REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 2 OF 2015

HALKANO MATA BAGAJA....................................APPELLANT

V E R S U S

REPUBLIC..PROSECUTOR

JUDGMENT.

The Appellant Halkano Mata Bagaja was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code CAP 63 of the Laws of Kenya.

The particulars of the offence were that on 7th November 2014, at Drib Gombo village in Marsabit County, jointly with another not before court, unlawfully assaulted Tari Halake thereby occasioning him actual bodily harm.

The Appellant was convicted and sentenced to five years imprisonment. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. In his petition of appeal, the appellant raised the following issues:

a. **THAT the Trial Magistrate erred in law and fact in convicting the Appellant when there was no sufficient evidence tendered against the accused thus a miscarriage of justice.**

b. **THAT the Trial Magistrate erred in law and fact in relying entirely on circumstantial evidence as there was no eye witness and thus a miscarriage of justice was occasioned.**

c. **THAT the Trial Magistrate erred in law and fact in failing to analyze the evidence as the alleged offence was said to have been committed during the day yet no independent witnesses were called.**

d. **THAT the Trial Magistrate erred in law and in fact in convicting the appellant for an offence of assault causing actual bodily harm when the ingredients of the offence were not satisfactorily proved against the appellant.**

e. **THAT the learned trial magistrate erred in law and fact by disregarding the accused defence which created a reasonable doubt in the prosecution's case.**

f. **THAT the Learned Trial Magistrate failed to appreciate that the proceedings before him were tainted with extraneous matters resulting in a wrong decision.**

g. **THAT the Learned Trial Magistrate erred in law and fact by shifting the burden of proof to the appellant.**

h. **THAT the Learned Trial Magistrate erred in law and fact by failing to consider the appellant's defence which was not challenged by the prosecution.**

i. **THAT the Learned Trial Magistrate erred in law and fact by completely failing to consider the defence/applicants case and give it the probative value it deserved.**

j. **THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate the prosecution's case was full of contradictions with each witness giving a different account of events.**

k. **THAT the Learned Trial Magistrate erred in law and facts by failing to observe that key witness who was mentioned as being at the scene was not called to testify, one Mzee Halake.**

l. THAT the Learned Trial Magistrate erred in law and fact by failing to observe that other wazees who came to allegedly rescue the complainant were not called to testify.

m. **THAT the Learned Trial Magistrate erred in law and fact in failing to observe that the prosecution did not connect the accused to the offence without a reasonable doubt.**

n. THAT the Learned Trial Magistrate erred in law and fact by giving a harsh and excessive sentence in the circumstances of the case.

o. THAT the Learned Trial Magistrate erred in law and fact by failing to consider that there was existing grudge between the complainant and the appellant as testified to by the complainant himself.

p. **THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate that the P3 form did not corroborate the injuries sustained by the complainant as he had testified to.**

q. **THAT the Learned Trial Magistrate erred in law and in fact by failing to warn himself on the danger of convicting on evidence of one witness which evidence was not corroborated.**

He therefor prayed that the conviction be quashed and sentence be set aside. I found the grounds to be repetitive.

Mr. Omari, Counsel for the appellant submitted on all the grounds cumulatively and argued that apart from the complainant, only two other witnesses were called and yet they were eye witnesses when the offence was allegedly committed and hence the offence was not proved to the required standard because there were contradictions in the prosecution's case. He submitted that PW1 testified that the offence occurred at 1.00 p.m. and he was rescued by one Halake and other elders, but none of them was called to corroborate PW1's evidence. He relied on the decision of ***MICHAEL OMWENGA MOKUA VS REPUBLIC CRA 6/06 (KISII)*** where the court held that where the prosecution failed to call a vital witness, it should be presumed that, his evidence would not have been in support of the prosecution evidence. He also cited ***BUKENYA VS REPUBLIC (1972) EA 549***.

Counsel further argued that there were contradictions in the prosecution case in that, whereas PW1 said he was injured on the head, the Doctor said that he was injured on the shoulder, abdomen and left knee and that in the judgement, the trial court imported its own evidence into the case; that the trial court handled the case casually and did not consider that the standard of proof in criminal cases is beyond any reasonable doubt. He urged the court to quash the conviction and set aside the sentence.

Mr. Mungai, Counsel for the State conceded the appeal for reasons that the complainant's evidence was not corroborated and that this being the evidence of a lone witness, the court should have warned itself.

