REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.34 OF 2009

BETWEEN

JOHN LITUNDA NGAIRA ……APPELLANT

AND

REPUBLIC …….RESPONDENT

(Being an appeal from conviction and sentence in Kakamega CM.CR. Case No.1179 of 2006 dated 05/03/2009 by Hon. P.O. Ooko, RM)

J U D G M E N T

Introduction

1. The Appellant herein was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code (cap 63 Laws of Kenya). The Prosecution alleged that the appellant on the 13th day of February 2006 at Ilanji village Mukomari sub location in Kakamega district within Western province unlawfully assaulted CHARLES ISUTSA thereby causing him actual bodily harm.
2. The appellant was found guilty as charged, convicted and fined ksh.20,000/= in default he was to serve one (1) year imprisonment. He was aggrieved by the conviction and sentence and has filed this appeal. In his petition of appeal dated 16/03/2009, the appellant raised the following issues:-

1. That the trial Magistrate erred in law in failing to take into account the fact that the medical evidence was inconsistent with the injuries which the complainant allegedly suffered.
2. That the trial Magistrate erred in law in failing to make an adverse inference of key witnesses mentioned by the Prosecution who were not called by the Prosecution to testify.
3. That the trial Magistrate erred in failing to make a finding that the Prosecution had not discharged its evidentiary burden to the required standards.
4. That the trial Magistrate erred in law in basing his sentencing of the appellant on inconclusive medical evidence.
5. That the trial Magistrate erred in failing to take into account the fact that the evidence on record pointed towards a scuffle and/or a fight rather than an assault.
6. That the sentence imposed upon the appellant was in the circumstances of the case harsh.

3. The appellant now wants this appeal allowed, conviction and sentence quashed and/or set aside.
4. The appeal was canvassed by way of written submissions. It is only the appellant's submissions that are on record as the State did not intend to file any submissions. As a first appellate Court,

this Court is duty bound to subject the entire evidence adduced before the trial Court to a fresh evaluation and analysis and draw its own conclusions, remembering only that it neither saw nor heard any of the witnesses and so cannot comment on their demeanor. In this regard, this Court is guided by the principles set out by the Court of Appeal in the case of **Kiilu & Another –vs- R [2005] 1KLR 174** where the Court of Appeal held that:-

"an appellant on a 1st appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrates findings should be supported. In doing so, it should make allowance to the fact that the trial Court has had the advantage of hearing and seeing the witnesses….."

The Prosecution Case

5. Briefly the Prosecution case was as follows: On the 13/02/2006 at about 10.00a.m PW1 Charles Mukumba Isutsa was informed by PW2, John Mbarasi that he (PW2) had seen the appellant digging the road and uprooting the trees that were there. The road passed through PW1's land. PW1 then went to the appellant and asked him why he was uprooting his trees which were of different species and his fencing posts. There were many people who were digging the road using pangas and jembes. The appellant who had a panga then asked PW1 to move away but before PW1 could do anything he (appellant) hit him once with the back of the panga. PW1 then tried to hold the panga but the appellant pulled it and it cut his (PW1) fingers. PW1 fell on the ground and appellant continued to assault him and he sustained more injuries. He was assisted by people who were around him and his family members. He reported the case at Kakamega Police station and was issued with a P3 form "MF I 1". He was treated at Kakamega Provincial General Hospital. He identified the appellant in Court. He had also earlier reported the matter to the area chief who in turn summoned the parties to his office. The appellant agreed to pay PW1 kshs.10,000/= but later the appellant refused to do so.
6. On cross examination PW1 told the court that he did not have any problem with the digging of the road but was not happy with the actions of the appellant. He maintained that he did not have anything like a walking stick when he went to the scene and further that he did not attempt to assault the appellant. He mentioned a few of the people who were at the scene.
7. PW2 JOHN MBARASI was the one who informed PW1 of what was happening as people were digging the road. Together with PW1 they went to the road where they met the appellant at the scene. After a short while PW2 claimed that he saw appellant who had a panga hit PW1. As the appellant was about to hit PW1 again PW1 held on to the panga which cut his fingers. PW2 said he saw PW1 falling down to the ground while the appellant continued assaulting him. PW1 bled from the face and hands. PW2 went away after rescuing PW1. He recorded his statement at Kakamega Police station.
8. On cross examination PW2 explained that he had known PW1 and the appellant for a long time. He maintained that the trees that belonged to PW1 had been uprooted and cut into pieces. He also told the trial Court that he had informed the complainant that the appellant had uprooted his trees which were on the road. He confirmed PW1's statement that he did not carry anything like a walking stick when he went to the scene and that there was no struggle between PW1 and the appellant. He explained that appellant hit the complainant by surprise and that complainant did not retaliate.
9. FRANCIS WASIKE the Clinical officer from Kakamega Provincial General Hospital testified as PW3. He produced the P3 form for the complainant. He confirmed that he treated the complainant on the 13/02/2006 and that the injuries sustained were bruises on the head, swelling on the back and panga slap marks. He also stated that the complainant was coughing blood sputum and had a cut on the left ankle. The injuries were about five (5) hours old which he classified as harm. The P3 form was produced and marked as "PExhibit 1".
10. On cross examination, PW3 maintained that he was the one who treated the complainant and filled

