



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO 200 OF 2011

(Arising from judgment on B.O. Ombewa RM in WEBUYE SRMCCRC NO 516 OF 2009)

SIMON WANYAMA WAMUKOTA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

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JUDGMENT

The Charge

[1] The Appellant was charged with three Counts. Count 1 and II were on Grievous Harm Contrary to Section 234 of the Penal Code. Count III was on Assault Causing Actual Bodily Harm Contrary to Section 251 of the Penal Code. The victims of the offences in Count I and II were: Justus Sifuna Sitati, tom Mutonyi Wanyama; and Count III was Edward Wanjala Wabwire, respectively.

The Plea

[2] The Appellant pleaded not guilty to all the Counts and the case proceeded to full hearing.

[3] After full trial, the trial court acquitted the Appellant of Count III but convicted him on Count I and II. Ultimately, the trial court sentenced the Appellant to serve a term of 6 years imprisonment for each Count (I & II); the sentence to run concurrently.

The Appeal

[4] The Appellant was aggrieved by the conviction and sentence meted out by trial magistrate and filed this appeal. The Petition of Appeal is dated 6th September, 2011 but the court stamp indicates it was filed on 6/9/2000, which I think was an error on the rubber stamp. I will presume the appeal was filed on 6/9/2011. In any event, there is no objection which has been taken up on the filing of the appeal. Certainly, that matter is a technicality with no compensating advantage in the decision of the court on the substance of the appeal.

[5] The Petition of Appeal carries the following grounds of Appeal;

1. That, I pleaded guilty to the charge.
2. That I pray that my sentence be reduced.
3. That, on the material day of the offence, I was not in sober mood and mistook my complainant

- with an intruder who knocked my door late in the night, but later discovered he was a family member.
4. That, I am 64 years old and most vulnerable to adverse prison conditions.
 5. That I pray for mercy.
 6. That, I be (sic) furnished with prosecution statements to enable me adduce additional grounds.

Submissions by the Appellant

[6] On 19/3/2013, the Appellant submitted before the court that:

- a) He was merely suspected,
- b) He prayed for assistance,
 - c) The issues related to land as the complainants had sold his land in order to get rid of the Appellant,
- d) The complainants are his children,
 - e) On the fateful night, the Appellant was attacked by nine (9) people and he managed to injure three (3) of them.

Respondent's Submissions

[7] The Respondent through Prosecuting Counsel Mr Kibellion opposed the Appeal. He was emphatic. The Appellant was charged with offence of causing grievous bodily harm to the complainants. The complainants were attending a funeral when the Appellant, at about 9.00 p.m., arrived and asked the three complainants to leave the burial. The appellant then left only to come back at about 11.00 p.m. and stabbed the complainants with a sword injuring them. PW4, the doctor testified on the injuries sustained by the complainant, and the extent of those injuries caused was established through the P3 forms produced in court.

[8] He continued to submit that although the incident took place at night, there was sufficient light to identify the Appellant as the assailant. The light was from the kerosene lamps that had been lit. PW2 positively identified the Appellant.

[9] According the Prosecuting Counsel, the Prosecution proved every element of the offence and the conviction was, therefore, safe. He further submitted that the offence of causing grievous bodily harm were serious offences and carries a jail term of life imprisonment. In contrast, the sentence meted out by the trial court was a conservative one and was after all mitigating factors had been considered.

[10] He prayed for the conviction and sentence to be upheld.

COURT'S ANALYSIS AND DETERMINATION

Re-evaluation of evidence

[11] This being the first appeal, I will, in line with the requirement of the law enunciated in the case of **Okeno v Republic**, re-evaluate the evidence as recorded by the trial magistrate and come to my own conclusions on the evidence tendered, the law applicable, and whether the case was proved beyond any reasonable doubt. I should be minded, however, that I did not see, hear or observe the witnesses first hand.

[12] The prosecution called five (5) witnesses. PW1 and PW2 were the complainants in Count I and II respectively. PW1 testified that at the material day i.e. 27/3/09, he was at a funeral at his

brother's home. He was in the company of Tom and Edward. They were seated at the fire place when at about 10.00 p.m. the Appellant arrived and demanded that the three should leave. None uttered a word or made any reply to the challenge. The Appellant then left only to come back at about 11.00 p.m. and when he found that they had not left as he had ordered, he stabbed PW1 on the left abdomen and the right side of the eye lid. PW1 lost consciousness. But he said that the Appellant also assaulted Tom and Edward Wanjala. He was taken to Webuye District Hospital where he regained consciousness the following day at about 9.00 a.m. He was told that he had been taken to hospital and admitted for 24 hours. He did not know who reported the matter to the police but he recorded his statement after he had been discharged from hospital. He identified the discharge summary from the hospital and the P3 form filled on the injuries he had received from the attack. He also identified the sword used by the Appellant to injure him.

[13] On cross-examination PW1 confirmed that there was a burial for his sister in-law, Mackay on 26/3/2009, and that it was at the home of the Appellant's brother. He also confirmed that the appellant was his uncle.

