



JOHN NTONJIRA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Appeal against the Judgment of S.M. Mwendwa Resident Magistrate in Maua S.P.M.'s Criminal Case No. 213 of 2008)

CRIMINAL LAW AND CRIMINAL PROCEDURE

Witness Hostile – evidence admissible – but of little value might cast doubt on guilt.

J U D G M E N T

The Appellant was charged in the lower court with assault causing actual bodily harm contrary to section 251 of the Penal Code (Cap 63 Laws of Kenya). He was after trial, convicted as charged and was sentenced to 2 years imprisonment. The appellant has appealed to this court against both the conviction and sentence. He preferred seven grounds.

When the appeal came for hearing on 9.07.2009 Mr. Oluoch learned Senior Deputy Chief Litigation Counsel conceded the Appeal on four grounds, namely:-

- 1) That the testimony of a hostile witness is worthless. P.W.II was declared a hostile witness and yet it is his evidence which was relied upon. That counsel submitted was a misdirection law;
- 2) While the learned magistrate found as a fact that at the time of the commission of the offence, there were only two persons at the scene he contradicts himself and says P.W.II was present when he was not. This too was a mis-direction;
- 3) The learned trial magistrate gave his opinion as to the type of the weapon used. Possibilities are not allowed in judgment. There must be a finding that a panga or other weapon was used; and
- 4) On the 16.10.2008, when the case proceeded to hearing it was a mention date for making orders relating to P.W.II who had been declared a hostile witness. A mention date cannot be turned into a hearing date.

Following submissions by learned State Counsel, Mr. H. Gitonga, learned counsel for the appellant pointed further contradictions in the judgment of the lower court. For instance he submitted, P.W.III, the Clinical Officer produced a P3 Form showing three injuries while the complainant testified that he only suffered one injury. In addition P.W.1 testified that the accused cut him only once and he ran away. Counsel also concurred with Mr. Oluoch learned State Counsel that the evidence of P.W.II, declared a hostile witness ought not to have been relied upon by the trial court.

Finally Mr. Gitonga submitted, the trial magistrate did not consider the appellant's mitigation, that the appellant sought forgiveness and was remorseful, and the court to find that the sentence was in the circumstances excessive. For all these reasons Counsel for the Appellant urged the court to allow the

appeal quash the conviction and set aside the sentence against the appellant.

Notwithstanding the fact that the state conceded to the Appellants Petition of Appeal it is the duty of the appellate court to examine and re-evaluate the evidence of all the witnesses before the court of first instance and make its own finding and conclusion.

The first point to start with in this case is the evidence of the appellant. He gave an unsworn statement, and called one independent witness Lucy Karimi (D.W.2) who gave sworn evidence. It is of course the right of an accused person to give evidence on oath and be liable to cross-examination. When an accused person elects to give an unsworn statement he achieves two objects. **Firstly** he escapes cross-examination so that the veracity of his statement is not tested by cross-examination. **secondly**, he devalues the worth of his statement because little weight or credibility is attached to it.

Having stated this, the unsworn statement by the accused confirms that of the complainant P.W.1 that they met on the road, they flashed their respective torches at each other, and he got the letter of the complainant and inflicted injury on him a cut on the forehead.

D.W.2 Lucy Karimi who gave sworn evidence for the Appellant, told the court in cross-examination that what she told the court is what the accused, that is, the appellant told her to say. It is hearsay, and again little weight can be attached to such evidence unless corroborated.

On the other hand the short evidence of P.W.1, the complainant regarding the injuries suffered is confirmed by P.W.IV Peter Koome the Clinical Officer. He found a cut wound on the forehead. The bruises on the left arm and left elbow with reduced mobility are consistent with a fall which is clear from his evidence in cross-examination by the appellant **“when you cut me I fell down”** and that the people with you did not come near – when your people saw that you cut me, they ran away. **“You did not steal anything from me. The torch I had was powerful and I saw you clearly”**.

According to the evidence of D.W.2 Lucy Karimi, which is not hearsay and tendered in cross-examination is that-

“Before I left house Sam Kalikuica and Mwikamba were together..”

It is not a wonder that the Sam Mwikamba also called Paul Mwikamba turned a hostile witness to save the neck of his friend, the appellant, and changed his story from the statement he had recorded with the investigation officer. The Appellant was smart enough not to steal anything from the complainant, he could thus have been open to a charge for violent robbery and earned himself a death sentence.