the P3 form. PW4 DANSON MUMARASI an employee of the complainant was also at the scene and had been instructed by the employer to remove the trees that had fallen down. As he was doing so he saw the appellant hit the complainant with a panga. The complainant then held the appellant's panga and was injured on his finger. The complainant then fell down and the appellant continued to step on him. PW4 testified that the appellant had injuries on the face and leg. They were separated by people who were repairing the road. He identified the appellant who was his neighbour.

11. PW4 confirmed on cross examination that he worked for the complainant and that the incident took place at 10am. He also told the Court that the people who were at the scene are the ones who rescued the complainant and also maintained that the two were not fighting and had no differences. PC WAINAINA No.69549 attached at Mathare police station but formerly at Kakamega police station crime branch section testified as PW5. He received the assault report from the complainant on the 13/02/2006 at 3.30p.m. He recorded the complainants statement and that of witnesses and issued the complainant with a P3 form. He testified that the complainant was treated at Kakamega P.G.H. He used the area chief of Ilesi location to assist him arrest the appellant. He thereafter preferred the assault charge against the appellant. At the close of the prosecution case, the trial Court found that a prima facie case had been established and put the appellant on his defence.

Defence Case

12. The appellant gave sworn testimony and called one witness. He denied assaulting the complainant. He testified that he was supervising the construction work of a road from Mukumu Primary school to Yenga primary school which was being repaired. He was in charge of counting the casual workers. On the 13/02/2006 when he went to the site he found that the complainant had chased his workers for no reason. He informed the chief but nothing was done. So he decided to proceed with the work on the 13/02/2006. He claimed to have been warned by his workers that the complainant was seen carrying a club near the site and may attack him. He also claimed that the complainant had a panga.
13. The appellant also testified that they struggled with the complainant when the complainant attempted to assault him and he wrestled him down. It was then that his fellow worker Christopher Sechero separated them. Later he was summoned by the chief on the 15/02/2006 and ordered to pay kshs.10,000/= for assaulting the complainant but he refused to pay. He reported the matter to the D.C. on 21/03/2006 and a letter was written to confirm the allegations see "MFI – D1" and "MFI – D2". He claimed that instead of responding to his letter the Chief went and arrested him on the 20/04/2006. He was later arraigned in court and charged with the offence before Court.
14. LABAN ANZIBO MANYIENYA DW1 told the trial Court that the appellant was their supervisor when they were constructing a road belonging to the County council. He testified that when they were working on the road they were stopped by the complainant from proceeding with the construction during an interval when the appellant had gone to get money for them. They stopped the work. On 13/02/2006 they were told to meet with the supervisor at 2.00p.m. They proceeded with the work and stopped at the complainants place. He then saw the complainant who was armed with a panga and a club and informed the appellant about it. It was then that the appellant went and grabbed the complainant and they both fell down. He testified that he never saw the appellant assaulting the complainant on the said date and further that the two never fought. He was later summoned by the area chief when the chief ordered the appellant to pay kshs.10,000/= to the complainant. They went to the D.C. to complain and were given letters "MFI D1 and D2".
15. On cross examination DW1 reiterated that on the 11/02/2006 the complainant warned them that if they proceeded with the construction of the road he would beat somebody who would be taken to mortuary and complainant would be taken to court. This statement annoyed them and they left the work. He explained that the complainant had fenced his plot with Cyprus trees and his (complainants) home was close to the road they were constructing. He testified that no single tree was to be uprooted. He told the Court that he was the one who informed the appellant of what was happening.

