



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEAL NO.102 OF 2010

(Appeal from Resident Magistrate honourable B. Ombewa in Webuye Court in Criminal no.1909 of 2009)

ELIUD WASIKE

WANJALA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted by the Resident Magistrate at Webuye of greivous harm contrary to section 234 of the Penal Code and sentenced to serve 7 years in jail. The particulars of the charge were that on 19/11/2009 a Misikhu Location in Bungoma East District of the Western Province he greivously injured Ben Munoko. He was aggrieved by the conviction and sentence and preferred this appeal which he personally prosecuted. It was opposed by the State which was represented by Mrs. Leting.

The evidence on which the Appellant was convicted was that on 19/11/2009 at about 4.30 p.m the complainant was riding a motor cycle to Misikhu Market when he was called from behind. He saw two people. They wanted to be carried to Makemo and sought to know how much it would cost. He told them he would charge Ksh.100/=. They had only Ksh.20/=. He declined to carry them and left. They, however, followed him and one of them, the Appellant, hit him with a stick twice on the left eye. He fell down unconscious and found himself at Webuye District Hospital at 10.00 p.m having been admitted. Evans Wanjala Simiyu was at the market when he saw people running towards a feeder road to Marinda. He went there and found the complainant lying down while being beaten by the Appellant who had a stick. The people went for the Appellant who took off running. They wanted to beat him for assaulting the complainant. He ran to Misikhu A. P. Camp while being chased. He was rescued by A. P. C. Justin Kariuki Nyanga who arrested him and took him to Webuye Police Station. The complainant was discharged the following day. The P3 (exhibit 2) completed by clinical officer Patrick Mambiri showed that he suffered cut wounds on both eyes and had a temporary problem of vision of both eyes, and especially the right eye. Patrick completed the P3 on 16/12/2009 whereas the treatment was on 19/11/2009 at Webuye District Hospital. The treatment involved cleaning the wounds and being given analgesics and other drugs. He was referred to Bungoma District Hospital to review the eye, but it does appear from the evidence that he did not go.

The Appellant gave unsworn statement in defence and did not call any witness. He stated that on 19/11/2009 he was assaulted by people who took his phone and money. He went to Webuye Police Station to report but was instead arrested and charged. He denied beating the complainant and alleged the charge was a frame-up.

The trial court considered the prosecution and the defence case and came to the conclusion that the charge against the Appellant had been proved beyond doubt. It accepted the prosecution evidence and discounted the defence version.

It is the duty of this first appellate court to subject all evidence adduced before the trial court to fresh and exhaustive scrutiny and consideration and be able to decide whether the conviction entered by the trial court should be upheld. (**Okeno v. Republic [1972] EA 32**). The court should bear in mind that it did not have the advantage of seeing or hearing the witnesses.

It is clear that the evidence of the complainant that he was hit and injured by the Appellant was supported by Evans Wanjala simiyu who witnessed the attack. The fact of injury was confirmed by the medical evidence contained in the P3. Further, that the Appellant was chased by irate members of public into Misikhu A.P Camp was corroborated by the testimony of APC Justin Kariuki Nyangi. The Appellant's statement in defence was considered against this evidence and found not to be true. I do not fault the finding. There was overwhelming evidence against the Appellant.

However, the complainant received cut wounds on the eyes and had temporary vision problems when he went to hospital. There was no evidence that the vision problems persisted. There was no review of the condition to show that the injury suffered led to any destruction of the eyes or to any permanent hurt of the eyes. The injury suffered, I find, amounted to harm. The conviction and sentence under section 234 of the Penal Code were therefore in error and are set aside. The Appellant is convicted on the lesser charge of assault causing actual bodily harm contrary to section 251 of the Penal Code.

Regarding sentence, it is considered that the attack was without reason or provocation. The Appellant was a first offender who was a parent and a widower, and asked for leniency. He has been in jail since 7/9/2010. I consider that he has suffered enough for the offence. He is hereby sentenced to the period already served. This means that he will be set at liberty forthwith unless he is otherwise being lawfully held.

Dated and delivered at Bungoma this 24th day of January, 2012 in the presence of the Appellant, the State Counsel Mrs. Leting and Lilian Gimose the court clerk.

A. O. MUCHELULE
JUDGE