



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 253 OF 2013

(Being an appeal from the conviction and sentence of Hon. A. Odawo Resident Magistrate delivered on 26/9/2013 in Machakos Principal Magistrate Criminal Case No. 430 of 2013)

GILBERT NZAU MULIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Gilbert Nzau Muli was charged with the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars of offence state that the Appellant on the 20th day of April, 2013 at Kiasa village in Machakos County, unlawfully did grievous harm to Nicholas Kennedy Mutisya.
2. When the Appellant was arraigned in court, he pleaded not guilty. The case proceeded to a full trial.
3. The prosecution case was that on the material day at about 7.00 p.m. the complainant, PW1 Nicholas Kennedy Mutisya took his motor cycle to the Junction bus stage. The other motor cycle riders at the bus stage demanded Ksh 5,000/= from him before he could ferry any customers from there. The complainant refused to meet this demand. The Appellant who came to the scene then slapped the complainant twice and pushed him down. The complainant left.
4. Using a motorcycle, the Appellant then followed the complainant up to Kyasa area where the complainant has a shop. The Appellant then slapped the complainant again and whipped out a pistol and threatened to kill him. The Appellant then picked a stone and hit the complainant on the head, thereby breaking one of his teeth.
5. The complainant who was rescued by members of public went to Kyumvi police station and reported the matter. The complainant was issued with a P3 from and went to Machakos General Hospital for treatment. The Appellant was subsequently arrested and charged with the offence herein.
6. In his statement of defence, the Appellant gave sworn evidence. Five witnesses were called. The Appellant's case was that when he arrived at the Kyumvi bus stage he found the complainant engaged in a confrontation with the other motor cycle riders. That as a neighbour he tried to calm them down. The Appellant and his child who was with him boarded a motor cycle but the complainant held him and pulled

him. The Appellant almost fell down but managed to move on. The complainant then followed him using a motor cycle. Upon reaching Josmat area, the complainant slapped him and he fell down. The complainant then whipped out a knife and threatened to kill him. The Appellant snatched the knife. The complainant fell down. The Appellant later reported the matter at the police station. The Appellant was later issued with a P3 form which was filled in at Bulima Mission Hospital. He returned the P3 form to the police station but no action was taken. He denied having handled a pistol or even knowing how to use one.

7. The trial magistrate convicted the Appellant and sentenced him to two (2) years imprisonment. The Appellant was dissatisfied with the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

- (a) That the prosecution evidence was contradictory and therefore the conviction was unsafe.
- (b) That the trial magistrate erred by failing to appreciate that the complainant was injured when he fell on stones.
- (c) That the medical evidence was not reliable.
- (d) That the trial magistrate erred in dismissing the Appellant's evidence of self defence.
- (e) That the Appellant was not given a fair trial thereby violating Article 50 of the Constitution.

8. During the hearing of the appeal, the Appellant relied on written submissions. The same essentially expounds on the grounds of appeal.

9. The learned counsel for the state submitted on the sufficiency of the prosecution evidence.

10. This being the first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

11. The complainant's evidence describes two scenes of the assault. That is at 7.00 p.m. at the junction and shortly thereafter at the nearby Kyasa Trading Centre outside the complainant's shop. PW2 Justin Mawira Njeru testified that when he heard the commotion in Kyasa area, he went outside and found the Appellant sitting on the complainant pointing a pistol at him threatening to kill him. According to PW2, he intervened and pulled the Appellant away but the Appellant took a stone and hit the complainant with it on the mouth, thereby injuring the complainant.

12. PW2 did not know how the incident started. PW3 Joseph Mumo Nzau who was also attracted to the scene by the commotion testified that he found the Appellant with a stone in his hands and the bleeding complainant running away.

13. On the other hand, DW2 John Mutuku Mathenge and DW5 Titus Kioko Mutula who were at the bus stage at the junction when the problems started blamed the scuffle on the complainant after the complainant failed to pay his dues to the motor cycle Sacco. DW2 and DW5 were not however at the second scene when the complainant was injured. According to DW3 Swaleh Kabisa and DW6 Stacellous Musyimi who were at this second scene, they saw the complainant beat and threaten the Appellant with a knife. DW4 Charles Kyalo Mwololo who was at the second scene however gave a different version of events. His evidence was that both the complainant and the Appellant fought by exchanging blows then the complainant pulled out a knife and they struggled over it and they fell down.

14. From the above analysis of the evidence on record, it is clear both the complainant and the Appellant talked about two incidents. The complainants' two eye witnesses talked about the second scene. Both of them were not at the first scene when the commotion started. According to PW3 he found

the complainant already injured. PW2 testified that he found the Appellant sitting on the complainant. There is therefore no independent evidence to counter the evidence of the defence witnesses that the complainant did beat the Appellant and threatened him with a knife. The evidence of the complainant and that of the Appellant each blames the other as the attacker. With the different versions of events described by the witnesses from each side, there are no reasons to prefer one version of events to the other.

15. Although the prosecution side adduced medical evidence through PW4 Dr. Emmanuel Loiposha and the evidence of the investigations carried out by PW5 PC Tiberias Obong'o which established that the complainant was injured, the evidence from the scene failed to prove beyond reasonable doubt whether it was a case of assault or affray. The failure by the Appellant to produce a medical report or any evidence of having reported the matter at the police station cannot be used against him as he had no burden of proof.

16. One of the shortfalls in the prosecution case is that it was not established whether when the offence took place there was daylight or not. The evidence on record shows that the first incident happened at about 7.00 p.m. The second incident occurred at a different scene thereafter. It is not clear from the record how long the protagonists took to go to the second scene and if there was no daylight, what source of light enabled the parties to see or if there was any other method of identification/recognition.

17. With the foregoing, the appeal has merits and is allowed. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 18th day of June, 2015

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B. THURANIRA JADEN

JUDGE