



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEALS NO.6 & 7 OF 2012

(An Appeal arising out of the conviction and sentence of M. Munyekenye, SRM delivered on 19th January 2012 in Busia CMC.CR. No.298 of 2011)

PASCAL EPERO.....1ST APPELLANT

MARTIN ODARO.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Pascal Epero, the 1st Appellant and Martin Odaro, the 2nd Appellant were jointly charged with the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on 29th August 2010 at 11.00 a.m. at Amase Sub-location of Okame Location, Busia County, the Appellants, jointly with others not before court, unlawfully did grievous harm to Geoffrey Osieko. When the Appellants were arraigned before the trial court, they pleaded not guilty to the charge. After full trial, the Appellants were convicted as charged. They were sentenced to serve two (2) years imprisonment. The Appellants were aggrieved by their conviction and sentence and duly filed their separate appeals to this court.

Prior to the hearing of the appeals, the two separate appeals filed by the Appellants were consolidated and heard together as one. The petitions of appeal filed by the Appellants raised more or less similar grounds of appeal. The Appellants were aggrieved that they had been convicted on the basis of insufficient evidence adduced by the prosecution witnesses. They faulted the trial court for believing the contradictory evidence of the prosecution witnesses that infact did not corroborate each other. They faulted the trial court for failing to properly evaluate the evidence adduced by both the prosecution and the defence thereby arriving at the erroneous determination that the prosecution had proved its case to the required standard of proof. They were aggrieved that the trial court had failed to take into consideration the evidence that the Appellants had adduced in their defence which in their view exonerated them from the crime. They accused trial court of sentencing them to a custodial sentence that in their view was manifestly excessive and unreasonable taking into account that the Appellants were first offenders.

During the hearing of the appeal, the 1st Appellant presented to this court written submission in support of his appeal. He urged the court to allow his appeal. On his part, the 2nd Appellant made oral submission urging the court to allow his appeal. It was his case that the prosecution had failed to prove its case to the required standard of proof. Mr. Obiri for the State opposed the appeal. He argued that the prosecution had established to the required standard of proof that indeed the Appellants assaulted the complainant in the case and thus caused him to suffer grievous harm. He urged the court to disallow the appeals lodged by

the Appellants.

The facts of this case according to the prosecution witnesses were as follows:

The complainant in this case Geoffrey Osieko told the court that on 29th August 2010 at about 11.00 a.m. he went to the house of John Okemel. He went to see the said John Okemel because he owed him some money. Before he reached the home of the said John Okemel, he met with Okemel's brother called Patrick Sibiya. He recalled that in a nearby house there were people who were engaged in an argument. Shortly thereafter, the 2nd Appellant, who was well known to him, came out of the house with a piece of timber and hit him on the head with it. According to the complainant, the attack was unprovoked. After he was hit with the timber other men, including the 1st Appellant attacked him. The 1st Appellant kicked him and jumped on him. The complainant raised alarm. PW2 Maximilla Ochieko, the sister of complainant came to his rescue. She testified that she was prompted to respond because she heard screams. She identified the screams to be that of the complainant because she recognized his voice. When she reached the scene she found the complainant having been beaten by the two Appellants and others whom she named. She testified that on reaching the scene, she found the 2nd Appellant holding a knife saying he was going to kill the complainant. PW2 stated that when she saw this, she screamed. Her brother Deogratiuous Sibiya came to the scene with a village elder. She recalled that the complainant who was severely injured was taken to Alupe District Hospital. As he was being taken to the hospital, the complainant became unconscious. The complainant testified that he regained his consciousness while at the hospital. He was admitted for four (4) days before he was discharged. The complainant told the court that in the course of the assault, he sustained cut wounds on his left thigh, right leg and on the lower leg. His left hand was swollen. He sustained injuries on his chest. At the time he testified before court, he complained that his chest was still hurting. He also bled from the nose. On being cross examined by the Appellants, the complainant told the court that he did not understand the reason why the Appellants assaulted him because he had no quarrel with them.

