



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 33 OF 2012**

**JOHN MURIITHI MWANIKI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence of the Senior Principal Magistrate's Court (T. M. Mwangi) at Gichugu, Criminal Case No. 864 of 2010 dated 23<sup>rd</sup> June, 2011)*

**JUDGMENT**

1. **JOHN MURIITHI MWANIKI**, the appellant herein, was charged vide **Gichugu Senior Resident Magistrate's Court Criminal Case No. 864 of 2010** with the offence of grievous harm contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 4<sup>th</sup> September, 2010 at Kirinyaga East District within Kirinyaga County he unlawfully did grievous harm to Simon Muriuki, the complainant at the trial court. Upon conclusion of the trial the Appellant was found guilty and sentenced to serve two (2) years imprisonment and being dissatisfied with both conviction and sentence he preferred this appeal and raised the following grounds:
2. (i) ***That the learned trial magistrate erred in law and in fact***  
***by failing to take into account matters which should have been taken into account and that the sentence was passed on the wrong factual basis.***
- (ii) ***That the learned trial magistrate erred in law and fact by failing to consider the evidence of the appellant and hence arrived at a wrong decision.***
- (iii) ***That the learned trial magistrate erred in law and fact by failing to consider that the appellant had a good alibi.***
- (iv) ***That the learned magistrate erred in law and fact when by failing to take into consideration that the prosecution witnesses gave hearsay evidence.***
- (v) ***That the learned trial magistrate erred in law and fact by shifting the burden of proof from the prosecution to the defence and hence arrived at the wrong decision.***

*(vi) That the trial magistrate erred in law and fact by failing to consider that the appellant was not at the scene of crime when the offence was committed.*

*(vii) That the learned magistrate erred in law and fact by failing to consider the entire evidence in totality but instead analysed the prosecution evidence in isolation and hence arrived at a wrong conclusion.*

3. In his oral submissions at the hearing of this appeal, the Appellant submitted that he was framed and pointed out that the P3 form produced as Exhibit 1 was filled at Kianyaga sub-District Hospital while the complainant testified that he was treated at Kerugoya District Hospital and wondered why no explanation was given by the investigating officer and why the trial court did not consider it as an anomaly.
4. The Appellant further doubted the authenticity of the evidence of P.W.2 (Mary Wanjiru Mungai) who told the trial Court that she was working at a different bar (Thayu Bar) from where the incident took place which the evidence pointed out was “Walker bar”. The Appellant further faulted the prosecution for not adducing evidence from other independent eye witnesses apart from the two witnesses P.W. 2 and P.W.3 who the Appellant argued were bar maids who could easily be manipulated. He pointed out that the incident happened outside a bar that was patronized by many people who should have come up to testify against him. He further submitted that P.W.3 (Judy Wawira Mugane) never witnessed the incident as she told the trial court that she was inside “Walker bar” when she heard screams outside and on coming out she found the complainant had been assaulted and did not see who did it.
5. The Appellant also took issue with the delay by prosecution in presenting him in court on 28<sup>th</sup> December, 2010 when the incident was said to have taken place on 4<sup>th</sup> September, 2010. He argued that no reason was given by the prosecution for the delay and that the trial court did not consider what he adduced in his defence which was that the Police used the case to extort money from him. He further pointed out that the amendment of the charge by the prosecution to that of grievous harm without evidence was a pointer or demonstration that he was being framed and that he had no motive or reason to assault the complainant.

Finally the Appellant took issue with the trial magistrate for not considering that the complainant was said to be drunk and could have been injured as a result of drunkenness.

On the sentence, the Appellant felt that the same was harsh considering the mitigating circumstances and the fact that he was a first offender. He saw no reason why he was not given an option of fine by the trial magistrate.

The Respondent through Mr. Omayo, learned counsel for State, opposed the appeal arguing that the trial magistrate was correct in analysis of evidence adduced through the five witnesses called and by convicting the Appellant on the basis of the same. The State pointed out that the Appellant was positively identified by witnesses to the incident who knew him by a nickname “father” and that the evidence corroborated the evidence of the complainant (P.W.1).

6. Mr. Omayo pointed out the evidence of Mary Wanjiru Mungai, the P.W.2 who told the trial court that she heard screams outside the bar and on going to check out found the Appellant banging the head of the complainant on the ground. He submitted that P.W.4 Joshua Kibet Bondet produced the P3 and the medical documents to prove the injuries suffered by the complainant.
7. On the issue of delay in prosecuting the Appellant Mr. Omayo submitted that the investigating officer Cpl Manyorio Shimwoto (P.W.5), indicated that there were negotiations going on and that the failure to agree led to the eventual prosecution of the Appellant.
8. On amendment of the charge, the State replied that amendment was based on the evidence contained in the P3 and that the amendment did not cause any prejudice to the Appellant as he was correctly convicted under **Section 251** of the **Penal Code** for the offence of assault causing actual bodily harm and not causing grievous harm as he had been charged.
9. I have considered the grounds raised in the petition of appeal and the oral submissions made in

