



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 63 OF 2012

THOMAS ITENYO KHWESO APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(APPEAL ARISING FROM THE DECISION OF HON. M. N. GICHERU, CM IN KITALE CHIEF
MAGISTRATE'S COURT IN CRIMINAL CASE NO. 2466 OF 2010)*

J U D G M E N T

The appellant had been charged with robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars were that on the 14th day of June 2009 at Moi Farm in Trans-Nzoia County jointly with others not before Court being armed with dangerous weapons namely an iron bar and a panga robbed Abdi Swaleh Muchuma of his wallet containing National identity card, elector's card, Equity Bank Plate and cash Kshs. 30,000 and at or immediately before or immediately after the time of such robbery wounded the said Abdi Swaleh Muchuma.

After the conclusion of hearing, the Trial Magistrate found the appellant guilty for a lesser offence of grievous harm and convicted him of the same and sentenced him to six years imprisonment. Being dissatisfied with the conviction and sentence, the appellant preferred an appeal through the firm of Messers Samba & Co. Advocates in which he raised the following grounds:-

1. *That the Trial Magistrate erred in law and fact in holding that the Prosecution had proved its case beyond any reasonable doubt.*
2. *The Learned Trial Magistrate erred in law and fact in relying on the evidence of Pw 2 to convict the appellant whereas the said Pw 2 did not identify the appellant at the scene of the alleged offence as the attack was from behind and the witness Pw 2, rode away very fast after being hit with an iron bar from behind.*
3. *The Learned Trial Magistrate erred in law and fact in convicting the appellant of the offence of grievous harm after disbelieving the evidence of the complainant to the effect that he had been robbed of a wallet containing Kshs. 30,000 and other personal documents, instead of dismissing the Prosecution case on the same basis.*
4. *The Learned Trial Magistrate erred in law and fact in dismissing the appellant's defence in the face of evidence of existing hostility between the appellant and the complainant, a vigilante serving under the jurisdiction of Moi's Bridge Police Station against whom the appellant had two pending civil claims in Kitale Court.*
5. *The Learned Magistrate actually shifted the burden of proof to the appellant which was the obligation of the Prosecution.*
6. *The whole judgment was against the weight of evidence.*
7. *That the sentence of imprisonment for 6 years was excessive.*

The facts of the case are that on the morning of 14/06/2009 at around 7.30 am Pw 1 Abdi Swaleh Muchuma the complainant herein took a bicycle taxi commonly known as “boda boda” from Simatwet Trading Centre. He was going to his shamba. The bicycle taxi belonged to Pw 2 Joshua Kiplimo Lelach. As the two were on the way, the complainant's nephew called Mukolongolo emerged from a maize farm. He was soon thereafter joined by the appellant and his son. Pw 2 was hit on the back with a metal bar. He ran away leaving the complainant behind.

The appellant's nephew Mukolongolo cut the complainant at the back of the head using a panga. The appellant then joined in and cut him on the face. The complainant struggled with the appellant who cut him on the left hand. The appellant aimed a panga at the complainant's neck. The complainant tried to block it as a result of which his small finger was cut off. The appellant's son joined him. He cut the complainant on the wrist joint. The complainant ran to a nearby home and armed himself with a jembe which he used to ward off his assailants. The complainant alleged that it is during the attack that the appellant took his wallet containing Kshs. 30,000 in cash as well as other personal documents. The appellant and the other two assailants then fled the scene.

A man called Dan came and escorted the complainant to a nearby road where he took matatu to Kitale District Hospital where he was admitted until 7th July 2009. While in hospital, his wife reported the incident to Moi's Bridge Police Station. Upon discharge from hospital, he went and recorded a statement at the Police Station. A P3 form was duly filled and produced in evidence by Pw 3 Chrisantus Masinde a Clinical Officer attached to Kitale District Hospital.

The appellant went underground for over one year until 15/09/2010 when the complainant spotted him at Kitale Law Courts where he had come for a civil case. The complainant informed Pw 4 PC Tom Juma of Kitale Police Station who came and arrested him. Pw 4 then proceeded to Moi's Bridge Police Station where he collected the statements which had been recorded and charged the appellant.

When the appellant was put on his defence, he denied committing the offence. He stated that he had a long history of misunderstanding with the complainant. That at sometime, the complainant wanted to seduce his wife but his wife refused. He went and reported the incident to Moi's Bridge Police Station who did not act on the complaint. He also contended that at one time, he arrested the complainant's neighbour who had illicit brew but that the complainant intervened. This strained the relationship between him and the complainant.

