



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NUMBER 180 OF 2011
CONSOLIDATED
WITH CRIMINAL APPEAL NO. 181 OF 2011

BETWEEN

MICHAEL NTHIGA NDWIGA1ST APPELLANT

JAMES KARIUKI NJOGU.....2ND APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal Case 2772 of 2006 by E.K. Nyutu R.M. on 7th September, 2010)

JUDGMENT

1. The appellants, **Michael Nthiga Ndwiga** and **James Kariuki Njogu**, appeal against conviction and sentence in a case where they were jointly charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. They were found guilty and after mitigation sentenced to a fine of Kshs. 20,000/= in default 8 months imprisonment.
2. The particulars of the offence were that on the 23rd day of June 2006 at TENRI Mission, Majimbo village, Kamiu sub-location, municipality location in Embu District within Eastern province, the appellants jointly assaulted Moses Kivuti Njiru thereby occasioning him actual bodily harm. In order to prove its case, the prosecution called four witnesses including the complainant, Moses Kivuti Njiru.
3. PW1, the complainant testified that on 23rd June 2006 was at work at TENRI mission when he was summoned by the 1st and 2nd appellants, the Principal and Headmaster at TENRI respectively. He testified that the appellants assaulted him for reporting that a teacher at the school had committed indecent assault on a female pupil during a school trip. PW1 stated that the appellants slapped and hit him with fists on the face. He testified that the 1st appellant stepped on him and struck him on the right sides of the face with his hand. He hit him twice on the right side and once on the left as a result of which he got injured on both his left and right side of his face. The 2nd accused hit him with blows on the left side of his mouth and slapped him from behind. As a result of the blows, PW 1 testified that he broke a tooth

although the tooth did not come out.

4. PW1 reported the matter at Mugoya Police Station where he was given a note to proceed to Embu General Hospital for treatment. He was treated and issued with a P3 Form. PW1 stated in cross examination that there were two security guards on the material day at the gate and that he complained about the incident to the watchman, one Musyoka who opened for him the gate.

5. PW2, James Ndirangu, a police officer from Itabua police station recorded PW1's complaint on 23rd June 2006 at about 8.45pm and issued him with a P3 form. He proceeded to investigate the complaint. In cross-examination, Mr Ndirangu stated that he had doubts whether the offence had actually taken place as alleged by complainant and his witnesses and that is why he forwarded the file to the D.C.I.O. In re-examination, he confirmed that it took about six months from the date of report to the arrest of the accused and that the DCIO ordered that the matter be brought before the court.

6. PW3 is a medical officer at Embu Provincial hospital who examined PW1 and filled and signed the P3 form on 27th June 2006. According to Dr. Godfrey Njuki Njiru, PW1 had changed clothes and alleged to have been assaulted by persons known to him. PW3 examined the patient seven days from the reported date of injury. According to the treatment card, PW1 had a swelling on the right side of the face and a crack on the second upper molar. The probable weapon used was a blunt object. PW3 assessed the degree of injury as "harm."

7. PW4, Musa Muriithi Njeru was a casual labourer at Majimbo. He testified that on 20th June 2006, at about 5.30 p.m, he was at home when PW1 went crying and complained that he had been beaten on the back and ribs by appellants. He went with PW1 to his uncle Ngari to report the matter. They all proceeded to Itabua Police Station where the report was made and they recorded their statements. It was his testimony that the people who assaulted PW1 were not known to him and that he neither saw PW1 being beaten nor did he see any injuries on him.

8. Both appellants gave unsworn testimony where they denied committing the offence. The 1st appellant confirmed that on the material day he summoned PW1 to discuss issues that had arisen during a school trip. The matter was discussed together with the 2nd appellant but no resolution was reached and PW1 left at about 6.00pm. The 2nd appellant also confirmed the meeting between the parties. He stated that the meeting was called to discuss the issue of misappropriation of funds and no resolution was reached. He stated that the complainant left in anger.

9. The learned magistrate analysed the evidence and concluded that the prosecution had proved its case beyond reasonable doubt and convicted each of the appellants of the offence of assault causing actual bodily harm.

