REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 109 of 2007

ARISTARIKAS OKASA …….....……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

[From Original Conviction and Sentence in Criminal Case Number 56 of 2006 of the Principal Magistrate's Court at Maseno]

JUDGMENT

The appellant Aristarikas Okasa and another were charged with the offence of grievous harm contrary to Section 234 of the Penal Code in that on the 24th December 2005 at Esirulo Village, Esirulo Sub Location, Central Bunyore Location, in Vihiga District of the Western Province jointly and unlawfully did grievous harm to one Robin Nyikuli thereby maiming him.

After their arrest on the 10th January 2006, the appellant and the co-accused appeared before the Resident Magistrate at Maseno and pleaded not guilty. The trial commenced on the 12th July 2006 before the learned Senior Resident Magistrate A. ONGINJO M/s and was taken over by the learned Ag Senior Resident Magistrate J. M. Nangea on the 2nd March 2007 after the appellant and his co-accused had been placed on their defence. As it were, the prosecution's evidence was taken by the learned Senior Resident Magistrate while the defence's evidence was taken by the learned Ag Senior Resident Magistrate.

At the end of the trial, the learned Ag Senior Resident Magistrate found the appellant guilty as charged. He was convicted and sentenced to serve four (4) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant lodged this appeal on the basis of the grounds contained in his memorandum of appeal filed herein on the 27th July 2007. The said grounds are as follows:-

(i) THAT the trial Magistrate erred in law and facts by overlooking on the fact that essential witnesses were not availed to clear doubt on the alleged felony i.e. eye witnesses, arresting officers and medical officer.

(ii) THAT the trial Magistrate erred when he based the conviction on the facts adduced which were hearsay.

(iii) THAT the trial Magistrate erred in upholding the conviction on the evidence adduced from the prosecution that was not proved beyond reasonable doubt.

(iv) THAT the defence was rejected without cogent reasons.

At the hearing of the appeal, the appellant appeared in person and fully relied on the aforementioned grounds. The state was represented by the learned State Counsel Mr. Mutai who opposed the appeal and contended that the prosecution's evidence against the appellant was cogent and overwhelming. He thus prayed for the dismissal of the appeal.

For a first appeal, the guideline was specified in the case of **OKENO =vs= REPUBLIC [1972] EA 32** in which the Court of Appeal stated as follows:-

"**An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya =vs= R [1975] EA 336). It is not the function of a first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions**. **Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters =vs= Sunday Post [1958] EA 424"**

The case for the prosecution was that the complainant Robin Nyikuli (PW1) then a student at Kisumu Polytechnic met the appellant on the 24th December 2005 at 12:00 noon. The appellant was armed with a panga and was known to the complainant. He demanded money from the complainant while issuing threats and allowed him to go away. The two met again later on the same day but this time, the appellant was in the company of his sister who was the co-accused and was (appellant) armed with a spear and a traditional slasher. He repeated his demand for money while issuing threats. He thereafter attacked and injured the complainant. He cut the complainant's left wrist using the slasher and stabbed him on the stomach using the spear.

The complainant proceeded home and then to the hospital at Mbale where he was treated and discharged. He reported the incident at the Mwichio police post where he was given a P3 form, which was filled as required. The appellant went into hiding but was later arrested together with his sister and both were charged with the offence of causing the complainant grievous harm. Their defence was a denial and a contention by the appellant that he was arrested on "[8th February 2007]" at about 10.00p.m while in his house. He was taken to the police station and on the following day saw an injured person whom it was claimed was injured by himself. He did not know who had injured the person. The appellant's co-accused contended that she was arrested on the 12th January 2006 when she went to see the appellant at Mwichio Police Post. She did not know about the offence and was not even nearby when it was committed.

The prosecution closed its case after calling a total of four (4) witnesses who included the complainant, Robin Nyikuli (PW1), a scrap metal dealer Ouya Luka (PW2), a clinical officer Eric Omondi Omollo (PW3) and a police officer P. C. James Kalya (PW4). The defence called one witness Benjamin Keah (DW1). After hearing all the witnesses the trial court delivered its judgment on the 16th July 2007, with the result that the appellant was found guilty, convicted and sentenced to four (4) years imprisonment. After a re-evaluation and re-examination of the evidence, this court considers that what arose as the basic point for determination is whether the complainant was assaulted and occasioned grievous bodily harm and if so, whether the appellant was responsible for the unlawful act.

