REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO 19 OF 2014

Appeal from the original conviction and sentence by the Principal Magistrate (Linus Kassan, PM)

in the Criminal Case No. 410 at the Senior Resident Magistrate's Court at Wajir.

ABDULLAHI MOHAMED SHABELLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Abdullahi Mohamed Shabello, the appellant, was charged with grievous harm contrary to section 234 of the Penal Code. The particulars are that on 14th September 2012 at Wajir Township in Wajir East District within Wajir County unlawfully did maim to Fatuma Adow Mohamed.

The case for the prosecution was supported by evidence of four witnesses. The appellant was the only witness for the defence. The trial court found the case for the prosecution proved beyond reasonable doubt, convicted and sentenced the appellant to five years imprisonment. The appellant is aggrieved by the conviction and sentence and has come to this court on appeal.

Petition of appeal

The appellant has raised the following grounds of appeal:

i. The charge was not explained to the appellant in the language that he understands.

ii. The appellant was not positively identified.

iii. The evidence does not establish who arrested the appellant.

iv. The prosecution evidence is contradictory and inconsistent.

v. The investigations were poorly conducted.

vi. Crucial witnesses were left out.

vii. The trial magistrate relied on extraneous matters to convict the appellant.

Appellant's submissions

The appellant has submitted that the record does not show that there was an interpreter and the language used by the court and the appellant and that as a result of this omission the appellant was prejudiced.

On identification, the appellant submitted that there were contradictions in the description of the clothes the appellant is alleged to have been wearing; that the complainant told the court that the appellant was wearing blue jeans while PW2 said he wore dark brown jeans and black jacket; that due to these contradictions there was need for evidence of other eye witnesses to clarify the issue of identification. These witnesses were not summoned to testify.

The appellant submitted that the charge does not indicate the time when the alleged offence took place; while the charge sheet says it was on 14th September 2012, the investigating officer stated that the offence was committed on 15th August 2012 at 3.20am while the complainant said it was on 14th August 2012; that the mode of arrest was not established and that one Mohamed Muktar, an eyewitness did not testify.

Respondent's submissions

The respondent opposed the appeal. The learned state counsel submitted that the lower court record shows that the language used was Kiswahili and Somali; that the appellant used Kiswahili to cross examine the witnesses and fully participated in the proceedings and therefore there was no miscarriage of justice.

On identification, learned counsel submitted that the appellant was known to PW1 before the date of the offence and that the place was lit with electricity and that recognition is more reliable than identification (**Anjoni v. Republic [1980] KLR 89)**; that the contradictions in the clothes worn by the appellant does not go to the root of the case in respect to the identification of the appellant and does not weaken the prosecution's case.

It was further submitted that under section 143 of the Evidence Act no particular number of witnesses shall be required to prove any fact and that there is sufficient evidence of the witnesses who have already testified.

On contradictory evidence it was submitted that the dates are not contradicting since the offence was committed on 14th August at midnight; that PW3 clarified in cross examination that the offence was committed on 14th August 2012; that, 14th September 2012, the date appearing on the charge sheet can be attributed to typographical error and is curable under section 382 of the Criminal Procedure Code; that this error did not occasion a miscarriage of justice.

Evidence

Fatuma Adow Muhumed, PW1, told the trial court that on 14th August 2012 at midnight she differed with Fauzia. She said that at that time both were on a road near Ngamia Club and that the appellant "came from nowhere" and stabbed her on her breast. He ran away while Fauzia continued to beat her. She said she was assisted to Wajir District Hospital for treatment. On cross examination PW1 said she had come from Ngamia club and that she had seen the appellant enter the club and come out, stabbed her and ran away. She said there was electricity light.

Osman Mohamed Abdi, PW2, told the court that on 14th August 2012 he saw Fauzia and PW1 fighting. His story differs from that of PW1 on the sequence of events. He testified that Fauzia caused chaos in the club by throwing bottles around and was ejected from the club. She telephoned one Shabello and told him that people were attacking her. The said Shabello came and harassed patrons; that Fauzia walked out of the club with one Karish and that the appellant held the complainant and stabbed her on the chest and left

immediately; that the complainant was assisted to hospital by "bubu". PW2 said that the appellant was the Shabello called by Fauzia.

