



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 54 OF 2016

JADIEL MURUNGI M'RINGANYAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case NO. 17 of 2016 of the Chief Magistrate's Court at Maua by C.A. Mayamba – Senior Resident Magistrate)

JUDGMENT

JADIEL MURUNGI M'RINGANYA, the appellant, was convicted for the offence of grievous harm contrary to section 234 of the Penal Code.

The particulars of the offence were that on the 18th day of April 2013 at Nguchia village, in Imenti Central District within Meru County, did grievous harm to **JOHN MURORI MWARANIA**.

The appellant was tried for the offence of robbery contrary to section 296 (2) of the Penal Code but the trial magistrate reduced it to that grievous harm contrary to section 234 of the Penal Code. He was sentenced to four years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented Mr. J Ndubi, learned counsel. He raised five grounds of appeal which can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by abdicating his duty to sentence and allowed prosecution witnesses to have an upper hand.
2. That the learned trial magistrate erred in law and fact by ignoring the contents of the pre sentence report.
3. That the learned trial magistrate erred in law and fact by passing a wrong and unlawful sentence.
4. That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

the complainant is the chief of Gaitu sub location. On 18th April 2013 he was patrolling his area. When

they reached the appellant's home they found revelers partaking mugacha, a local illicit brew. The rest ran away but the appellant remained behind. He resisted arrest and in the process injured the complainant.

The appellants denied any involvement in the offence and contended that it was the complainant who beat him.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32**.

Under the Victim Protection Act No. 17 of 2014, a victim is given the right to participate in restorative justice. Section 15 of the said Act provides as follows:

- (1) A victim has a right to restorative justice.**
 - (2) Where the victim elects to participate in any process towards restorative justice, the process shall proceed on condition that —**
 - (a) the participation of the offender shall not prejudice any of them offender's rights under any law or be deemed as evidence of admission or proof of guilt in respect of the offence complained of;**
 - (b) any of the parties may withdraw their participation to the process at any time;**
 - (c) where a process for restorative justice fails, the criminal trial of the offender shall proceed to final determination, but without prejudice to the right of the victim to seek appropriate relief in civil proceedings;**

and

 - (d) The process towards restorative justice does not violate the provisions of Article 159(3) of the Constitution.**
- (3) Any agreement for restoration or other redress agreed between the victim and the offender shall be recorded and enforced as an order of the Court and may be enforced as a decree of the Court.**
- (4) Any restorative justice process shall be for a period of six months and may only be extended with the leave of the court.**

The participation of the complainants in an attempt to promote restorative justice was not illegal. Since the conviction had been entered, the appellant was not in any way prejudiced.

The learned trial magistrate cannot be faulted for attempting to promote reconciliation suo moto. section 176 of the Criminal Procedure Code clothes the court with powers to promote reconciliation. It provides:

In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

A pre sentence report is meant to assist the court to arrive at a fair sentence and in some cases, the most appropriate. It is never binding on the trial court. On this point I do not wish to say any more.

Whenever a trial court is seized of a matter and the prosecution proves a lesser offence to the one charged, it may proceed to convict for the lesser offence. This however must comply with section 169 (1) of the Criminal Procedure Code. The section provides:

(1) 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.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.

(see NYANAMBA VS.REPUBLIC [1983] KLR 599)

For the court to convict an accused for the lesser offence, under section 179 of the Criminal Procedure code two factors must be considered:

(1) Whether the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor charge also.

(2) Whether the charge under the major charge (section 296 (2) of the Penal Code in the instant charge) gave the accused notice of all the circumstances going to constitute the offence under the section (234 of the Penal Code) which he was convicted.

The offence of robbery under section 296(2) of the Penal Code, is merely theft that is accompanied by either threat to use violence or use of violence or where the offender is armed with an offensive or dangerous weapon or where he is in company of one or more persons.

It can be discerned that where robbery may not be proved assault or grievous harm may. This is because these two offences are a subset of the offence of robbery.

The learned trial magistrate erroneously indicated that he was invoking section 179 (1) of the Penal Code to convict the appellant on a lesser charge. This ought to have been under section 179 (1) of the Criminal Procedure Code. In my view this was not prejudicial to the appellant . This error is curable under section 382 of the Criminal Procedure Code.

The judgment of the learned trial magistrate satisfied the requirements of section 169(1) of the Criminal Procedure Code.

Was there evidence to convict the appellant for the offence of grievous harm? Although the appellant contended that the complainant beat him, there is no medical evidence to support his claim. Though he called witnesses who supported his contention, none of them explained how the complainant sustained the injuries. When PW2, PW3 and PW4 were cross examined, none of them was challenged with the fact that it was the complainant who beat the appellant. The learned trial magistrate was right to dismiss his defence.

Dr. Njuguna Mbeere (PW5) saw the complainant when the injuries were less than 2 hours old. He assessed the injuries as grievous harm .

There were several eye witnesses who testified that it was the appellant who inflicted the injuries on the complainant. The evidence of PW1, PW2, PW3 and PW4 was clear as to who inflicted the injuries on the

complainant and by use of what weapon.

In a nutshell, the conviction of the appellant was based on sound evidence. His appeal on conviction must therefore fail.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE