`REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 118 OF 2011

CHRISTOPHER MBOGO WAMAI…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

J U D G M E N T

The Appellant herein was the Accused in **Embu Chief Magistrate's Criminal Case No. 1749 of 2010** where he was charged with the offence of **Grievous Harm contrary to Section 234 of the Penal Code.** The particulars are that the offence occurred on 10/8/2010. The Appellant pleaded not guilty and the matter proceeded to full hearing. The Appellant was found guilty and convicted and sentenced to 4 years imprisonment. He has appealed against both conviction and sentence raising the following grounds:

1. ***There were contradictions in the evidence of PW1 and PW2.***
2. ***The trial court erred in saying the evidence of DW11 did not corroborate that of the Appellant.***
3. ***The issue of status quo was not understood.***
4. ***She erred in law when she stated that the Defence evidence failed to discredit that of the prosecution.***
5. ***She erred by failing to consider the Appellant's mitigation.***

In his submissions, Mr. Kathungu said the Appellant and PW1 are brothers and share a boundary and they have a dispute over it. From the evidence he says it's not easy to tell what was used to hit PW1. Was it a jembe or fist? And when were the teeth knocked out? The only eye witness (a minor) PW3 said at page 9 lines 3-6 that she found the Appellant punching PW1 and PW1 was bleeding from the nose not mouth. So how were the teeth removed without bleeding in the mouth?

He submitted that the evidence of DW11 corroborated that of the Appellant that the Appellant did not assault PW1. He combined ground 4 & 5 and submitted that there was no credible evidence to convict the Appellant. The teeth and jembe were never produced.

The state through Mr. Wahoro conceded to the appeal. The reason being that P3 shows the injury was 9 days old on the date of examination. That cast doubt on the safety of the Appeal.

This being a first appeal, this court is enjoined to re-consider and re-evaluate the evidence adduced and draw its own conclusion in order to satisfy itself that there is no failure of justice. I am guided by the case of ***SIMIYU & ANOTHER [2005] 1 KLR 192 (CA)***.

The prosecution case was that on 10/8/2010 at 5 p.m. PW1 who is a brother to the Appellant came home and while at his gate he saw the Appellant working on his land. He had a fork jembe. PW1 approached to find out what he was up to. He responded that he was ready to die. He turned to hit him with the fork jembe but PW1 ducked. He however hit him on the nose and he fell. He was also hit on the right 2nd last finger and right leg.

Appellant then left. His front incisor teeth were knocked and later came off. As he left he met PW2 to whom he explained what had happened. They went to Manyatta Police Station and reported and he was given a note and P3 form and went to the hospital. PW3 who is PW1's grandchild said she saw the Appellant tilling PW1's shamba. She went to the house. When she came out she saw the Appellant punching the complainant who was bleeding from the nose.

PW4, the doctor who examined PW1 on 19/8/2010 confirmed the injuries complained of. PW1 had lost 2 upper incisor teeth and the treatment notes showed he had an abbreviation on the upper lips and tenderness on the neck. He had no fractures on the right palm and right foot. PW5 was the investigating officer. He did not produce the fork jembe or teeth.

The Appellant and his witness DW11 denied that there was any fighting between PW1 and the Appellant. From the evidence on record, there is no dispute that the Appellant and PW1 are brothers. Even the witnesses both for the defence and prosecution are all their relatives. What has come out clearly is that there is an issue concerning land. It's even clear from the record that on this day of 10th August 2010 the Appellant and PW1 met on this controversial part of the land. What transpired is what is not clear.

PW1 says he was hit by the Appellant with a fork jembe on the nose, hand and right leg. PW3 saw PW1 bleeding from the nose and not the mouth. PW2 said he met PW1 who was bleeding from the mouth and he even gave him first aid. He however does not mention anything about the broken upper incisor teeth. Where was he applying the first aid?

There is an issue about the teeth that are alleged to have come out. The doctor PW4 who filled the P3 form is not the one who first saw PW1 when he was injured. In his evidence he says he examined PW1 9 days after the incident and that is when he filed the P3 form. It's not clear from what is before court whether these teeth were knocked out off on 10/8/2009 or another day. The complainant reported to the police station on 10/8/2009 and the police sent him to hospital on 12/8/2009. However, page 3 of the P3 form only says he complained of having been assaulted by his brother and sustained injuries on his neck and upper lips. He never told the police about the teeth. He even told the police he did not know what instrument his brother used to assault him.

This kind of scenario requires the medical officer who first treated a complainant to testify and even produce treatment notes before the court to enable the court deal with emerging issues as this one. The notes PW4 used did not show that PW1 had lost 2 teeth. It's clear from what was written on the P3 form that PW1 was not hit with a fork jembe as he alleges in his evidence. Even PW2 and PW3 never witnessed him being assaulted. It could as well be true as PW1 says they were struggling over the fork jembe and he got injured. The injury that made the doctor assess the injury as Grievous Harm was the missing teeth. It was therefore important to establish when the teeth came out and even have them produced in court as exhibits.

The learned state counsel expressed his dissatisfaction with the P3 form produced in the lower court and conceded to the Appeal. I have no doubt in my mind that the complainant may have received some injuries but not to the magnitude he tried to make the court believe. Had the learned trial magistrate critically analyzed the evidence before her, she would have noticed the loopholes I have raised above and either reduced the charge to assault contrary to Section 251 of the Penal Code, or acquitted the Appellant.

I therefore find it unsafe to allow the conviction to stand and hence allow the appeal. I quash the conviction and set aside the sentence. Appellant to be released forthwith unless held under a separate warrant.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN EMBU THIS 21ST DAY OF DECEMBER, 2011

H.I. ONG'UDI

JUDGE