We have analyzed the evidence adduced before the lower Court. Our duty as a first appellate Court is to subject the evidence to a fresh and exhaustive examination. In our examination of the evidence, we are expected to reach our own conclusions and findings. We are expected to weigh conflicting evidence and draw our own conclusions. In doing all these, we are however bound to make allowance for the fact that we did not hear or see the witnesses testifying. This was set out in the case of **Okeno Vs. Republic [1972] EA 32.**

The appellant was convicted of a lesser offence of grievous harm as the Trial Magistrate did not believe the complainant's evidence that he lost Kshs. 30,000 as well as other personal documents. Mr. Samba argued that as the Trial Magistrate did not believe the evidence of the complainant on loss of Kshs. 30,000 he should not have convicted the appellant on the rest of the evidence. He further argued that there were contradictions between the evidence adduced before the Trial Magistrate and what was recorded in the statements of the complainant and his witness. Mr. Samba further argued that there was hostility between the complainant and the appellant which hostility extended to Police Officers at Moi's Bridge Police Station. He argued that the charge of robbery with violence was meant to silence the appellant. Mr. Samba relied on the case of **Ndungu Kimanyi [1976-1980]** in which the Court of Appeal judges said as follows:-

“The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence”.

Mr. Chelashaw for the State opposed the appellant's appeal arguing that the Trial Magistrate was correct in making a finding that there was no evidence of robbery and therefore convicted the appellant on grievous harm which had been proved. Mr. Chelashaw argued that the Magistrate found that there was no report of robbery made and as such what was proved was grievous harm. He further argued that the animosity between the appellant and the complainant shows that the appellant had the motive for attacking the complainant.

We have considered the evidence adduced before the lower Court as well as the documents produced in support thereof. An extract from the investigation diary vide OB No. 33 of 15/09/2009 shows that the initial report which was made was of grievous harm. However when the appellant was finally charged, the offence which faced him was that of robbery with violence. In any case requiring an investigation, the first report is very important when it comes to testing the credibility of any subsequent testimony. In the present case, what was initially reported was a case of grievous harm but when the complainant testified, he introduced the issue of money having been stolen from him. Had the complainant reported that he lost money in his first report, then the evidence as to the same would have been believed. In the present case the initial report made was that of grievous harm.

The complainant went ahead to testify on how he was attacked by the appellant and his son and nephew. The attack took place at 7.30 am. Pw 2 was present during the attack even though he did not know the attackers. Evidence as to the injuries which the complainant sustained was produced by Pw 3 Chrisantus Masinde who observed that the complainant had multiple cut wounds on the head, had a deep cut wounds on the left forearm. The small finger of the left hand had been amputated. There was a fracture of the left ulna and a cut wound on the left forearm. He assessed the degree of injury as grievous harm. The P3 form was produced as *exhibit 3*. The evidence of Pw 3 corroborated that of the complainant.

The appellant used to stay at Moi Farm but after the attack, he went into hiding for over one year. He was only arrested when he came for a civil case which he had filed against a Police Officer from Moi's Bridge Police Station. The Trial Magistrate took the fact of the disappearance of the appellant as a pointer to his guilt. In the case of **Malowa Vs Republic [1980] KLR 110** the appellant disappeared from home after an alleged murder. It was held that the disappearance amounted to corroboration of the Prosecution case.

The Trial Magistrate did not disbelieve the entire evidence of the complainant. The only bit which he did not believe is that regarding robbery. The Trial Magistrate had reason for this. The initial report was that of grievous harm. There is no way that would have changed to robbery. It is therefore clear that the Trial Magistrate was not doubting the entire evidence of the complainant. There was motive for the attack. There was bad blood between the complainant and the appellant. As the Magistrate rightly observed, the appellant should have waited for the law to take its own course instead of attacking the complainant. The deep animosity between the appellant and the complainant may have informed the decision of the Police to attempt to enhance the minor offence to that of robbery with violence so as to maximumly punish the appellant who had also filed civil suits against Police Officers from Moi's Bridge Police Station as confirmed by documents produced by the appellant in which he had sued Police Officers from Moi's Bridge Police Station.

The fact however remains that the complainant was attacked and seriously injured by the appellant. The Trial Magistrate was proper in convicting the appellant for the offence of grievous harm. The sentence of six years imprisonment was in fact lenient considering the circumstances surrounding the attack. The attack was savage and was unprovoked. We find no merit in the appeal which we hereby dismiss in its entirety.

Dated, signed and delivered at Kitale on this ,....5th..... day of December, 2013.

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellant:

Respondent:

Court Clerk: