



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 86 OF 2013

PAUL GACHOKI MUCHANGI APPELLANT

VERSUS

REPUBLICRESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT AT GICHUGU (T.M. MWANGI – P.M) IN CRIMINAL CASE NO. 649 OF 2012 DELIVERED ON 4TH APRIL, 2013.

JUDGMENT

PAUL GACHOKI MUCHANGI the appellant herein was convicted by the Principal Magistrate Gichugu (Mr. T.M. Mwangi) for the offence of causing grievous harm contrary to ***Section 234 of the Penal Code*** the particulars being that on 1st day of February 2011 at Kiandai village, Thimu Sub-location in Kirinyaga East District of Kirinyaga County unlawfully did grievous harm to ANGELOUS KIURA GACHIRATA. He was sentenced to six (6) years imprisonment and now appeals to this Court raising the following grounds:-

1. ***That he pleaded not guilty***
2. ***That the trial magistrate erred in law and fact by failing to consider that PW1 said he was not able to identify him since it was night***
3. ***That the trial magistrate erred in law and in fact by relying on the testimonies of PW2 and PW3 who did not witness the incident***
4. ***That the trial magistrate erred in law and in fact by failing to note that medical examiner's evidence was that PW1 told him he had been attacked by people he did not know***
5. ***That the trial magistrate failed to consider that the testimony of PW5 the arresting officer contradicted that of the complainant PW1***
6. ***That the trial magistrate failed to consider his defence***
7. ***That the trial magistrate failed to consider the appellant's mitigation and meted out a stiff sentence***

The State through Ms Kambanga State Counsel supported the conviction and sentence and urged me to enhance the sentence.

As a first appellate Court, I am enjoined to consider and evaluate afresh the evidence on record and reach my own conclusion on whether the conviction and sentence should stand. In so doing, I take note of the fact that the trial Court had the advantage of seeing and hearing the witnesses.

The complainant testified as PW1 and stated that on the material day at about 7.30 p.m. he was walking to

his house from the kitchen when the appellant who was hiding behind the house confronted him and hit him on the head and right leg using a panga and metal bar and also took 50/= from his pocket. His father GACHIRATA NJOGU (PW2) came and found him bleeding from a deep cut on the head and a fractured leg and took him to Kerugoya District Hospital where he was admitted for eight (8) days and later reported to police. Meanwhile, the appellant who was his neighbour ran away from home but was arrested later. He said their differences with the appellant arose out of the fact that though they work in the same place, he has more customers than the appellant and earlier the same day, the appellant had told him that he (complainant) would not continue to work while appellant had no work. He added that he recognized the appellant from moon-light.

GACHIRATA NJOGU (PW2) is father to the complainant and told the Court that on the material day the complainant was at the shop with him before going round the kitchen and appellant went to the shop and asked for cigarettes but the witness told him he had none. The appellant then also went round the kitchen and the witness heard the complainant groaning and shouting and when he went to check, he found the complainant bleeding profusely so he called Githinji (PW3) who helped in taking complainant to hospital and the matter was reported to the police.

GITHINJI NGARI (PW3) testified that he met the appellant on the night of the incident who greeted him and told him **“you’ll hear”**. The appellant went towards the house of PW2 and moments later, he was called to the home of PW2 where he saw complainant having been injured on the head and leg. He suspected that complainant was injured by appellant because of the words which he had uttered earlier i.e. **“you’ll hear”**.

HEZRON MAINA (PW4) a Clinical officer at Kerugoya District Hospital examined the complainant on the same day and found that he had a cut wound 5 cm long on the head and a swollen right leg and x-ray confirmed that it had been fractured on the tibia bone. Complainant was admitted from 1st February 2011 to 8th February 2011 and later prepared and signed the P3 Form (Exhibit 3) which shows that the injury sustained was maim.

P.C. HILARY CHERUIYOT (PW5) testified that he investigated this case and after recording witnesses statements, he arrested the appellant on 24th May 2012 and charged him with this offence.

In his defence from the dock, the appellant denied the offence saying he and the complainant work together and live in the same village and that on 1st February 2011, he went home after work and in the morning, he heard that the complainant had been harmed. He denied having any differences with complainant.

It is not in dispute that the complainant and appellant are well known to each other and infact they work at the same place. One of the appellant’s ground of appeal is that the complainant did not see him well and said so in his evidence. However, looking at the complainant’s evidence, there is nowhere that he said he didn’t see appellant because it was at night. Infact complainant’s evidence shows that he recognized the appellant that night from the moon-light. In cross-examination by the appellant, he said:-

At 7.30 p.m. there was light from the moon, I saw accused for the first time at 7.30 p.m. when he was 4 metres away. I did not talk to him but he told me that “you will not continue to do work while I have no work”. He said so after he cut me”

The complainant’s evidence was not of identification of a stranger. It was evidence of recognition of a person he knew well and the appellant has himself admitted in his defence that he was working at the same place with complainant and they live in the same village. Evidence of recognition is more reliable as it is the evidence of a person well known to the other unlike evidence of identification of a stranger. In this case, not only did the complainant say he recognized the appellant but he also talked to him. Further there is evidence from complainant’s father that the appellant was seen in the vicinity of the shop moments before the assault and further, the appellant had uttered the words **“you’ll hear”** to PW4 moments before the incident. Taking all that into account, there can be no doubt that the complainant’s recognition of the appellant as the person who assaulted him on the night in question is free from doubt.

The evidence of PW2 and PW3 placed the appellant at the scene of the crime and also demonstrated a motive for the assault and the trial magistrate was entitled to take it into consideration.

On the ground that the complainant told the Medical officer that he had been attacked by un-known persons, the evidence of HEZRON MAINA (PW4) the said Medical officer was infact as follows:-

“ On general medical history, my client complained of having been assaulted by a person well known to him on 1st February 2011 at around 7.30 p.m.”

The evidence of this witness is therefore clearly the opposite of what the appellant alleges he said.

On the ground that the evidence of the arresting officer contradicted that of the complainant, it is not stated in what ways the two witnesses' statements were contradictory. And on the ground that his defence was not considered, the trial Court said it considered the appellant's defence and found him ***“---- sly evasive, cunning and untruthful in his evidence”*** while the prosecution witnesses were ***“honest credible and truthful”***. Having observed their respective demeanours, the trial magistrate was entitled to arrive at the decision which he did and for my part, having re-considered and re-evaluated the evidence in it's totality, I am satisfied that the appellant's conviction was on sound evidence. On the ground that his mitigation was not considered, the record shows that prior to passing sentence, the trial magistrate observed as follows:

“I have considered the gravity of offence, mitigation by an unremorseful first offender and circumstances under which the offence was committed and I sentence accused to serve 6 years in prison”.

It is therefore not true that the trial magistrate did not consider his mitigation. He did but he also took into account the seriousness of the offence and the fact that appellant showed no remorse. Infact I may add that the appellant was lucky as he was not charged with the more serious offence of robbery with violence contrary to ***Section 296 (2) Penal Code*** as the complainant's testimony was that not only did the appellant injure him but that he also took his 50/= . The offence for which he stands convicted attracts a sentence of upto life imprisonment. The sentence of six (6) years imprisonment was well deserved.

The up-shot of the above is that his appeal against conviction and sentence is dismissed.

B.N. OLAO

30TH OCTOBER, 2013

30/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant present

Mr. Sitati State Counsel present

Language – English/Kiswahili

COURT: Judgment delivered this 30th day of October 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present

Right of appeal explained.

B.N. OLAO

JUDGE

30TH OCTOBER, 2013