



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.137 OF 2014
JOSEPH JUMA ANDATI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence at Butere Senior Principal Magistrate's Court by E.S. Olwande - SPM on 16th July, 2014)

JUDGEMENT

The appellant has appealed against his conviction and sentence of six years imprisonment imposed upon him on 14th September, 2014 by the court of the Principal Magistrate at Butere in respect of the offence of grievous harm contrary to section 234 of the Penal Code (Cap 63) Laws of Kenya. In support of his appeal, he has listed five grounds in his petition which was filed in court on 30th September, 2014.

The respondent/republic has supported both the conviction and sentence.

This is a first appeal. And as a first appeal court, I am required to reassess the entire evidence produced before the trial court and come to my own independent conclusion based on that evidence. I am simultaneously required to defer to findings of facts based on the credibility of witnesses because the trial court was better placed to assess the demeanour of the witnesses.

The trial court found that the appellant had been sent by his father to go and buy cooking oil. And for that purpose, he had been given Kshs 150/-. In the process, he met the appellant as she was heading to the shops who demanded the Kshs 50/- claiming that that was his own money. The complainant (PW 2) refused to give in to the demands of the appellant. As a result, the appellant got hold of the complainant by the collar and hit him with his head in the mouth. The complainant lost three teeth on the upper part of his jaw following the injury inflicted upon him by the appellant.

The evidence of the complainant is supported by Cedrick Musa (PW 3). PW 3 heard the commotion between the complainant and the appellant. As a result, he responded to that commotion and saw the appellant hitting the complainant in the mouth as a result of which the complainant lost three teeth. PW 3 say two of the complainant's teeth falling to the ground.

The matter was reported to the police at Butere Police Station. The complainant went with his parents to report the incident. The complainant told the police officer No. 50312 PC Jackson Wanyama. The complainant repeated that he lost three teeth as a result of being hit by the appellant. The complainant went to Butere District Hospital where he was medically examined by the Clinical Officer, Mr Kyalo Peter (PW 1). According to the Clinical Officer, the complainant had open sockets for teeth

numbers 12, 11 and 21. He also found that the complainant had no fractures and further found that he had blood stains in the mouth. He then treated him with antibiotics and anti tetanus drugs. He then completed the P3 form. In his opinion the complainant suffered grievous harm which he found was a a permanent disfigurement. The P3 report was put in evidence as exhibit P1 and 2.

The appellant was put on his defence and he gave sworn evidence. According to him, he was attending a driving course when he was arrested in respect of this offence. He recalled that on 21st January, 2014, he had taken out their cows and started to milk them. While doing so, four AP Officers came with a village elder and arrested him and thereafter they took him to Ibokolo AP Police Camp. It is at that station that he was asked about the commotion at Sabatia. The next day, he was taken to Butere Police Station. At that station, he was asked if he had caused injury to any person. In response to this he replied in the negative. He denied assaulting the complainant. He went further to state that he did not know him. Additionally, he also denied knowing the eye witness Cedrick Musa. He finally stated that Cedrick Musa did not see him assault the complainant and that he only heard the noise.

The trial court believed the evidence of the complainant and rejected that of the defence. I have reassessed that evidence and I have come to the same conclusion as did the trial court. The eye witness evidence of the complainant is supported by the evidence of the Clinical Officer. The defence of the appellant was rightly rejected by the trial court.

Turning to his ground of appeal the appellant has stated that his defence evidence and mitigation were not considered by the trial court. I have perused the judgement of the trial court and I find that the defence of the appellant was fully considered and rejected. The trial court framed the issues for determination one of which was whether the complainant lost three teeth or one tooth. It came to the right conclusion that the complainant lost three teeth. Based on the medical evidence the clinical officer classified the injury sustained as grievous harm.

The next ground of appeal was that the decision of the trial court was driven by malice. This complaint is not supported by the evidence adduced at the trial. This ground is without merit and I dismiss it. The appellant has also complained that the trial court did not find that the offence was proved beyond reasonable doubt. In this regard, the trial court stated:

“On the last issue, I find that prosecution has proved the offence beyond reasonable doubt doubt and I convict the accused under Section 234 of the Penal Code.”

It is clear from this finding that the trial court found the offence proved beyond reasonable doubt.

Finally, the appellant has asserted that the sentence of six years imprisonment was manifestly excessive to the extent that this court should interfere with it by reducing it. In this regard, I find that the appellant was originally sentenced to pay compensation to the complainant in the sum of Kshs 50,000/, being the amount of money for restoring the teeth of the complainant. He was also sentenced to serve community service for a period of one year at Ibokolo Police Camp. Finally, his parents or guardians were to guarantee the payment of the amount of money failing which execution were to issue against the parents or guardian. This was on 16th July, 2014.

According to the report of the social worker (Mr Opaka) the mother of the appellant had agreed to pay the sum of Kshs 50,000/- within 10 months. The social worker went further to state that the appellant was not willing to serve the community service as directed. The social worker visited the home of the appellant three times and whenever he saw him, he ran away. According to the social officer, the appellant had become a problem to his mother. He demolished her kitchen and sold the iron sheets. His mother had to run away from home. Finally, the life of the appellant is also in danger as members of the community have threatened to lynch him because of his criminal activities.

The attack against the complainant by the appellant was not provoked. I agree with Mr Mailanya for the respondent that the sentence imposed was lenient. I find that it was not so lenient as to warrant it being enhanced. I have considered all these matters and I find that the sentence imposed was proper.

The appeal of the appellant against both conviction and sentence is hereby dismissed.

JUDGEMENT DATED, SIGNED and DELIVERED at KAKAMEGA this 24th day of JULY 2015

J.M. BWONWONGA

JUDGE

24.07.15