REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 186 of 2007

DAVID GACHURU NGUGI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at Kigumo in Criminal Case No. 2720 of 2006 dated 19th June 2007 by S. M. Mokua – SRM)

J U D G M E N T

The appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars stated in the charge sheet were that on 5th November 2006 at Gachocho village in Maragua District, the appellant unlawfully did grievous harm to one Jamleck Kinuthia Macharia. The appellant denied the offence. The prosecutor in a bid to prove the case lined up a total of 4 witnesses.

The complainant Jamleck Kinuthia Macharia (PW1) testified that on 5th November 2006 the appellant who is a member of his clan challenged him to a fight at about 7.45 a.m. The fight was over a plant that PW1 had uprooted in his shamba. The land belonging to the accused is separated from that of the complainant by a path.

According to the complainant's testimony, the appellant then hit him on the head tied him up using ropes and continued cutting him with a panga. Apparently as he was doing this the appellant was smoking cannabis sativa. The appellant also reminded him of the evidence he had given against him in another case. The complainant eventually ended up at the police station. At the police station PW1 was received by P.C. Robert Muna, (PW3). According to PW3 this was on 31/11/06 and not 5th November 2006 as per the evidence of PW1. At the Kigumo police station, the appellant reported that PW1 had stolen his seedlings. PW1 had been tied and had injuries on the head where he had been cut. After PW3 had received the report, he referred PW1 to hospital and issued a P3 form to him. PW4, Boniface Ndegwa, a clinical Officer at Maragua District Hospital attended to PW1. He observed that PW1 had cut wound on the head (posterior region), tender swelling on the right shoulder. The x-ray showed that he had a fracture on posterior region. He formed the opinion that the injuries sustained were grievous harm. He filled the P3 form to that effect. It was then that PW3 preferred the instant charge against the appellant.

Put on his defence, the appellant in unsworn statutory statement stated that on 5th November 2006 PW1 was assaulted by his brother in the morning on the allegation that he had stolen his hen. Appellant on hearing screams rushed to the scene and separated the two. PW1 went and reported the incident to the

police. Because of another case that was pending, when the appellant came to court, he was arrested. He denied committing the offence and claimed that this case was a frame up.

The trial magistrate having carefully analysed the evidence tendered by prosecution as well as the defence, came to the conclusion that the appellant was guilty as charged and proceeded to convict him accordingly. Upon convicting the appellant he sentenced him to 6 years imprisonment. The appellant was aggrieved by the conviction and sentence and hence preferred the instant appeal. He lamented in his petition of appeal that the learned magistrate was in error in convicting him by relying on uncorroborated, doubtful, inconsistent and insufficient evidence, no exhibits were tendered in evidence and finally that the learned magistrate evaluated the prosecution evidence in isolation.

At the hearing of the appeal, the appellant was represented by Mr. Irungu, learned counsel whereas the state was represented by Mr. Orinda, learned principal state counsel. In his submissions in support of the appeal, Mr. Irungu argued that the prosecution evidence did not flow and had fundamental contradiction especially with regard to the evidence of PW1 and PW2. Further counsel submitted that there was no corroborative evidence. Counsel further submitted that the panga alleged to have been used to inflict injuries on PW1 was not tendered in evidence. That being the case, the evidence of the clinical officer was hearsay.

On his part, Mr. Orinda submitted that corroboration is not an essential requirement in every criminal case. The court can act on the evidence of a single witness. The parties knew each other and therefore identification was a non issue. A mix up here and there in the testimonies of the prosecution witnesses was not prejudicial to the appellant. Counsel went on to submit that there was no law that states that a weapon must be produced in evidence to prove grievous harm. The clinical officer testified. Hs evidence was not hearsay.

As a first appellate court, my duties are clearly cut out for me. I am required to subject the evidence tendered during the trial to fresh and exhaustive evaluation so as to reach my decision as to the guilt or otherwise of the appellant. See Okeno v/s Republic (1972) E.A. 32.

