



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

HCCRA NO.42 OF 2015

STANLEY KIPRONO CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

((Being an appeal from the original conviction and sentence in Criminal Case No. CM CR. NO.3182 of 2014 before the Kericho Resident Magistrate's Court (Hon. B. Limo) on 8th September 2015))

JUDGMENT

1. The appellant was charged with the offence of assault causing bodily harm contrary to section 251 of the Penal code. The particulars of the offence were that on the 18th of October 2014, at about 9.30 a.m, at Kapranditi Village, Kipkellion Location, Kericho County, the appellant assaulted Isaiah Mutai occasioning him actual bodily harm contrary to section 251 of the Penal Code. The accused pleaded not guilty to the offence and following a full trial before the Resident Magistrate's Court in Kericho (Hon. B. Limo), he was convicted of the offence and sentenced to 3 years imprisonment on 8th September 2015. Dissatisfied with the conviction and sentence, he filed a Petition of Appeal dated... in which he raised various grounds. However, at the hearing of his appeal on..., he asked this Court to rely on Amended grounds of appeal together with his written submissions.

2. In his Amended Grounds of Appeal, the appellant challenged the decision of the trial court on the following grounds:

1. That, the learned trial magistrate erred in both law and fact when he relied on unproved evidences of prosecution if convict/appellant 3 years imprisonment.

2. That, the learned trial magistrate erred in law and fact when he ignored to consider that the arresting officer was not summoned and other crucial witnesses (i.e) PW1 wife (Jennifer Mutai) who was on the scene of crime.

3. That, the learned trial magistrate erred in law by failing to observe that section 211 of the Criminal Procedure Code was contravened thus miscarriage of justice.

4. That, the learned trial magistrate erred in law and fact by rejecting my rights for calling my defence witness (DW).

5. That, the trial magistrate erred in law by contravening section 169 (1) of the Criminal Procedure Code.

3. As the first appellate court, I bear in mind that I am not bound by the findings of fact of the trial court. Rather, I am required to subject the evidence adduced before the trial court to a fresh evaluation and draw my own conclusions. In doing this, I must bear in mind that I have neither seen nor heard any of the witnesses. In this regard, I am guided by the words of the Court of Appeal in the case of **Kiilu & Another V. R (2005) 1 KLR 174** in which it stated:

“...an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions..”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

4. I will therefore consider the evidence that was placed before the trial court before considering the appellant’s grounds of appeal, his submissions thereon and the response of the State.

5. The prosecution called 5 witnesses. PW1, the complainant, told the court that on 15th October 2014, at about 9.00 a.m, he was at the shamba that he leased from the brother of the accused, one Wilson Cheruyot. He was with his wife, Jennifer Mutai. He testified that the accused, who had a stick and a panga, chased him and upon reaching him, stabbed him on the right forearm with the stick. PW2, Joseph Mutai, testified that he was at his farm picking tea when he heard an alarm from the accused’s house. He saw the accused go towards PW1’s direction, followed him and saw him chasing PW1. When PW1 fell down, the accused stabbed him on his right hand using a sharp stick. He stated in cross-examination by the accused that he lived 200 metres from the accused and heard the accused’s wife tell the accused “not to go”. PW3, James Kibui Yebei, stated that on the material day and time, he was at his farm pruning. He heard an alarm that PW1 be rescued. He saw the accused chase PW1 with a panga and a stick. When he reached where PW1 was, he found him bleeding on his right hand. PW3 stated in cross-examination that he had seen the accused chase the complainant, then had found him bleeding.

6. PW5, Judith Anyango, was the investigating officer. Her testimony was that the complainant made a report of an assault on 18th October 2014 at 10.20 a.m and she recorded his statement. His statement was to the effect that he was attacked by the accused with a stick. She gave the accused a P3 form to be filled at the health centre. She then charged the accused with the offence.

7. The evidence of PW4, the clinical officer, was that from his examination of the complainant, he had a wound on the right arm whose probable cause was a blunt pricking object. He produced a P3 form dated 20th October, 2014 in respect of the complainant.

8. The accused was put on his defence. He elected to give unsworn evidence and call one witness. In his statement, the accused stated that on the material date, he was spraying his cow. He sent his wife to fetch water and after a while, he heard her raise an alarm. He stated that he rushed to the scene and found the (complainant) on top of his wife, pressing her to the ground, and that the complainant run away. He went to report but was arrested. He denied assaulting the complainant. He then closed his case and did not call any witness.

9. In his judgment, the trial court analysed the evidence before him, both the prosecution and the defence’s statement. He found that the evidence of PW1 was corroborated by PW2 and PW3; that PW2 and PW3 had seen the accused chase PW1, and that PW2 saw the accused stab PW1. He also found that PW3 later joined PW2 and saw PW1 bleeding on his right hand. The trial Magistrate further found that the evidence of PW4, who produced the P3 form, corroborated the evidence on the injuries sustained by PW1. The court also considered the unsworn statement of the accused and found it to have no merit. He therefore found that the prosecution had proved its case beyond reasonable doubt.

Whether the Prosecution evidence was inconsistent

10. In his first ground of appeal, the appellant argued that the trial magistrate erred by convicting him on evidence that was not consistent and credible. He also challenged the contents of the P3 form and alleged that the evidence of PW1, 2 and 3 was suspect as they were his brothers with whom he had had a long family dispute that has resulted in other criminal cases pending before the court.

