and excessive.

Counsel closed the submissions by stating that the prosecution did not prove its case against the appellant beyond any reasonable doubt, and relied on the case of **WOOLIMNGTON -vs- DPP (1935) ALLER 1, REPUBLIC -vs- OKETHI OKALE (1965) EA 555** and the case of **SERENTALE -vs- REPUBLIC (1968)EA 360**. Counsel urged this court to quash the conviction and set aside the sentence.

Learned prosecuting counsel Mr. Orwa opposed the appeal, and emphasized that there was no dispute that the appellant and the complainant were remandees at Wajir Prison on the day of the incident. There was also no dispute that the two fought. Counsel stated that the case appeared to be one of affray.

With regard to failure of the prosecution to call a prison officer and the investigating officer as witnesses, counsel submitted that no prejudice was occasioned on the appellant. Counsel submitted that section 211 of the Criminal Procedure Code was complied with by the trial court.

Counsel further submitted that the qualifications of the Clinical Officer were not disputed or questioned in the trial court, and that as such, there should be no such disputes on appeal herein. Counsel submitted that the toe nail of the complainant could not be produced in court as it was a minute item.

On prejudicial sentiments made by the trial magistrate, counsel submitted that the same did not influence the decision reached by the trial court. According to counsel, no prejudice was occasioned to the appellant when the court stated that he was a repeat offender because he had other pending criminal matters in court.

Counsel submitted also that the appellant asked for forgiveness in his mitigation which showed that he committed the offence.

Lastly counsel, submitted that the sentence was not excessive but urged this court to substitute the conviction to conviction for affray instead of assault causing actual bodily harm.

In response to the prosecuting counsels submissions, Ms Kamende learned counsel for the appellant, submitted that the sentence imposed was not based on facts. In addition no evidence was tendered that the appellant and complainant fought. Counsel clarified that no issue of qualifications of the Clinical Officer was raised by the appellant. The issue was whether the medical evidence on the injury was sufficient to be sustain the conviction by the trial court.

Counsel also submitted that the magistrate did not make a finding on the prima facie case as required under Section 211 of the Criminal Procedure Code, which according to counsel was an error.

Further that it was wrong for the trial magistrate to state that the appellant was a repeat offender while he had not been convicted and was thus innocent.

Counsel submitted also that the mitigating plea by the appellant for forgiveness was not the same as a plea of guilty.

In counsel's view, the failure by the prosecution to call prison officers to testify in court was fatal to the conviction. Lastly, counsel argued that substitution of the conviction with a conviction for affray should not be done as that was a totally different offence.

This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences, bearing in mind that I did not have the opportunity to see witnesses testify to determine their demeanor. See the case of ***Okeno -vs-Republic (1972) EA 32.***

I have re-evaluated the evidence on record. I have considered the grounds of appeal and the submissions on both sides. This appeal raises several issues.

The first issue is with regard to prima facie case. I have perused the record. On the 2nd September 2014 the prosecution closed its case before calling Sgt Nyaga as a witness. The prosecution case was closed after the trial court stated that the appellant was a high risk individual and ordered the prosecution to close their case instead of having him appear before the court one too many times. The prosecution closed their case.

It is clear from the record that Section 211 of the Criminal Procedure Code was explained to the accused in a language which he understood to which he replied that he would give a sworn statement.

The court did not however, state that a prima facie case had been established by the prosecution against the appellant before explaining to him the provisions of section 211 of the Criminal Procedure Code and

putting him on his defence.

Though this lapse was a mistake on the part of the trial court, I find that it was not fatal to the criminal proceedings. The fact that the trial court explained to the appellant the provisions of Section 211 of the Criminal Procedure Code, after the closure of the prosecution case, in my view had the effect that the court was convinced that he had a case to answer. That argument by counsel, which is not in the grounds of appeal, is thus not merited and is hereby dismissed.

The other complaint of the appellant's counsel is that the trial court in the judgment did not find that the prosecution had proved its case beyond any reasonable doubt. This argument by counsel is also not in the grounds of appeal.

