



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 165 of 2009

(From original conviction and sentence in Criminal Case No. 148 of 2009 of the Resident Magistrate's Court at Eldama Ravine - {D. M. Machage - R.M. dated 3rd June, 2009})

CHANGWONY CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Criminal Practice and Procedure - evidence charge of doing grievous harm - evidence of a single witness - duty of trial court to properly evaluate such evidence.

Sentencing - severity of sentence - doing grievous bodily harm - convicting for - sentence of four years imprisonment - accused first offender - whether sentence excessive.

JUDGMENT

The appellant was charged with the offence of doing grievous bodily harm to the complainant contrary to Section 234 of the Penal Code (Cap. 63, Laws of Kenya), in that he pushed the complainant from the back and the complainant fell into the river and suffered dislocation and compound fracture of her left ankle joint (*according to the evidence of PWIV, Dr. Christopher Kemboi*). The Appellant was, on the evidence found guilty convicted and sentenced to serve a jail term of four years for the offence.

Being dissatisfied with both his conviction and sentence, the Appellant has appealed to this court on eight grounds but only one ground is of substance, namely, that the trial magistrate erred in law and fact in convicting the Appellant on the evidence of a single witness.

The State, through Mr. Nyakundi, learned State Counsel did not support the conviction of the Appellant.

It has been said upten times that the duty of the first appellate court is to reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, and it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence, to support the trial court's findings and conclusions - **NGUI vs. REPUBLIC** [1984] KLR 729, following **OKENO vs. REPUBLIC** [1972] E.A. 32, and **PANDYA vs. R** [1957] E. A. 336.

REPUBLIC [1984] KLR 729, following **OKENO vs. REPUBLIC** [1972] E.A. 32, and **PANDYA vs. R** [1957] E. A. 336.

Indeed as the learned trial magistrate found, there is not much difference between the evidence of the prosecution PW1 (the complainant) and that of DW1 (the Appellant). PW1 testified that she had gone to the home of PW1 (*in the spirit of African mothers solidarity*) to celebrate the birth of a new baby by DW1's wife. She however found that the celebration was not at the Appellant's place, so she left. On her way home she met the Appellant who warned her not to step into his home again. The Appellant according to PW1, followed her secretly (*I did not see him until he was close to me hardly a metre away wanting to hit me*) and that he pushed her with use of his stick into the river where she fell and injured her ankle joint. PW1 screamed for help, and the Appellant called DW1, and was later joined by DWII, and many other people who heard her screams.

PWII testified that he too heard screams coming from the Appellant's direction, and ran to the place. He found PW1 had fallen and injured her ankle joint. PWII too heard.

PWIII received a report from PW1 to the effect that the Appellant had chased her from his home, followed her and pushed her with the aid of a stick causing her to fall into the river dislocating her ankle in the process.

Reference has already been to the evidence of PWIV, Dr. Christopher Kemboi, who examined and found that PW1 had dislocated and suffered a fracture of her left ankle joint. The only question is whether the trial court properly directed itself on the evidence that there was no big difference or disagreement between PW1 and the Appellant so as to cause the complainant to "*fix the Accused*" (*the Appellant*). The further question is whose evidence as between the complainant and the appellant is more credible.

Mr. Nyakundi learned State Counsel submitted that he did not support the conviction of the Appellant. The evidence of the complainant (PW1) was that the Appellant merely followed her. There was no evidence of a threat, or even that the Appellant hit her. Whereas under Section 143 of the Evidence Act, the evidence of a single witness is acceptable, in this particular case the evidence of PW1 is scanty and the other evidence is not corroborative and the evidence of the Appellant and his witnesses was not evaluated by the trial court, and consequently the Appellant's defence was not properly considered.

