



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 64 OF 2015

MUSYOKI SIMBAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in the Principal magistrate's court at

Kyuso – Criminal Case No. 325 of 2014 – B. M. Mararo PM)

JUDGMENT

The appellant was charged in the magistrate's court at Kyuso with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on 25th May 2014 at Mukonga Sub Location in Mumoni District within Kitui County assaulted Philip Lui Simba thereby occasioning him actual bodily harm.

He denied the offence. After full trial, he was convicted and sentenced to serve 3 years imprisonment.

Dissatisfied with the decision of the trial court the appellant filed the present appeal. Before the hearing of the appeal he filed an amended petition of appeal as well as written submissions, which he relied upon. The grounds of appeal are as follows:-

1. That the trial magistrate erred in law and facts in convicting him without considering that the investigation officers failed to investigate the case properly.
2. The trial magistrate erred in law and fact in convicting him without considering that the prosecution's case was contradictory and inconsistent contrary to section 163 (1) of the Evidence Act.
3. The mode of arrest was not proper.
4. Trial magistrate erred in convicting him without considering that the trial was unfair.
5. The trial magistrate erred in convicting him without considering that the prosecution failed to prove their case to the requisite standard.

During the hearing of the appeal, the appellant relied on his written submissions and elected not to make oral submissions. I have perused and considered the said written submissions.

The learned Prosecuting Counsel Mr. Okemwa opposed the appeal. Counsel submitted that the evidence on record established that the appellant caused actual bodily harm to the victim Pw1 who was his own brother and was physically challenged as he suffered from Polio. Counsel emphasized that the attack was done recklessly and the appellant used a lot of force in attacking his brother and broke his leg. Counsel emphasized that there was no reasonable cause for the attack.

Counsel submitted further that the medical evidence tendered by Pw5 supported by the P3 form, confirmed that the victim suffered fresh wounds and a fracture of the thigh bone and the degree of injury was assessed as maim. Counsel urged that the appeal lacked merit and should be dismissed.

In response, the appellant said that he would add nothing to what was in his written submissions.

In brief the prosecution evidence was that on the 25th May 2014, the complainant Philip came from grazing at around 7pm and went to the house of Musyoki Bilo to ask for tobacco. He then heard the appellant ask Bilo why his goats were hated. The appellant then produced a club from his jacket and hit the complainant hard and broke his leg. The complainant was later taken to hospital, treated and a P3 form filled. The appellant was then arrested and charged with the offence.

When put on his defence, the appellant tendered unsworn testimony. He stated that he was a livestock dealer and that his goats had grazed near the farm of Douglas arising a dispute in which he was asked to pay Kshs. 300,000/= for the damage caused by the goats. However he denied breaking the leg of the complainant and said that he was surprised that he had been arrested on 11th July 2015.

Based on the evidence on record, the learned magistrate found that the prosecution had proved their case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced him.

This is a first appeal. As a first appellate court, I am required to re-examine all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance for that fact. See the case of *Okeno Vs. Republic [1972] EA 32*.

I have re-evaluated the evidence on record. I have perused and considered the judgment. I have considered the submissions on both sides, both written and oral.

The allegation against the appellant was that he hit the complainant Pw1 Philip Simba with a stick and broke his leg. At the time of the incident, the complainant was already physically challenged as he was suffering from Polio. The complainant was the appellants step brother.

I observe that the incident occurred in the evening hours. The complainant and Pw3 Douglas Bilo Simba and Pw4 Julius Muthui Kinyua were all present when the incident occurred. According to their evidence there was an argument about the appellant's goats grazing on Douglas Simba's farm. Douglas Simba was Pw3. This story was also supported by the defence, in which the appellant said that his goats had grazed near the farm of the said Douglas Bilo Simba.

I have no reason to disbelieve the evidence of the eye witnesses. There is no doubt in my mind that they knew the appellant and the complainant well. There could be no possibility of mistaken identity. The appellant's denial of the incident was rightly rejected by the trial court.

The medical evidence produced by the Clinical Officer Pw5 Joseph Muriungi supported the allegation of serious assault on the complainant. The degree of injury was assessed as maim. The injuries fit the description of the assault on the complainant given by prosecution witnesses. In my view therefore, the prosecution proved beyond any reasonable doubt that the appellant committed the offence.

When the appellant says that investigating officers failed to investigate the case properly, that is not true from the record. The evidence both from eye witnesses and medical evidence was clear.

There was also no truth in his allegation that the prosecution case was contradictory and inconsistent. There was also no evidence that the arrest was irregular.

In addition there is nothing on record to show that the trial was unfair as the appellant was availed adequate time to prepare himself, he heard all witnesses testify, he cross examined them, and was finally given a chance to say what he wanted to say in his defence, which he did.

The sentence of 3 years imprisonment in the circumstances of the case in my view was not excessive. Though the appellant was treated as a first offender and he stated in mitigation that he had children who would likely to suffer, the injury he inflicted on a challenged step brother justified the sentence of 3 years imprisonment, for an offence that carries a maximum sentence of 5 years imprisonment.

I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Garissa this 17th day of August 2016

GEORGE DULU

JUDGE