

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 224 OF 2013

ANTONY BIDOLA ASHIOYA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the judgment of [L. N. KINALE, R.M.] in the Principal Magistrate's Court at Butere in Criminal Case No.322 of 2012 delivered on 13.12.2012)

J U D G M E N T

The appellant was charged with the offence of assaulting a police officer in due execution of his duty contrary to **section 253 (b)** of the **Penal Code**. The particulars were that the appellant *on the 19.12.2011 at Ebukwala village, Wambulushu sub-location, Kisa Central Location within Khwisero district in Kakamega the accused unlawfully assaulted No.22822 APC ERIC OKWACH a police officer who was in the due execution of his duty for the offence of stealing.*

The appellant was convicted and sentenced to serve three years imprisonment. The grounds of appeal are that the case was not proved, it is the complainant who caused injuries to the appellant, the trial court did not assess the circumstances of the case and that the sentence is harsh. During the hearing of the appeal the appellant urged the court to reduce the sentence. He is sick and he has been advised by the doctors to use sunglasses. One of his eyes is bad and he has no parents. His eye was perforated by the police officer who promised to pay him KShs.15,000/=. Mr. Oroni, State Counsel opposed the appeal and relied on the record of the trial court.

DOUGLAS MASONA, a registered clinical officer testified as PW1. He was based at the Khwisero Health centre. The complainant went to the Health centre on the 19.12.2011 having sustained cut wound on the head and left hand. He was stitched and other treatment administered. He produced the P3 form. **PW2 AP ERICK OKWACH** was the complainant and was based at the Khwisero District offices. He knew the appellant. On the 19.12.2011 he was on duty when they got information that someone had snatched the keys of a motorbike and wanted to burn the motorbike. He went to the scene with other officers with the reportee and saw the appellant who was the one who had taken the keys. The appellant started running away and they started running after him. The complainant was ahead and was catching up with the appellant when he slipped and fell as he was about to handcuff the appellant. It had rained. The appellant removed a sword from his trouser and attacked him. He was attacked and lost consciousness. He later found himself at the Khwisero District hospital. He was treated and discharged at about 11.00 p.m. the same day. His other colleagues were behind him and they are the ones who took him to hospital. The appellant escaped but was arrested after a long time as he had escaped from home. It is his further evidence that the appellant disappeared from home and went to Mombasa. He resurfaced and was arrested.

PW3 APC AYUB KANGU MUNIAFU was with the complainant. He testified that they went to the scene and the appellant started running as he knew them. The complainant was ahead and he slipped and fell as it had rained. The appellant assaulted PW2 and ran away. They took PW2 to hospital. **PW4 PATRICK OKWANA** was the one whose keys had been taken. He testified that he had taken PW5 on a motorbike to a funeral and when they were leaving the appellant confronted him and accused him of taking police officers to arrest them at their chang'aa den. The appellant took the keys of the motorbike and he pushed his motorbike manually to his home. PW5 later took the keys to his house the following day.

JOSEPH MUKOBA was **PW5**. He was carried by **PW4** on a motorbike and went for a funeral. The appellant whom he knew held the keys to the motorbike and threatened to burn it as it used to carry police officers to a chang'aa den and have the drinkers arrested. He tried to convince the appellant to give out the keys but he refused. He notified the police who went to the scene and the appellant started running away when he saw the police. One of the officers fell down and the appellant assaulted him and ran away. The keys dropped and he picked them. **PW6 CPL GEOFFREY KIBUR** was attached at the Khwisero police station. He investigated the case. The appellant was arrested on the 30.9.2012 and charged with the offence.

The appellant gave sworn evidence in his defence. He testified that on 19.12.2011 he went to a chang'aa den at about 4.00 p.m. Police officers went to the place at about 4.30 p.m. including the complainant. They demanded money and those who had KShs.500/= were released. He had no money and he was arrested. The complainant stepped on a stool and he fell down as he was hit on the head. He was also injured on his left eye and he was bleeding severely. The police called for a car and he was taken to Khwisero district hospital where he was admitted until 20.12.2011. The complainant promised to give him KShs.15,000/= and after he was discharged he kept on claiming that amount from the complainant. In September 2012 he was arrested and charged with the offence. He did not know that the complainant had taken a P3 form.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. It is the evidence of **PW2** that he was assaulted by the appellant when he tried to arrest him. **PW3** who is his colleague was present and witnessed the incident. It is the evidence of **PW2** and **PW3** that they knew the appellant. The incident occurred at about 5.00 p.m. **PW5** was also present at the scene and is the one who had called the police. The appellant contends that he was arrested at a chang'aa den and his eye was injured. The trial court noted that it is true that the appellant's eye was injured and I also had the advantage of seeing the appellant who seemed to have an injured eye. However, there is no proof that the appellant was injured by the complainant. The line of cross-examination when the two police officers testified did not mention anything to do with the chang'aa den. The issue of chang'aa den only arose in the defence. I do find that the defence did not disprove the prosecution case. It cannot be doubted that it is the appellant who assaulted the complainant. The appellant was arrested after a long time as he had escaped. I am satisfied that the case was proved beyond reasonable doubt and the trial court made the correct conclusion.

On the issue of sentence, I note that the trial court called for the Probation officer's report. The officer was of the opinion that the appellant was not likely to abide by the probation terms and he was not welcomed in the community. He is feared by his neighbours and he is termed as a jail bird by the administration. Although the appellant disputed the findings of the officer I do find that the sentence is not excessive and I will not review it. In the end I do find that the appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 24th day of September 2014

SAID J. CHITEMBWE

J U D G E