The offence if at all was committed early in the morning, at about 7.45 a.m. to be precise. It involved relatives and indeed members of the same clan. That being the case, the question of identification of the culprit or lack of it does not arise. It cannot even be a question of mistaken identity. To my mind therefore the conviction of the appellant should have turned on the credibility to be attached to the evidence that was tendered by the trial court. Unfortunately the learned magistrate made no such finding.

From the evidence on record, it is clear that there is no love lost between the appellant and complainant. Indeed as at the time the appellant was alleged to have committed the offence, there was another case pending in court between the parties i.e. criminal case number 1831 of 2006. From the sentencing notes of the learned magistrate, it would appear that the appellant was found guilty in the said criminal case and was sentenced to 2 years imprisonment. This being the case, it behoved the learned magistrate to approach the prosecution evidence with a lot of care and circumspection bearing in mind the possibility that PW1 could have invoked our criminal justice system so as to fix the appellant once and for all. I say so because, looking at the testimony of the complainant it is doubtful, inconsistent and does not flow. In fact it is fundamentally contradictory. It is the case of PW1 that the appellant came to his house at 7.45 a.m. spoiling for a fight; yet without being nudged on he voluntarily accompanied the appellant to his parcel of land. The appellant did not request him to accompany him to his parcel of land. I doubt whether this is a reaction of a person who was fearing for his own safety. PW1 did not at all mention that he went to the parcel of land in the company of his wife, Damaris Wairimu (PW2). Yet PW2 testified that the appellant came and she accompanied him to the shamba. The appellant showed her some holes for trees that had been uprooted. Then the appellant alleged that he was to kill PW1. Later she found that the appellant had cut her son using a panga. If indeed PW2 accompanied the appellant and PW1 to the shamba, why didn't PW1 say so. Further whereas PW1 claimed that the reason that he was taken to the shamba by the appellant was to show him a plant he had uprooted in his shamba, according to P|W2 however it was to show them holes of trees that had been uprooted. Whereas according to PW1 the appellant merely stated that he wanted a fight when he confronted him in his house, PW2 however stated

that the appellant alleged that he would kill her husband. Further whereas PW1 claimed that PW2 was his wife, on her part, PW2 claimed that PW1 was her son. Yet under cross-examination she turned around and claimed that PW1 was her husband. In his evidence PW1 does not say how he ended up in the police station whereas PW2 stated that the appellant dragged PW1 and said that he was going to take him to Kigumo police station.

The truth of the matter it would appear is as per the evidence of PW3, a police officer at Kigumo police station. According to him on 31st November 2006, the appellant brought the complainant to the station claiming that he had stolen his seedlings. He had tied him and had injuries. However this evidence raises more questions than answers. Was the crime committed on 5th November or 31st November 2006? Yet from the charge sheet the appellant is alleged to have been arrested on 18th December 2006. Yet again from the evidence of the clinical officer, he examined PW1 on 5th November 2006. There are more contradictions as to whether the appellant tied up PW1 with ropes and who took him to the police station and on what dates.

Given the hostile relationship between the appellant and PW1, these contradictions and inconsistencies are material and go to the root of the prosecution case and indeed to the credibility to be attached to the witnesses. I am unable to agree with the learned state counsel's submissions that they were minor and not prejudicial to the appellant.

PW1 conceded in his evidence in chief that as the alleged assault was going on, the appellant was smoking cannabis sativa. The learned magistrate in her judgment did not revert to this aspect. Is it possible that the appellant was high on cannabis sativa when committing the alleged offence if at all. That possibility cannot be ruled out given the circumstances. It was necessary that the learned magistrate considers the issue, if for anything else be but as a mitigating factor.

Yes, corroboration is not necessary in every criminal case as properly pointed out by the learned state counsel. The court can act on the evidence of a single witness. However given the circumstances prevailing in this case, I think that corroboration was absolutely necessary, the evidence of the star witnesses (PW1 & PW2) having been discredited for want of consistency and credibility.

It is for the foregoing reasons that I find that this appeal has considerable merit. Accordingly it is allowed, the conviction quashed and the sentence imposed set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 22nd day of September 2008

M. S. A. MAKHANDIA

JUDGE