The evidence of both P.W.1, (corroborated unwillingly by the unsworn statement of the appellant) that they met on the road annoyed each with flashes of dazzling and blinding torch light, and the appellant being armed with a panga (machete) or metal bar (according to P.W.2) hit P.W.I (the complainant) on the face knocking him to the ground. P.W.3 Peter Koome, the Clinical Officer confirmed in his evidence the injuries suffered by the complainant. P.W.4, testified in cross-examination that the appellant wanted to cover-up the complainant’s case by feigning his own report to the Police well after the Police had completed their investigations into P.W.1’s complaint of assault by the appellant.

Although the evidence of a hostile witness is generally of little value it is still admissible. That was the holding in the case of **MWANGI & OTHERS VS REPUBLIC [1974] E.A. 449**. In this case the evidence of P.W.2, corroborates the evidence of P.W.1 that the appellant was in the company of 6 or so other people who all ran away after the appellant cut P.W.1 the complainant on the head and he fell down. D.W. 2, upon his recall and cross-examination by the prosecution also confirms the evidence of the appellant’s company although she did not witness the assault.

I do not therefore agree with learned Senior Deputy Chief Litigation Counsel that it was a mis-direction to rely on the evidence of P.W.2, more so because Section 161 of the Evidence Act (Cap 80 Laws of Kenya) confers upon the court the discretion to allow a person who calls a witness (in this case the prosecution) to

put any questions to him which might be put (to such witness) in cross-examination by the adverse party. P.W.2 on being recalled had his statement read to him in open court and testified that he saw the appellant armed with “**a metal bar and he slashed P.W.1. P.W.1 was hit with a metal bar and he fell down bleeding. Accused followed him on the ground and was beating him,**” **that he screamed and attracted the attention of the public and the accused ran away. Accused is the one who hit P.W.1 with metal bar on the head, elbow and back neck.....”**

I do not therefore agree with submission by counsel for the State that the trial magistrate was speculating on the type of weapon used. I think the critical evidence here is that P.W.1 was hit so hard with some metal bar a panga is essentially a metal bar with sharpened side or sides that he required stitches on his head. That evidence is clear from both P.W.1 and P.W.2.

Whereas I agree with learned Senior Deputy Litigation Counsel that a mention date should not be turned into a hearing date, no law or procedure is violated where all the parties agree to the hearing on that date, if the court so allows. In this case, the court had on 14.10.2008 ordered P.W.2 to be remanded in custody for 2 days, and was produced for further orders on 16.10.2008 in relation to orders against P.W.2 as a hostile witness, otherwise the case appears to have been scheduled for hearing on 16.10.2008, and that is why P.W.3 was called to testify before P.W.2 was recalled and was in effect cross-examined by prosecution on his statement; and in turn further cross-examined by the Appellant and clearly stated that it was the appellant who torched the complainant first, and when he was torched, he assaulted the complainant.

In those circumstances, I am satisfied that the learned trial Magistrate came to the right decision in finding the appellant guilty of assault causing actual bodily harm contrary to section 251 of the Penal Code. The punishment prescribed for that offence is 5 years. The Appellant was sentenced to 2 years. That was a lenient sentence. This court has a wide and unfettered discretion under Section 354 of the Criminal Procedure Code to affirm, reduce, enhance or alter that sentence.

I do not propose to reduce that sentence. The appellant was sentenced on 4.11.2008 and went to jail on that date. He was released by this court on cash bail on 28.01.2009. He therefore served 2 months and 15 days out of the term of 24 months he would have served if the appeal was unsuccessful, and he was not granted bail pending appeal. There is therefore a balance of 21 months and 15 days which he could possibly serve.

I do not however propose to send the appellant to serve that term. I propose to, and in exercise of the discretion conferred upon this court by Section 354(3) (b) (ii) of the Criminal Procedure Code, alter the said sentence by suspending the said sentence pursuant to the provisions of Section 15 of the Criminal Procedure Code.

For the avoidance of doubt the attention of the appellant is drawn to the provisions of Section 15(2) that should the appellant be sentenced to another or similar offence during the said operational period of 21 months and 15 days, he will serve the said term in full and other sentence he may be sentenced to.

The Appellants Petition of appeal therefore fails, and there shall be orders as stated above.

Dated, signed and delivered at Meru this 16th day of Oct 2009

M. J. ANYARA EMUKULE

JUDGE