



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 06 OF 2013

(from the original conviction and sentencing of the Principal Magistrate's Court – Maseno in Cr case No. 1210/2009 - Hon. J. Ongondo – SRM)

JOSEPH ONG'ONG'A AWIYAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

INTRODUCTION

This is an appeal against the judgment of the Senior Resident Magistrate Maseno by which the appellant was convicted and sentenced to 10 years imprisonment for the offence of grievous harm. The issue for determination is whether the prosecution evidence proved the offence beyond reasonable doubt. After hearing the parties submissions and evaluating the evidence on record the court is of the opinion that the appeal has no merits.

BACKGROUND

The appellant was charged with assault causing actual bodily harm contrary to Section 251 of the penal code substituted the charge with that of grievous harm contrary to Section 234 of the penal code. The particulars of the offence were that on 4/9/2009 at 1.00pm at Kadol village, Kisumu West district, the appellant unlawfully did grievous harm to Stephen Odhiambo Odega. The appellant denied the charge and the prosecution called 4 witnesses in support.

PROSECUTION CASE

Stephen Odhiambo (PW1) is a neighbour of the appellant. On 4/9/2009, PW1 came home at about 1300 hrs and found his calf injured. His sister told her that the calf was injured by the appellant after it crossed the boundary into the appellant home. PW1 went alone to ask the appellant why he had injured the calf. He found the appellant at home with his mother. The appellant tried to stab him with a knife but PW1 blocked it and was cut on his right hand. The appellant went back to his house and took a panga which he used to cut the PW1 on the forehead and nose. PW1 lost one nostril. He lost consciousness and regained it while at Nyanza general Hospital.

Betty Awino Anyango (PW2) was in her house on 4/9/2009 at 3.30pm when she heard commotion outside. She went out to check only to find her brother-in-law (PW1) bleeding from his nose and the

appellant standing next to him with a blood stained panga. PW1 screamed and neighbours came and took him to hospital. Then the police came and arrested the appellant. The appellant threw away the panga when he heard the police were coming to arrest him.

Juma Kishori (PW3) is a police officer. On 4/12/2009 at 2.30pm, he was at the Miwani Police station when he received a report from Timothy that his son (PW1) had been assaulted with a panga. PW3 in the company of another officer rushed to Kombewa district hospital where PW1 had been taken for treatment but found that he had been rushed to Nyanza Provincial Hospital. PW3 then went to the scene and found the appellant already confined by a crowd and he arrested him and took him to the station. He saw bloodstains at the scene during the arrest. He did not recover the panga during arrest.

Dr. Ochola (PW4) produced the PW1's P3 which was prepared by Dr. Clance Onyango. The P3 indicated that the PW1 suffered revulsion head cut and had stitched nose. The degree of injury was classified as serious harm or grievous harm. After close of the prosecution case, the trial court put the appellant to his defence after finding that he had a case to answer.

DEFENCE CASE

The appellant gave an unsworn defence. He stated that the PW1 and Odhiambo while armed with panga and knife came to his house and found him eating. They accused him of injuring a calf but he denied. They assaulted him with the said weapons. Onyango lifted the panga to cut the appellant but he dodged and the panga cut Odhiambo on his nose. They also attacked appellant's mother but she ran away.

The PW1 and his colleague left after the injury and the appellant went to report to the Assistant chief. The police however came and arrested him (appellant). After the close of the hearing the trial court convicted the appellant and sentenced him to 10 years imprisonment. The appellant was aggrieved and filed this appeal.

GROUND OF THE APPEAL

1. THAT the prosecution did not discharge its duty adequately when they delayed for a period of 5 years for the case to begin.
2. THAT the lower court failed to summon potential witnesses to shed light on this case.
3. THAT the entire police investigations were shoddy.
4. THAT the prosecution relied on hearsay evidence.

