REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

HIGH COURT CRIMINAL APPEAL NUMBER 64 OF 2007

STEPHEN POUCH KAMARKECH …………………………..………………APPELLANT

- VERSUS -

REPUBLIC……………………………………………………………………. RESPONDENT

(From the original conviction and sentence in criminal case number 1403/05 at the Kapenguria Resident Magistrate Court (Hon P.A Olengo OM II) .

JUDGMENT

The appellant, Stephen Rotich Kamarkech, was charged in court with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code.

The particulars in count 1 are that on the 12th day of December, 2005 at Chewoyet reserve in West Pokot District within Rift Valley Province unlawfully assaulted BENARD ROTICH KAMARKECH thereby occasioning him actual bodily harm.

In **COUNT II** he was charged with creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal Code.

The particulars in **COUNT II** are that on the 23rd day of December, 2005 at Chewoyet reserve in West Pokot District within Rift Valley Province created a disturbance in a manner likely to cause a breach of the peace by chasing BERNARD ROTICH KAMARKECH with a panga with intent to cut him.
In **COUNT III** he was charged with Malicious Damage to property Contrary to Section 339 (1) (b) of the Penal Code.

The particulars in **COUNT III** are that on the 23rd day of December, 2005 at Chewoyet reserve in West Pokot District within Rift Valley Province willfully and unlawfully damaged 3(three) sufurias, five cups, 1 cattle, one glass and five iron sheets all valued at Kshs 3,000/= the property of **BERNARD ROTICH KAMARKECH.**

In **COUNT IV** he was charged with being in possession of an offensive weapon in a public place contrary to section 11(1) of the Public Order Act (Cap 56) of Laws of Kenya.

The particulars in **COUNT IV** are that on the 23rd day of December, 2005 at 5.00 pm at Chewoyet reserve in West Pokot District within Rift Valley Province was found in possession of a dangerous weapon, a panga.

He was convicted after trial and sentenced to serve:-

1. Three (3) years imprisonment in the first count;

2. Three (3) years imprisonment on third count; the sentence to run consecutively.

By his undated Memorandum of Appeal he raised seven (7) grounds of appeal. At the hearing, he adopted the said Grounds of Appeal by way of his submission and rested his case.

The said grounds of appeal are as follows: -

1. **THAT:** Your Lordship, the learned Magistrate erred in law and facts in sentencing I the appellant to serve the respective sentences consecutively without noting that the respective counts were in a single file.

2. **THAT:** The learned trial Magistrate erred in law and facts in convicting I the appellant on insufficient evidence.

3. **THAT:** The learned trial Magistrate erred in law and facts in relying on the evidence of PW 1 without considering that there was no cogent and prompt first report of the alleged offences put to the person in authority in support of the case.

4. **THAT:** The learned Magistrate erred in law and facts in failing to take issue with the failure to avail some of the most essential witnesses mentioned in the matter which was fatal to the prosecution case.

5. **THAT:** The learned trial Magistrate erred in law and facts in holding that the prosecution had proved its case against I the appellant beyond all reasonable doubts.

6. **THAT:** The learned trial Magistrate erred in law and facts in declining to attach any due weight to my defence statement and the need to outline cogent reasons before rejecting the same since the burden of proof was shifted upon I the appellant.

7. **THAT:** The learned trial Magistrate erred in law in failing to find that my Constitutional right to be arraigned in court within 24 hours of arrest as provided under section 72(3) of the Constitution was violated by the police.

I will use the said grounds of appeal as an index In the interim period before the hearing the appellant filed, without leave, what he titled amended petition of appeal. However, he did not formally seek leave to have the same admitted belatedly.

In the premises, I have struck out the said amended petition of appeal and proceed to consider the **seven (7) grounds** of appeal filed by the appellant with leave of the Court.

In **ground 1,** he complains that the learned trial Magistrate erred in law and fact in sentencing the appellant to serve the respective sentences consecutively without taking notice that the respective counts were in a single file.

I cannot fathom the basis of this ground of appeal but I reckon that he is aggrieved by the length of the sentence which will in total be 6 years.

As a matter of law sentence imposed is donated by the Penal Code. A Judicial Officer presiding cannot impose an illegal sentence. He must act within the confines of the Criminal Procedure Code and/or the Penal Code as the case may be.

In **count 1,** he is charged with assault causing actual bodily harm contrary to section 251 of the Penal Code.

The maximum sentence allowed by the law, under the said section, is 5 years. Hence the learned trial Magistrate did not go overboard. His complaint, as I understand is that the sentence runs consecutively.

In respect of the third count he was charged with malicious damage to property contrary to section 339(1)(b) of the Penal Code.

The maximum sentence under this count is 5 years hence the learned trial Magistrate did not go overboard. His complaint, as I understand him, is that the sentence runs consecutively.

In **ground 2,** he raised the issue of conviction based on insufficient evidence. As I understand him, his complaint is that the evidence does not support the charge. Put in another way that the conviction is against the weight of the evidence.

On the available evidence the complainant and the appellant are neighbours. On his way home he met the accused who asked him cynically whether he knew who he was. When he confirmed his identity, the appellant withdrew a knife and cut him 7 times on the head. He was referred to the Kapenguria District Hospital where he was treated and discharged. When he went home he found several of his utensils damaged. He got to learn that the appellant damaged the same.

