



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

CRA NO.122 OF 2008

(Appeal arising from BGM CMC CRC NO.2039/09)

PATRICK WAFULA KHISA ::: **APPELLANT**
REPUBLIC ::: **RESPONDENT**
VERSUS

J U D G M E N T

The appellant Patrick Wafula Khisa was convicted by Bungoma Principal Magistrate of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code and fined Ksh.10,000/- in default five (5) months imprisonment. He appealed against both conviction and sentence.

Mr Onchiri for the appellant argued the grounds of appeal. He submitted that the charge sheet gives 23/09/06 as the date of offence while the O.B. number was no.34 of 27/09/05. The date of offence was contradicted by other witnesses who gave the date as 23/09/05. The investigating officer also gave a contradictory date on the date he received the report, being 10/03/06. The counsel argued that the clinical officer PW3 was not qualified to produce the P3 form. It was also not clear what weapon caused the injuries from the evidence on record.

The state counsel Mrs Leting responded that the issue of the dates was just a topographical error which should not affect the substance of the case. It was her submission that the case was proved beyond reasonable doubt and that the clinical officer was qualified to produce the P3 form.

On the issue of the dates I refer to the charge sheet which gives 23/09/06 as the date of the offence. The record of appeal and the original file show that the plea was taken on 23/03/06. The appellant was arrested on 11/03/06 according to the charge sheet. PW5 said he received the report of assault from PW1 on 10/03/06. He had information that the appellant worked at Nzoia Sugar Company and arrested him the following day. PW5 arraigned the appellant in court on 23/03/06 about twelve (12) days after arrest. It would appear that the appellant was out on police bond for that period pending completion of investigations. I say this because the appellant did not complain of having been over-detained in police custody. The evidence of the key witnesses PW1, PW2, and PW4 confirm that the offence was committed on 23/09/05. The O.B no.34 of 27/09/05 confirms that the P3 form was issued on 27/09/05. At the time the P3 form was issued the complainant had been treated on 24/09/05 which was only one day after the incident. The clinical officer confirmed the date of medical examination. It follows that the police would not have issued the P3 form on 27/09/05 if the matter was not in their hands. PW5 may have been assigned the case to investigate on 10/03/05 long after it had been reported. I find that the date of offence in the charge sheet 23/09/06 is a clerical or topographical error. The evidence on record is clear that the date of the offence is 23/09/05. It is clearly provided in section 348 of the Criminal Procedure Code that such an irregularity cannot affect the substance of the case. The argument of the appellant that this was a major contradiction is hereby rejected.

PW3 who produced the P3 form was a clinical officer working at Bungoma District Hospital. The Part II of the P3 form provides that the document should be complete by a medical officer or a practitioner carrying out examination. A district or sub-district hospital is headed by a medical officer who is qualified as a medical officer and practitioner mostly with a masters or bachelors degree in medicine and with a masters of surgery.

A clinical officer is trained in general medicine dealing with the observation and treatment of patients. In that capacity, a clinical officer deals with conditions requiring medical examination and treatment but not surgery. The clinical officer works under the supervision of the medical officer in charge of the hospital or other organizations. PW3 in this case was qualified to produce a P3 form for a patient he examined in the course of his duties and under the supervision of the medical officer in charge of Bungoma District Hospital.

On the evidence on record, PW1 explained how she returned to her house in the evening of the material day. The appellant who was her husband attacked her using a knife and fists. PW2 and PW4 were her business associates in the maize trade which she was engaged in. They came to her house at the material time and found the appellant assaulting PW1 outside the house. PW2 said he noticed that PW1's dress was blood-stained. PW3 saw the appellant kick and hit PW1 with fists even as she bled from the nose.

In defence, the appellant narrated an incident of 13/09/05 when he went home at 10.00pm. He said he found a stranger in his house who floored him down as he ran out of the house. He called one witness DW2 who said he went to the house of the appellant around 10.00pm on 13/09/05 and found him on the ground. The appellant told DW2 that he had been wrestled to the ground by a stranger he found in his house. The two witnesses did not talk of the events of 23/09/05 when the offence occurred. Their evidence was therefore not relevant to the incident which led to this offence.

The magistrate found that the case against the appellant had been proved as required and convicted him. I agree with the finding of the magistrate. PW1's evidence was corroborated by two eye witnesses (PW2 and PW4) and that the clinical officer on examination confirmed the injuries. The clinical officer found that the injuries were caused by a blunt object. The appellant kicked and punched the complainant. The kicking and punching is consistent with a blunt object.

I find that the appellant was rightly convicted by the magistrate. The sentence imposed of Sh.10,000/- fine was infact lenient. Section 251 of the Penal Code gives the maximum sentence as two (2) years imprisonment.

I find no merit in this appeal and I dismiss it accordingly. The conviction and sentence are hereby upheld.

F.N. MUCHEMI
JUDGE

Judgment dated and delivered on the 21st day of October, 2010 in the presence of the appellant, Mr. Situma for Onchiri and the State Counsel.

F.N. MUCHEMI
JUDGE