



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 50 OF 2012

BETWEEN

BENSON NJERU GAKUNDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Siakago Criminal Case 911 of 2010 by Hon. S.M. Mokua P.M. on 9th March, 2012)

JUDGMENT

1. The appellant, Benson Njeru Gakundi was charged with the offence of grievous harm contrary to **section 234** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on the 7th July 2010 at around 9.30 pm at Machanga village in Mbeere South District within Embu county unlawfully assaulted Josephine Ndegi Matu thereby occasioning her grievous harm. He was also charged with another count of creating disturbance in a manner likely to cause a breach of the peace contrary to **section 95(1)(b)** of the *Penal Code*. The particulars were that on 7th July 2010 at Machanga village in Mbeere South District created a disturbance in a manner likely to cause a breach of the peace by threatening to cut Alice Nthua Matu with a panga.
2. The prosecution case was as follows. PW1, Josephine Ndegi Matu testified that on 7th July 2010 at 9.00am, she was headed to the shamba when she met the appellant armed with a crowbar and locked the gate. He also carried trees which to use to close PW1's path. The accused then hit PW1 on the right shoulder and right side of her head and she fell down unconscious. She regained consciousness to find herself in Embu Provincial hospital. She testified that the accused is her nephew and that her homestead and his are 400 metres apart. Due to the injury, she developed hearing problems and her right jaw got dislocated. She stated that the appellant was out to interfere with the boundary and take her land.
3. PW2, Alice Nthua Matu, PW1's daughter, testified that on the material date, she saw the appellant entering their compound. By that time, PW1 was headed to the shamba. She saw the accused hit PW1 with a crowbar as a result of which she fell down. She was about 50 metres from where the incident took place. She screamed and rushed to the scene and found her mother bleeding from the nose and mouth. The appellant raised the panga which he allegedly wanted to cut her with. Karani and Julia among other persons arrived at the scene, prompting the appellant to flee.
4. PW3, Erick Karani Njuki, PW1's herd's boy testified that at the material time he was outside the homestead taking tea when PW1 was escorting a casual worker to the shamba and met the

- appellant at the gate. He saw the appellant take a crow bar and hit PW1 on the head as a result of which she fell down. He saw PW2 rush to the scene screaming and members of the public came. The appellant pushed his wheelbarrow from the scene. When PW3 got to where the appellant was, PW1 was bleeding from the mouth. He stated that he knew the accused prior to the incident.
5. PW4, Julia Mbuya Kariuki, testified that at the material time she was at home when she heard screams from a neighbour's place. She rushed there and found PW2 screaming. She found the appellant present armed with a crowbar and at the time was swinging his panga towards PW2. PW1 was lying on the ground bleeding from her mouth and nose. They screamed thereby attracting members of public.
 6. PW5, Jane Ireri, a housewife testified that at 10.00 am on the material day, she had gone to a borehole to fetch water when she heard screams emanating from PW1's place. She found her lying by the entrance of her compound bleeding from the nose and mouth. She called her name but she could not respond. She and others escorted PW1 to Kiritiri Police Station to report and thereafter to Embu Provincial General Hospital.
 7. Dr. Godfrey Njuki Njiru, PW6 was the doctor who examined PW1 and filled the P3 form. He testified that at the time PW1 was admitted, she was unconscious and had blood oozing from the right ear. He noted that there was also a sign of fracture on the skull which was confirmed by an x-ray and a scan which indicated that she had a brain concussion and right side weakness. His opinion was that the injuries were caused by a blunt object. He assessed PW1's injuries as grievous harm.
 8. PC Danson Mugo, PW7, testified that he heard screams from his neighbourhood and rushed to the PW1's homestead where he found a group of neighbours. PW1 was sitting down, bleeding from mouth and nose. He learned that she had been hit using an iron bar. PW1's son was contacted and availed a vehicle whereby they escorted PW1 to Kiritiri Police Station and later Kiritiri Health Centre. She was referred to Embu Provincial hospital where she was admitted.
 9. Inspector Simon Nzuki, PW8, testified that he was at the office when PW2 brought her mother who had been seriously injured. He carried out investigations regarding the incident. He did not recover weapons allegedly used in inflicting the injuries.
 10. The appellant, a police constable based at Garbatula Police Station elected to give sworn evidence. He stated that at the material time, he was in Embu on the night of 6th and 7th July 2010 and then he left for Garbatulla the next day which is the date of the incident. He was later called by OCPD Mbeere in November informing him that he had attacked a neighbor. He attributed his woes to existent family differences with PW1.
 11. The appellant called three witnesses. DW1, Peter Mugo, a casual labourer who sometimes worked for the appellant, testified that on the material day he was working in the shamba when he learnt that the complainant fell down while carrying a jerrican. He stated that he knew she was epileptic. DW2, Jonathan Njeru, a farmer who knew the appellant, stated that on the material day he was fetching water and a head of him was a lady carrying water. He suddenly saw her fall. He stated that he heard people say that she was epileptic. DW3, Mukami Njeru, who ran a hotel in Kiritiri, testified that on the material day the appellant called her and informed her he had paw paws to sell to her. While on the way to the appellants place, the lady who was walking in front of her fell down. She stated that she learnt from other people that she was an epileptic.
 12. After reviewing the evidence, the learned magistrate was convinced that the prosecution had proved its case beyond reasonable doubt. He convicted the appellant on both counts and sentenced him to 10 years imprisonment on the first count and 6 months on the second count, both sentences to run concurrently. He now appeals against conviction and sentence.
 13. The appellant challenged the decision of the learned magistrate on various grounds. First, that the