Robert Kerker Nguriareng testified that on 23rd October 2005 the appellant went into the homestead of the complainant and destroyed ***inter-alia*** iron-sheets which were outside. He identified the panga that the appellant had on the material day.

Number 32301 PC Thomas Magaiywa received a report of assault from the appellant. He gave him a P3 which was subsequently filled by Japha Kamau (PW 4), on 20th September, 2005 a clinical officer attached to Kapenguria District Hospital. He classified the injury as harm.

When put on his defence, he testified that he had differences with his brother over the sale of land to a third party. He objected.

Subsequently, on 23rd December, 2005 he was arrested at his neighbours' house by three policemen. Then a panga was planted on him. On 24th December, 2005 the complainant came to the Police Station with wire posts which were tendered in evidence as exhibits. He contended that he was arrested because of a grudge between him and the complainant. He denied having assaulted the complainant or damaging his property.

At the end of the trial the learned trial Magistrate convicted the appellant in count 1 and 3 of the charge and thus provoked this appeal.

Being a first appeal I am bound by law to re-evaluate the evidence on record. Having done so, I came to a concurrent finding with the subordinate Court that the appellant assaulted and damaged the property of the complainant.

In my considered view, it was just a case of believing the evidence of PW 1 or the defence of the appellant. Having done so, I find as a matter of fact and law that the evidence was overwhelming. There is thus no basis for the complaint in ground 1 and 2 of the appeal.

In respect of ***ground 3*** of appeal he complains that the learned trial Magistrate erred in law and fact in relying on the evidence of PW 1 in convicting him (the appellant) without report of the alleged assault being given to a person in authority.

On the available evidence, ***No. 32301 P.C Thomas Maigwa PW 3*** testified that he received a report of assault from the complainant. Based on that report he arrested the appellant and issued him with a P3 form which he tendered in evidence as Exhibit 1.

Against that backdrop of evidence nothing really turns on ground 3 of the appeal. I dismiss the same.

In ***ground 4*** he complains that the learned trial Magistrate erred in law and fact in failing to avail all the essential witnesses.

While it is true that the prosecution is entitled to avail all the key witnesses, there is no harm in bringing only the witnesses whose evidence is crucial. In a case where the witnesses would echo the other evidence already on record, it would be unwise to bring many witnesses to say the same thing. In this case, he was identified by his own brother the complainant. In the circumstances, which other witness would be crucial? Put in another way which crucial witness was left out by the prosecution? In my considered view none. In any event there is also nothing wrong in a Court of law relying on a single identifying witness after testing his evidence as required by law.

In respect of ***ground 5*** the complaint is that the prosecution did not prove the case beyond any reasonable doubt. It is instructive to note that the legal jargon beyond any reasonable doubt is not the same thing as proof beyond any shadow of doubt. In law, a reasonable doubt is one for which a sensible reason can be supplied ***(Granville Williams, Criminal Law 873 (2d ed 1961).*** Put in another way it is a belief on the available evidence that there is a real possibility that the accused is not guilty.

In this case the Court believed PW I's testimony which was supported by medical evidence. The sum total of that evidence proved that the complainant was unlawfully cut with a panga by the appellant and that the injury was classified as harm. That evidence was adequate to sustain a conviction. Hence nothing really turns on this ground of appeal.

In ***ground 6,*** he complains that the learned trial Magistrate declined to attach due weight to his defence. That in any case the trial Magistrate did not give reasons why he rejected the same.

The learned trial Magistrate had the opportunity of seeing and assessing the demeanor of the appellant in Court. Having done so, he concluded that his evidence was not cogent. The complainant's evidence in his view, and my view, was straight forward. The complainant and the appellant are brothers. He did not see any motive for the complainant to lie that his brother, the appellant, had cut him seven times on the head when a third party was the culprit. Having re-evaluated the entire evidence, I have also come to an irresistible conclusion that it was the appellant who caused harm to the person of the complainant and also damaged his property. In my assessment nothing really turns on this ground of appeal.

In ***ground 7*** he complains that the learned trial Magistrate erred in law in failing to find that his constitutional right to be arraigned in Court within 24 hours of arrest courtesy of section 72(3) of the constitution was violated by the police.

I have scanned through the proceedings. Having done so, I have not found any indication that the appellant complained of having been detained for 24 hours before being brought to Court. That being the case, his complaint raised in respect thereof is belated and does not form a proper ground of appeal. Accordingly, I find no basis for his complaint and reject the same. Assuming that his constitutional rights were violated, which I have found not, then it is a matter to be raised in a Civil Suit for compensation. The certified copy of the subordinate court judgment would be exhibits in the Civil Suit.

In the result, I find no merit in the entire appeal regarding conviction, which I accordingly dismiss.

Turning to sentence, I note that both **COUNT I** and **COUNT III** of the charges attract a penalty of five(5) years. That being the case, I am of the considered view that the sentence in Count I was not harsh and excessive. Equally, I note that the maximum sentence in Count III is 5 years. That being the case, I am of the considered view that the sentence was not harsh and excessive. Accordingly, I also dismiss the appeal on sentence. It is so ordered.

Dated, delivered and signed at Kitale this 3rd day of June 2011.

N.R.O OMBIJA

JUDGE

Dated, delivered and countersigned by Hon. Lady Justice Martha

Koome the …………………………………………day of……………….. 2011.

MARTHA KOOME
JUDGE