REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 140 of 2004

CLIFORD KINYUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from a judgment of A.N. Kimani, Chuka

delivered on 4th November 2004

JUDGMENT

The appellant was convicted and sentenced to three (3) years imprisonment for assault causing actual bodily harm contrary to section 251 of the Penal Code. It is alleged that on 11th April 2004 at Kianjagi Village, Murugi Location, Meru South District the appellant unlawfully assaulted John Njagi Kiraithe thereby occasioning him actual bodily harm.

It was evidenced of the complainant that on the evening in question at about 9 pm while walking home he met the appellant. After exchanging greetings, he demanded his payment for some work done for the appellant in a church. The appellant responded by hitting the complainant with his fist before stabbing him with a sharp object.

PW1, Lydiah Nkonge treated the complainant and completed a P3 form classifying the degree of injury as "harm." The complainant had been escorted to the hospital by his cousin, Erastus Mbaabu who confirmed that the complainant told him that the appellant had assaulted him. Similarly the complainant gave the appellant's name to PW4, PC Onesmus Muoki when the former went to report the incident to the police. P.C. Muoki caused the appellant to be arrested.

In his unsworn evidence the appellant told the court how the complainant went to his residence. He asked him to return the next day. The complainant refused and became a nuisance. The appellant reported to the police and the complainant was beaten. The appellant denied attacking the complainant arguing that he had been framed up.

The learned trial magistrate considered the evidence before him and found that it proved the charge hence the conviction and sentence. The appellant was not satisfied and has filed this appeal raising nine (9) grounds, namely:-

(i) That the magistrate was biased against the appellant

(ii) That he averred in convicting the appellant on the evidence of a single witness without corroboration

(iii) The sentence was excessive

(iv) The defence was not considered

(v) The magistrate relied an extraneous matters in arriving at his decision.

(vi) The evidence against the appellant was inconsistent.

(vii) The judgment and conviction was against the weight of evidence.

(viii) The court relied on assumptions, conjective and speculations in the judgment.

(ix) The trial magistrate shifted the burden to the appellant

In a supplementary petition, the appellant raised two other grounds, namely:-

(i) That the proceedings were partly conducted by an incompetent prosecutor, and

(ii) That the appellant's constitutional right guaranteed under section 77 of the Constitution were violated.

Learned counsel for the respondent conceded the appeal, correctly so, in view of the first ground in the supplementary petition but urged the court to order a retrial arguing that the evidence against the appellant is overwhelming.

On his part, learned counsel for the appellant submitted that a retrial will present an opportunity to the prosecution to fill in the gaps in its case. That a retrial will be an exercise in futility given the period that has elapsed and the fact that the evidence against the appellant does not meet the standard of proof required in criminal trials.

I have anxiously considered these submissions. I have perused the record and confirm that Sgt Musila was in court on two occasions. On both occasions he represented the prosecution during the mention of the case. Otherwise plea was taken when IP Michuki was the prosecutor and IP Kunga led all the witnesses in the case. The participation of Sgt. Musila in the proceedings does not amount to prosecution and therefore does not vitiate the trial. See Roy Elirima Richard v R (2003) KLR 537. That ground therefore fails.

Turning to the second ground in the supplementary petition, there are no particulars of the right under section 77 of the Constitution which were alleged breached. The court will not speculate. On the appeal generally, I am alive of my duty as the first appellate court to re-evaluate the evidence on record to arrive at my independent conclusion always bearing in mind that I did not see or hear the witnesses.

The incident took place at 9 pm. The evidence relied upon is that of the complainant only for identification of the assailant. According to the complainant the appellant had contracted him to undertaken some work at a church. On the night in question, when they met, the complaint demanded for the payment of work after they exchanged greetings. This, in my view, is a case of recognition. The appellant was known to the complainant prior to this night. They talked to each other before the attack.

It was a case of visual and voice recognition. In *Anjononi & Another v R* (1980) KLR 54 at p. 60 the Court of Appeal said the following:-

"Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

The conditions obtaining in this particular case were such that there could be no possibility of error. The complainant's evidence is supported by the fact that he gave the appellant's name immediately to his cousin, Erastus Mbaabu and the police.

I am satisfied that the appellant was positively identified. His defence is therefore rejected, having been displayed by the prosecution evidence. I find no bias in the manner the trial was conducted. Similarly, the trial magistrate gave sufficient consideration to the defence and found no bias on the same. No details of the alleged extraneous matters relied upon by the trial magistrate have been shown.

I come to the conclusion that the charge against the appellant was proved beyond any reasonable doubt. In the result this appeal fails and is dismissed accordingly. The appellant's bond is cancelled and it is ordered that he shall serve the sentence imposed, regard being had to the period served before he was admitted to bail pending this appeal.

Dated and delivered at Meru this 18th day of Feb 2008.

W. OUKO

JUDGE