



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 89 OF 2011

(From original conviction and sentence in Criminal Case No. 2266 of 2009 of the Principal Magistrate's Court at Nyahururu, D. N. Musyoka, R. M.)

DANIEL MUMOS KABUGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with seven counts of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code, (*Cap. 63, Laws of Kenya*). He was on the evidence found guilty and convicted on all the seven counts. He was consequently fined Ksh 10,000/= for each count and in default 6 months imprisonment for each count, and the prison terms to run consecutively.

Aggrieved with both his conviction and sentence the appellant has appealed to this court. The Petition of Appeal filed on 4th April 2011 sets out five grounds of appeal which may be summarized as follows -

- (1) that the case against him was fabricated and an organized deal among the prosecution witnesses;
- (2) that he was a victim of circumstances and there was no evidence upon which to convict and sentence him to a harsh sentence;
- (3) that the evidence was uncorroborated and that the evidence came from an extended family – who had ganged up to fight the appellant;
- (4) that the medical evidence was unreliable, as there were no x-ray of the victims alleged injuries.

The Appellant consequently prayed that his appeal be allowed, the harsh sentence be set aside and he be set free.

At the hearing of the appeal the Appellant submitted written submissions entitled - **“Appeal to consider my Mitigation Grounds”**. The grounds were -

- (1) *He was convicted on 25.03.2011 and sentenced to 2¹/₂ years imprisonment.*
- (2) *He had served one year and three months, and that he had reformed, and become a good citizen*

of Kenya.

- (3) ***He left behind a wife and two small children of whom he was the sole bread winner. His parents are deceased.***
- (4) ***He was a first offender.***
- (5) ***Considering the above circumstances, his sentence be reduced, and he be set free.***

In response to State Counsel's submissions opposing the Appeal on both conviction and sentence the Appellant argued that the whole incident arose out of an accident and a grudge between his family and the respective families of the the two groups, and that after the incident it was he, the appellant who reported the matter to the Police.

In opposition to the appeal, Mr. Omwega learned State Counsel submitted that the case against the appellant was proved beyond reasonable doubt, that the appellant is a local bully, and that his conviction was proper, as all the elements of the offence were proved, and that the offence carried a penalty of five years imprisonment, and that the appellant got a light sentence and asked that the sentence be upheld.

I have considered the respective arguments. From his submissions, the Appellant has abandoned the question of his conviction. He is only concerned about his sentence which he says is harsh and excessive.

However if there was any doubt regarding his conviction, I want to say that there was ample evidence upon which the appellant was convicted. The Appellant was riding his motorbike taxi (*boda boda*), and knocked a child going home from school. When called upon to assist the parents to take the child to Hospital, the Appellant became hostile and summoned his fellow motor bike transport operators who descended upon the seven complainants with all manner of crude weapons, causing each of them actual bodily harm. It was only upon the intervention of an old man according to the evidence of PW6 (*actually a good samaritan on his way to Nyeri, who had stopped to inquire what the source of the commotion was*), that the assault on the complainants stopped.

When the old man informed the Appellants "*jeshi*" that the issue was not about stealing the appellants motor bike, but about an accident which the appellant had caused, his colleagues took off on their motor bikes and the accused rode off to the Police. When the Police came to the scene of the assault and obtained a proper explanation that the appellant had caused the accident on a child, had refused to take the child to hospital and had instead summoned his "*jeshi*" on the lie that the complainants were trying to steal his motorbike from him, that the appellant was arrested and arraigned in court, convicted and sentenced as stated above.

I have observed that the appellant has by his submissions abandoned his appeal on conviction. I have also stated that he was properly convicted on the evidence, and State Counsel's description of him as a "*village bully*" is apt. The only question at issue is one of sentence. The punishment for the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code is imprisonment for 5 years. There is actually no provision for a fine.

Although under Section 26(3) of the Penal Code a person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment where the law provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment.

The expression used in Section 251 for punishment is a term "*not exceeding five*", which means this is the maximum and not the minimum sentence which may be imposed by the court. The trial court was thus right under the provisions of Section 26(3) of the Penal Code to impose the sentence of a fine, and in default 6 months imprisonment for each of the seven counts and the sentence were to run consecutively.

There were seven counts and the total period of imprisonment would therefore be 42 months or 3¹/₂

years and not 30 months or 2¹/₂ years as the appellant submitted. The appellant was convicted of all the seven counts, and the trial court was within its jurisdiction to order the sentences to run consecutively. The period 42 months is well below the 60 months or 5 years prescribed under S. 251 of the Penal Code. I see no reason to reduce that sentence.

For those reasons, I find no merit in the appellant's appeal. I confirm both the conviction and sentence. I dismiss the appeal.

It is so ordered.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE