



No.2986
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.CR. APPEAL NO.46 OF 2009

ELIUD MUNYIKA JAMES..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against both conviction and sentence of S. K. Mutai Esq. the Learned Resident Magistrate of Kitui in Cr. Case No.562 dated 11th March, 2009)

JUDGMENT

The appellant, **Eliud Munyika James** was charged before the Principal Magistrate's Court at Kitui with Assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on the 10th June, 2008 at about 4.00 p.m. at Kiteta village, Mbusiani sub location in Kyangwithya West Location within Kitui District of the Eastern Province, the appellant unlawfully assaulted **Robert Muthawa** thereby occasioning him actual bodily harm. The appellant denied the offence and was in due course tried.

The prosecution called a total of five witnesses in support of its case. They were; **Grace Muthon Gichuki, Robert Muthawa** the complainant (PW.2), **Robert Nguta Malonza, Perter Muli Muthawa**, (PW.4) and **PC Andre Ngeno**, (PW.5). In summary their evidence was that, PW.1 a Clinical Officer at Kitui District examined the complainant on 22nd July, 2008. She noted on examination that the complainant had injuries on the chest and upper limbs and complained of chest pains. He also had injuries on the left elbow joint where there was limited movement as it was swollen and the left hand had bruises. She classified the degree of injury as harm. She treated the complainant and filled a P3 form using a treatment card. She tendered in evidence the two documents. Meanwhile, the complainant on 10th June, 2008 at about 4 p.m. was conducting a burial committee meeting for his late brother at his home when one, **John Kimotho** came and called him outside. He went and met two people one of them being the appellant and the other he was told was a forest officer.

The Forest officer told him that he had been sent by the area chief to ask him to come along with them to the farm to have a look at the tree on the common boundary with the appellant. He refused to go whereupon the appellant jumped on him and beat him. He hit him on the chest and he fell down. He felt pain on his chest and elbow joint. He reported the matter at Kitui Police Station and was referred to Kitui District Hospital for treatment. The following day he was issued with a P3 form and recorded a statement. He positively identified the appellant during the incident. In the burial meeting, there was PW.3 as well. He saw the appellant with another person approach. The appellant sent one John to call the complainant. The complainant complied but soon thereafter he saw the appellant assault the complainant

and step on him. Thereafter the appellant ran away when the complainant's brother, **Peter Muli Muthawa** (PW.4) intervened.

On his part PW.4 stated that on the material day at about 4 p.m. whilst attending a burial meeting of his brother, John came and called the complainant a brother of his too and they went. After about two minutes he heard the complainant scream. He rushed out and found the appellant holding the complainant down and that when he tried to intervene, the appellant pushed him. The complainant had been injured and was bleeding.

PW.5 was a Police Officer based at Kitui Police Station. On the material day at about 6.20 p.m. whilst at the station the complainant came and reported that he had been assaulted by the appellant. He noted bruises on the left hand near the elbow. The complainant also complained of chest pains. He booked the report and referred the complainant to the hospital. Thereafter he recorded statements from the complainant and his witnesses, issued him with a P3 form and thereafter caused the arrest of the appellant.

Put on his defence, the appellant chose to give sworn evidence but called no witnesses. He stated that on the said date at 4 p.m. he was in the company of a Forest Officer at the complainant's home. The Forest Officer sent for the complainant so that they could view a tree on the common boundary. It was then that the complainant tried to punch him after he was told to cut the tree on their common border but he fell down and screamed. He further stated that PW.4 beat him and that he thereafter left for home.

The learned magistrate having weighed the evidence of the prosecution as well as that of the defence found the case against the appellant proved beyond reasonable doubt as required. He therefore convicted him and sentenced him to 2 years imprisonment. Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal on the grounds that the evidence adduced by the prosecution was not sufficient to convict him and that the sentence of 2 years imprisonment without an option of a fine was too harsh, oppressive and unreasonable in the circumstances.

When the appeal came before me on 3rd November, 2011, for interpartes hearing, all that the appellant could say was that he had since reconciled with the complainant and paid him KShs.84,000/- as compensation. He therefore prayed to the court to be merciful to him. I took this to mean that the appellant was abandoning the appeal on conviction but would instead pursue the appeal on sentence.

Mr. Mwenda, learned State Counsel was of the opinion that the appellant was positively identified in the act by PW.2, 3 and 4. The incident occurred at 4.00 p.m. in broad day light. The sentence imposed was not excessive. Accordingly, he urged me to dismiss the appeal.

As already observed, I will treat this appeal as an appeal on sentence only going by the submissions of the appellant in support of the appeal.

A sentence must in the end, however, depend upon the facts of its own particular case. An Appellate Court cannot interfere with the discretion which the trial court exercised in sentencing the accused unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on wrong principle or that the sentence is manifestly excessive in the circumstances of the case.

The offence charged attracts a maximum sentence of five years. The appellant was sentenced to 2 years imprisonment. The sentence was therefore lawful. The learned Magistrate took into account the fact that the offence was serious and common. He did not consider extraneous matters when sentencing the appellant. The sentence in my view was not manifestly excessive in all the circumstances. It was merited and well deserved.

However, considering the events that have occurred since the sentence was imposed, viz; the appellant has paid KShs.84,000/- to the complainant as compensation for the injuries he caused him and the fact that he had served four months or so of the sentence imposed before he was released on bail pending appeal, I think that the appellant has been sufficiently punished. Accordingly, I would commute the

sentence imposed to the term served by the appellant as aforesaid. The appeal on sentence therefore succeeds to that extent.

Dated, signed and delivered at Machakos this 30th day of November, 2011.

ASIKE-MAKHANDIA
JUDGE