



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 151 OF 2010

PATRICK NJERU MBOG.....APPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No. 37 OF 2010 at the Resident Magistrate's Court at Karaba by Hon. E.K. NYUTU – RM on 14/10/2010

J U D G M E N T

PATRICK NJERU MBOGO the Appellant was charged and convicted of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code.

The particulars of the offence as stated in the charge sheet were as follows;

PATRICK NJERU MBOGO: On the 22nd day of March 2010 in Mbeere District within Eastern Province intentionally and unlawfully attempted to have sexual intercourse with JK

The Appellant was sentenced to five (5) years imprisonment. He was aggrieved by the Judgment and raised the following grounds;

1. ***That the Honourable trial Magistrate erred in both facts and law by putting reliance on evidence adduced by PW1 which was surrounded by a lot of doubts.***
2. ***That the Honourable trial Magistrate erred in both facts and law for not considering that PW2 said that she never knew the Appellant before.***
3. ***That the Honourable trial Magistrate erred in fact for not considering the Appellant's defence witness which was true.***

The case of the Prosecution was that PW1 a woman aged 65 years old was asleep in her house with her children on the night of 22nd March 2010. She heard knocks on the door. She went with a torch and whistle to the door. When she blew the whistle the person forced the door open. She flashed at him and identified him as the person who had come to her home to harvest honey at one time. They struggled as the person wanted to cut her. He cut the fingers of her right hand in the process. Her screams and those of her children attracted neighbours who came. She told them who attacker was. They went to his house and found it locked from outside. He was arrested the next day. PW3 confirmed that PW1 had been injured.

In his defence he denied the charge saying he had spent that night at the house of her estranged wife (DW1). DW1 came to confirm that story.

When the appeal came for hearing the Appellant told the Court that he had been framed up. And further that he wanted the Court to consider the sentence. M/s Ing'ahizu the learned State Counsel opposed the appeal saying the evidence was overwhelming. And that the Appellant had been properly identified. She submitted that the sentence of five (5) years was lawful.

This being a 1st appeal this Court is enjoined to reconsider and reevaluate the evidence on record and arrive at its own conclusion. The Court should not lose sight of the fact that it did not hear nor see the witnesses. In the case of *ARUM –V- REPUBLIC [2006]2 E.A. 10* it was held as follows;

“A Court hearing the first appeal has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate Court would give allowance for the same. OKENO –V- REPUBLIC [1972] E.A. 32 follows”.

I have considered the submissions by the Appellant and the learned State Counsel. I have equally evaluated the evidence of both the Prosecution and the defence. The time of offence was 2am. PW1 said she was able to identify the attacker with the light from her torch which she shone on his face. She gave his names to those who came to her rescue eg PW4 and PW5. A police officer (PW4) with members of the public proceeded to the Appellant's home that night. They missed him. He was however spotted at Karaba that morning at 8am. He was arrested by members of the public.

In his defence the Appellant said this charge was a fabrication as he was at the house of DW1 that night. The learned trial Magistrate had an issue with the evidence of the Appellant and his supposed to be wife. In her Judgment at page 34 lines 15 - page 35 lines 1-3 she states;

“However what I find doubtful in the evidence of DW2 is that she stated that accused was her former husband and that she lives at her parent's home. I found it doubtful that accused would leave his house empty and go to the house of DW2 who lives with her parents yet the two are no longer married. I also observed the demeanor of both the accused and DW2 during the defence hearing and I was not convinced as to their truthfulness”.

She is allowed under section 199 Criminal Procedure Code to take note of the demeanor of the witnesses. This Court did not have the advantage of seeing the Appellant's witness. The learned trial Magistrate did not believe this witness after observing her. This Court can't fault her on that.

PW 1 stated that after she shone the torch on the Appellant's face and identified her, he took away the torch from her and the struggle started. This was not the first time PW1 was seeing the Appellant. The conditions for identification as explained were positive. The screams made the Appellant run away before accomplishing his mission. I do find that the learned trial Magistrate analysed the evidence well and arrived at the correct conclusion. The conviction was proper and I uphold it. The Appellant was sentenced to five (5) years imprisonment. The offence of assault is a misdemeanor with a maximum sentence of five (5) years. The Appellant was said to be a first offender. He should have been given an option of a fine. In giving the five (5) years sentence the learned trial Magistrate must have considered the circumstances under which the offence was committed. The Appellant has been in prison now for two (2) years nine (9) months. Considering remission he would have served three (3) years four (4) months and leave prison in February 2014. However considering that he did not benefit from an option of a fine I will reduce his sentence to the period already served. To that extent **only** does the appeal succeed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 1ST DAY OF AUGUST 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for State

Appellant

Bernard – C/c