



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 118 OF 2015

BETWEEN

ANNAH KENDIAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from Judgement of Hon. J. Ong'ondo SRM delivered on 4th June, 2015 in Kakamega
CMC CR. Case No. 1938 of 2013)

J U D G M E N T

Introduction

1. The appellant herein was arraigned before the Chief Magistrate's Court at Kakamega on a charge of grievous harm contrary to Section 234 of the Penal Code, the particulars being that on the 22nd day of August, 2013 at Murumba Sub-location Butso Central Kakamega County, willfully did grievous harm to Diana Watende. The appellant pleaded not guilty, thereby forcing the prosecution to proceed with the case.
2. The prosecution called 5 witnesses all of whom testified that indeed it was the appellant who attacked the complainant and hit her on the mouth. That as a result of the said attack the complainant lost some 2 teeth. The complainant reported the matter to the police and was also treated by PW4, Duncan Miningwo a Clinical Officer at Kakamega County General Hospital. PW4 produced medical records in support of the prosecution's assertion that the complainant suffered grievous harm
3. The appellant also testified, and in her two sentence unsworn testimony, she denied committing the offence. She did not call any witnesses.

Judgment of the Learned Trial Magistrate

4. After a careful analysis of all the evidence placed before him the learned trial magistrate was satisfied that the prosecution had proved the case against the appellant beyond any reasonable doubt. The appellant was accordingly found guilty and convicted of the offence of grievous harm. Upon conviction, the appellant was sentenced to serve 3(three) years imprisonment. Before sentence, the learned trial Magistrate noted that the offence was one of aggravated assault and that the appellant deserved a deterrent sentence.

The Appeal

5. The appellant was aggrieved by both conviction and sentence and filed this appeal on 25.10.2013. The appeal is premised on 5 short grounds of appeal;-

1. The honourable court erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt.
2. The honourable court erred in law and fact in allowing the evidence of PW3 to be adduced after affirming the witness. She ought to have given unsworn evidence.
3. The honourable court treated the evidence of PW3 with weight it did not deserve for it was evidence of a minor who did not understand the value of telling the truth
4. The honourable court erred in law and fact in failing to uphold the appellant's choice to have the case to start a fresh after there was a change of the trial Magistrate
5. The honourable court erred in law in holding that the medical evidence adduced could suffice to convict the appellant.

6. The appellant prays that the appeal be allowed, conviction be quashed and sentence be set aside

7. This being a first appeal, this court is under a duty to rehear the appellant's case with a view to reaching its own conclusions in the matter, only making allowance for the fact that it neither saw nor heard the witnesses as they testified during the trial. This court ought also to remember that unless the findings of the learned trial Magistrate were completely unfounded, or if the facts and the evidence do not support the conviction, this court would be slow to upset the judgment of the learned trial Magistrate. I will therefore carefully reconsider and evaluate the evidence afresh and come up with my own conclusions. See **Okeno- Vs – Republic [1972]EA 32**

The Prosecution Case

8. The prosecution called 5 witnesses in support of its case against the appellant. PW1, Riana Wetende is the complainant. Her testimony was to the effect that on 22.08.2013 at about 7.30am, the appellant who was armed with a Jembe went to her (PW1's) home and found her seated outside the house with her children. The appellant demanded an explanation from PW1 concerning certain utterances which PW1 had allegedly made. Without waiting for an answer, the appellant hit PW1 on the left cheek using the jembe wooden handle, as a result of which PW1 lost 3 teeth. The incident was witnessed by PW1's daughter Violet Magina who testified as PW3. PW3 agreed with PW1 that the appellant hit PW1 with a jembe while PW1 was seated on the ground. On seeing what was happening, PW3 screamed and one Ayiro(not called as a witnesses) came to PW1's rescue.

9. When Joseph Wetende PW2 got news of the attack by the appellant on PW1, he rushed home from his place of work at Masera School. He testified that PW1 lost some teeth during the attack. He escorted her to the sub-chief and later to the police station and then the hospital. The appellant was arrested thereafter and charged. PW2 told the court that there were no grudges between his family and that of the appellant who was his sister in law.

10. Duncan Miningwo, PW4 a clinical officer a Kakamega County hospital examined PW1 and established that she had lost 2 teeth, had bruises on the left cheek and pain on the chest. He opined that the weapon used was blunt and the degree of harm was maim. The signed P3 form was produced as PExhibit 4 while the treatment notes were produced as Pexhibit 2.