11. In submissions on behalf of the State, Learned State Counsel, Ms. Keli opposed the appeal. With respect to the first ground, Ms. Keli submitted that the prosecution witnesses were consistent in their evidence, were credible and reliable. The position of the state was that the evidence adduced was overwhelming and the conviction obtained was safe. With respect to the evidence of the prosecution witnesses, the State submitted that each witness gave independent evidence of what happened on the material day, and there was no inconsistency in their evidence.

12. I have considered the evidence of the prosecution witnesses which I have set out above. I note that each of the witnesses gave evidence with respect to what they saw and heard on the material day. I am unable to see any inconsistency in the said evidence. Indeed, I note that the evidence was not shaken on cross examination by the accused. The evidence is that the complainant was in the farm that he has leased from a brother of the accused when he saw the accused coming towards him with a panga and a stick. PW2, whose evidence was that his home was 200 metres from the accused's, heard the accused's wife pleading with him "not to go", then saw the accused chasing PW1. PW3 heard an alarm that PW1 should be rescued, then found the complainant bleeding from an injury. The totality of the evidence points to the accused having assaulted the complainant.

13. The accused has raised the issue of a grudge between him and the prosecution witnesses. However, this arises for the first time in this appeal, and was not raised during the proceedings before the trial court.

14. The appellant has also complained about the production of the P3 form with respect to the injuries sustained by the complainant. He submits that the P3 form was produced by the investigating officer. However, this is not borne out by the record, which shows that the P3 form was produced by the clinical officer.

15. With regard to the appellant's complaint that the complainant stated that he recorded a statement at Soit Police Station, I agree with the submissions of the state that no prejudice was caused to the appellant by this error. The charge sheet before the court originated from Kapsoit Police Station, which bears out the submission that the reference to Soit Station was an error. In my view, this ground of appeal has no basis, and must fail.

Whether the trial court erred in not summoning certain witnesses

16. His second ground was that the court failed to summon or compel the prosecution to summon the arresting police officer and a crucial witness, one Jennifer Mutai. His submission was that the said Jennifer Mutai was at the scene of crime, and a failure to call her rendered the whole prosecution case unproved. He relied on the decision in **Bukenya and another –vs- Uganda Cr. Appl. No.68 of 1972 EAC** where the court held that: "the court has right and duty to call witnesses whose evidence appears essential to the first decision of the case."

17. The State's response on this ground is that under section 143 of the Evidence Act, there is no number of witnesses required for the proof of any fact, and that it was for the Prosecution to decide how many witnesses were relevant to its case. The State relied on the decision in **Criminal Appeal No.215 of 2010** in which the same issues were raised by the appellant on failure to call prosecution witnesses and the Court of Appeal held that you do not need plethora of witnesses.

18. I have considered the respective submissions of the parties on this point. As submitted by Ms. Keli for the State, the prosecution does not need a plethora of witnesses to prove its case. In the case of **Bukenya vs Uganda (supra)** relied on by the appellant, the court considered the issue of whether or not additional

witnesses should have been summoned, and came to the conclusion that a request for additional witnesses would only have arisen if there were gaps in the prosecution case, or the evidence relied on was found to have been barely sufficient. See also **Criminal Appeal No.214 of 2009- Joseph Otieno Juma vs Republic**. In my view, this ground of appeal is also without merit, and must also fail.

Whether the trial court failed to comply with section 211 of the Criminal Procedure Code

19. The appellant's third ground was that that section 211 of the Criminal Procedure Code was not complied with. According to the appellant, after the prosecution closed its case, "a prima facie case was not made" against the appellant, and the trial court failed to "re-explain the substances of the charges to the appellant" as required by the section 211 of the CPC, which the appellant contends led to a miscarriage of justice. The State's response is that the court complied with this section. I have considered the record of the court which indicates, at page 11 of the record, that the provisions of section 211 of the Criminal Procedure Code were explained to the appellant. He elected to give unsworn evidence, and to call one witness. I find no merit in this ground also.

Whether the trial court erred by rejecting the appellant's right to call his witness

20. The appellant's fourth ground is that he has a right to be given a fair trial. His submission is that he asked the court numerous times to be allowed to summon his witnesses, the implication appearing to be that he was denied a chance to call witnesses in his defence. However, the record indicates that though he had stated that he intended to call one witness, the appellant appears to have subsequently changed his mind. He gave his unsworn statement, then indicated that he would not be calling the witness he had indicated that he wished to call, and he proceeded to close his case. There was therefore no denial of his right to a fair trial as it was his choice not to call his witness.

Whether the trial court contravened section 169 (1) of the Criminal Procedure Code.

21. In his final ground of appeal, the appellant argues that the trial court did not comply with section 169(1) of the Criminal Procedure Code. This is because it did not give the points for determination and the decision thereon.

22. Section 169 of the Criminal Procedure Code provides as follows:

Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

23. I have considered the judgment of the court and the analysis of the evidence and the conclusion of the court on the issue before it. I note that the trial court analysed the evidence before it and considered whether the prosecution had established its case against the appellant. I am unable to find a violation of the provisions of section 169(1) of the Criminal Procedure Code.

24. The upshot of my findings on the appellant's five grounds of appeal is that there is no merit in the present appeal. I therefore dismiss the appeal and uphold the conviction and sentence.

Dated, delivered and signed at Kericho this 23rd day of November 2016

MUMBI NGUGI

JUDGE