



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 50 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 194 & 195 OF 2012)

BETWEEN

CHACHA CHACHA KIHINGO 1ST APPELLANT

MARWA CHACHA CHACHA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 83 of 2012 at Principal Magistrate's Court at Kehancha, Hon. T.A. Temba, RM dated 27th July 2012)

JUDGMENT

1. The 1st appellant, **CHACHA CHACHA KIHINGU** is the father of the 2nd appellant, **MARWA CHACHA CHACHA**. They were charged jointly in the subordinate court for assault causing actual bodily harm contrary to **section 251** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 3rd February 2012 at Siabai sub-location in Kuria East District within Migori County assaulted **PAUL MARWA CHACHA** thereby occasioning him actual bodily harm.
2. The appellants appeal against the conviction and sentence primarily on the ground that there was insufficient evidence to convict him. In support of their respective grounds of appeal, the appellants also filed supplementary grounds which were basically a narrative of their submissions.
3. Ms Owenga, learned counsel for the State, supported the conviction on the ground that there was sufficient evidence to sustain the conviction and that the facts constituting the offence were proved beyond reasonable doubt.
4. As this is the first appeal, this court is enjoined to conduct an independent review of the evidence and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (see *Okeno v Republic* [1972] EA 32).
5. The prosecution case was that complainant's sister was abducted by the 1st appellant's son and the complainant was assaulted when he went to rescue her. In my analysis I shall refer to the witnesses by the number by which they were referred in the judgment as one witness, a clinical officer, was called to produce the P3 on behalf of PW 4 who was ultimately called to testify.

6. PW 1, the complainant, recalled that after closing his shop on 3rd February 2012 at 7.00 pm he went home and was told by his mother that his sister, MC had been taken by one, Mandere, the 1st appellant's son. He ran after them on foot and caught them near the 1st appellant home. He met four people including the 2nd appellant escorting MC and demanded that they hand over his sister. The 2nd appellant slashed him on the right side of the nose. The 1st appellant came out of his house and hit him whereupon he screamed and fell down and the group then got away. He called a *boda boda* operator who took him to Ntitaru Hospital where he got treatment. He also reported the incident at Ntitaru Police Station. When cross-examined by the 1st appellant, he confirmed that he was with his brother PW 2 when they came to collect the girl. He also stated that earlier in the day, the 1st appellant had been ordered by *balozi* to release the girl which he complied with but his sons came to collect the girl later in the day. He denied hitting the doors of the 1st appellant's house.

7. PW 3, a brother of PW 1, testified that on the material date he was with his brother and when they arrived home, their mother told them that MN had been taken by Mandere. They followed the group of four and confronted them when they were near the 1st appellant's home. He testified that the 2nd appellant had a panga which he used to slash PW 1 on the face. He was also slashed on the upper left arm. They both fell and the group went away with MN. They left and got medical attention. In cross-examination he denied getting into the appellants' compound.

8. PW 4, a police officer attached to Ntitaru Police Station, recalled that on 3rd February 2013 at about 10.00 pm, PW 1 came to the police station escorted by a mob to report that he had been assaulted when he gone to rescue his sister from an eloping party. He was bleeding from the nose and following a deep cut on the face. PW 2 also had a deep cut on his upper arm. He booked the report and issued a P3 form and referred PW 1 to Ntitaru Police Station for attention. He later apprehended the two appellants at from the homes early in the morning. He stated in cross-examination that the girl, MN, was arrested in one of the 1st appellant house and the alleged "husband" was said to be away in Nairobi.

9. PW 4, a clinical officer, working at Ntitaru Hospital at the time, completed the P3 form issued to PW 1 by Ntitaru Police Station on 7th February 2012. He relied on initial treatment notes prepared on 3rd February 2012 when PW 1 was seen at Ntitaru Hospital. He examined PW 1 after 4 days. He observed a cut wound on the right side of the fact which had been stitched and dressed and which he concluded could have been caused by a sharp object. There was also a deep 8cm cut wound across the nasal bridge. He assessed the injury as harm.

