REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 71 OF 2014

JOSEPH KILONZO MWANZIA …….. APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(*From the conviction and sentence in Mwingi SRM Criminal Case No. 592 of 2012 – M.W. Murage Ag. SRM*)

JUDGEMENT

The appellant was charged in the subordinate court with two counts of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of count 1 were that on the 4th September 2012 at Ndaluni Sub Location in Migwani District of Kitui County unlawfully assaulted Samwel Mulei Ngola thereby occasioning him actual bodily harm. The particulars of count 2 were that on the 7th May 2012 at the same place unlawfully assaulted Francis Maithya Mwendwa thereby occasioning him actual bodily harm. He pleaded not guilty to both counts. After a full trial he was acquitted of count 1. He was however convicted on count 2 and sentenced to serve 3 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has appealed to this court. His grounds of appeal are in summary as follows:-

1. That the learned magistrate erred when in convicted him without considering that the prosecution evidence was not corroborative.
2. That the trial magistrate erred in convicting and sentencing him without considering that the case arose from an existing grudge between the appellant and the employer of the first complainant and the father of the second complainant respectively.
3. The learned magistrate erred when he convicted and sentenced him without considering that the police officer who arrested him was the investigating officer.
4. The trial magistrate erred in failing to observe that the P3 forms presented in court were fake and unreliable.
5. The learned magistrate erred in failing to note that essential witnesses who were mentioned did not come to court to clear the doubt.
6. The learned magistrate erred in ignoring his defence.
7. The learned magistrate erred in sentencing when he did not consider that he was a first offender and that he had a family of three children and mother and that three of the children were in school and he was a peasant farmer.

During the hearing of the appeal, the appellant made oral submissions. He stated that the trial court was unfair to him. That he did not commit the offence. He said that the whole issue started with Munyithya who alleged that he had assaulted his employee and stolen a mobile phone. He submitted therefore that

Munyithya framed him because he wanted him to be in custody in order to disrupt his family life, comprising of his mother and the children.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that there was no proof of an existing grudge as the appellant did not cross examine any of the witnesses on the alleged grudge. Counsel added that there was nothing wrong with the investigating officer being the arresting officer at the same time. On the P3 form, counsel submitted that there was no evidence that the same was fake and that the appellant did not give any particulars which would suggest that the said P3 form was fake. He also did not cross examine PW4 on the genuineness of the of the P3 form. In counsel's view the allegation by the appellant regarding the P3 form was an afterthought. Counsel further submitted that the prosecution called all the witnesses required to prove their case. The evidence of PW1 and PW2 was corroborated of that of PW3 and PW4. According to counsel, both PW1 and 2 were known well to the appellant before. Counsel submitted also that during his defence, the appellant pleaded for leniency which meant that he had committed the offence. Counsel lastly submitted that the magistrate considered the defence and also the mitigation of the appellant. As such the conviction was proper and the sentence lawful.

In response to the Prosecuting Counsel's submissions the appellant submitted that he wanted the court to be lenient to him, because he was eager to support his family.

During the trial in the subordinate court, the prosecution called four witnesses. PW1 was Nzau Mulei Ngola the complainant in count 1. It was his evidence that on the 4th September 2012 at about 9pm he was sent to a canteen. On the way he met Kimanzi Njugu as well as the appellant. The appellant was armed with a panga and accosted and grabbed him by the neck, inserted his hands into his pocket and took his Nokia cell phone. He then threw the mobile phone at him destroying it. Kimanzi Njugu intervened and saved the situation. By that time PW1 had been hit by the appellant with a stick on his back and neck. The witness went to hospital for treatment and a P3 form was filled.

PW2 was Francis Maithya Mwendwa the complainant in count 2. It was his evidence that on the 7th May 2012 as he was leaving a place called Kyome, he met the appellant who demanded to know why he had fabricated a claim against his brother John. The appellant suddenly struck him with a stick on the right shoulder. After he fell down, the appellant continued striking him. A person called Munyoki came and rescued the witness from the attacks of the appellant. He was treated at Migwani Hospital and a P3 form issued.