PW3 PC Jared Nyafo was at the material time attached to Adungosi Police Station. He recalled that on 11th March 2011, he was instructed by his senior to investigate the case. After concluding investigation, he made the decision to charge the Appellants with the present offence. PW4 Benson Amukowa, a Senior Clinical Officer then based at Alupe District Hospital testified that he attended to the complainant at the said hospital. He noted the following injuries:

The complainant had a scar of a cut wound on the scalp, the right bicep muscle area was still tender. He had a cut wound on the left thigh. He had a scar of bruised wound on the left leg below the knee. He also had a scar of a bruised wound on the right leg below the knee joint. The skull x-ray showed that there was a crack. He assessed the type of weapons used were both sharp and blunt. He produced the P3 form and the medical notes into evidence.

When the Appellants were put on their defence, they denied committing the offence. They told the court that on the material day they saw the complainant fight with another man by the name Patrick Sibiya alias Masiga. They told the court that it is the fighting between the two that caused the complainant to sustain the injuries. They denied the prosecution's evidence to the effect that they had participated in the assault of the complainant. They called two witnesses, Lawrence Etyang and Nafula Omusugutu who corroborated their defence.

This being a first appeal, it is the duty of this court to reconsider and to reevaluate the evidence adduced by the prosecution witnesses and the evidence offered by the defence to determine whether or not to uphold the conviction of the Appellants. In doing so, this court is required to always put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard to that fact (see **Okeno -Vs- Republic [1972] EA 32**). The issue for determination by this court is whether the prosecution proved its case on the charge of causing grievous harm to the required standard of proof beyond any reasonable doubt.

This court has reevaluated the evidence adduced before the trial court. It is the Appellants' appeal that the

prosecution witnesses failed to adduce sufficient evidence to establish their guilt. They allege that the evidence adduced by the prosecution witness was uncorroborated and did not support the finding made by the court that they were the ones who assaulted the complainant. There is no doubt that the complainant was assaulted by both blunt and sharp objects. According to the testimony of PW4, the complainant had injuries consistent with injuries of a person who had been assaulted by both blunt and sharp objects. According to the complainant, he was hit on the head by the 2nd Appellant. PW4 testified that the complainant had sustained a cracked skull. This injury which was sustained by the complainant is consistent with his testimony that he was hit with a piece of timber on his head by the 2nd Appellant. PW2 testified that he saw the 2nd Appellant holding a knife. Among the people at the scene where the complainant was being assaulted was the 1st Appellant. The complainant sustained cut injuries which were consistent with being cut with a sharp object. These injuries were caused by the knife which the 2nd Appellant had in his possession. The complainant had other injuries which were consistent with the kicks that he was subjected to by the 1st Appellant.

Taking into consideration the totality of the evidence adduced by the prosecution witnesses, it was clear to this court that the prosecution proved its case against the Appellants to the required standard of proof beyond any reasonable doubt. The assault of the complainant took place in broad daylight. The complainant knew the Appellants prior to the assault. The issue of mistaken identity cannot therefore arise. The testimony of the complainant was corroborated by that of PW2. The injuries that the complainant sustained were consistent with evidence that he gave to court regarding the manner of his assault. The injuries that he sustained were of a permanent nature. The cut wounds, although they had healed, left scars. He also had a crack on his skull. It is by God's grace that the complainant was not fatally injured. The evidence adduced by the Appellants in their defence can only be termed as self-serving. It did not exonerate them from the crime. The evidence adduced by the prosecution witnesses was consistent, cogent, and sufficiently established the guilt of the Appellants. It was credible and pointed to the Appellants, together with others, as the persons who inflicted the injuries on the complainant.

The appeals lack merit. They are dismissed. The conviction and the sentence imposed by the trial court is hereby upheld. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 23RD DAY OF JULY 2013.

F. TUIYOT

JUDGE