Submissions

16. As earlier stated it is only the appellant's Counsel who filed submissions. A brief analysis of the submissions is as follows: The appellant took issue with the injuries allegedly sustained by the complainant vis-a-vis those reflected in the P3 form which they say were inconsistent. Counsel also submitted that it was wrong for the trial Magistrate to base his sentencing on inconclusive medical evidence which showed that PW3 opined that the weapon used was a blunt object yet the injuries show that PW1 suffered a cut.
17. Counsel in also took issue with persons mentioned by the Prosecution witnesses who were not called to testify. It was submitted that the evidence of contradictions regarding alleged injuries and evidence of a scuffle which ensued between the Appellant and PW1 were apparently ignored thereby shifting the burden of proof. Lastly, that in light of the defence case and the evidence of a struggle a conviction on assault and sentence meted were not justified.

Analysis and Findings

18. This Court has considered the submissions by Counsel for the accused and the grounds of appeal. The Court has re-evaluated the evidence on record and makes the following findings and analysis. Even though the State did not file any submissions, this Court has the duty to put the evidence to a fresh scrutiny and arrive at its own determination. In **Odhiambo –vs- Republic [2005]** 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**."
19. The alleged offence herein took place on the 13/02/2006 in broad daylight. PW1 and the appellant are people who knew each other as they were neighbours. Under Section 43 of the evidence Act, no particular number of witnesses is required to prove a fact. The Court re-stated this fact in the Court of Appeal case at **Eldoret C.R.A No.257 of 2009 Benjamin Mbugua Gitau –vs- Republic.** Generally the Prosecution has the discretion to call as a witness and it is not for the defence to determine that issue for them. 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 prosecutions duty is to call 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] E.A 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."

20. In this 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 dangers if the offence was committed under difficult circumstances that did not favour clear and positive identification.
21. It was clear that PW1 was not alone at the scene but there were other people like PW2, PW4 and even DW1 who allegedly intervened in the matter. No reason was given why none of the other people mentioned by the Prosecution witnesses and who were present at the scene were called as witnesses. As above stated the Prosecution has the discretion on who to call and who not to call to testify as a witness.
22. I find therefore that for the above reason ground 2 of the petition of appeal must fail. On grounds 1 and 4 of the petition of appeal, the issue to be proved is whether the complainant sustained injuries as a result of the assault. In **John Oketch Abongo –vs- Republic Kisumu CA N.CR. No.4 of 2000 [2000] e KLR** the Court of Appeal dealt with this issue as follows:

"whether or not grevious harm or any other harm is disclosed must be a matter for the Court to find from the evidence led and guided by the definition in the Penal Code. A Court will be assisted by Medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the Courts have accepted and gone by the findings and opinions in the medical evidence. But in appropriate circumstances, the Court is at liberty to form its own opinion having regard to the evidence before it as to the nature and classification of the injury."

23. I am satisfied that even in the absence of the medical evidence, the fact that PW1 was injured by the appellant was proved by the testimony of the witnesses. PW2 did not properly describe the finger which was injured. It was PW3 who treated the complainant and who was best placed to know which finger was injured. The complainant had multiple cuts and bruises on his body. I do agree with the learned trial Magistrate that a cut wound can be sustained by a blunt object thus the argument in the appellant's submissions cannot stand. I also do find that there are no contradictions with regard to the injuries sustained by the complainant.
24. The trial Court took into account both the evidence of the Prosecution and that of the defence and found that the Prosecution had discharged its evidentiary burden to the required standard. In its judgment the trial Court found that this was not a case of affray since DW1 stated that both PW1 and the appellant never fought which evidence corroborated that of PW2 and PW4 who also stated respectively that there was no struggle and fight between PW1 and the appellant.
25. It is unfortunate that although the appellant filed his appeal timeously the same was not heard within the period of one (1) year which he served in prison. However even if the same had been heard within that time it could not have succeeded because of the reasons above stated.

Conclusion

26. The upshot of what I have said above is that this appeal has no merit on both conviction and sentence. The same is hereby dismissed in its entirety. I confirm the judgment of the learned trial Court.
27. Orders accordingly. Right of Appeal 14 days.

Judgment delivered, dated and signed in open Court at Kakamega this

11th day of November 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Kundu for Amasakha for Appellant

Mr. Omwenga (present) for Respondent

Mr. Lagat - Court Assistant