It was the Appellant's evidence that the complainant (PW1) had gone to his home for the celebration of his newly born child, but since he had two houses (*homes - i.e. polygamous*), the baby was born in his other home to which other women had gone, leaving him alone in the home herding his animals. The complainant left and the appellant heard screams from her and like PWII, ran to find out the cause of the screams. He found the complainant had been injured, and she accused him of chasing her - but he said, he did not chase her with a stick or otherwise. He was about 400 - 500 yards away from where he heard the screams and ran to rescue the complainant. He had no grudge against her. No one was close by at the time she fell into the stream and he ran to rescue. I saw her fall. The compound is uphill, the stream is low land.

DWII, too heard the screams from the nearby stream and he too ran to the rescue, and had the complainant taken to the hospital.

The law of precedent is that the trial court must properly evaluate the danger of convicting on the basis of a single witness by satisfying itself of there being no possibility of error. It was the view of Mr. Nyakundi, learned State Counsel, that

the trial court did not adequately evaluate the evidence of the defence. I agree with those sentiments, and it may therefore be unsafe to sustain the conviction and sentence.

Firstly there is agreement between the evidence of PW1 and DW1 that PW1 (*the Complainant*) had gone to one of DW1's homes to celebrate the birth of DW1's child. She however found that the birth was in another house of DW1 (*the Appellant*) where the other village clan women had gone. The Appellant therefore asked the complainant to leave his homestead or follow the other women. According to PW1 (*the Complainant*), the Appellant "*chased her away*". The chances are that having received this cold and unwelcome reception PW1 (the complainant) hurried back to her home - down and up the hill. While going down the hill, she may have hit, either some stone, some dead tree stump, root of a tree running across the hill-path, staggered into some hole and while striving to remove her foot therefrom, twisted her ankle so hard that she sustained a fracture arising from the dislocation. This scenario is supported by the evidence of DW1 (*the Appellant*) in cross-examination. He said -

"I heard her scream, I arrived when she said I was the one who pushed her. I rescued her and went back home. She had alcohol. She did not know that I had gone to have her rescued. I left her to inform members of the public. Many people came and took her to hospital. I proceeded to graze my cows. I was later charged."

Taking this bit of evidence from the Appellant, it is unclear what this phrase "*she had alcohol*" means. It could either mean "*she appeared drunk*" or "*was carrying some alcohol*". Either way, one does not carry alcohol for fun. It is to be consumed. Alcohol makes most consumers "*light-headed*" and walking down hill over the Eldama Ravine hills terrain is not only a challenging but also a torturous feat, and where any one's vision were in any slight way affected by the inhibition of alcohol, exacerbated by the unwelcome reception by the owner of the home, it is entirely plausible that the complainant (PW1) slipped and fell on her own accord unaided by any push by the use of a stick or otherwise on the part of the Appellant, and thereby sustained the injuries she suffered to her left side ankle joint.

Having fallen and cried out for help, the Appellant took the honourable action and ran to her rescue, and assisted by other samaritans, including PWII and DWII, took the complainant to Hospital. There is therefore no conclusive evidence that the Appellant "*chased*" or "*followed*" the complainant and pushed her down the river. If she was pushed down the river, her injury might have been explained if she fell on a stone or debris in the river, but hardly her left ankle joint.

In the absence therefore of any other independent evidence that it was the Appellant who pushed the complainant to the river by use of a stick (*herding stick*), or otherwise, it was unsafe to convict the Appellant on the sole evidence of a single witness, the complainant. The trial court also failed to warn itself of the danger of conviction on the evidence of a single witness.

For those reasons, I agree with Mr. Nyakundi learned State Counsel, that it was unsafe to convict the Appellant, and it would equally be unsafe to uphold the conviction and sentence.

The appeal herein therefore succeeds, and the judgment and sentence of the lower court read and pronounced on 3rd June 2009 is hereby quashed and sentence set aside. I direct that the appellant be released forthwith unless otherwise lawfully held. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 21st day of May 2010

M. J. ANYARA EMUKULE

JUDGE