REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA Criminal Appeal 53 of 2009

FRED WAMBASI MURUMBA.....APPELLANT

~VRS~

REPUBLIC .....RESPONDENT

JUDGMENT

The Appellants Fred Wambasi Murumba and Zachary Wabomba Murumba filed separate appeals nos.53 and 54 both of 2009. The two appeals were consolidated and heard together on the 22nd October, 2009. The Appellants were jointly charged and convicted of a charge of grievous bodily harm contrary to section 234 of the Penal Code by Webuye Ag. Senior Resident Magistrate L. Arika and sentenced to serve five (5) years imprisonment. The appeal is against both conviction and sentence.

The Appellants have eight grounds of appeal which were argued together by their counsel Mr. Makali on two limbs of conviction and sentence. He took the court through the grounds. Precisely, the conviction is challenged on ground of insufficient, contradictory and uncorroborated evidence. The complainant was not sure that the 2nd Appellant hit him, yet the trial magistrate proceeded to convict both Appellants after stating that it did not matter who between them hit the complainant. The contradictions in the evidence of the witnesses which were material were ignored in the judgment of the court. The sentence of five (5) years is excessive in the circumstances according to the Appellants. The court was referred to the decision of ***BUKENYA & OTHERS –VS- UGANDA H. CRA NO.68 OF 1972***. Mr. Makali also took issue with the procedure in that section 200 of the Criminal Procedure was not complied with.

The state opposed the appeal through Mr. Onderi, Senior Principal State Counsel. He submitted that section that section 200 of the Criminal Procedure Code was fully complied with as the appeal record shows. The number of witnesses called shows. The number of witnesses called does not matter provided the number called establishes the truth as held in the ***BUKENYA & OTHERS*** case. Moreover, the facts in that case were different with this appeal. There is no requirement that the evidence of the complainant be corroborated. It was the state's submission that the prosecution proved their case beyond any reasonable doubt. The conviction was safe and sentence reasonable.

PW1, testified that he was on duty as the watchman at Namarambi Primary School on 24th September 2006 around 3.00 p.m. He saw two boys assaulting a lady near the school. He went to the scene. One of the boys took a pole from the fence and hit PW1. The first accused hit him on the right arm near the elbow as he tried to block the pole. PW1 further said that he does not know whether 2nd accused hit him. He became unconscious and found himself admitted at Lugulu Mission Hospital.

PW2, testified that she stood on the road talking with one Bramwel whom she found there repairing his bicycle. The accused persons passed there on their bicycle and returned to pick a quarrel with Bramwel. When the 1st accused started assaulting Bramwel, PW2 asked him why he was doing so. The 1st accused hit PW2 who screamed for help. PW1 came to her rescue and was assaulted by the 1st accused using a fence stick dropper. A teacher and two other people rescued the watchman and took him to hospital.

PW3 was the Clinical Officer who produced the discharge summary and the P.3 form on behalf of his colleague. He said the complainant had a haematoma on the skull due to depressed fracture. The injury was caused by a blunt object and degree of injury was grievous harm.

The prosecution then closed their case on 10th march 2009 after informing the court that the Investigating Officer was still sick which reason had caused adjournment of the case earlier. In his judgment, the magistrate stated:

> *"The first accused hit the watchman all over the body. The 2nd accused hit the watchman with the fence stick."*

The court proceeded to convict both accused persons after making a finding guided by ***KISUMU HCCRA NO.102 OF 2007*** that failure to testify by an investigating officer is not fatal to the prosecution's case. With this finding, I agree that this is the correct position since it has been so held in a number of Court of Appeal decisions. The evidence of PW1 and PW2 is material to the assault. PW1 said the first accused hit him with a pole he removed from the fence. PW2 supported this evidence although they called the weapon a fence dropper. It was clear in the mind of the court as it is now before me that the two witnesses referred to the same weapon, which is a stick which removed from the fence as the two watched. PW2 added that the 1st accused hit PW1 with the stick on his entire body. This would mean that PW1 was hit several times. The injury which is material in this case is the blunt injury on the head. A stick is a blunt object as it were and PW3 confirmed that such a weapon caused the said injury.

As for the 2nd accused PW1 said:

"I do not know whether the 2nd accused hit me."

PW1 did not adduce any more evidence against the 2nd accused. PW2 said of 2nd accused:

> "The second accused also assaulted the watchman PW1 using the fence dropper."

The evidence of the two witnesses PW1 and PW2 put together is clear that the 1st accused was the first to attack PW1. He hit him several times until PW1 fell unconscious. He later found himself admitted in hospital. PW2 confirms that the 2nd accused assaulted PW1. PW1 was not sure whether 2nd accused assaulted him most probably because of the poor state of health he was in after 1st accused assaulted him. The court found that both accused assaulted the complainant. There is a statement by the magistrate in his judgment which Mr. Makali took issue with that it *"was immaterial who hit the complainant"*. What did he mean by this? I believe it means that the two accused persons were executing a common purpose in assaulting PW1. This is supported by evidence of the two key witnesses PW1 and PW3. As I have already found, the 2nd accused also assaulted the complainant with the stick. The magistrate was correct to infer that the two accused were acting in execution of the same purpose and that it did not matter who hit PW1 at whatever stage and what part of the body he hit.

On alleged contradictions, I have carefully scrutinized the evidence of PW1 and PW2. I do not find any material contradiction. During cross-examination, each of the accused persons asked about two or three questions which did not deal with the part each played in the assault. The evidence of the two witnesses was not shaken even in cross-examination.

In their defence, the two accused admitted being at the scene of crime though they denied committing the offence. Being within the vicinity, the lower court found they had the opportunity to commit the crime. He correctly rejected their defence that they were innocent.

As for the alleged non-compliance with section 200 of the Criminal Procedure Code, I refer to the record of the proceedings of 6th June 2008 where the succeeding magistrate Ms L. Arika said:

> "*Court: Section 200 (3) of the Criminal procedure Code explained to the accused in Kiswahili and each of them responds in Kiswahili:*
> *Accused 1- No need to recall witnesses, let the hearing proceed from where it reached.*
> *Accused 2- I do not want witnesses recalled. Let the hearing proceed from where it had reached."*

The response of the accused persons leaves no doubt that they understood their rights under the language which they understood. The same language was used throughout the proceedings of the lower court. The foregoing analysis of the evidence *vis a vis* the issues raised support the judgment of the lower court. It is my finding that the two accused persons were rightly convicted of the offence of grievous harm contrary to section 234 of the Penal Code.

The maximum sentence for the offence is life imprisonment. Although the accused persons were first offenders, I find the sentence reasonable. The magistrate noted that it was by good luck that the complainant survived the injuries which were nearly fatal. I make the same observation.

The appeal therefore fails. I uphold the conviction and sentence accordingly.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma
This 26th Day of November. 2009 in the presence of
The appellants, Mr. Murunga for Makali for appellants and Mr. Ondari state counsel