



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NOS. 227 AND 228 OF 2012
(CONSOLIDATED)

BETWEEN

RONALD MORACHU MOKAYA 1ST APPELLANT

DOUGLAS OMWENGA MOKAYA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by T.A. Sitati,

RM dated 25th September 2012 in Kehancha Criminal case No.45 of 2012)

JUDGMENT

Introduction

1. The appellants herein Douglas Omwenga Mokaya and Ronald Morachu Mokaya were the 1st and 2nd accused at the SRM's court at Kehancha in criminal Case No.45 of 2012. They were charged with maim contrary to section 234 of the Penal Code. The particulars of the charge were that on 11th January 2012 at Nyamaharaga sub location in Kuria West District within Migori County, jointly with others not before court maimed Richard Onyonka, inflicted him [with injuries] using a metal bar on the right arm.

2. They pleaded not guilty to the charges and trial ensued. The prosecution called 6 witnesses. No.219897 APC Richard Onyonka was PW1, Rebekah Cherono was PW2 while Zachariah Sando was PW3, Josephat Sagwe, a clinical officer at Gucha South District testified as PW4, while No.65331 PC Festus Musembi of Isebania police station and Geoffrey Machoka testified as PW5 and PW6 respectively.

Facts and Evidence

3. The facts and the evidence of this case are found in the testimonies of the 6 prosecution witnesses. PW1 (Onyonka) stated that at about 7.00 p.m. on 12th January 2012, he was on his way home from a funeral at the home of one Julius Matagaro. He was in the company of PC Kimani but at the junction of Kehancha-Isebania road, PC Kimani went his way and left Onyonka to proceed.

4. At the material time, he saw 5 men standing in front of him, two of whom were the appellants herein.

The 2nd appellant is Onyonka's step-brother. The 2nd appellant was armed with a rungu. On seeing the 5 men, Onyonka decided to change direction and walked towards Sunshine area. As he got to Sunshine area, he again saw the 5 men, ahead of him. Though Onyonka sensed danger, he walked on, using the farthest side of the road. Onyonka said it was not very dark yet.

5. Suddenly, Omwenga, the 2nd appellant went for Onyonka and hit him hard on the left shoulder, sending Onyonka to the ground. As soon as Onyonka fell to the ground, the 1st appellant and the other 3 men attacked him. The 1st appellant (Ronald) bit Onyonka on the chest. He was left unconscious in a ditch.

6. Later, and after his family had been informed of the attack, Onyonka was taken to Isebania sub-district hospital where he was treated and discharged. It was Sgt. Kimani who rescued him. On the following day which was 13th January 2012, Onyonka was referred to Ombo Mission Hospital for X-ray examination.

7. At the Isebania Sub District Hospital, Onyonka was attended to by Geoffrey Machoka, PW6 (Machoka) between 7.00-8.00 p.m. Upon examination Machoka found that Onyonka had swellings on the upper right shoulder and left shoulder. The neck had no injuries but Onyonka complained of pain in the neck. Machoka also told the court that Onyonka had a bite mark on the chest. Machoka prepared treatment notes for the treatment given on both 12th January 2012 and 13th January 2012. These treatment notes were produced as **P. Exhibit 2**.

8. A report of the attack was made to Isebania police station. The report was received by PC Kimchir (not called as a witness) who was also the Investigating Officer in the case. It was Number 65331 PC Festus Musembi, PW5, who testified on behalf of PC Kimchir. According to the Investigating Officer's report, Onyonka identified his assailants when he made the first report to the police.

9. During cross examination by Omwenga, Onyonka denied that he and Omwenga trafficked in narcotics from Tanzania. He also denied that Omwenga was mad and said that since he had no grudge with Omwenga, he could not say why Omwenga attacked him.

10. In response to questions from Ronald, Onyonka testified that following a prior dispute, he (Onyonka) had chased away Ronald from home where Ronald had been Onyonka's caretaker. Onyonka also clarified that he and Ronald were the sons of brothers. Onyonka denied Ronald's suggestion that he had framed Ronald because Ronald had refused to corner Omwenga aka kihara over an alleged debt owed by Omwenga to Onyonka.

11. PW2, Rebekah Cherono (Rebekah) testified that on the evening of 12th January 2012 at about 6.00 p.m., she was in her home cooking when a young man known as Shaddy came knocking hurriedly at her door and informed her that her husband, Onyonka, had been attacked by thugs while on his way home. She accompanied Shaddy to the scene which was some ten minutes away on foot. On arrival at the scene, Rebekah said she saw 2 men who were standing at a distance, namely Ronald and Kihara (Omwenga) Onyonka was bleeding from the forehead and right side of the face while he groaned in pain. She administered First Aid to her husband. When Rebekah questioned the 2 appellants as to what had happened to Onyonka, none of them answered her. That is when she called Sgt Kimani for help. Sgt Kimani arrived later accompanied by 2 police officers and took Onyonka for treatment. According to Rebekah, Onyonka told her that a total of 5 men including the 2 appellants herein had attacked him. Rebekah confirmed that while Omwenga was a casual labourer in the neighbourhood, Ronald was Onyonka's step brother, and that there had been simmering differences between Ronald's and Onyonka's families.