In my view, even assuming that was true, that fact on its own would not render the judgment fatally defective. Ultimately it would depend on whether the trial court weighed the evidence both on the prosecution side and defence side and believed on one side as against the other. Therefore in my view the fact that the learned magistrate did not specifically say the prosecution had proved the case beyond reasonable doubt was not fatal.

The other issue raised on appeal is whether the facts disclosed an offence of affray, that is fighting in public. This issue was raised by the prosecuting counsel who urged this court to make a finding that what was proved by the prosecution was an offence of affray. Having perused the record, I find no evidence of a fight between the complainant and the appellant. There was also no evidence that such fight, if it was there, was in a public place. As rightly pointed out by counsel for the appellant, the facts do not suggest that there was an affray. I dismiss that ground or argument.

During the trial, the prosecution called only two witnesses. The learned magistrate went out of his way to stop the prosecution from calling an additional witness Sgt Nyaga, because, according to the trial magistrate, the appellant was a dangerous person and a repeat offender.

The evidence on record regarding the alleged assault was that between the appellant and the complainant, both of whom testified on oath. The complainant was cross examined. The appellant on the other hand was not cross examined.

There was a mention of a metallic bowl used by the appellant to hit the complainant on the toe. This item was not produced in evidence as an exhibit and no explanation was given by the prosecution for that failure. The incident occurred in prison remand custody and a report was said to have been made to the prison officers who intervened immediately. None of the prison officers was called to testify in court.

From the record, the learned magistrate was over zealous to prevent the calling of Sgt Nyaga by the prosecution to come and testify because he thought that the appellant was a dangerous person as he had been charged with other offences of possession of grenades. The magistrate even went on to treat the appellant as a repeat offender when he had not been convicted, contrary to the provisions of Article 49 of the Constitution of Kenya 2010 which requires that a person charged in court be treated as innocent until proven guilty. All these factors show a bias on the side of the magistrate or trial court.

In the case of *Bukenya -vs- Uganda (1972) EA* it was stated by the court of Appeal for East Africa that **it was**, the function of the Prosecution or Director of Public Prosecution to call witnesses. That function did not belong to the court. The interference on the prosecution freedom to call witnesses by the court created a situation where one cannot say that the magistrate had a predetermined idea as to the guilt of the appellant. One cannot also say whether the evidence of the witnesses who were stopped from coming to court by the magistrate would be different from that of the complainant. The court being a court of justice, should always appear to be unbiased. Once it appears to be biased as in the present case, the benefit of the doubt in my view has to be given to the accused person. The bias herein was evidence by the magistrates predetermined guilt of the appellant and prevention of the prosecution from calling its witnesses.

In the mitigation the appellant asked for forgiveness. Learned Prosecuting Counsel Mr. Orwa has submitted that such was an admission of the offence. In my view mitigation or what is said by the parties during mitigation on both sides can never be an admission of an offence or exoneration from an offence. Mitigation is a statement that is made by an accused person to seek mercy or a lighter sentence from the court. Asking for forgiveness simply means that he is asking not to be punished severely, because the court has powers even to discharge an accused person after conviction. That request by an accused affects only the sentence, it does not affect the conviction or become an admission of the offence.

In my view the conviction herein was not safe because crucial witnesses were not called to testify, and also because the learned magistrate went on to interfere with the prosecutions intentions to call witnesses and ordered the closure of the case, before key witnesses were called to testify. The magistrate also showed bias by saying that the appellant was a dangerous person without any evidence on record.

In the sentencing, the magistrate also made a wrong assumption that the appellant was a repeat offender when he had not been previously convicted. A charge or trial in a criminal case against a person, unless a conviction is entered, cannot operate as a previous conviction as an accused person is deemed to be innocent until proved guilty. This was another fatal mistake on the part of the trial court.

On the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 14th day of June 2016.

GEORGE DULU

JUDGE