



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 38 OF 2013

S M K.....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. 878 OF 2010 DELIVERED ON 29TH

MARCH 2012)

JUDGMENT

S M K the appellant herein was on 29th March 2012 convicted after trial by the Principal Magistrate Gichugu Court for the offence of Grievous harm contrary to ***Section 234 of the Penal Code*** and sentenced to ten (10) years imprisonment. It was alleged that on 23rd December 2010 at Thumaita Sub-location in Kirinyaga East District within Kirinyaga County, he unlawfully did grievous harm to J W by cutting her left hand using a panga. The complainant is infact a physically and mentally retarded daughter of the appellant whose age was given as 14 years at time of the trial.

Being aggrieved by that conviction and sentence, the appellant has filed this appeal raising the following grounds:-

1. *That he pleaded not guilty*
2. *That the learned trial magistrate erred in law and in fact by convicting him on hearsay evidence*
3. *That the learned trial magistrate erred in law and in fact by failing to consider that no exhibits were presented to Court*
4. *That the learned trial magistrate failed to consider that there was an existing grudge between him, PW1 and PW2*
5. *That the trial magistrate erred in law and in fact by relying on a single evidence of PW1, PW2 and PW3 who are family members*
6. *That the trial magistrate erred in law and in fact by misguiding himself that he had committed the said offence yet there were no eye witnesses and the complainant is disabled and could not tell what was going on*
7. *That the trial magistrate erred in law and in fact by failing to consider that he was kept in Police custody for more than 14 days having been arrested on 28th December 2010 and taken to Court on 3rd January 2011.*

The appeal was opposed and in his submissions, Mr. Omayo State Counsel urged me to

dismiss the appeal and asked me to find that infact the sentence was lenient.

The complainant was not able to testify due to her condition but her mother A K M (PW1) testified that on the night of 23rd December 2010, the appellant arrived home drunk and asked for food which he was given but instead refused to eat and started making noise and so PW1 left and went to sleep in the house of her brother in law M K. Later that night, P N who is a niece to appellant went and told her that the appellant had told her (P) that the complainant was dying. PW2 went to the house and found that the complainant had been cut. She took her to hospital and later reported to Police at Kianyaga and was issued with a P3 Form. Complainant was admitted for three (3) weeks.

P N (PW2) is niece to appellant and she testified that on the material night, the appellant called her and told her to go and see the complainant who was bleeding. He then led her to the bedroom where the witness saw complainant and she asked the appellant ***“is this what you have decided to do?”*** PW2 then went to look for complainant’s mother and together with J M (PW3) who is appellant’s son they looked for a vehicle to take complainant to hospital. She said complainant’s upper limb had been cut.

J M (PW3) is appellant’s son and on the material night he was called by P (PW2) who took him to appellant’s house where they saw the complainant bleeding. They called her mother and got a vehicle to take her to hospital and later reported to the police. PW2 added that appellant was the only one with the complainant in the house so he is the only one who cut her.

DR. JOHN MAINA (PW4) of Kerugoya District Hospital testified that he examined the complainant and was given a history of her having been cut by the father. She had a deep cut wound on the left upper arm which was some five (5) hours old caused by a sharp object. She was given blood transfusion and put on analgesics. He assessed the degree of injury as Grievous harm and filled the P3 (Exhibit1).

PW5 (ISAAC KABENGI) is the Assistant Chief Thumaita Sub-location and on 28th December 2010, he got information that the appellant had assaulted his physically challenged daughter and had gone into hiding. So he looked for him and arrested him that evening in a bar and took him to Kianyaga Police Station.

CPL MANYORIO SIMOTWO (PW6) of Kianyaga Police Station testified that he commenced investigations after receiving this complaint. He visited the hospital where complainant was admitted and recorded the statements from her mother and other witnesses and later ordered for the arrest of the appellant who was charged.

The record shows that during the trial, the appellant had been represented by Mr. Nganga but at the time of his defence, he opted to proceed in the absence of his said advocate who had failed to attend several times.

In his sworn statement in defence, the appellant told the Court that he arrived home at 9 p.m. on the material night and asked his wife to give him food. Instead the wife carried away the complainant and his son J M arrived at the scene holding a panga and asked him why he was quarelling his mother. Then J M swung the panga at appellant who ducked and the panga hit complainant on the left hand. Appellant escaped because his son had previously also cut him and the matter had been reported to the Police but he later forgave his son. He added that he has a dispute with his wife over land and he denied the charge.

As a first appellate Court, I am required to re-evaluate the evidence to see if the trial Court was justified in arriving at the decision that it did. In doing so, however, I must take into account that the trial magistrate had the benefit of observing the witnesses during trial – **OKENO VS REPUBLIC 1972 E.A 32.**

I have accordingly re-considered the evidence together with the submissions by the appellant

and Mr. Omayo the learned State Counsel. I have also looked at the grounds of appeal.

The appellant says he was convicted on hearsay evidence. The main witness was of course the complainant's mother who told the Court that she had left the complainant in the house with the appellant only to be called by P (PW2) who told her that the appellant had told her that complainant was dying and when she went to the house, she found that indeed the complainant had been cut. P (PW2) did confirm that the appellant called her to go and see the complainant and when she did, she saw the complainant's hand cut. That evidence by the complainant's mother and PW2 was not hearsay. They may not have seen the appellant in the act of cutting the complainant. Indeed they never said that they did. But they saw the complainant moments after the incident and saw the complainant's injured hand. What they told the Court is what they saw and not what they were told and the fact that the appellant was the only person in that house at that time could only lead to the irresistible conclusion that he was the one who harmed the complainant. The evidence of complainant's mother and that of PW2 P was supported by that of J M (PW3) and who is appellant's son. He too said the appellant was the only person in the house when the complainant was injured.

