REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 76 OF 2012

NATHAN MUCHIRI NDUNDA.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT.

The Appellant, Nathan Muchiri Ndunda was charged with the offence of grievous harm contrary to Section 234 of the Penal Code CAP 63 of the Laws of Kenya. The particulars of the charge were that on 19th August 2010, at Nkondi Sub-location Tharaka South District, within Eastern Province, unlawfully did grievous harm to George Kirema Muangi.

The appellant was tried and convicted of the offence and sentenced to pay a fine of Kshs 25,000 or in default to serve six months imprisonment.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. In his Petition of Appeal, he raised the following summarized grounds:

a. **THAT the trial magistrate erred in law and fact in convicting the appellant in a charge that had not been proved beyond reasonable doubt by the prosecution.**

b. **THAT the learned trial magistrate erred in law and fact by not considering the defence of the appellant at all and his witness.**

This being the first appellate court, the evidence adduced before the trial court will be subjected to a fresh evaluation and analysis and this court has to draw its own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of ***KIILU AND ANOTHER V R (2005) 1 KLR 174*** where the Court of Appeal held thus:

> ***"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..”

The appeal was opposed. It was contended by Mr. Mulochi Learned State Counsel, that there was sufficient evidence upon which to base a conviction and that PW1, with the help of moonlight, was able to see the appellant who was well known to him.

Briefly, the prosecution’s case was as follows: PW1 George Kirema was on 19th August 2010 at around 10 p.m., coming from Matakiri and Nkondi market on his way home when he used a path which is a shortcut and found the appellant standing on the side of the road. It was his evidence that there was moonlight and he greeted him whereupon the appellant asked him how he had indentified him at night. Before he could answer, the appellant hit him with a piece of metal on the right leg and he fell down. He screamed and asked the appellant why he was killing him and two people came to his help whereupon they found the appellant still at the scene, holding the metal. PW1 was then carried to PW2’s house and later taken to Meru District Hospital and issued with a P3 form.

PW2 Samuel Kilonzo testified that on 19th August 2010 at around 9 p.m., he was in his house when he heard a person screaming saying: “Muchiri why are you killing me”. He went to the scene and found the appellant and another person on the ground. He further testified that there was moonlight and he had a spotlight and that he knew the appellant before. The person lying on the ground was PW1 and he told the appellant not to attack PW1 again. The appellant then went away and PW2 sent for PW1’s father whereupon they carried PW1 to his house. He later recorded his statement with the police.

PW3 Dr. Robert Nato Sifuna, a doctor based at Meru District hospital produced a P3 form in respect PW1. The said P3 had been filled by Dr. Mutuku. Dr. Mutuku found that the complainant had pain in the chest and abdomen, swollen index finger on the left hand, swollen right leg and knee joint with tenderness, deformity causing reduced movement on the leg and a fracture on the leg. The degree of the injuries was classified as grievous harm.

PW 4 PC Jeremiah Seme testified that on 22nd August 2010 a report was booked at Marimanti Police Station over an assault where PW1 reported that on 19th August 2010, he was from Nkondi market where he was taking alcohol when he decided to take a shortcut home. He passed through a corridor but was attacked by one man until he fell down. He further testified that he went through the report and found that the complainant could not identify the attacker at the time but he screamed and those who came to his rescue indentified the appellant. He later issued a P3 form to the complainant and recorded statements from the witnesses.

In his sworn testimony, the appellant said that on the material day, he was at Nkondi taking beer with PW1 and DW2 when PW1 stated that his torch had been stolen by some young men who were at the bar. The young men who were at the bar were searched but the torch was not found on them and PW 1 stated that he had bought the torch for Ksh 200 and demanded to be paid. The young men paid PW1 for the torch whereupon DW1 told PW1 that it was not right since the torch was not recovered on them. He stated that PW1 was very drunk, he started jumping up and down throwing kicks around and fell down. He later heard PW1 say that his leg had been broken.

DW2 Alex Njiru testified that on the material day, he was at Nkondi taking beer with the appellant and PW1 and a lady by the name Gatuura. DW2 reiterated what DW1 told the court about the loss of PW’s torch and how the young men were forced to pay for it and DW1 told off PW1; that PW1 started throwing kicks around and in the process fell down. The following day he heard that PW1 had been injured.

I have considered the submissions by the appellant and the State Counsel, the grounds of appeal, and the authority relied upon by the appellant. In addition, I have reevaluated the evidence on record.

There were material contradictions in the evidence of PW1, PW2 and PW 4. PW1 testified that on the material day, he passed on a path which is a shortcut and found the appellant standing on the side of the

road and greeted him and that there was moonlight on that day and that the appellant asked him how he had indentified him. In cross examination, he denied having been drinking beer at Nkondi market and denied having passed by any pub that night. This was in sharp contradiction to the first report that PW1 made at the police station, that he was taking alcohol at Nkondi when he decided to take a shortcut home and passed through a corridor when he was attacked by one man until he fell down and that he could not identify the attacker at the time save for those who came to his rescue. PW2's evidence too contradicts PW4's evidence on the first report at the police station. According to PW2 the complainant identified the perpetrator and even called him by name, 'Muchiri'. A first report to the authority or any 'other' person is very crucial in such a case because by then, the incident is still fresh and has not been influenced or changed to suit one's circumstances. The importance of a first report cannot be underscored. It was considered in the case of KIOKO **KILONZO & OTHERS V REPUBLIC CRA 82-85/2011**where the Court of Appeal considered the case of **TEREKALI V REPUBLIC (1952) EACA** where that court said:

> ***"… Evidence of first report by; the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others…"***

Going by the first report to police, PW1 did not know his assailants. In his testimony in court, PW2 seems to have relied on PW'1s identification of the assailant. PW2 and PW1 mentioned 'Muchiri'. Again this is in sharp contrast to what PW4 told the court that PW1 had not known the assailant. Then it follows that PW2 too did not identify the assailant.

In the case of **NJUKI V REPUBLIC (2002) 1 KLR 771**, it was stated as follows:

> "***in certain criminal cases, particularly those which involve many witnesses discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused……however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."***

In the instant case, the witnesses were not many and even then, the discrepancies are so serious as they go to the issue of identification of the assailant. It is not clear if PW1 was able to identify the appellant as his assailant given the discrepancies in the evidence of PW1, 2 and 4. These material discrepancies remain unresolved.

Though the defence of the accused was not convincing, the onus always rests on the prosecution to prove its case beyond any doubt. There were material discrepancies in the prosecution evidence which go to the root of the matter and these discrepancies created a doubt in the court's mind as to the guilt of the appellant.

As a result I do find and hold that the conviction that was entered against the appellant was not safe and I accordingly allow the appellant's appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JUNE, 2015.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mulochi for the State

Mr. Mwanzia for the Accused

Faith, Court Assistant

Appellant, Present