12. During cross examination by the appellants, Rebekah denied that she was in a conspiracy with Onyonka to give false testimony against the appellants.

13. Zakariah Mwita Sando, PW3 (Mwita) a boda boda operator within Sirare town testified that on 12th

January 2012 at about 7.00 p.m., he dropped a passenger home near a place called Border Point Hotel. As he passed near Sunshine Academy, he saw some 5 men standing in the middle of the road, two of whom were the appellants herein, and all the 5 men were armed with what appeared like sticks. As the motor cycle lights got nearer to where the 5 men were, they scattered to the side of the road. On the way back from dropping his passenger, using the same route via Sunshine Academy, Mwitwa heard the voice of a man groaning in pain coming from the ditch. The man was asking for help in Kiswahili and asked Mwitwa to go and call the Onyonka family. Mwitwa complied and brought Rebekah to the scene. Mwitwa went away from the scene after the police took away Onyonka to the hospital for treatment.

14. During cross examination by Omwenga, Mwitwa stated that his account concerning the case against the appellants was correct; he also stated that he was not aware of any business transactions between Onyonka and Omwenga. Mwitwa also denied that the motor cycle Reg. No. KMCP 997P, which Mwitwa operated as boda boda was used for ferrying bhang for Onyonka.

15. In response to Ronald's questions, Mwitwa denied that he was in a business relationship with both Onyonka and Omwenga. He also denied that he knew that Onyonka trafficked in narcotics.

16. In his sworn defence, Ronald told the court that on 11th January 2012, he was at a construction site where he worked as a mason. At about 3.00 p.m., Onyonka called him on mobile and informed him that he (Onyonka) had differences with Omwenga over money, and that he was feeling threatened. That Ronald advised Onyonka to report the matter to the police. It was only later he was informed that Onyonka had taken a P3 form and that he (Onyonka) had named Ronald as one of the people who had attacked him (Onyonka).

17. During cross examination, Ronald told the court that Onyonka was involved in underhand dealings and that he and Onyonka had differed over many issues. He also said that Onyonka was framing him because of these many differences. In answer to questions from Omwenga, Ronald stated that at one time Omwenga had complained to him (Ronald) that Onyonka had refused to pay Omwenga his Kshs.50,000/=.

18. Ronald called 2 witnesses. DW1 was Daniel Mokaya who stated that on 12th January 2012 while he, Onyonka and Omwenga were drinking together, Omwenga demanded some cash payment from Onyonka. The two ended up fighting in the bar, but after DW1 intervened, Onyonka and Omwenga warmed up to each other again.

19. During cross examination, DW1 stated that no-one intervened in the fight between Onyonka and Omwenga and that after the fight Onyonka sought Ronald's intervention by calling him, but Ronald did not show up. He also stated in answer to a question by Omwenga that the fight took place at a chang'aa den and not at a bar in the town.

20. DW2 was Kepha Okiaga Ombogo who stated that he was not present when the fight between Onyonka and Omwenga took place. He also told the court that Onyonka telephoned him (on a date that is not indicated) and told him he had been assaulted by Ronald. From the testimony, DW2 is a brother to both Onyonka and Ronald. Later Ronald called him and informed him that he had been arrested. DW2 asked the court to allow the family to withdraw the dispute from court.

21. DW3 was Rhoda Nyaboke who told the court she was the mother to both Onyonka and Ronald. She confirmed that Onyonka was injured and that the dispute was a small issue that started at home and that according to Onyonka, his attackers were unknown. Although DW2 stated that he was a brother to both Ronald and Onyonka, DW3 stated that she was wife to DW2, although their relationship is very much strained. She also stated during cross examination that Onyonka and Ronald used to quarrel frequently, even over very small issues.

22. Omwenga also gave sworn testimony and denied the charge against him. He testified that he and Onyonka are business partners and that when he went to collect his share of money from the business on 18th December 2011, Onyonka refused to give him the 50,000/= due to him and again on 8th January

2012 Onyonka refused to give him the money. On the 23rd January 2012, he was arrested by AP's from Sirare and taken to Isebania police station. He denied any knowledge of the alleged events of 11th January 2012.