APPELLANT'S SUBMISSIONS

The appellant submitted that he was arrested 5 years after the alleged offence and the complainant died before testifying in the case. He submitted that he was attacked by complainant and his brother armed with panga and he dodged the panga and the complainant was cut by his own brother. He urged the court to consider the contradictions in the evidence regarding the time of the offence, the body part injured during the incidence, and the scene of the offence.

He also faulted the trial court for substituting the charge of assault with grievous harm after close of the hearing without calling the appellant to plead to the charge. He asked this court to consider his mitigation and the fact that he was a first offender.

RESPONDENT REPLY

Mr. Magoma learned state counsel opposed the appeal. He denied that the appellant was charged 5 years after the offence. He submitted that even if the charges were delayed, Section 219 of the Criminal Procedure Code would provide the cure because there is no limitation period for criminal cases.

He however submitted that the offence was proved by evidence because the offence took place in broad daylight. The PW1 was neighbour to the appellant and he saw the appellant attack him with a knife and

panga. The appellant cut the PW1 on the nose and forehead. The Pw2 confirmed the injury. She heard commotion and went out and saw PW1 bleeding and the appellant standing next to him with a panga.

PW3 arrested the appellant at the scene where he also found blood stains on the ground. PW4 produced P3 which showed that PW1 was cut on the nose and forehead. The degree of injury was assessed as grievous harm.

ANALYSIS AND DETERMINATION

Section 4 of the penal code defines grievous harm as harm which amounts to a maim or dangerous harm or seriously or permanently injures of health or which is likely so to injure health or which extends to permanent disfigurement or to any permanent or serious injury to an external or internal organ membrane or sense.

The P3 produced by the PW4 showed that the nature of the injury was grievous harm. The identity of the assailant is not in dispute because it was done during the broad day light. PW1 and PW2 identified the appellant as the person who assaulted the PW1. The scene of the accident was within the appellant's homestead which was next to the PW1 and PW2.

The evidence of PW1 is corroborated by PW2 who after hearing commotion went out of her house and saw the appellant standing next to the PW1 who was bleeding from the nose. The appellant was holding a blood stained panga.

PW3 also visited the scene and found blood stains on the ground. He also found the appellant in the hands of the crowd which responded to the PW1's cry for help. Both the PW1 and the appellant stated that the appellant's mother was present when the PW1 was cut on the nose and forehead. She however did not testify either for the defence or prosecution.

The appellant did not justify the reason for cutting the PW1. Instead he alleged that the PW1 was cut by his brother when the appellant dodged the weapon. The court does not agree with that allegation by the appellant. PW2 did not see the alleged brother of the PW1 at the scene. The court does not find merit in that explanation by the appellant. The court takes issue with the appellants allegation that he was not arrested and charged until after 5 years of the offence. The court agrees with the testimony of PW2 and 3 that the appellant was arrested immediately after the offence and while the PW1 was in the hospital. The proceedings shows that the appellant was arraigned before the court on 7/9/2009 when he pleaded to the initial charge of assault.

It is also not true as submitted by the appellant that the complainant died before testifying in support of the charge. The truth is that the PW1 was the victim of the appellant attack and the P3 and the testimony of PW2 confirm that fact. It is therefore deliberate lie on the part of the appellant to submit that the charge was brought after 5 years and that complainant died before giving evidence.

This court is further disgusted by the deliberate lie by the appellant when he stated that the charge of assault was substituted by the trial court while writing judgment and without calling the appellant to take a plea. The truth of the matter is that after the PW4 (doctor) testified, the prosecution sought leave to substitute the charge and the appellant pleaded not guilty.

The record shows that on the same day of the said plea the prosecution closed its case and the appellant was put to his defence. He is the one who demanded to give his defence on the same day arguing that his case had dragged for a long time. He cannot therefore lie that the trial court changed the charge at the time of judgment. In view of the foregoing observation, this court does not find any merits in the appeal.

DISPOSITION

The appeal is dismissed and the conviction and sentence affirmed.

Signed this 22nd day of November 2013

ONESMUS MAKAU

JUDGE

Delivered this 22nd day of November 2013