



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 79 OF 2014

(From the original Principal Magistrates Criminal Suit No. 122 of 2014 Linus Kassan PM).

GUROW OSMAN MOHAMED 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 the 3rd April 2014 at Khorof Location in Wajir East District within Wajir County unlawfully assaulted one Barre Hussein Isaac thereby occasioning him actual bodily harm. He pleaded not guilty to the charge. After a full trial he was convicted of the offence and sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial grounds of appeal on 15th September 2014. However before the appeal was heard the appellant filed a fresh petition of appeal together with written submissions. The grounds of appeal are as follows:-

1. The magistrate erred in convicting him without considering that crucial witnesses were not brought by the prosecution to testify.
2. The magistrate erred in convicting him without considering that PW1, PW2 and PW3 were part of the appellants family.
3. The magistrate erred in convicting him without considering that PW3 had no P3 form to support the prosecution case.
4. The magistrate erred in convicting him without considering that there was a family grudge between himself and other members of the family.
5. The magistrate erred in convicting him without considering that the prosecution evidence was contradictory and uncorroborated.
6. The sentence of 10 years imprisonment was harsh and excessive.

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

The Learned Prosecuting counsel Mr. Okemwa opposed the appeal. Counsel submitted that the prosecution called 6 witnesses to establish their case and that the P3 form produced by the prosecution clearly established that the complainant sustained injuries from an axe. Counsel submitted that the prosecution evidence on record was consistent and as such the conviction was proper. Counsel however submitted that the sentence of 10 years imprisonment was an illegal and excessive sentence. Counsel opined that the sentence should have been a mere fine, as the maximum sentence for the offence was 5 years imprisonment.

In summary, the prosecution evidence is that on the 3rd of April 2014 the complainant PW1 Barre Hussein Isaac, a brother of the appellant, was at home when the appellant proceeded to brand the goats of the complainant using his own sign. When the complainant told the appellant not to do so, he got furious, hit him with an axe on the head, neck, chick, hand and left arm. As a consequence the complainant sustained injuries and became unconscious.

The appellant also attacked the complainants wife PW3 Madina Adow and injured her on the head. Another brother of the appellant. Adan Hussein Isaac PW3, witnessed the incident. The matter was reported to the police and the complainant taken to hospital. PW2 the Clinical Officer Mohamud Mohamed produced the P3 form and testified that on the same 3rd of April 2014 the complainant was taken to Wajir District Hospital and was treated for the injuries suffered. According to the Clinical Officer, the injuries suffered were classified as grievous harm. The appellant was thus arrested and charged with the offence.

When put on his defence, the appellant denied on oath that he assaulted the complainant. According to him, the complainant suffered from epilepsy and fell down from the ailment, thus sustaining the injuries. He stated that the complainant merely wanted to take away his property.

This being a first appeal, I am required to re-evaluate 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 in order to determine their demeanor and give due allowance to that fact. See the case of ***Okeno - vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record. The appellant has complained that there was a grudge existing between him and other family members. He did not raise such issue of grudge in cross examination of witnesses during trial. In my view, that complaint is an afterthought. I dismiss the same.

The appellant has complained that no medical evidence was produced to support the allegations that he injured the complainant. The P3 form produced by PW2 the Clinical Officer is quite clear that the complainant sustained serious injuries. The evidence is that the complainant went for treatment at Wajir District Hospital on the same day of the alleged incident. It cannot thus be said that there was no evidence of injuries tendered in court by the prosecution.

The appellant has complained that the magistrate erred in convicting him though the prosecution evidence was inconsistent and contradictory. I have perused the entire evidence of the prosecution and I find no contradictions or inconsistency in the evidence of the prosecution witnesses. I dismiss that complaint.

On the totality of the evidence, the appellant stated in his defence that the complainant was injured from in an epileptic attack. In my view this defence was an afterthought as the appellant did not make any suggestion in the trial and his examination of witnesses, that the complainant suffered from epilepsy. The evidence of PW1 the complainant his wife PW3 and his brother PW4 was quite consistent and gave the complete detailed story of the reason and circumstances in which the appellant attacked the complainant.

There arose a dispute between them due to the fact that the appellant was branding the complainant's goats to appear as if they belonged to the appellant. It was in the course of the dispute that the appellant, who was armed with an axe, cut the complainant causing him the injuries herein. It is also clear from the evidence that the appellant thereafter drove the animals, including camels, into the bush for grazing and he was arrested at the place where he was grazing the animals, after he attempted to run away after seeing

the police.

The axe which was alleged to have been used was recovered later in the absence of the appellant. It was not taken to the Government Analyst to confirm whether it had blood stains. The appellant also was recorded as having given sworn testimony but he was not cross examined. However before the date when he testified, the appellant stated that he would give unsworn testimony and call two witnesses.

In my view the magistrate must have made an error when he wrote that the appellant gave sworn testimony after the appellant elected to give unsworn testimony. It is of note that the appellant also did not call the two witnesses he intended to call. I thus find that the appellant gave unsworn testimony and was thus not subject to cross examination.

I find from the totality of the evidence on record, that the complainant was not injured when he fell due to an epileptic attack. I

find that he was injured by the appellant as described by the prosecution witnesses. In my view therefore the conviction of the appellant for the offence of assault causing actual bodily harm is sustainable.

The appellant was sentenced to serve 10 years imprisonment. The sentence unlawful, as the maximum sentence for the offence of assault was 5 years imprisonment. The appellant was lucky to have been charged with assault causing actual bodily harm instead of causing grievous harm contrary to Section 234 of the Penal Code.

However since he was charged with simple assault, he could not be liable to a higher sentence. Though the prosecuting counsel is of the view that the appellant should have been merely fined, in my view, a custodial sentence is justified in the circumstances of this case. I will thus set aside the illegal sentence of 10 years imprisonment and order that the appellant will instead serve imprisonment for 3 years.

Consequently, I dismiss the appeal and conviction and uphold the conviction of the trial court. With regard to sentence, I set aside the illegal sentence of 10 years imprisonment and order that the appellant

will instead serve imprisonment for a term of three (3) years from the date on which he was sentenced by the trial court. It is so ordered.

Dated and delivered at Garissa this 12th October 2016.

GEORGE DULU

JUDGE