



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 228 OF 2003

LESIIT J.

LEWIS GITONGA.....APPELLENT

VERSUS

REPUBLIC.....REPOUDENT

JUDGMENT

The Appellant was convicted of one count of assault causing actual bodily harm contrary to section 251 of the Penal Code and sentenced to imprisonment for 14 months. Being aggrieved by the conviction and sentence the Appellant has now Appealed to this court.

The Appellant relies on the petition of Appeal dated 17th November, 2003. There can be summarized as one that the learned trial magistrate failed to evaluate the evidence as required that the trial magistrate to consider the Appellant's defence and that the sentence was inordinately excessive.

The facts for the prosecution case was that the Complainant was walking along a foot path next to the Appellant's shamba when the Appellant accosted her. He cut her on the right leg and hit her with the flat side of a panga on the face and back. The P3 form confirmed the cut on the leg and left side of the head.

The Appellant denied the offence and claimed that the complaint was stealing his nappier grass. The Appellant also stated that the Complainant fell down and was held by barbed wire that is what caused her the injury. The application called four witnesses. Each witness gave different evidence. DW1 said he saw Appellant and PW1 together talking amicably and that the Complainant asked Appellant to forgive him. DW2 told court that he was the sub area. He said that the Appellant reported that the Complainant had entered his shamba and that when he, DW2 warned the Complainant not to go to Appellant's shamba, the Complainant showed him a cut on the leg which she said the Appellant inflicted on her. DW3 the Area Assistant Chief confirmed that the Appellant reported the matter to him. He confirmed that the Complainant had injuries on the leg and that she told him that it was the Appellant who caused the injury.

DW4's evidence was that he saw the Complainant and Appellant talking amicably and that the Complainant asked the Appellant to forgive her for entering his shamba.

I have carefully considered the Appellant's Appeal, the grounds in the petition and submissions by counsel. I am guided by the case of **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] EA 424.)”

The Appellant was represented by Mr. Otieno. The gist of his submissions is that the Complainant trespassed into Appellants land and that the Appellant and Complainant made peace. Mr. Otieno also submitted that the P3 form contradicted the Complainant’s evidence that she had been cut when the P3 form indicated the injury was by a blunt object.

Mr. Mungai for the State opposed the Appeal. Learned State Counsel urged the court to find that the Complainant, an old lady was passing through the Appellants land on a foot path when the Appellant accosted her causing her the injuries.

The P3 form confirms that the Complainant was a woman of 54 years old and that she was injured on her head and leg. The leg had a cut wound which was treated. From the P3 from the injuries were caused by both sharp and blunt object.

Mr. Otieno’s submission that the prosecution evidences that injuries were caused by a blunt object and thereof contradicted the Complainants evidence has been disproved by the P3 form.

I find that both the prosecution and defence witnesses confirmed that the Complainant had a cut wound on her leg. There were PW2 PW3 and PW4. On defence side DW2 and 3 the Sub Area and Assistant Chief of the area. PW2 witnessed the attack on the Complainant by the Appellant. To PW3, 4, DW2 and 3 they all stated that the Complainant reported to them that it was the Appellant who cut her.

I find there was overwhelming evidence both by the prosecution and defence witnesses that the Complainant had a cut wound. I believe the Complainant and PW2’s evidence that it was the Appellant who caused it. The learned trial magistrate’s finding that the Appellant committed the offence cannot be faulted.

The counsel for the Appellant urged that the Complainant had trespassed into the Appellant’s land. That cannot be correct as DW4 admitted that there was a footpath on the Appellant’s land used by members of public. Even if the Complainant was on the Appellant’s shamba, it cannot be trespass if indeed she was walking along a foot path. Even if she was trespassing, that is no grounds for the Appellant to attack and assault her. He ought to have taken lawful action to enforce his rights.

Having come to the conclusion I have of this matter I find no merit in the Appeal against conviction in regard to sentence the charge was assault contrary to section 251 of the Penal Code. The offence is a misdemeanour.

The Appellant being a first offender ought to have been considered for a non custodial sentence.

The Appellant was jailed for the offence on 4th November, 2003. He was given bail pending this Appeal in the sum of Ksh.10,000/- on 29th January, 2004. He therefore served 3 months imprisonment out of his original sentence. I will allow his Appeal on sentence by ordering a fine of 10,000/-. I order further that the cash bail depositing herein as part of conditions for bail pending Appeal be utilized as fine for the Appellant as ordered in this Appeal.

Those are my orders.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF DECEMBER, 2011

J. LESIIT

JUDGE