- support. I have also considered the opposition made by the Respondent through Mr. Omayo, learned counsel for State. What is in issue is whether the evidence adduced sufficiently proved the prosecution case beyond reasonable doubts and whether the gaps pointed out by the Appellant in his defence was sufficient to create doubts in the prosecution case. There is also the issue of sentence and whether the same was too harsh in view of mitigating circumstances.
10. The role of an appellate court in a criminal appeal is to re-evaluate the evidence tendered before the trial court and see if the same supports the finding of the trial court or not.
  11. The incident, the subject of this appeal occurred at night. The evidence adduced shows that the incident occurred between 10.30 p.m. and 11.30 p.m. outside a bar. The Appellant stated in his defence that there were many people surrounding where the Appellant lay as he passed by and that he went in to check at the complainant and had nothing to do with the assault. The Complainant however, told the trial court it is the appellant who called him a dog and pushed him down as a result of which he fell on the pavement and got injured.
  12. The only material witness to the incident in my considered view was P.W.2 – Mary Wanjiru Mungai – who told the Court that she worked as a bar maid in another bar known as “Thayu bar” but at the material time she stated that she was at “Walker bar” when she heard screams and on stepping outside found the appellant holding the complainant. She did not however, tell the Court what she was doing at “Walker bar” at the material time. This was material in view of what the Appellant told the Court in his defence which was the fact that he was framed for an offence he stated he did not commit.
  13. The Complainant from the evidence adduced was treated at Kerugoya District Hospital for the injuries sustained and this as the complainant explained was due to the fact that he could not get treated at Kianyaga sub-District Hospital. But what was not satisfactorily explained to the trial court was why the P3 was taken to Kianyaga sub-District Hospital to be filled and yet all the treatment was done at Kerugoya District Hospital. No reason was given by the prosecution as to why no doctor or any medical officer from Kerugoya District Hospital was summoned to testify. The investigation officer was also at pains at the trial on the reason why he sent the P3 to Kianyaga sub-District Hospital instead of Kerugoya District Hospital. The reason that the complainant had no fare to travel to Kerugoya is an excuse rather than a reason and this casted some doubts about the prosecution’s case and had the trial court properly directed its mind to the same perhaps the findings could have been different.
  14. I have also considered the delay in prosecuting the Appellant for almost 3 months and my view is that the prosecution did not come out clean. The offence took place on 4<sup>th</sup> September, 2010 and the P3 was filled and signed on 15<sup>th</sup> September, 2010 by which time the Police had already recorded the statements from witnesses going by what the investigating officer told the trial Court. There is absolutely no reason why the Appellant could not be arraigned in Court immediately if the Police was sure that he was the culprit that committed the offence. Mr. Omayo submitted that there were negotiations going on but looking at the evidence of the investigating officer (P.W.5) he categorically denied knowledge of any such negotiations. The reasons why the appellant was not arrested and arraigned in court immediately was therefore not explained sufficiently to remove doubts in the prosecution’s case.
  15. The trial court failed to address itself on the issue despite the same being raised by the Appellant in his defence that the Police were trying to extort some money from him. Although the veracity of such statements are normally difficult to establish, it was sufficient in my view to create doubts about the totality of the evidence adduced by the prosecution particularly when weighed against the defence put forward by the appellant. I find that had the trial learned magistrate properly directed herself on the same, perhaps her finding on guilt of the Appellant could have been different.
  16. I have also looked at the P3 produced as Exhibit 1 and noted that the date indicated on it as the date and time the incident was reported was 6<sup>th</sup> September, 2010. This is inconsistent with the

date the witnesses told the trial court that they reported to the Police which was on 4<sup>th</sup> September, 2010. This inconsistency was not addressed at the trial court and I find that the same casted further doubt on the prosecution case at the trial.

17.I also agree with the Appellant that the trial court appears to have fell into error when it took into consideration extraneous factors when passing sentence against the Appellant. The learned trial magistrate concluded that the Appellant was a person of bad temper and could not control himself. However, going through the evidence adduced I did not find any evidence adduced demonstrating bad temper on the part of the Appellant. I therefore find that the trial court was a bit harsh in sentencing the Appellant to 2 years in prison without an option of fine considering the mitigating factors and also the fact that he was a first offender.

In the light of the foregoing I do find merit in this appeal. The trial court did not address itself to the gaps in the prosecution case as aforesaid and as a result erred in finding that the case had been proved beyond reasonable doubt. I find that conviction of the Appellant in the face of defence put forward was not safe. Consequently I allow this appeal. The conviction is reversed and the sentence is set aside. He shall be set free forthwith unless lawfully held and the cash bail deposited be refunded to the depositor. It is so ordered.

*Dated and delivered at Kerugoya this 22<sup>nd</sup> day of September, 2015.*

**R. K. LIMO**

**JUDGE**

22.09.2015

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Appellant present

Omayo for State present

John Muriithi Mwaniki present

**COURT:** Judgment signed, dated and delivered in the open court in the presence of the appellant in person and Omayo for State.

**R. K. LIMO**

**JUDGE**