REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 3 OF 2015

(An appeal from the Judgment of the Senior Resident Magistrate, Runyenjes in SPMCR. Case No. 573 of 2014 dated 16/1/2015)

ELVIS MURIUKI NJAGI..... APPELLANT

VERSUS

PROSECUTION…….....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Runyenjes Senior Resident Magistrate delivered on 16/1/2015. the appellant was charged and convicted of the offence of grievous harm contrary to Section 234 Penal Code and sentenced to six (6) years imprisonment. Being dissatisfied with the judgment the appellant lodged this appeal.

The following grounds support the appeal:-

1. *The magistrate erred when he failed to consider that the appellant was not mentioned in the initial report at the police station.*
2. *The magistrate erred when he acted upon evidence of recognition which was not cogent.*
3. *The magistrate erred in not considering that the evidence of the doctor was not reliable.*
4. *The magistrate erred when he failed to consider the violation of Section 272 and 302 of the Criminal Procedure Code.*
5. *The magistrate erred when he failed to give the defence adequate consideration and failed to consider the provisions of Section 169(1) of the Criminal Procedure Code.*

The appellant in his submissions argued that the prosecution did not prove the case beyond any reasonable doubt. He contended that the magistrate relied on uncorroborated and contradictory evidence. He further argued that there was contradictory evidence as to the location of th injury. PW4 stated that the injury was on the left upper limb between the third and the last digit. PW1 and PW2 stated that the complainant was injured on the left finger.

PW1 testified that she was injured at 4.00 p.m. while PW2 indicates the incident took place at 5.00 p.m. The appellant said that he was not armed with a panga. He argued that vital witnesses were not summoned to give evidence and that the magistrate rejected the evidence on weak reasons. It was also contended that the charge sheet did not contain the word “panga” or “rungu”.

Ms. Nandwa the counsel for the respondent submitted that PW2 was witnessed PW1 being cut by the appellant. She argued that the prosecution had proved all the elements of the offence of grievous harm and that PW1 was injured by the appellant. The incident occurred day time at around 4.00 p.m. when

there was enough light. PW1 and PW2 stated that they were able to identify the appellant positively.

The respondent further argued that the difference in the time of the offence has not caused the appellant injustice in any way and it is curable under Section 382 of the CPC. The allegation that medical evidence was not sufficient is proved wrong by the evidence of PW4. The State argued that the appellant has not said what was wrong with his mode of arrest. He was arrested by members of the public which is allowed under Section 34 of the CPC.

The prosecution called all the witnesses that were important. Section 143 of the evidence act provides discretion on the number of witnesses to call to prove a point. The general rules of framing a charge are provided for under Section 137 of the CPC. The particulars of the weapons the appellant was armed with should not be part of the charge sheet.

The duty of the 1st appellate court was explained by the Court of Appeal in *NJOROGE VS REPUBLIC [1987] KLR 19* that:-

> *As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570*

PW1 testified that on 29/11/2014 at 4.pm he was at home when he heard noise coming from behind her house. She went to check what was happening and found the appellant beating an old man. The appellant abandoned the old man and started beating her. He had a panga which he used to cut PW1 on the left finger. There were other people at the scene who witnessed the assault. The appellant was armed with a panga and a rungu. PW1 further said that there was no grudge between her and the appellant. In cross examination PW1 stated that the appellant was aiming to cut her neck but she blocked the panga with her left hand and was cut on the left finger.

PW2 testified that on 29/11/2014 at 5.00 p.m. she was at home preparing supper. She heard people making noise. She rushed to where the screams were coming from. The lady who was screaming (PW1) informed her that the appellant was another person. PW2 asked the appellant what was wrong and he threatened to harm her together with other people at the scene.

PW2 said the appellant was armed with a panga and he approached the crowd and raised the panga and cut PW1 on the left hand on the small finger. The people at the scene restrained the appellant and the sub chief came and arrested him.

The testimony of PW3 the investigating officer was that on 29/11/2014 at 5.30 p.m. he was at the station when the complainant came in the company of 6 members of the public escorting the accused. The members of the public had a panga and a rungu which they said the appellant allegedly used on the complainant. Her left hand small finger was cut with the panga. He booked the report and referred the complainant to hospital and issued her with a P3 form which was duly filed. He produced the rungu and panga as exhibits.

PW4 the Clinical Officer testified that according to the P3 form filed on 30/11/2014 for the complainant, she sustained a deep cut wound on the left upper limb between the last and the third digit measuring 7 cm. The age of the injury was 2 days old and that the weapon used was a sharp object. The wound was stitched. PW4 classified the degree of injury as maim based on the fact that the injury was would affect the last digit for a long time in future.

The appellant in his defence stated that the complainant wanted to have a love affair with him but he refused because she was a married woman. On the material day, the complainant found him drinking in a bar and asked the appellant to go to her house and have sex with her but the appellant declined. On his

way home, the complainant followed him with a group of people and alleged that he had cut her. They arrested him and escorted him to the police station. He denies that the panga recovered from him and he saw it with the bar watchman. He claimed to have been framed.