10. The appellants cited eight grounds of appeal. It is their case that the learned magistrate misdirected herself in her interpretation of the charge of assault as defined in **section 250** of the Penal Code and erred in law in holding that the word "unlawfully" used in **Section 250** did not apply to a charge under **section 251**. According to the submissions made by Mr. Njage counsel for the appellants before the trial court, the charge against the accused persons was totally defective as the word 'unlawful' did not appear on the charge sheet. The second ground of appeal is that the trial court erred and misdirected itself on assessment of the credibility of the complainant's demeanor and conduct as a whole, having reported the incident to the police seven days after the incident. The third ground of appeal is the reliance by the learned Magistrate on the evidence of the doctor who was not the one who examined the complainant and the failure to produce medical reports in court to support PW3's findings. Further, that the learned magistrate erred and misdirected herself on the burden of proof; that having agreed with the defence that PW4's evidence did not "add any value to the prosecution case" misdirected herself on the burden of proof when she held that his contradiction of the complainant, "made no difference to the prosecution case." The appellants also fault the judgment of the trial court on the ground that it misdirected itself in shifting the burden of proof to the accused when it held that "*The accused persons gave unsworn statements and therefore the court did not have the benefit of having their evidence tested.*" Further, that the judgment of

the learned magistrate was defective with regard to the conviction for failing to specify the offence of which, and the section of the Penal Code or other law under which, the accused was convicted, in violation of **Section 169(2)** of the Penal Code, and further that the sentence was not dated.

11. The appeal was opposed by the prosecution. Its case is that the attack on PW1 is corroborated by PW3 who filled the P3 form. The prosecution however admitted the contradiction in PW4's testimony but stated that this was not enough to invalidate the prosecution case. The prosecution denied that the charge sheet was defective. According to the prosecution, **section 250** of the **Penal Code**, the assault did not need to result to harm and the prosecution only needed prove that the assault was unlawful. On the other hand, under section 251, the prosecution had to prove that injury to render the assault unlawful. Mr Njogu state counsel contended that the fact of the PW1's injury was proved and corroborated by PW3. Counsel contended that the reasons for disbelieving the unsworn statements were clear and that the sentence was legal and proper.

12. It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The court must weigh conflicting evidence and draw its own decision on the evidence. (See **Okeno v Republic [1972] EA 32**). In doing so the court must also take into account the fact that it did not hear or see the witnesses.

13. It is not in doubt that PW1 was hit by a blunt object according to the testimony of PW3 who examined the injuries. My re-evaluation of the evidence is that prosecution evidence is fraught with inconsistencies. For example, although PW4 was the person who saw the accused immediately after the assault, his testimony was that he did not see any injuries on the accused person but together they went to his uncle and thereafter they accompanied PW1 to the police station. Even more glaring, PW4 testifies to events of 20th June 2006 while the alleged offence is said to have occurred on 23rd June 2013. Although the learned magistrate glossed over the date of the incident by stating that the evidence of PW4 testimony did not add value to the prosecution case to the extent that he did not see PW1 being beaten or saw any injuries on PW1, I think the evidence of PW4 is important as it would tend to corroborate the fact that PW1 was assaulted as he was a person PW1 knew and would ordinarily inform him what happened. According to the testimony of PW4, PW1 told him that the appellants had beaten him on the back and the ribs. This is inconsistent with PW3's evidence that the treatment card showed PW1 had a swelling on the right side of the face and a crack on the 2nd upper molar. If the PW1 had sustained broken tooth, surely that must have been apparent or he would have told PW4 the first person he informed. These inconsistencies, coupled by the fact that PW3 the doctor who examined the PW1 seven days after the incident when PW1 had allegedly healed was not the one who treated the PW1 end to introduce reasonable doubt in the evidence against the appellants. It is also not clear why the security guards at the gate to whom PW1 complained about the assault and who opened for him the gate as he left the institution immediately after the assault was not called to testify.

14. After re-evaluating the evidence I find and hold that the prosecution failed to establish beyond reasonable doubt the commission of the offence. In the result, the appeal must be allowed.

15. Both the conviction and sentence are hereby set aside. The fine paid by the appellants shall be refunded to the appellants.

DATED and DELIVERED at EMBU this 16th December 2013.

D.S. MAJANJA

JUDGE