learned magistrate failed to indicate the language in which the substituted charge was read and that therefore the element and substance of the charge were not read to the accused rendering the trial a nullity. Second, that the panga and crowbar which were allegedly used to commit the offence were not produced and therefore the evidence of PW1 was not corroborated by the weapons. The appellant also challenged the judgment on the ground that PW6 only produced a P3 form but did not produce the x-ray photos and a scan medical report. The appellant also claimed that there was no evidence in support of the second count. The prosecution on its part supports the conviction and sentence on the ground that the evidence against the appellant was overwhelming.

14. It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own independent conclusions in deciding whether the judgment of the trial court should be upheld. (See *Okeno v Republic* [1972] EA 32). In doing so, it must also take into account the fact that it lacks the privilege of hearing or seeing the witnesses testify.
15. Before I deal with the evidence, I will deal with the issue that the trial was carried out in a language the appellant failed to understand. The appellant's counsel contended that when the substituted charges were read on 9th March 2013, the learned magistrate did not indicate the language in which the proceedings were conducted.
16. **Article 50** of the Constitution guarantees an accused the right to have the trial conducted in a language he or she understands. The requirement is not merely technical but substantive. Although the language of the proceedings was not indicated in the record for the material day, the subsequent proceedings are clear that the appellant pleaded to the charges and the subsequent proceedings were carried out in English and Kimbeere as indicated in the record. The record also indicates that the appellant was able to follow the proceedings and he indeed cross-examined the prosecution witnesses and called his own witnesses. I therefore find this ground lacks merit.
17. The other grounds deal with the evaluation of the evidence which is in fact the duty of the first appellate court. The issue for consideration is whether the appellant committed the offence. I find that the appellant was at the material time at the place where the alleged offence took place. The incident took place in the morning and the appellant was well known to PW2 and PW3 who saw the appellant hit the accused person. PW1 also recognized the assailant as her cousin. The evidence of the medical doctor, PW6, that PW1 sustained blunt injuries is consistent with blows struck by a crow bar.
18. I do think that failure to produce the crow bar used to assault PW1 is fatal to the prosecution case in view of the clear evidence of PW1 corroborated by PW2, PW3 and PW4 who all saw the appellant use the crowbar. Furthermore the PW6 concluded that injuries suffered by PW1 were caused by a blunt object. The fact that the crowbar was not produced or could not be found does not change this overwhelming evidence.
19. The appellant's evidence that he was not involved in the felony is not borne out by the overwhelming prosecution evidence that places him at the status quo. His evidence that on the night of 6th and 7th July he was in Embu and he left for Garbatula on 7th July 2010 at least places him within the area. Likewise, the evidence of DW1, DW2 and DW3 does not assist his case. The evidence of DW1 was clearly hearsay. DW3 admitted in cross-examination that he did not see the complainant's physical appearance and was not sure that PW1 was the person she saw. The witnesses all relied on hearsay and rumour to support the contention that PW1 was an epileptic. This is not borne out by any medical evidence and the injuries sustained by PW1 are not consistent with PW1 having suffered an epileptic fit. The appellant's evidence was rightly dismissed by the learned magistrate.
20. Finally, the appellant contends that the second count of causing disturbance likely to cause a breach of the peace was not established. The count referred to the appellant threatening one Alice Nthua Matu with a panga. PW1, in her evidence, refers to Alice Nthua as her neighbor. The other witnesses did not point to any incident concerning the threat to her by the appellant with a panga

as charged. PW4 testified that the appellant threatened PW2 who is Esther Nthua Mate. In the circumstances, this count was not established and the conviction thereon is quashed.

21. I have considered the sentence imposed. The maximum sentence is that of life imprisonment and as the appellant as a first offender, I consider the sentence of 10 year's imprisonment excessive in the circumstances. I substitute it with a sentence of 6 years imprisonment.

22. The appeal is allowed only to the extent that the conviction and sentence for the 2nd count of creating a disturbance contrary to **section 95(1)(b)** of the *Penal Code* is quashed. The appellant conviction on the charge of causing grievous harm contrary to **section 234** of the *Penal Code* is affirmed and the sentence imposed substituted with a sentence of 5 years imprisonment.

DATED and DELIVERED at EMBU this 16th December 2013.

D.S. MAJANJA

JUDGE