He also agreed with the applicant's Counsel that there is no reason why Halake, the person mentioned as having rescued PW1, was not called as a witness. He also agreed that there was contradictions between PW1's evidence and that of the Doctor (PW3) as to the injuries that pw1 sustained.

This being the first appellate court, it behoves this court to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and 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 the 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…"***

Briefly, the prosecution's case was as follows; PW1 Tari Halake was on 7th November 2014 at 1:00 p.m., taking luggage to Kubi Bagaza on a motor cycle carrier. On the way, the appellant stopped him while accompanied by his brother one Galgalo. The appellant then started assaulting him using fists and kicked him on the stomach and head. He further testified that the appellant's brother also assaulted him. He did not know why he was being assaulted. It was his evidence that Mzee Halake and other elders came to his rescue; that previously, they had differences with the appellant which were sorted out at home whereupon he was penalized. This incident was reported to the police and he recorded a statement.

PW2 PC Timothy Makau who was the investigating officer in this case testified that on 8th November 2014, he was at Marsabit police station when PW1 reported that he had been attacked by two people known to him namely, the appellant and one Galgalo Mata. He issued him with a P3 form, took possession of a motorcycle that PW1 was using and recorded statements.

PW3 Dr. Steve Sereti from Marsabit County Hospital testified and produced a P3 form in respect of PW1. He examined PW1 and found that he had injuries on the shoulder, abdomen and left knee. He classified the nature of the injuries as harm and signed the P3 Form which he produced in court as exhibit 1.

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

Even though the State conceded the appeal, it is not automatic that this court will allow the appeal. This court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. ***In ODHIAMBO V REPUBLIC (2008) KLR***

565, the court said:

> ***"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence".***

The alleged offence took place in broad daylight, about 1.00 p.m. PW1 and the appellant are people who knew each other well. PW1 said that they had disagreed before this incident but the issue had been resolved and he had been penalized. The details of the disagreement are not known.

Under Section 143 of the Evidence Act, no particular number of witnesses is required to prove a fact.

The court restated this fact in ***CRA 257/09, BENSON MBUGUA V REPUBLIC (ELD)***. Generally, the prosecution has the discretion to call whoever they wish to call as a witness and it is not for the defence to determine that issue for the prosecution. However, the prosecution should not fail to call relevant witnesses for ulterior motives, for example, if they know that the evidence would be adverse to their case.The prosecution has a duty to call all witnesses relevant to their case whether or not the evidence is adverse to their case, provided the witness will assist in the just resolution of the case. In ***BUKENYA & OTHERS VS REPUBLIC (1972) EA 549***, the court said at Page 551:

> ***"While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of these witnesses, if called would have been tended to be adverse to the prosecution case".***

In the instant case, the incident having taken place at daytime, ordinarily even one witness would have sufficed and there would have been no requirement that the court warns itself of the dangers of relying on the evidence of a single witness. The court is only required to warn itself of such danger if the offence was committed under circumstances that did not favour identification, like in darkness. The prosecution Counsel misdirected himself in submitting that the trial court needed to warn itself.

It was clear that PW1 was not alone at the scene but there were other people like Halake who allegedly intervened. No reason was given why none of the people that were present at the scene were called as witnesses. This is necessitated by the fact that PW1 and the appellant were not on good terms. The prosecution should have endeavored to call any other independent witnesses to allay any fears of there being an attempt to frame or fix the other. The prosecution should have called Halake or any other independent witness, but not necessarily all who were present at the occurrence.

The other complaint raised by the appellant is that there were inconsistencies in the evidence of PW1 and PW3 in that while PW1 said he was injured on the head and abdomen, PW3 found that he was injured on the knee, shoulder and abdomen. May be the evidence of another independent witness would have resolved these discrepancies. The prosecution did not bother to clarify the said inconsistencies. PW1 must have known where he was injured. I find the prosecution evidence to be barely sufficient to prove the charge and there was need for other independent corroborative evidence.

Having considered the evidence in its totality, it is my view that the omission to call any independent witness in this case leaves the court wondering whether the prosecution was holding back some evidence that may have been adverse to its case. A doubt is raised in the prosecution case and I resolve the one in favour of the appellant.

The conviction is unsafe and I hereby, allow the appeal, quash the conviction and set aside sentence. The applicant is set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JUNE, 2015.

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Mulochi for State

Faith, Court Assistant

Mr. Omari for Accused

Accused, Present