



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 188 of 2009

(From Original Conviction and Sentence in Criminal Case No. 5268 of 2007 of the Chief Magistrate's Court at Makadara)

NELSON KIOGORA NJOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of Grievous Harm contrary to Section 234 of the Penal Code. He was tried convicted and sentenced to five (5) years imprisonment. He has appealed against both conviction and sentence.

He has set out four grounds of appeal the first of which he seeks reduction of sentence saying the imprisonment is harsh and excessive. The other ground is that he was detained in police custody for more than prescribed time contrary to prescribed period.

At the hearing of Appeal he submitted that the complainants are his step brothers. When he was arrested he stayed for 2 1/2 years after the act of the offence. He was not taken to court on 28/9/07. The appeal was opposed by State. When he was arrested he was released on bail. He was visiting the police twice a week. He hit the complainant on the head. The record shows that the appellant was arrested on 28/9/07 and was taken to court on 17/12/07. But he was out on bail of shs. 5,000/= cash. The offence was committed on 24/12/2005. The prosecution case was that PW1 who used to live in Mlolongo before, was a casual worker. On 24/12/2005 at 7.30 pm he went to his brother's club. He heard people argue. It was the barmaid and Appellant. Appellant slapped the barmaid. He called the pub owner. He decided to call the police. He went with Muriithi and Munene his brother. Before he took car key to go to police station the Appellant pushed him against the door. He hit PW1 with a bottle. PW1 fell down. He became unconscious. PW1 showed the court an ugly scar on the forehead. He produced P3 form. Appellant pushed PW1. Then PW1 looked and saw it was him who hit him with a bottle. However the bottle was not exhibited. PW2 gave evidence he was a businessman operating a shop. He heard of a fight. He went to the scene which was his own pub.

He found Appellant with a bottle, a bar maid informed him that his brother had taken too much in the pub.

He saw that PW1 his brother was okay. Appellant claimed he had been given a fake 200/= note. PW2 said he saw the note and it was fake. Appellant passed, hit brother on the head.

PW3 gave evidence at the material time he was at the pub to watch news. There was commotion in the bar between the maid and the Appellant. The issue was fake money. Accused slapped the barmaid. Accused had a small bottle of beer that had not been opened. Appellant became violent. PW4 was a police officer PC 69517 Maringo Police Station. On 28.9.07 the complainant came with a letter which was directing him to arrest the Appellant. He with PC Kerunga went and arrested Appellant.

PW5 was Dr. Kamau a Police Surgeon. He examined the complainant on alleged assault. There was a dent on his head and 2 surgical wounds on the head. There was blood clot. It was a month after the alleged offence. Blunt object could have been used. The injury was certified "**grievous harm.**" The complainant was treated at Kenyatta Hospital on 25 – 30.12.2005. The doctor produced P3 form.

Thereafter evidence was taken from PW6 a Police Constable. On 1/10/07 he was at the Police Station Appellant was brought from Mlolongo.

P3 form had been issued on 2005. Complainant wrote his statement on 5/12/2007. The police files were misplaced hence delay in charging appellant.

The Appellant was put on his defence. He admitted having entered the bar. He admitted having had a quarrel with the waiter over change. At the door he turned to see if owner of the bar was following him. He pushed him outside.

Appellant fell down. The Appellant went to his home in rural area. Then he was arrested and charged.

It is said that the complainant and Appellant were relatives.

PW1 says he heard argument between Appellant and waiter and saw the Appellant slap the waiter. Appellant pushed PW1 against the door. PW1 turned and saw Appellant hit him with a bottle. PW2 was given information by a barmaid. PW2 saw that his brother PW1 was okay. Appellant broke the bottle and caused chaos in the bar. He hit PW1 on the head. PW1 fell and bled profusely.

The injury was examined by Doctor Z. Kamau one month after alleged injury. He certified injury as grievous. The basis of the quarrel 200/= note was fake, but the matter turned to assault. The parties were passing through a door to get out to discuss the dispute outside the bar then there must have been several persons and at the door there was pushing then both men fell down. It is said that the Appellant had a small bottle unopened with which he hit the complainant on the head.

After one month the doctor examined the complainant's injuries and gave evidence in court. The P3 form shows that general medical history was "**assault**" and immediate result of injury was "**grievous harm.**" The doctor described the injuries sustained in the neck in detail. But were there injuries caused only by one blow with a small bottle on the head. The doctor examined the injuries after one month.

The trial Magistrate made a finding that Appellant hit the complainant with a bottle of beer and fell down. There was no evidence to show that complainant was hit. Then the Appellant himself says "**I was advised to go to my rural home**" which he did and he was arrested after 1 and 8 months. It is clear this dispute arises out of communication break down between step brothers. No one can tell whether the fall alleged by parties was deliberate or accidental. They say there were many persons in the pub. Then this delay occasioned in bringing the Appellant to police station was explained, as if he was not really guilty as alleged.

I find that it is not clear where the injuries were treated until the doctor came after 1 month. If the injuries were as serious as he said were they were caused by only one blow of the small bottle. Why did the prosecution not produce that bottle.

The first treatment medical evidence was not exhibited which is vital evidence to enable measurements of the injury. It is my view and I find that the prosecution failed to prove the case beyond reasonable doubt.

I therefore allow the appeal and quash conviction and set aside sentence.

The appellant shall be set at liberty forthwith unless otherwise detained lawfully.

Dated and delivered at Nairobi this 28th day of April 2010.

J. N. KHAMINWA

JUDGE