10. The accused were put on their defence. The 1st appellant made an unsworn statement where he said that on 3rd February 2012 at about 10 pm he was robbed. He was at home and he heard loud screams caused by attackers who came to raid his home because of a girl he had returned to the parents earlier. He stated that he reported the attack to the chief but nothing was done. He denied committing the case. His witness, DW 1, testified that he also heard screams at about 10 pm while he was asleep. He woke up and went by the fence where he saw people banging the 1st appellant's door demanding release of his daughter. He later spoke to him and he informed him that the girl was not there and that she had been surrendered earlier in the day. He stated that he did not see the 1st appellant assault PW 1.

11. The 2nd appellant also denied the charges in his unsworn statement. He stated that he was at home with his father when they heard strangers cut their main door demanding their daughter. As a result they raised alarm and neighbours came. The raider disappeared form the compound. He confirmed that earlier in the day the girl had been returned. DW 2, a neighbor, testified that she heard screams coming from the 1st appellant's home. She went there after the screams had subsided. She talked with the 1st appellant who told her the attackers were men. DW 2 testified that on the material night at about 10 pm he heard screams and when he arrived at the appellant's house found a lot of people and door had been damaged and was on the ground.

12. I have evaluated the evidence and I satisfied that PW 1 was indeed assaulted as confirmed by his own

account, PW 2's account and the medical evidence tendered by PW 5 and the fact that he was seen at the police station by PW 5 when he came to make the report on the material night.

13. The next issue for consideration is whether the appellants are the ones who assaulted the complainant. The issue of identification was critical but in this case, it was really a matter of recognition as the PW 1 and PW 2 knew the appellants. They knew where PW 1 and PW 2 resided when they went to look for their sister. When considering evidence in these circumstances the court must be cautious. In **Wamunga v Republic [1989] KLR 424 at 426**, the Court of Appeal was instructive in this regard:

... it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

14. I find that the accounts of PW 1 and PW 2 credible for several reasons. First, PW 1 went and immediately reported the assault at the police station and he sought treatment thereafter. Both PW 1 and PW 2 were categorical that the attack took place at about 7.00 pm while the appellant's stated that the attack took place at about 10.00 pm. The time of the assault and the report are both corroborated by the P3 form filled by PW 4. I find that that the assault occurred at about 7.00pm and the report made at about 10.00pm. The appellants' defence that the girl had been returned earlier in the day was undermined by PW 5, the arresting officer, who confirmed that he found the girl, MN, in one of the 1st appellant's houses when he went to arrest the appellants early in the morning on the next day.

15. The appellants' defence is that they were the victims of a robbery was rightly rejected by the learned magistrate. Although the 1st appellant stated he reported the robbery to the chief, it is worth noting that despite the robbery the other witnesses did not deem it fit to follow up the report. The totality of the defence witnesses is that people came to demand a girl from the 1st appellant's home. This confirms the prosecution case.

16. The 2nd appellant was part of the gang that went to collect MN while the 1st appellant was at home. PW 2 did not testify that he saw the 1st appellant hit PW 1. I am therefore prepared to give the 1st appellant the benefit of the doubt in the circumstances. I have evaluated the evidence and I am satisfied that the prosecution proved its case against the 2nd appellant beyond reasonable doubt. I therefore quash the 1st appellant's conviction and affirm that of the 2nd appellant.

17. As regards the sentence, the learned magistrate in imposing the sentence took into account the nature and circumstances of the attack. It took place at night in a group and it concerned the elopement of a child. I do not consider the sentence harsh or excessive. The sentence is also affirmed.

18. The 2nd appellant's appeal is dismissed. The 1st appellant's appeal is allowed. He is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 21st day of November 2014

D.S. MAJANJA

JUDGE

Appellants in person.

Ms Owenga, Senior Prosecution Counsel, instructed by Office of the Director of Public Prosecutions for

the respondent.