DR. JOHN MAINA (PW4) confirmed that complainant who had a condition known as cerebral palsy had sustained injury to her left hand assessed as maim and caused by a sharp object.

The appellant has also raised the ground that no exhibit was presented to Court to confirm that he actually committed the offence and has also said the trial magistrate failed to consider that there is a grudge between him PW1 and PW2 concerning family land. Failure to produce the panga or other exhibit used in harming the complainant was not fatal and it is not in all cases that the item used in committing the offence must be produced. What is not in dispute is that indeed the injury to the complainant was caused by a sharp object and bearing in mind that the offence was committed on 23rd December 2010 and the appellant arrested on 28th December 2010, he had all the time to dispose of the panga or whatever else he used to injure the complainant.

On the issue of the grudge between him, PW1 and PW2, it is true that PW1 said there exists a land dispute between them. However, there was nothing to suggest that that dispute was the cause of this charge. Indeed the trial magistrate considered this line of defence and stated as follows in his judgment:-

“ Although PW1 and DW1 may have had their domestic squabbles, there was no evidence that their relationship was so sour as to have made PW1 testify falsely against DW1”.

There was of course also the evidence of PW1 and PW3 who saw the injured complainant moments after the incident and it is not suggested anywhere that they gave false testimony against the appellant due to any land dispute.

The appellant has also raised the issue that the trial magistrate relied on the evidence of PW1, PW2 and PW3 who are family members and further, that there was no eye witness and the complainant is disabled. As stated earlier, the evidence against the appellant was largely circumstantial but in appropriate cases, such evidence can prove the commission of an offence with the accuracy of mathematics so long as it can only lead to the irresistible inference that the accused was the person who committed the offence. The trial magistrate was alive to this fact and stated in his judgment as follows:-

“The child was wounded between 10 p.m. and 12 a.m. when DW1 was clearly at the scene of the offence. PW2 was the first of the prosecution witnesses to see child before 12 a.m. The inculpatory facts against DW1 are inconsistent with his innocence and incapable of any other explanation than that of the guilt of the (sic) DW1”.

In my view, the trial magistrate correctly addressed himself on the law with regard to circumstantial evidence and notwithstanding the fact that no one saw the appellant in the act, the fact that he was the only person with the complainant in the house when she was injured leads to the irresistible inference that he was the one who injured her. There are no other con-existing circumstances that could persuade a Court to draw any other hypothesis other than that of guilt – **REPUBLIC VS KIPKERING arap KOSKE**

& ANOTHER 1949 16 E.A.C.A 135.

The appellant also raises the issue that the witnesses were family members. It is not the law that family members cannot testify against one of their own. The offence herein relates to injury to a child of the appellant and in such circumstances, the appellant's wife was a competent witness for the prosecution – see **Section 127 (3) (c) of the Evidence Act.** Though the child could not testify due to her medical condition, the mother was a competent witness to give evidence on her behalf.

The appellant finally takes issue with the fact that his Constitutional rights were infringed upon because he was arrested on 28th December 2010 and taken to Court on 3rd January 2011 and further, that his defence was not considered. The charge sheet shows that he was arrested on 28th January 2010 and taken before a District Magistrate II (Mr. Onkoba) on 31st December 2010 who however did not take his plea citing lack of jurisdiction and it was not until 3rd January 2011 that his plea was taken before Miss S.N. Ndegwa (Senior Resident Magistrate). However as the Court of Appeal has now held in the case of **JULIUS KAMAU MBUGUA VS REPUBLIC CRIMINAL APPEAL NO. 50 of 2008** that an infringement of a Constitutional right is a matter to be addressed in a Civil Court in a claim for damages but that alone does not vitiate a criminal trial. The record also shows that his defence was considered and dismissed as ***“dishonest, cunning and evasive”***

Having re-evaluated the evidence as I should, I am satisfied that the trial magistrate arrived at the correct decision that the circumstantial evidence against the appellant could only lead to the inevitable conclusion that he was the one who caused the complainant the serious injuries subject matter of this case. His defence that the witnesses lied or that complainant was injured when his son M threw a panga at him could not be true and was not supported by the evidence on record which established beyond reasonable doubt that only he could have committed the offence. I would, in the circumstances, up-hold this conviction.

On sentence, the trial magistrate imposed a jail term of ten (10) years. **Section 234 of the Penal Code** upon which he was convicted carries upto a life sentence. In imposing the sentence that he did, the trial magistrate made the following observations:-

“ Accused had committed a heinous and an unforgivable act by severally wounding a helpless disabled child without provocation”.

I agree with those sentiments and can only add that appellant was extremely callous in harming one who he was expected to protect. The sentence was well deserved.

I dismiss the appeal against conviction and sentence.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2013

27/11/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered this 27th day of November 2013 in open Court.

Mr. Sitati State Counsel present

Appellant present

Mr. Muriithi Court clerk present

Right of appeal explained.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2013