11. It was number 8321 police constable Shariff Mohammed of Kakamega Police Station PW5 who booked the report by PW1. According to PW5, PW1 lost 4 teeth and also suffered an injury on the upper left side of the mouth. PW5 issued PW1 with a P3 form which was produced in evidence as PExhibit 3.

The Defence Case

12. At the close of the prosecution case, the appellant was found to have a case to answer and was accordingly put on her defence. Her evidence, comprised in abrief unsworn testimony was as follows;

“ I am Annah Kendi. I am presently[a] farmer from Murumba. On material date, I was at home. I did not commit offence.”

Submissions

13. The appellant’s counsel filed written submissions dated 09.12.2016 and made arguments on 3 major grounds. Counsel submitted that the trial court fell into error when it convicted the appellant first because of procedural technicalities concerning the evidence of PW3 who was a minor and also because of the court’s failure to comply with Section 200 of the Criminal Procedure Code. Counsel also contended that there were so many glaring contradictions in the prosecution case that the conviction was not safe. Counsel also complained that the trial court did not consider the appellant’s defence of alibi. He urged the court to allow the appeal.

14. In response, Mr Ngetich, prosecution counsel opposed the appeal and urged the court to make a finding that the appellant’s complaints against the judgment of the learned trial court were baseless and lacking in merit. Counsel urged this court to dismiss the appeal.

Analysis and Determination

15. After carefully reconsidering and evaluating the evidence afresh, the following issues arise for determination:-

- a. Whether there were procedural technicalities that negatively affected the prosecution case.
- b. Whether there were such sharing contradictions in the prosecution based on such evidence is ...

I will now proceed to consider the two issues.

a. Whether there were procedural technicalities

16. It was submitted on behalf of the appellant that the trial court fell into error when it gave too much weight to the testimony of PW3 who was a minor and who did not give sworn evidence for reasons that she did not understand the importance of telling the truth. That it was wrong for the trial court to assert that the knowledge of PW3 was a crucial consideration and that reliance on such evidence was prejudicial to the appellant.

17. In response, Mr. Ng’etich, prosecution counsel submitted that though PW3 did not give sworn evidence, she was taken through a proper voir dire examination and that after she testified she was subjected to cross examination. Under the English Oaths Act 1978 SS 5 and 6, a witness who objects to being sworn is permitted to make his solemn affirmation instead of taking an oath, and the affirmation is administered in situations where there would be practical inconvenience or delay if an oath were to be administered. “In the manner appropriate to the religious beliefs of a witness who objects to being sworn. It is worth noting that a solemn affirmation has the same force and effect as an oath.”

18. The Oaths and Statutory Declarations Act, Chapter 15 laws of Kenya, provides under Section 15 thereof that “every person upon objecting to being sworn, and stating, as the ground of such objection either that he has no religious belief or that the taking of an Oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is required by law, which affirmation shall be of the same effect as if he had taken the oath.” Section 17 of the Act provides for persons who may make oaths or affirmations.

19. Section 19 deals specifically with the evidence of children and provides that children who are of tender years and who do not in the opinion of the court, understand the nature of an oath shall give

unsworn evidence if the court is satisfied that the child possesses sufficient intelligence to justify the reception of the child's evidence, and on condition that the child understands the duty of speaking the truth.

20. In the instant case, the record shows that when PW3 was put into the witness box and upon being asked by the court whether she was a church goer and whether she knew the bible, she answered both questions in the negative. When the child was asked whether she knew God she stated that she did not and she further told the court that if she told lies, she would be caned by her parents. The child also told the court that she was not a Christian, though she promised to tell the truth. The trial court then concluded. "I order the minor be affirmed as she does not understand oath but understands value of saying the truth."

21. From all the above, it is clear that PW3 did not understand the nature of an oath nor is it clear from the record that the child was possessed of sufficient intelligence to justify her being affirmed. I am therefore satisfied that the trial court fell into error when it ordered PW3 to be affirmed, especially when the law places the same weight on evidence taken by affirmation as evidence taken under oath. The best that the trial court could have done was to allow PW3 to give unsworn evidence. Grounds 2 and 4 of the petition of appeal as far as the evidence of PW3 is concerned, succeed.

22. The second point raised under procedural technicalities is that the succeeding trial Magistrate did not comply with Section 200 of the Criminal Procedure Code namely that having made an order after compliance with the said Section to have the case start de novo, it was wrong for him to order the case to proceed from where it had reached with the first trial Magistrate. Counsel for the appellant submitted that this prejudiced the appellant. In response, counsel for the respondent, though admitting that there is no detailed explanation of the applications made by the two parties concerning Section 200 of the CPC, submitted that the wording of Section 200 does not guarantee an absolute right for an accused person to recall all witnesses when the case starts de novo and therefore that a succeeding Magistrate has the discretion to order the case to proceed from where the first magistrate left it. Let us look at the provisions of Section 200 of the CPC.

