



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 39 OF 2007

LESIT J,
GEOFFREY KIREMA.....APPELLANT
VERSUS
REPUBLICRESPONDENT

(From Original R.M Court Criminal Case No. 1227 of 2006 at Tigania; G. Oyugi Resident Magistrate)

JUDGEMENT

The appellant was convicted of one count of grievous harm contrary to section 234 of the Penal Code and sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence he filed this appeal.

The appellant has raised five grounds of appeal to the effect that the evidence was insufficient to sustain a conviction, that exhibits produced by the prosecution were irrelevant and that the sentence was too harsh.

The facts of the case are that the complainant, PW2, was cutting sugar cane in his shamba at 11 am on 13th July, 2006 when the appellant approached him from behind and cut him, on the right shoulder, the upper and lower left leg. As a result of the cuts, the complainant has to walk with the aid of crutches. The first person to arrive at the scene of attack was PW3, Charles Kaberia. The others were not called as witnesses. Charles' evidence was that he was attracted to the scene by scream. He went to the complainant's shamba where he found the complainant lying down with deep cuts on the shoulder, and left leg. Charles said that the accused was the only other person present and he was holding a panga ready to cut the complainants again. The accused ran away on seeing Charles.

The appellant denied the offence in his unsworn statement in defence.

I have carefully analyzed and evaluated afresh all the evidence adduced before the lower court as is the duty of a first appellate court. In the case for OKENO V. REPUBLIC [1972] EA 32, the role of a first appellate Court is given as follows:

“ An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA424.)”

Mr. Ogot argued the appeal on behalf of the appellant. He urged that the evidence against the appellant was insufficient because the complainant said he was attacked from behind and therefore he could not have seen his attacker.

Mr. Kimathi learned state counsel urged that the evidence of the complainant that he was injured was confirmed by PW1, a Clinical Officer. He urged that the court also noted the healed scars. Counsel urged that PW3 went to the complainant's rescue and found the appellant attacking the complainants, and the identity of the attacker was in the circumstances doubtless.

In regard to the ability of the complainant to see his attacker, it is true the complainant stated that he was attacked from behind. That was in regard to the injury inflicted on his shoulder. The complainant was however clear that on being cut on the shoulder, he fell down and that the appellant proceeded to cut him on the left leg twice. The complainant stated that the appellant was not in a hurry and did not leave until Charles, PW2 went to his rescue and threatened to kill him if he did not stop cutting the complainant.

Even though the learned trial magistrate did not consider the circumstances under which the appellant was identified, I have considered them. I find that the incident took place at 11am. It was therefore in broad day light. The appellant was known to the complainant, being his brother in law. Charles, PW2 also knew the appellant before as a neighbor. The chances of a mistaken identity were therefore non-existent.

Mr. Ogot challenged the learned trial Magistrate's finding that the weapon used in this incident was a panga urging that no witness testified to that effect. I have analyzed the entire evidence and I have found that PW3, Charles, in cross examination by the appellant stated that he, PW3 did not know where the appellant took the panga. It is clear from the evidence that a panga was mentioned as the weapon used in the attack against the complainant and therefore the learned trial magistrate was not guilty of conjecture. Nothing turns on this point.

Mr. Ogot challenged the learned trial magistrate for being too fast in hearing and disposing off the case. I did not understand the basis of the complaint as it is unfounded in law. Mr. Kimathi on his part said that the trial magistrate was merely being efficient when he took a short time to complete the case.

The learned trial magistrate should be commended for completely the case speedily and with great expedition. There is no lower time limit within which a case should be heard. The shorter it takes, the better in the interest of justice so long as all the parties are given an opportunity to be heard and the trial is conducted fairly. The learned trial magistrate took one day to hear and finalize the case. That was excellent.

There was a complaint that the provisions of section 211 of the Criminal Procedure Code were not complied with because the appellant was not asked if he had witnesses to call. The state through Mr. Kimathi did not think so.

Section 211 (1) of Criminal Procedure Code provides as follows:

“(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross – examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).”

I have looked at the proceedings and noted that the learned trial Magistrate recorded that the accused rights under Section 211 of the Criminal Procedure Code were complied with.

The record shows that in answer to what was explained to the accused he stated that he would give an

unsworn statement. It is shown that he had or had no a witnesses to call. That notwithstanding I am satisfied that the provisions of Section 211 of criminal Procedure Code were complied with and that the appellant did not suffer any prejudice in the manner the trial was conducted.

Having considered the evidence on record and the learned trial magistrate's judgment, I am satisfied that there was overwhelming evidence to prove on the required standard that it was the appellant and no one else who attacked and injured the appellant. The description of the manner in which the injuries were inflicted is in tandem with the medical evidence. The complainant suffered deep cuts on the shoulder, and left leg. He had to be admitted for a week.

The evidence is clear that injuries suffered by the complainant in this attack were grievous. I find the prosecution also established a motive for the attack. It was shown that the appellant lost a land case before the land office which was between him and the complainant. That explains the motive for the attack. Having carefully considered the case I am satisfied that the conviction entered against the appellant was correct and ought not to be distributed.

In regard to the sentence Mr. Ogot urged that 20 years imprisonment was too harsh as, he submitted, grievous conviction goes with injuries. Mr. Kimathi on his part said that the sentence was lenient in view of the seriousness of the injuries.

A person convicted of grievous harm under section 234 of the Penal Code is liable to imprisonment for life. The appellant was not sentenced to the maximum sentence fro the offence. I did not quit follow Mr. Ogoti's submissions but I did understand him to complain about the sentence. I do not know if 20 years imprisonment can be described as lenient as Mr.Kimathi suggested.

I have however considered the severity of the injuries suffered, that due to the severance of the muscles, the complainant can no longer walk un aided.

The clinical officer, PW1, did not indicate in his evidence whether the inability to walk was permanent or whether there was a hope of some recovery. I have however noted the learned trial magistrate's remark that the appellant's intention was to kill the complainant. In view of the fact the learned trial magistrate had the opportunity to see the witnesses and the appellant and to examine their demeanors, I cannot disagree with his findings of fact that appellant's intention was to kill the complainant.

Given the injuries suffered by the complainant and the fact he has been reduced to a cripple, considering the learned trial magistrate's findings of fact that the appellant had bad intentions on the complainant, I will not interfere with the sentence imposed against the appellant.

The result is that the appeal against both the conviction and sentence is rejected fro lack of merit.

I uphold the conviction and confirm the sentence of 20 years imprisonment. The appellant's appeal is dismissed.

Dated, Signed and Delivered this 13th April 2011.

**LESIT,
JUDGE**