



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Appeal 13 of 2010

PETER WANYONYI.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence by the Resident Magistrate Hon. F. Kyambia at Bungoma in Cr. Case No.1124 of 2008)

JUDGMENT

The Appellant was convicted of assault causing actual bodily harm contrary to section 251 of the Penal Code and sentenced to serve one year in jail. The particulars of the offence were that on 30/5/2008 at Bungoma town in Bungoma District of the Western Province he unlawfully assaulted Harikrushna Harmanbhai Patel (PW1) and occasioned him actual bodily harm. He was not satisfied with the conviction and sentence and appealed to this court. The appeal was prosecuted on his behalf by Mr. Were. Mr. Ogoti for the State defended both the conviction and the sentence.

From the record, it is clear that PW1 had a shop in Bungoma town in which he sold auto spares and agrovet and pharmacy goods. At the time in question he was renovating the building. The Appellant was selling second hand books which he would keep at the verandah of PW1's shop. PW1 had an employee called Jigneshkumar Patel (PW2) who was supervising the renovation. At 8.00 a.m. PW1 sent PW2 to go and supervise the renovation. PW2 found that the Appellant's huge and heavy cartons of books were at the verandah. PW2 stated that he asked the Appellant to remove them but he did not. The Appellant testified that when he went to collect the books he saw PW2 call on his phone. Indeed PW1 testified that PW2 called him saying the Appellant had refused to remove the books.

What happened after PW1 came was in contention. PW1 stated that he asked the Appellant to remove the books but he just looked at him. He (PW1) begun washing the place. The cartons were there. PW2 said some water fell on the cartons. The Appellant came and boxed him on the right cheek and twice on the head, then carried him and threw him on the ground. He was now bleeding from the mouth, and got injured on the mouth and back. The Appellant testified that when PW1 came he begun

pouring water on his books. The Appellant tried blocking him but was abused by being called “*stupid African*”. He then threw a punch at the appellant but the latter ducked and he hit the wall. The Appellant’s witness Stanley Nyongesa (DW2) stated that he saw PW1 pouring water on the books. PW1 then tried to hit the Appellant who ducked and he hit the wall. On cross-examination, DW2 said PW1 hit the window when the Appellant ducked. They denied that the Appellant assaulted PW1.

Medical evidence was produced to support PW1’s evidence that as a result of the assault he was attended to at Bungoma District Hospital. Centus Ochola (PW3) was the Clinical Officer who attended him. He found PW1 with a soiled shirt. He had a bruised lower lip which was torn on the inner aspect. He had a painful lower back. He had been injured by a blunt object and the injuries were classified as “*harm*” (Exhibit 1). The P3 shows blood stained right palm and tender sacral area.

When each of PW1 and PW2 was cross-examined by M/s Nanzushi they denied that PW1 had abused the Appellant by calling him “*stupid African,*” or at all.

It is clear that the evidence of PW1 and PW2 was that the former was attacked by the Appellant as a result of which he got injured. The prosecution produced the medical record to support the fact of injury. It was the evidence of the Appellant and his witness that PW1 injured himself when he fell after throwing a punch which was ducked. The trial court considered the evidence and accepted the version of PW1 and PW2 and rejected that of the Appellant and his witness. The court noted that there was a stand-off between PW1 and the Appellant over the books and when the former poured water on them. It found that the Appellant was angered by the action of PW1 and that that is what gave him the reason to attack him. My own consideration of the evidence shows that the lower court could not be faulted for its finding on the facts. In any case, the injuries described by PW3 were inconsistent with falling down.

Regarding sentence, I am aware that sentencing entails the exercise of a discretion by the trial court. The appellate court can only interfere with that discretion if it is clear that the court overlooked some material factors, took into consideration some immaterial fact, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case (**Wanjema v. Republic [1971] EA 493**).

The Appellant was a first offender. Generally, a sentence of imprisonment should not be imposed on such an offender unless the offence was particularly grave or aggravated in nature. The offence of assault causing actual bodily harm under section 251 of the Penal Code is a misdemeanor. The court should have looked at imprisonment for the offence as a last option, and not the first option. Reasons why non-custodial treatment was not preferred should have been recorded. It is for these reasons that I consider that the sentence of one year imprisonment was manifestly harsh and excessive in the circumstances. It is hereby set aside, and in its place the Appellant shall pay a fine of Ksh.20,000/= in default to serve 6 months imprisonment.

To that extend, therefore, the appeal succeeds.

Dated, signed and delivered at Bungoma this 17th day of September, 2012.

A. O. MUCHELULE
JUDGE