PW3 was the arresting officer Pc. Joseph Mbugua from Migwani Police Station. It was his evidence that on the 5th of September 2012 at 10am while at the station, Kimanzi Nguli made a report he was assaulted by the appellant who injured his neck on 1st September 2012 at 9pm. Another complainant Mwendwa Maithya also complained of an assault by the same appellant. It was his evidence that the appellant was brought to the police station by the area chief, and that the two complainants confirmed that he was the person who had assaulted them.

PW4 Thomas Gichohi was a nurse at Migwani Hospital. It was his evidence that he examined Francis Maithya Mwendwa who complained of an assault against him which occurred on 7th May 2012 at 3pm. It was his evidence that the complaint had a blood stained shirt. He was treated. A p3 form was filed. The injury was classified as harm. He also testified that Samuel Mulei Ngola also complained of an assault and was treated on the 5th of September 2012. He had blood stained clothes. He was treated and discharged.

When put on his defence, the appellant gave sworn testimony. He stated that he lived at Ndalani in Kione area of Migwani district. That he was pleading for leniency. That he did not assault anybody. That on the material day he was at home and merely heard that he had assaulted PW1 and PW2.

Faced with the above evidence the learned magistrate found that the prosecution did not prove beyond reasonable doubt that the appellant had committed count 1 because a P3 form was issued to Kimanzi Nguli and not Samuel Mulei Ngola the alleged complainant. The learned magistrate however found that

the prosecution had proved its case against the appellant on count 2. The court thus convicted the appellant and sentenced him. There from arose the present appeal.

This is a first appeal. As a first appellate court I am duty bound to reevaluate all the evidence on record and come to my own conclusions and inferences. I have to be mindful of the fact that I did not have the opportunity of seeing the witnesses testify to determine their demeanor. See the case of ***Okeno Vs. Republic [1972] EA 32***.

I have re-evaluated the evidence on record. The appellant has appeared to this court on several grounds.

With regard to the ground of an existing grudge, I find that to be an afterthought. The appellant did not state in his defence that there was any existing grudge. He merely stated that he did not commit the offence. He also did not cross examine any of the prosecution witnesses on an existing grudge. He however cross examined PW2 who stated that the appellant assaulted him because of a claim that he had fixed his brother. From the evidence on record it is apparent to me that it was the appellant who was retaliating rather than the prosecution witnesses trying to implicate him because of an existing grudge. I dismiss that ground.

With regard to the evidence of the prosecution not being corroborative, I find that the evidence of the prosecution is simple, straight forward and clear. The issue was merely the identity of the appellant with regard to the charge on which he was convicted. The incident on which the appellant was convicted occurred in the afternoon at around 3pm. It was in broad daylight. I find no inconsistency in the prosecution evidence that would create a doubt in my mind that the appellant assaulted PW2.

With regard to the arresting officer also being the investigating officer, there is no law or rule practice that prohibits the investigating officer being the arresting officer at the same time. It is only the identification parade officer, who should neither be the arresting officer or the investigating officer. I dismiss that ground of appeal.

With regard to the complaint that the P3 form was fake, I find no basis or evidence to support that allegation. The P3 form was filled in the normal course of the business in the Migwani Hospital. There was no indication of any irregularity on how it was filled. There was also no indication that there was anything on the face of it which could show an irregularity. I thus dismiss that ground.

With regard to sentence, the appellant was sentenced to serve 3 years imprisonment. The maximum sentence for assault causing actual bodily harm is 5 years. The appellant had said before sentence that he had small children. The learned magistrate recorded that the court had considered everything before sentencing him to 3 years imprisonment. In my view the sentence of 3 years imprisonment in the circumstances of this case was justified and proper.

Before I conclude, I wish to point out that in my view, the learned trial magistrate wrongly inferred a n admission from the appellant. The learned magistrate stated in the judgment that because the appellant stated in his defence that he pleaded for leniency, that meant that the defence was partly an admission. That was not true. It was a remark that was not called for from the trial court. Pleading for leniency is not the same as admitting the offence, especially in the present circumstances where the appellant specifically stated that he did not commit the assault and that he was arrested and merely informed that he had assaulted some people. However with the evidence on record, I am satisfied that the above misdirection by the trial court did not affect the conviction. It did not prejudice the appellant in any way.

To conclude, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Garissa this 18th day of May, 2015

GEORGE DULU

JUDGE