This basic issue was well captured in the judgment of the learned Ag Senior Resident Magistrate. As regards the unlawful act and the consequential injuries, the evidence adduced by the prosecution through the clinical officer (PW3) was largely uncontroverted. The P3 form produced (Pex 1) did establish the fact of assault as indicated in the evidence of the complainant (PW1) and the scrap metal dealer. (PW2). The findings of the clinical officer as recorded in the P3 form did establish that the complainant was injured with a sharp and blunt object to the degree of suffering maim which is defined as the destruction or permanent disabling of any external or internal organ, member or sense.

As regards the identification of the assailant, the evidence by the complainant as corroborated by that

of the scrap metal dealer Ouya Luka (PW2) did credibly and cogently establish that the appellant was the assailant. Ouya (PW2) was in the company of the complainant when the offence was committed. He affirmed the complainant's evidence that the appellant was responsible for the unlawful act. He said that the spear that the appellant was holding was aimed at him but it missed and instead stabbed the complainant on the abdomen. His evidence was based on what he saw and witnessed. It was not therefore hearsay evidence.

The decision of the trial court was grounded on solid and credible evidence, which completely shattered the defence raised by the appellant, which was essentially a denial of the offence. There is nothing in the decision suggesting that the burden of proof was thrown at the appellant. The findings and conclusions of the trial magistrate were proper and lawful to justify the conviction of the appellant.

The sentence of four years imprisonment was on the lower side considering that an offence under Section 234 of the Penal Code carries life imprisonment. However, the state has not requested for enhancement of the sentence and this court would not be inclined to increase it considering the mitigating factors advanced by the appellant in the lower court. In essence, the appeal would have no merit and calls for dismissal.

However, there are vital procedural mistakes, which occurred during the trial and must be addressed herein to determine whether or not the appellant was accorded a fair trial. Firstly, and less important is the matter of the acquittal of the co-accused by the lower court. In its judgment, the trial court did not make a formal pronouncement of the co-accused's acquittal. Just as it found the appellant guilty as charged and convicted him it would have also made a finding that the co-accused was found not guilty as charged and acquitted her in accordance with Section 215 Criminal Procedure Code. It was not enough for the trial court to simply state in the judgment that:

" **There is no evidence implicating the 2nd accused in the assault. She was only alleged to have incited the 1st accused to attack the complainant. This does not constitute the offence charged".**

The trial court should have gone further to pronounce the verdict of not guilty followed by an order of acquittal.

As the judgment stands, it is doubtful whether the appellant's co-accused does actually stand acquitted. It is also quite intriguing and interesting that the trial magistrate considered that a person found to have incited the commission of an offence such as grievous harm would be innocent of the offence. He failed to address his mind to or was ignorant of the provisions of Chapter V of the penal code, which provides for parties to offences.

The second and most important procedural mistake made by the trial court is the matter of Section 200 (3) of the Criminal Procedure Code which provides that:-

"**Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witnesses be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right".**

The proceedings in the lower court were before the learned Senior Resident Magistrate (as she was then)

A. ONGINJO M/s. She heard the prosecution case to its conclusion and thereafter placed the accused on their defence. The defence hearing was set for the 2nd March 2007 when a new magistrate took over i.e. the learned Ag Senior Resident Magistrate J. M. Nangea. He proceeded to take down the evidence of the defence without informing the accused of their right under Section 200 (3) Criminal Procedure Code which is mandatory. This constituted a serious procedural error and a miscarriage of justice calling for interference by this court. Commenting on Section 200 (3) of the Criminal Procedure Code, the Court of Appeal in the case of [**CYRUS MURIITHI KAMAU & ANOTEHR =vs= REPUBLIC CR. APP NO. 87 & 88 OF 2006 AT NYERI]** (unreported) had the following to say:-

" **This section is clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms…….……."**

In that case, the appellants had before the trial court allegedly waived their rights under Section 200 (3) Criminal Procedure Code thereby relieving the succeeding magistrate of his duty to inform the appellants of their rights. The court of appeal quoted a passage from an earlier decision of the same court differently constituted (i.e. in the case of **Ndegwa =vs= Republic [1985] KLR 534**) which passage stated as follows:-

" **No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration".**

Herein, the failure by the succeeding magistrate, the learned Ag Senior Resident Magistrate J. M. Nangea, to adhere to the provisions of Section 200 (3) of the Criminal Procedure Code calls for interference by this court in terms of Section 200(4) of the Criminal Procedure Code which provides that:-

Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate the High Court may if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial".

There was apparent prejudice occasioned to the appellant when the convicting magistrate failed to inform him of his rights under Section 200(3) Criminal Procedure Code. Consequently, and for that reason alone, the conviction and sentence of the appellant by the lower court is hereby set aside with an order for re-trial in respect of the appellant only before a different magistrate.

Those are the orders of the court.

Dated, signed and delivered at Kisumu this 15th day of May 2008.

J. R. KARANJA

JUDGE

JRK/aao