[14] PW2 testified that PW1 was his cousin. On 27/3/2009 at 9.00 a.m., he with PW7 and other two people were at his cousin's home whose wife had passed on. The Appellant then came to where they were and started shouting at them and demanding that they leave the funeral. They did not reply. When the Appellant returned for the second time, he stabbed PW2 on the head and PW2 fell down. He also stabbed PW1 and Edward Wanjala. PW2 then lost consciousness and was taken to Webuye District Hospital where he regained consciousness the following day. He was admitted for one month and two days. He was discharged on 21/4/2009.

[15] After discharge, PW2 recorded a statement with the police. He identified the discharge summary and P3 form filled on his injuries.

[16] PW2 confirmed the Appellant was his father and that they had not quarrel led on anything before. He did not even respond to the demands by the Appellant at the scene of the crime. He confirmed he was saying the truth.

[17] PW3 also testified that he was at the funeral on 27/3/09 with PW1, PW2 and Edward when they were stabbed by the Appellant. The Appellant had come to the funeral and started shouting at them. He left. Then he came back at about 11.00 p.m. and stabbed PW1, PW2 and Edward with a sword. The victims were then taken to Kuywa Dispensary and them to Webuye District Hospital as the injuries they suffered were serious. PW1 and PW2 were stabbed on the abdomen.

[18] On cross-examination PW3 confirmed that he was a neighbour to the appellant and he did not have any differences with the appellant before on anything. The Appellant simply came and stabbed people. The Appellant sought to know whether PW3 had taken him to hospital.

[19] PW4, Dr Edward Vilembwa testified. He was attached to Webuye District Hospital. He is a duly registered doctor and Assistant director of medical services. On 4/5/2009 he examined PW1 and PW2 and filled up P3 form on the injuries they sustained as a result of assault by a known person.

[20] According to his examination, PW1 sustained the following injuries:

- a) Head injury- stab wound which had been stitched.
- b) Thorax and abdomen three (3) stab wounds, two on the lower part of the right abdomen, and injuries to the small and large intestines but had been repaired.

[21] The injuries were approximately 1 month and 1 week old. According to PW4, the probable weapon that inflicted the injuries was a sharp weapon. PW4 classified the injuries as grievous harm. He then produced the P3 form and the discharge summons for PW1. PW1 was admitted on

28/3/2009 and was discharged on 21/4/2009.

[22] PW4 also testified on the injuries sustained by PW2. He produced a P3 form and the discharge summaries from Webuye District Hospital which showed he was admitted on 28/3/2009 and discharged on 21/4/2009. He was operated on that treated. PW4 told the trial court that PW2 suffered the following injuries as a result of assault by a person known to him:

- a) Penetrating abdominal stabs wounds on the right of upper abdomen which was existing on the left upper abdomen.
- b) On operation, the stab had gone through gall bladder and the liver.
- c. The liver and spleen were also stabbed.

[23] He classified these injuries as grievous harm which was inflicted by a sharp weapon.

[24] The Appellant did not put any questions to PW4.

[25] PW5 was the investigating officer. He received the report on the commission of the offence from an old man, once Martin Mangoli from Sitikho. But before he could go to the scene, the appellant was brought to the police station by AP Officers. He locked him in the cells and he proceeded to Webuye District Hospital where he found PW1 and PW2 had already been admitted. He also found a third person but who had not yet been admitted to the hospital.

[26] PW4 observed that PW1 and PW2 had been stabbed on the ribs whilst the other 3rd complainant had been stabbed on the head.

[27] PW4 visited the scene and found out that the Appellant and the complainants share a homestead. The appellant is the father of the complainants. He also recovered a sword that the Appellant used to stab PW1 and PW2. He subsequently charged the Appellant with the offence he faced in the trial. He produced the sword as exhibit 3.

Defence Case

[28] The Appellant was put to his defence in a ruling delivered on 26/10/2010. He gave unsworn testimony that on 29/3/2009, he was sleeping in his house when his 9 children came and started hitting his door at 11.00 p.m. They broke the door and started beating the Appellant. The Appellant then, in self-defence, stabbed three (3) of them i.e. Wanjala, Sifuna and Tom. Sifuna and Tom are PW1 and PW2 respectively. The attackers were alleging that the Appellant had killed the wife of Isaac. They were threatening to kill the Appellant and his wife.

[29] The Appellant called one more witness, DW2 – his wife. She told the trial court that on 27/3/2009 at around 11.00 p.m. when they were sleeping, they heard commotion and people hitting their door. She recognized the voice of Wanjala. The attackers were ordering them to open the door. The Appellant and DW2 did not open the door, and so the attackers broke down the door and the window and entered into the house where they started beating DW2. She screamed and the Appellant came to her defence and stabbed some of the attackers. DW2 was then chased from her homestead by the people who attacked them on the fateful night.

[30] Although DW2 alleged that she had been beaten up by the people who attacked them on 27/3/2009, on cross-examination she told the trial court that she had nothing to show that she was beaten. She claimed she even went to Webuye District Hospital.

