



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO 64'B' OF 2011

(From the judgment of P. ACHIENG, RM in BGM CMCRC NO 545 OF 2010)

JESTIMORE MUKHEBI MARANGO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

Charge: Conviction and Sentence

[1] The Appellant was charged with Assault Causing Actual Bodily Harm Contrary to section 251 of the Penal Code. He was then convicted after a full hearing and sentenced to a non-custodial sentence i.e. one year probation. He was aggrieved and filed the appeal.

The Appeal

[2] The appeal carries four significant grounds which can be compressed as follows; that the evidence was inconsistent with the charge sheet; and the trial court did not ascertain whether and when the Complainant had been injured. Mr Onchiri argued in support of the appeal that the date and time when the offence was alleged to have been committed was not clear; the dates in the OB and the P3 Form are different. According to him, the incident is alleged to have taken place on 26.3.2010 at noon whereas that P3 Form talks of 11am. These inconsistencies are serious.

[3] Onchiri further argued that the evidence of PW1 and PW2 on the place of treatment does not agree. Another inconsistent was that PW1 said she stood up while PW2 said PW1 was crying on the ground. Even more fatal was the fact that no treatment notes that were produced by the prosecution. Those notes are the primary evidence of assault and go to the root of the case. He prays for the appeal to be allowed.

Arguments by the Respondent

[4] The Respondent argued that the Appellant was placed at the scene by the evidence tendered; at the shamba. PW1 and PW2 proved that the Appellant assaulted PW1. Although no treatment notes that were produced, a P3 Form was produced by PW4. The P3 Form referred to the treatments notes which he used to fill it. That is sufficient medical evidence in a case for assault. Kibelion submitted further that the issues on the dates in the OB had been raised at the trial and comprehensive answers were provided. He prays for the appeal to be dismissed.

Evidence Analysis

[5] This being the first appeal, the court is enjoined to re-evaluate the evidence tendered before the trial court and make its own conclusions, except it must be minded that it did not see or hear the witnesses. PW1 told the trial court that on 26.3.2010 at about noon, she was in the shamba digging when suddenly somebody started hitting her with a stick until she fell down. At the time of the attack, she was bending looking down. She was hit on the neck. She screamed. When she got up, she realized it was the accused who had hit her. She was treated at Bungoma District Hospital where the P3 Form was also filled.

[6] PW2 said she responded to the screams by PW1 and found the Appellant standing near PW1. He was holding a jembe belonging to PW1. She snatched it from him and helped PW1 to stand up. She took PW1 to Amagoro District Hospital.

[7] PW3, the Investigation Officer (IO) told the court that the complainant reported to him that she had been beaten by the Appellant - her neighbour. The Appellant beat her after an argument over a land dispute both had. He then ordered his arrest.

[8] PW4 produced the P3 Form on the injuries inflicted on PW1. He said he used the treatment notes with which PW1 had been treated.

Court's findings and orders

[9] No doubt PW1 was injured. The P3 Form is sufficient medical evidence of injuries sustained. It is not necessary that the medical notes be produced as long as it is shown by the doctor that the findings in the P3 Form were based on the initial treatment notes. The question is; were the injuries on PW1 inflicted by the Appellant? The prosecution had to prove this question beyond any reasonable doubt.

[10] It is not clear whether PW1 was sure that the Appellant assaulted her although she said that when she stood up she realized it was the Appellant. PW2 gave contradictory evidence that she is the one who helped PW1 to get up. That is a matter which puts actual identity of the assailant in doubt. It is worth noting that, she only said that Lilian and Timothy went to the scene and that the Appellant left the scene without saying whether the two found the Appellant at the scene. PW3, the IO gave yet another startling angle to the case when he claimed that PW1 told him that she was beaten by the Appellant when they were arguing over a land dispute they had. This was denied by PW1.

[10] In sum, it was not possible for the trial court to have concluded that the prosecution had proved its case beyond any reasonable doubt. Serious doubts existed on the commission of the offence by the Appellant and the inescapable conclusion would have been that the prosecution had not proved its case beyond reasonable doubt. The appeal is allowed with the result that I quash the conviction and set aside the sentence meted out by the trial court.

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

F. GIKONYO

JUDGE

Read, signed and delivered in open court at Bungoma this 23rd day of October 2013

H.A.OMONDI

JUDGE

