

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 92 of 2006

AMOS MSHOLI BOMAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

Amos Msholi Boma, the appellant herein, was tried for the offence of grievous harm contrary to Section of the Penal code. The particulars of the offence are that on the 12th day of February 2005 at Muranju village Wundanyi location in Taita Taveta District within Coast Province, unlawfully did grievous harm to Martin Righa Kisaghi. At the end of the trial the appellant was convicted and sentenced to serve seven (7) years imprisonment. Being aggrieved with the decision the appellant preferred this appeal.

On appeal, the appellant put forward seven grounds of appeal which may be summarized to two. First is to the effect that the prosecution did not prove its case to the required standards of beyond reasonable doubt. Secondly, is that the sentence is manifestly excessive.

The prosecution's case before the trial court was supported by the evidence of five witness. The complainant, Martin Righa Kisaghi (P.W.1) told the trial court that on 12th February 2005 at about 6.00 p.m. he met the appellant while on his way from Wundanyi to visit his grandmother. P.W.1 was in company of his cousin Knight Manga Mwakio (P.W.3). At Plan offices, P.W.1 greeted the appellant by saying 'Jakidum' 'Jakidum'. P.W. 1 said that the appellant reacted angrily by hitting P.W.1 on the right side of his head making P.W.1 to fall down. As a result of the fall, P.W.1 claimed he lost six teeth and had four damaged. Knight Manga Mwakio (P.W.3), said the appellant was following them. She said she saw the appellant quarrel and chase P.W.1. She said he saw him pick a stone which he threw at P.W.1 hitting him at the rear of his head thus making him to fall down. Grace Malala (P.W.4) said she saw the appellant who was following them; chase P.W.1 after P.W.1 referred to him as 'Jakidum'. She said she saw the appellant throwing a stone at P.W.1. P.W.1 was hit at the back upon which he fell down. Dr. Sammy Kilonzo (P.w.2) filled the P3 form on 14th March 2005. He found that P.W.1 had five missing teeth. He also found a healed wound at the back of his ear and on the nostril. There were also multiple injuries on the head. P.W.2 concluded that the injuries were caused by both sharp and blunt objects. P.C. Rama Mwachiro (P.W.5) booked the report of assault on 13/2/2005. P.W.5 said that he was told by P.W.1 that the appellant got furious because of the manner P.W.1 greeted him. P.W.5 said P.W.1 told him that the appellant chased him and as a result he fell down on the tarmac and as a result he got injured on the mouth and teeth.

When placed on his defence the appellant gave sworn testimony. The appellant admitted meeting the complainant (P.W.1). He said he was threatened by the complainant as he usually does. The appellant said that when his friends questioned him about the threats he ran away and in the process he fell down on the tarmac. The appellant said he took him (P.W.1) to hospital for treatment. The appellant said he had no intention to hurt him.

I have re-assessed and re-evaluated the evidence tendered by both the prosecution and the defence. It is not disputed that the appellant was placed at the scene of crime. It is not also denied that the complainant (P.W.1) got injured as a result of his encounter with the appellant. What is not clear is

whether the appellant actually inflicted the injuries complained of. The complainant claims that the appellant hit him and as a result he fell down and lost teeth. According to the evidence of P.W.3 & P.W.4, the appellant threw a stone at P.W.1 thus making him fall down. According to the evidence of P.W.5, he was told that the complainant (P.W.1) was hit with a stone. P.W.2 stated in the P3 form that the complainant (P.W.1) suffered multiple injuries on the head. It is the submission of Mr. Monda that the evidence proved the offence to the required standard of beyond reasonable doubt. The trial magistrate was of the view that the complainant had to run for his dear life when threatened by the appellant and as a result he fell down and got injured. After a careful re-assessment of the entire evidence I have come to the conclusion that there are serious doubts whether the appellant actually assaulted the complainant. It is possible the appellant chased the complainant and in the process he fell down and he had himself injured. For this reason I am convinced that the learned Resident Magistrate unfairly dismissed the appellant's defence without giving it due consideration. In short, there is credible doubt that the appellant never touched the complainant but instead the complainant fled and in the course of running he hurt himself. The doctor does not indicate whether or not the complainant was hit at the back of the head. He simply states that the complainant had multiple injuries on the head. In fact the complainant does not mention having been hit with a stone. There is no credible evidence as to who treated the complainant on his first visit to the hospital. P.W.2 did not deem it fit to mention the treatment notes which assisted him to fill the P3 form. In the final analysis I am not convinced that the prosecution proved its case to the required standards of beyond reasonable doubt. For this reason I allow the appeal by quashing the conviction and setting aside the sentence. The appellant is hereby set free forthwith unless lawfully held. In view of my above findings I do not need to consider the second ground of appeal as against sentence.

Dated and delivered at Mombasa this 29th day of July 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Monda Learned Senior State Counsel and the appellant in person.