[31] In cross-examination DW2 admitted that she went to the village elder before the Appellant had stabbed the complainants. She, however, said that the Appellant had armed himself with a sword when he heard the commotion outside the house.

Court's Determination

[32] There was sufficient evidence before the trial court to find a conviction for the offence of grievous harm. The evidence of PW1, PW2, PW3 and PW4 proved that PW1 and PW2 were stabbed by the Appellant. All the witnesses who testified knew the Appellant well. PW1 was his nephew, PW2 was his son, and PW3 was his neighbour. This was evidence of identification by recognition. It is not possible that all those witnesses were mistake about the identity of the people who attacked them. Indeed there has been sufficient evidence that the victims of the beastly act that was committed by the Appellant were seated around a fire that had been lit for purposes of the funeral to keep the people warm at night. But, evidentiary, it served another vital purpose in this case of illuminating on the persons near that fire including the Appellant. That is an important supporting-evidence that there was also a kerosene lamp lit for purposes of lighting the area people were seated.

[33] Accordingly, there was proper identification of the Appellant as the person who stabbed and injured PW1 and PW2 on 27/3/2009.

[34] Further, the weapon that was used was recovered and belonged to the Appellant. In fact the Appellant and DW2 and all the other witnesses confirmed that the Appellant is the one who stabbed PW1, PW2 and Edward on 27/3/2009 using the sword that was produced in court.

But was it in self-defence?

[35] The Appellant testified that he stabbed his victims in self-defence. He alleged that the victims wanted to kill him and his wife when he stabbed them. What does not add up was the evidence by DW2 that she escaped and went to the village elder before the Appellant had stabbed the complainants. In examination in chief, DW2 had told the trial court that the Appellant stabbed the complainants while defending her. DW2 could not also have witnessed the stabbing of the complainants, because, from what she said in cross-examination, she had already left for the home of the village elder when the Appellant stabbed the complainants. It is, therefore, not correct for her to have testified in-chief that the Appellant stabbed the complaints.

[36] The evidence of DW2 is further marred with half-truths when she said that she went to Webuye District Hospital yet she could not produce anything to show that she had been beaten and injured. That evidence was vital in proving their story that they were attacked and she was beaten up by the supposed attackers. In short, her evidence was false and therefore worthless in law for any purpose.

[37] The Appellant is also untruthful. He submitted before this court that he was framed for the offences he faced in the trial. He also placed as a ground of appeal that he was not in sober moods and mistook the complainant as an intruder who knocked on his door, but later realized he was a family member. In his evidence (unsworn statement) he told the trial court that the supposedly attackers broke down his door and started beating him. That is when he stabbed some of them in self-defence. Those positions are quite irreconcilable. The trial magistrate properly analysed the defence evidence and arrived at the correct conclusion.

[38] The story by the defence was an afterthought and bore no evidentiary weight. The trial magistrate was therefore in his right to state:

“In my view the available evidence is reliable and sufficient to make a finding that the accused unlawfully stabbed the complainants using a sword. Even though the accused said he did so in self defence (sic), there is no evidence that he or his wife was assaulted by the complainants. The available evidence show (sic) that the accused stabbed the complainants using a sword without any justification. I find that the prosecution has discharged its burden of proof and accordingly find the accused guilty as charged and convict him on both counts 1 and 2 pursuant to section 215 of the Criminal Procedure

Code”.

[39] After evaluating all the evidence adduced in the trial, and the defence offered, the inescapable conclusion that the court makes is that the accused stabbed the complainants without any lawful justification. The finding of guilt and conviction thereto by the trial magistrate was quite in order and it is hereby upheld.

[40] So far I have addressed ground No.3, 4 and 5 of the Petition of Appeal. As for grounds 1 and 6, I need only say that: ground 1 is not applicable as the Appellant did not plead guilty to the charges; and ground 6, was not argued at all and thus there is nothing to consider. The latter ground should have been pursued at interlocutory stage and perhaps be a basis for amendments of grounds of appeal under section 350 (2) (b) (iv) of the CPC. I will say no more on that ground.

[41] As for ground No.2, the offence of causing grievous harm to a person is a serious felony which attracts a maximum sentence of life imprisonment. A sentence of 6 years on each Count which runs concurrently is reasonable in the circumstances of this case. I, therefore, uphold the sentence as meted out by the trial magistrate.

[42] Before I close, let me say one little thing. I have noted that ground No.3 of the Petition of Appeal alluded to *I was not in sober moods*.... I have also, noted that the Appellant kept on asking the witnesses whether they had taken him to hospital. That was a curious question and I do not want to attach any weight to it as it was never argued. Although I should say that if the Appellant was making a defence of insanity or diminished responsibility, it ought to have been proved before the trial court. Nothing substantial was canvassed on that aspect of ground 3 and so it fails as well.

[43] There is nothing that impels the court to interfere with the conviction and sentence meted out by the trial court. I uphold the conviction and sentence. Orders accordingly

Dated, and signed at Bungoma this 18th day of October 2013

F. GIKONYO

JUDGE

Read, signed and delivered in open court at Bungoma this 24rd day of October 2013

H.A.OMONDI

JUDGE