The appellant was charged with the offence of grievous harm contrary to Section 234 of the Penal Code. Section 234 provides that:-

> *"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."*

The appellant complained that he was not mentioned in the initial report. The record shows that the appellant did not cross-examine PW3 the investigating officer on the contents of the Occurrence Book (OB). The appellant never requested for the OB to be produced in court during the hearing. This confirms that the issue never arose during the trial and cannot therefore be dealt with on appeal.

The appellant cited Section 272 and 302 of the Criminal Procedure Code which he claimed were violated by the trial magistrate. Section 272 was repealed while Section 302 relates to cross-examination of witnesses. I have perused the proceedings and noted that the appellant was given his right of cross-examining all the witnesses who testified. His allegation that Section 302 was violated has no basis.

The appellant challenged the evidence of recognition which he argued was not cogent and cited Section 137 of the Criminal Procedure Code in that regard. This Section contains the rules for the framing of charges and informations. It has got nothing to do with evidence of identification or recognition.

PW1 and PW2 confirmed that the incident took place during daytime which was not disputed by the appellant. He did not raise the issue of identification when he cross-examined the two witnesses. The appellant was arrested at the scene by people who were present when he committed the offence. The evidence of PW1 and PW2 as well as that of PW3 PC Kazungu Charo (who re-arrested him from the members of public) is sufficient proof that it is the appellant and not any other person who assaulted PW1.

The evidence of the doctor PW4 was challenged as being inadequate. The doctor testified that he examined the complainant on 29/11/2014 and found she had blood stained clothes and pain on the left side of the neck. She had a deep cut on the left upper limb between the last and the third digit measuring 7 cm deep. The injury was classified as “maim”. The approximate age of the injury was two days confirming that the complainant was injured on 29/11/2014.

PW4 was an expert witness whose evidence can only be challenged by that of another expert. This was not done when the appellant gave his testimony. The evidence of PW4 is therefore sufficient to prove that PW1 sustained injuries of grievous nature.

It was the appellant’s contention that his defence was not given adequate consideration. It is clear from the judgment that the trial magistrate considered the defence of the appellant and found it not plausible. He said that *“the accused defence that he has just been framed by PW1 because he declined to have sex with her does not hold water.”*

The complainant testified that she heard screams from behind her house and went outside just to find the appellant beating an old man. He was armed with a panga and on seeing the complainant, he turned on her cutting her with the panga on the left hand. PW2 was attracted by the screams of the complainant and on arrival at the scene, she saw the appellant raise the panga and cut the complainant on the left finger. The evidence of the prosecution was well corroborated and was not shaken by the defence of the appellant that he was framed.

The appellant in his submissions raised some additional grounds. He argued that the evidence of the prosecution was contradictory as to the place of injury. He said that PW4 said that PW1 was injured on the left upper limb while PW1 and PW2 said that the injury was on the left finger. The P3 produced by

PW4 was very clear that the injury was on the left upper limb specifically between the second and the third digit. The left finger is of course on the left hand. The hand is one of the upper limbs. I find no contradiction in the evidence of PW1 and PW2 on one part and that of PW4 on the other part. The discrepancy on the time of incident between PW1 and PW2 of 4.00 and 5.00 p.m. is a minor one and of no consequence to the prosecution's case.

The appellant argued that some vital witnesses were not called to testify. The prosecution has discretion under Section 143 of Criminal Procedure Code to call the number of witnesses they deem fit. The quality of evidence is not based on the number of witnesses but on the credibility.

The allegations that the panga was planted on the appellant was dislodged by the evidence of PW1, PW2 and PW3 who clearly described how he was arrested. From the evidence of PW1 and others, the appellant's defence that he was on his way home did not add up. Neither did the allegation that PW1 had approached him for sexual favours make sense. PW1 would not have managed to convince PW2 and several member of public to join in the frame up, if any. The doctor confirmed the existence of the injury which PW2 saw being inflicted by the appellant.

It is not necessary in a charge of this nature that the weapon used during the assault should be named in the charge sheet. Such particulars normally come from the evidence of the witnesses.

The appellant argued that the provisions of Section 169 (1) of the CPC were not complied with. The section provides:-

> (1) *Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*

On perusal of the judgment, it is evident that the trial magistrate included issues for determination and that the judgment was prepared in the language of the court. It contained reasons for determination and was duly signed and dated by the magistrate. The allegation that the magistrate did not comply with Section 169(1) of the CPC is not true.

It is my considered opinion that the prosecution’s evidence against the appellant was overwhelming and that the conviction was safe.

The appellant was sentenced to six years imprisonment. The maximum sentence under Section 234 of the Penal Code is life imprisonment. The sentence was not only reasonable but within the law.

I find no merit in this appeal and it is hereby dismissed. The conviction and sentence are hereby upheld.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF NOVEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Nandwa for Respondent

Appellant