23. During cross examination, Omwenga told the court that Onyonka was his business partner in trafficking narcotics though he admitted that such business was contraband. He said that on the day Onyonka was attacked he (Omwenga) was nowhere near the changaa den where the alleged fight took place, although he admitted that he did not controvert the evidence by DW1 that he (Omwenga) fought with Onyonka at a changaa drinking den on 12th January 2012 at about 4.00 p.m.

24. DW4 was Richard Masera. He testified that on 11th January 2012 while he was with Ronald, Ronald received a telephone call from Onyonka and that Onyonka requested for a knife from Ronald so he could use the same against a person who had shown aggression to him (Onyonka). On the following day Ronald informed DW4 that Onyonka had differed with Omwenga but that the two had thereafter buried the hatchet.

25. At the close of the hearing, the trial court carefully considered the evidence on record and found that the prosecution had proved the charge of assault contrary to **Section 251** of the **Penal Code**. The two appellants were accordingly found guilty of the said offence, convicted and sentenced to five (5) years imprisonment.

26. Both appellants being aggrieved by both conviction and sentence preferred the appeal to this court. The two appeals were consolidated by an order of this court made on 17th October 2013. In his home made petition of appeal, the 1st appellant, Ronald raised the issue of identification and contended he was not conclusively identified at the scene; secondly that the prosecution evidence was contradictory and finally that the trial court failed to consider his defence and mitigation.

27. The 2nd appellant herein, Omwenga, in his home made petition of appeal appealed against both conviction and sentence of the lower court on grounds similar to those raised by the 1st appellant.

28. When the matter came up before me on 17th October 2013, the 1st appellant Ronald Morachu Mokaya submitted that he was appealing against lower court's judgment because there was a complaint that he was not complainant's brother but he was. Secondly he submitted that during the trial they were asked if they could compensate complainant, and given time to think about it but on coming back to court, they were jailed. Thirdly he submitted that when he asked for proceedings in the lower court he was told that he had to pay for them. Ronald also submitted that the source of light PW3 had used to identify them was questionable. He also questioned PW2's testimony as to how they could attack the complainant and still remain at the scene long thereafter to be found by PW2.

29. The 2nd appellant Douglas Omwenga Mokaya submitted to the court that the complainant was his partner in illegal business, that the debt he had gone to ask for on 18th December 2011 was the reason for Onyonka framing him and that he was arrested by the police on 11th January 2012, taken into custody before being taken to court for charges he knew nothing about.

30. Secondly, on sentence Omwenga submitted that he did not know why he was sentenced to five years imprisonment. He also wondered why he was charged together with 1st appellant when he did not know him at all.

31. Regarding testimony of the doctor, Omwenga submitted that the said evidence contradicted the injuries suffered by complainant especially concerning the location of the human bite allegedly inflicted by Ronald. Omwenga also submitted that PW4 was not the arresting officer, nor was he the investigating officer.

32. The appeal was opposed. Mr. Imbali for the Director of Public Prosecutions submitted as follows:-

- the prosecution evidence, especially the testimony of PW1 was clear that he was bitten by Ronald on the chest.
- the appellants were found at the scene by PW2 after they had assaulted PW1.
- the evidence of PW3 was clear to the effect that the 2 appellants were both identified as being part of the gang of 5 that assaulted PW1.
- the 2 medical reports confirmed that PW1 had been injured during the attack.
- PW5 testified as the investigating officer.
- the issue of identification was well settled by the evidence of both PW1 and the appellants themselves who admitted knowing PW1 prior to the incident.
- there was sufficient light from the motor bike headlamps by which the 2 appellants were identified apart from the fact that according to PW1, the incident took place at about 7.00 p.m. when it was not yet dark.
- the alleged debt owned by PW1 to Omwenga led to Omwenga attacking PW1.
- the sentence imposed upon the appellants was lawful, being the maximum authorized by law.
- reduction of the offence from maim to simple assault was done in accordance with the law.

33. Mr. Imbali urged the court to find that the appeal had no merit and to dismiss the same.

34. In his reply to submissions by counsel for the Director of Public Prosecutions, the 2nd appellant Omwenga confirmed to the court that Mwita, Onyonka and Rebekah all knew him.

35. This being a first appeal, it is the duty of this court as the first appellate court to evaluate the evidence of the trial court afresh and come to its own independent conclusion. See generally **Okeno –vs- Republic [1972] EA 32, Pandya –vs- Republic [1957] EA 336 and Selle & others –vs- Associated Motor Boat Company Ltd & others [1968] EA 123.** In **Selle case**, the Court of Appeal for East Africa lay down the duties of the first appellate court in the following words by Sir Clement De Lestang:-

“Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Mohamed Sholan (1955) 22 EACA 275).