'200(1)-----

(2)-----

(3) Where a succeeding Magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding Magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting Magistrate, the high Court may, if it is of the opinion that the accused person was materially prejudiced thereby set aside the conviction and may order a new trial."

23. In the instant case, the scenario was as follows;-

Hon Morang'a took the evidence of PW1, PW2 and PW3 before the succeeding Magistrate, J. Ong'ondo took over the proceedings on 06.02.2014. On that day, the honourable trial magistrate informed the appellant of the provisions of Section 200 of the CPC whereupon the appellant stated; " I apply matter to begin afresh." The court made an order for the case to begin afresh and for the prosecution to bond all 13 witnesses. The case was then fixed for hearing de novo on 10.04.2014. However, the case did not proceed on 10.04.2014 because, according to the prosecutor, the complainant was indisposed. Hearing was adjourned to 24.06.2014 but on that day the appellant was absent and a warrant for her arrest was issued. Finally, the case came up again for hearing on 10.09.2014 and on that day the record shows the following;-

"Court;- 4 witnesses had testified and accused wants the case to start

afresh

Prosecutor:- I want case to proceed from where it had reached. I do

not have file

Court:- Hearing on 16.12.2014. Prosecution bond remaining

witnesses”

24. It is to be noted that though the appellant was present in court, she was not given an opportunity to respond to the prosecutor’s application for the case to proceed from where it has reached. The trial Court simply proceeded to fix the case for hearing on 16.12.2014 and by implication allowing the prosecutor’s application for the case to proceed from where it had reached when the court said, “Prosecution to bond remaining witnesses.”

25. The appellant has submitted that this turn of events materially prejudiced her. It is my considered view that ordering the case to proceed from where it had reached before Hon. Morang’a, when the succeeding court had already made an order that the case was to start de novo denied the appellant a legitimate expectation to have the witnesses recalled and for them to testify before the succeeding Magistrate. I am thus satisfied that the appellant’s complaint revolving around Section 200 of the CPC is valid and the same is allowed.

26. Before I return to the provisions of section 200(4), I will first say something about alleged contradictions in the evidence of the prosecution witnesses. Yes, there are some contradictions in the evidence, but the fundamental issue when considering contradictions in evidence is whether such contradictions have caused prejudice to the appellant. If the contradictions are minor and not material, they can be cured by Section 382 of the CPC. In the case of **Twehanga M. Alfred – vrs – Uganda, Criminal Appeal No. 139 of 2001 [2003] UGCA** the court expressed itself thus on the issue of contradictions.

“With regard to contradictions in the prosecution case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case”

27. In my humble view, the contradictions in this case touching on the number of teeth that the complainant lost as a result of the assault are such that they are immaterial to the substance of the case.

28. Another point worth mentioning is the appellant’s complaint that the learned trial court ignored the totality of the appellant’s defence. As stated earlier, the appellant’s defence was brief, though as submitted by defence, she raised the defence of alibi in addition to denying that she committed the offence. In his judgment (handwritten) the learned trial Magistrate wrote “ In her defence, the accused just denied the offence” I do not think that the defence required much more comment than what the trial court said, and in any event, the prosecution evidence was such that it displaced the alibi defence raised by the appellant.

Should there be an order for retrial

29. Section 200(4) of the CPC(Supra) empowers an appellate court to order a retrial where it is satisfied that non –compliance with Section 200(3) prejudiced the appellant. In this case, I am satisfied that indeed there was prejudice to the appellant when the succeeding Magistrate reneged on an earlier order for the case against the appellant to start de novo. No reasons were given for such an about-turn. The appellant was also not given an opportunity to respond to the prosecution’s application to proceed with the case from where it had reached before Hon. Morang’a.

Conclusion

30. In the end, I allow this appeal, quash the conviction and set aside the sentence. The case is referred back to the Chief Magistrate’s court for retrial before a Magistrate other than J. Ong’ondo, who heard part of the case and delivered the judgment. To expedite the process of retrial, this case shall be mentioned before the Chief Magistrate’s court at Kakamega on 18.10.2014 for plea and for directions as to hearing dates. Appellant remanded in custody until 18.10.2014. Right of appeal within 14 days.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 12th day of October, 2016

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Momanyi (present).....for Appellant

.....Mr. Ng’etich (present).....for Respondent

.....Mr. Polycarp.....Court Assistant