Police Constable Mwaka, PW3, puts the date as 15th August 2012 at 3.20am when he received a report of the complainant's stabbing by the appellant and issued her with a P3 form. On cross examination he said the date was 14th August 2012 at 3.20am. He said that one "bubu" assisted the complainant to the police station and that she was bleeding profusely when she arrived.

George Thiong'o, PW4 examined PW1 on 14th August 2012. He noted the clothes were soaked in blood and she had a deep cut on the mid right side of the heart. He classified the injury as maim.

In his defence the appellant denied stabbing PW1. He testified that he was at home that evening and that PW1 was "fixing" him because of jealousy after he had refused to marry her.

Determination

As required of this court while sitting on first appeal, I have examined and evaluated all the evidence adduced in the lower court afresh. On the issue of language I have compares the typed proceedings with the handwritten ones. On 14th September 2012 when the plea was taken, the trial court read over the proceedings and the same were explained to the appellant in Kiswahili language. He denied the charge. The typed proceedings failed to capture the fact that Kiswahili was used during plea taking and that the charges were read and explained to the appellant. The proceedings were conducted and translated in Kiswahili and Somali languages. I find the allegation on the language of the court has no merit.

On identification of the appellant, I have considered the evidence of PW1 and PW2. The appellant was someone known to PW1 before the date the offence was committed. PW1 said that the appellant was wearing blue jeans but did not state the colour of the shirt or jacket he was wearing. PW2 said the appellant was wearing a black jacket and dark brown jeans. Obviously there are contradictions on the colour of the jeans. I have considered this evidence against the admission by the appellant that PW1 fought with Fauzia. I have also considered the evidence that PW1 had been injured. My view is that although the evidence differs on the colour of the jeans, this is not fatal to the prosecution case. I find this evidence does not create doubt in my mind that the appellant was properly identified as the person who stabbed PW1. PW1 recognized him since he knew him before. PW2 as well saw him and recognized him.

Further, although PW1 and PW2 gave different sequence of events, their evidence touching on the stabbing of PW1 by the appellant, the person who did it and the part of the body this was done is consistent. Both agree it was the appellant was stabbed PW1. PW1 was not forthright concerning her presence in Ngamia Club and tried to deny that she was at the club drinking but this does not form part of the main issue which is that it is the appellant who stabbed her on the chest. I also find the evidence that a person referred to as "bubu" assisted PW1 to the police station and to hospital. PW3 confirmed this evidence that "Bubu" assisted PW1 all the way to the police station.

PW1 reported to PW3 that Shabello had stabbed her. PW3 confirmed that PW1 was injured above her right breast. PW4 the clinical officer who treated PW1 confirmed injuries on her chest and classified the degree of injury as maim.

I find that the appellant was positively identified as the person who inflicted a serious stab wound on PW1. The appellant was known to the two witnesses. Besides, he is said to have entered the club and walked out giving PW1 and PW2 adequate time to see and recognize him. Court was also told that there was electricity light at the scene. I find that the evidence proves beyond doubt that the appellant is the person who attacked PW1.

The evidence of PW3 shows that the appellant was arrested from Wajir District Hospital where he had been admitted with injuries. There is nothing wrong with the mode of arrest and I find no prejudice on the part of the appellant.

PW3 received the report of stabbing, effected arrest of the appellant and issued the P3 form to PW1. He also preferred the charges against the appellant. I find nothing wrong with this. In my view there is no prejudice on the appellant in the manner the police handled the case.

The appellant did not state which witnesses were left out. The prosecution called the witnesses it required to prove its case and it is trite law that no particular number of witnesses is required to prove a fact and finally, the appellant has not pointed out what extraneous matters he claims the trial court relied on.

On my part, I find that this charge has been proved beyond all reasonable doubt. I find the appellant's defence a mere denial and I hereby reject the same.

The dates when this offence was committed is said to be 14th August 2012. I note some discrepancies about the date quoted on the charge sheet. Since all witnesses referred to 14th August 2012 as the date the offence was committed, the error can only be attributable to a typographical one. This is not prejudicial to the appellant and is curable under section 382 of the Criminal Procedure Code.

In conclusion, I find that the appeal has no merit and uphold the conviction. The sentence under section 234 of the Penal Code is life imprisonment. The appellant was sentenced to serve five years and I find no reason to disturb the orders of the trial court. Consequently, the appeal is hereby dismissed. It is so ordered.

Dated, signed and delivered on 7th April 2014.

S.N.MUTUKU

JUDGE