36. In addition to the above, a first appellate court is bound to weigh and consider the judgment of the trial court with a view to determining whether the findings therein can be supported.

37. This court has carefully reconsidered the evidence and evaluated it afresh. The court has also carefully weighed and considered the judgment of the learned trial magistrate as well as the submissions made by the appellants and the respondent at the hearing of the appeal.

38. From the above analysis, the issues that arise for determination are the following:-

1. Were the appellants clearly and positively identified during the attack or is this case a frame-up?
2. Were the sentences meted out to the appellants overly harsh in the circumstances?

39. With regard to the first issue, it was Onyonka’s testimony that the attack took place at 7.00 p.m. in the evening when it was not too dark. Ahead of him he noticed 5 men carrying sticks. In his evidence in chief he told the trial court that:

“I saw 5 armed men standing ahead of me I recognized 2 of them. Ronald and Omwenga. Ronald is my own brother – Step brother in fact the 4 men were armed with metal rods. Ronald had a rungu. It wasn’t dark.

---- suddenly Omwenga came at me and hit me hard on the left shoulder sending me to the ground thereafter the others joined him in the attack. Ronald bit me with his teeth on my chest.”

40. PW3’s evidence was also crucial in determining who attacked the complainant, he stated:

“when my motor cycle headlights, shone on them I saw them scatter to the side of the road. I recognized Douglas and Ronald among the 5 men. These 2 were known to me ---- As I neared the spot I had found the 5 men I heard a man groan in pain.”

41. PW6 the clinical officer who attended to the complainant confirmed the following during evidence in chief:-

“I recall attending to one Richard Onyonka on 12th January 2012 in the evening hours of 7 p.m. He complained of being assaulted by known persons. He had a swollen upper right shoulder region, left shoulder, neck showed no injuries but he complained of pain. I recorded this was a soft tissue injury. He had a bite mark on the chest.”

42. All the above testimonies by the prosecution witness confirm that the complainant did not only identify but recognized the people who attacked him. The evidence also confirms the extent of the injuries he sustained from the attack.

43. In Peter Musau Mwanzia –vs- Republic [2008] e KLR, the Court of Appeal sitting in Nairobi presided over by Tunoi, Bosire and Onyango Otieno JJA held:-

“The witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and trust to put a difference between recognition and example, that the suspect has been known to him for sometime is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in seeing the suspect at the time of the offence, can recall very well having seen him earlier or before the incident.”

44. In the case of Anjononi & others –vs- R[1980] KLR 59, the Court stated:-

“This was however a case of recognition, not identification of assailants. Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.”

45. After evaluating afresh all evidence adduced by the prosecution witnesses and taking into account the principles of recognition as enunciated in the above authorities, there is no shadow of doubt in my mind that the appellants were clearly recognized by both Onyonka and Mwita. The evidence given by the appellants herein went a long way in corroborating the case for the prosecution to the effect that the 2 appellants felt justified to settle scores with Onyonka for whatever reason. The defence witnesses did not shake the case for the prosecution against the 2 appellants. It is my finding that there was no fabrication of evidence against the appellants. The defence of alibi raised by the appellants is hollow and was easily displaced by the prosecution evidence.

46. On the issue of sentence, counsel for the state Mr. Imbali submitted correctly that the trial court reduced the charges in line with the evidence of PW4 who confirmed that the fracturing of the cervical bone was healing and therefore that was not a permanent disfigurement of any organ or bone.

47. However, in as much as a sentence of 5 years imprisonment is prescribed by the law, the trial court has to consider what appropriate evidence to give. In Makanga –vs- R. – criminal Appeal No.972 of 1983 (unreported) where it was held:-

“In determining what is the appropriate sentence to mete out, the court has to consider such factors as the nature of offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person and the fact that maximum sentence is intended for the worst offenders of the class for which the punishment is provided.”

48. Similar sentiments were echoed in Otieno –vs- Republic [1983] KLR 295 and Arissol –vs- R.[1957] EA 447 where it was held:-

“The general rule is that a maximum sentence should not be imposed on a first offender. It is wrong to depart from that rule even if on the evidence the accused person might have been convicted of a graver offence.”

49. Taking the above authorities into account, and considering the fact that the appellants were first offenders and the charges which they earlier faced were reduced from maim to harm it is my considered opinion that the sentence of 5 years imprisonment is overly harsh in the circumstances and the same ought to be reduced. Accordingly, I reduce the sentence to 2¹/₂ years imprisonment and such sentence shall run from the date the appellants were sentenced in the lower court.

50. Save to the above extent on sentence, the appeal on conviction is dismissed.

Dated and delivered at Kisii this 23rd day of January, 2014

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Both present in person for the Appellants

Miss Cheruiyot for the Respondent

Mr. Bibu - Court Clerk