



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 352 OF 2007

-BETWEEN-

CHARLES MAINA NGARUIYA.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Resident Magistrate A.O. Aminga dated 19th January, 2007 in Criminal Case No.871 of 2006 at Limuru Law Courts)

JUDGEMENT

The appellant was charged with assault causing actual bodily harm contrary to s.251 of the Penal Code (Cap.63, Laws of Kenya). The particulars were that on 21st May, 2006 at Kimende Township in Kiambu District of Central Province, the appellant unlawfully assaulted **D M G**, thereby occasioning him actual bodily harm.

The complainant, **D M G**, a minor aged 10 years, stated that he was at the shopping centre when the appellant herein came and insultingly referred to him as an uncircumcised boy, before hitting him on the forehead with the fist and twisting the complainant's left hand.

PW2, **John Gitau Kamau**, stated that he had met the complainant crying, and when he inquired what was the matter, the complainant said he had been assaulted by the appellant herein.

PW3, **Sgt. Joseph Muchai**, who was the Investigating Officer, received the complaint, and later issued the complainant with a note and a P3 medical-reporting form, to be filled in by a doctor. PW3 said he had noticed that the complainant's nose had bruises. The P3 form when produced, showed the degree of injury sustained by the complainant as "harm".

The appellant herein gave sworn testimony, and stated that the complainant who is his cousin, was riding a bicycle on a slope, and nearly rode into him from behind; and the complainant fell down and started crying. He denied assaulting the complainant.

The learned Magistrate was of the opinion that the issue for determination was whether the complainant had sustained injuries at the hands of the appellant herein.

The trial Court noted that the main part of the evidence was that of the complainant himself; for PW2's evidence was not that of an eye-witness.

The trial Court considered it significant that the complainant had said the accused hit him on the forehead with fists, and twisted his left hand; PW3 had noticed bruises on the complainant's nose; the evidence of the doctor as shown on the P3 form, was to the effect that the complainant had a tender forehead, and a small laceration on the left side of the nose; and the complainant's right shoulder =was painful and was tender. The P3 form records that the source =of the injuries would have been a blunt object. =The learned Magistrate found that such injuries were consistent with causation by assault, just as the complainant had testified. The only remaining question was whether such injuries were the handiwork of the appellant herein.

The learned Magistrate treated the evidence on the foregoing point, from both sides, with caution; for the reason that there was evidence from both sides that "the accused's and [the] complainant's respective families are not in good terms".

The trial Court considered crucial the testimony of PW2, who had come to the *locus in quo* and found the complainant crying; and his explanation to PW2 was that he had been beaten by the appellant herein.

The trial Court viewed the pertinent issue of veracity and factual objectivity on the basis of the demeanour of witnesses; and the learned Magistrate's assessment of the complainant as a witness, was that the boy was "unquestionably capable of appreciating the nature and solemnity of the oath", and that the complainant "exhibited the clarity and innocent credibility of a young, unbiased mind". The Court drew the inference that if the complainant had simply fallen off his bicycle, nothing was likely to "spur himto give an open lie to PW2....and [to] falsely implicate the accused". The learned Magistrate found the defence testimony unbelievable, and dismissed it. He found that the prosecution had proved its case beyond any reasonable doubt, and convicted the appellant herein.

The trial Court, after treating the appellant as a first offender, imposed a fine of Kshs.12,000/= and, in default, a four-month term of imprisonment.

The appellant's grounds of appeal were as follows:

- (i) the offence of assault causing actual bodily harm was not proved beyond reasonable doubt;
- (ii) the rules relating to onus of proof were not observed by the trial Court;
- (iii) the trial Court should not have relied on the complainant's evidence which was "full of contradictions, inconsistencies and [was] wholly unreliable, unworthy and suspect";
- (iv) the trial Court erred in law, in "failing to give a proper evaluation and assessment of the evidence of the appellant;"
- (v) the trial Court "erred in law and fact in basing [its] judgment on extraneous factors, speculative matters and matters of conjecture" ;
- (vi) the learned Magistrate erred in law and fact, in failing to evaluate the exculpatory evidence tendered by the appellant;
- (vii) the trial Court erred in law and fact in rejecting the evidence of the appellant without offering any, or any proper reasons for doing so;
- (viii) the trial Court should have held that the evidence adduced by the prosecution witnesses was unreliable, inconsistent and contradictory;
- (ix) the trial Court erred in law, in failing to warn itself of the dangers of placing heavy reliance on

the evidence of the complainant, a minor of tender years;

(x) the learned Magistrate erred in law in relying on the uncorroborated evidence of the complainant, and failing to hold that the same required material corroboration;

(xi) the learned trial Magistrate erred in law and fact; in failing to hold that the evidence on record was unsafe as a basis for entering a conviction for the offence of causing actual bodily harm.

Learned counsel **Mr. Wachira**, on the occasion of hearing the appeal, urged that the prosecution had failed to discharge the burden of proof resting upon it; and that the Magistrate had shifted the burden of proof from the respondent's side to the appellant's side.

Counsel submitted that even though the trial Court subjected the infant complainant to a *voir dire* examination and then allowed him to testify, "the Court failed to warn itself of the dangers of depending exclusively on such evidence, and that material corroboration was required".

Counsel contested the admission of the P3 medical-reporting form, on the ground that it was not produced by the maker but by the Investigating Officer.

Learned respondent's counsel, **Mr. Makura** contested the appeal, and expressed his support for both conviction and sentence. Counsel urged that the prosecution had given proof of the offence committed by the appellant, beyond any reasonable doubt: the appellant had assaulted and injured the complainant, and the complainant had reported the incident to his grandfather (PW2). During the trial, **Mr. Okello** had been on record as advocate for the appellant herein, and he had raised no objection to the production of the P3 form by the Investigating Officer. Counsel urged that any contradictions in the recording of the prosecution evidence would be minor, and may be cured by virtue of the Court's powers provided for in s.382 of the Criminal Procedure Code (Cap 75, Laws of Kenya). Counsel urged that the trial Court had taken into account the defence statement; and that even with this having been done, the outcome of the trial was sufficient proof that the appellant had committed the offence charged. Counsel urged that the conviction was safe, and thus the appeal lacked merit and was for dismissing.

After considering all the evidence as recorded in the proceedings, as well as the finding of the Court, the grounds of appeal and the submissions of counsel, I have come to the conclusion that the testimony of the complainant was quite properly taken, and that the trial Court duly paid attention to the demeanour of witnesses, and proceeded as cautiously as it should have done.

It is a common element in the evidence that the complainant had been riding a bicycle at the material time, and was following the appellant from behind. The complainant gives what the learned Magistrate found to be truthful evidence, that the appellant stopped the cycling-on of the complainant, and assaulted him, inflicting harm upon him. Although the appellant is in agreement on the fact that the complainant was cycling behind him and he had objections to this, he did not say *why* he thought the complainant should not cycle behind him; and he was not forthcoming with his evidence on how his objections coincided with the fall from the bicycle of the complainant, nor on how the complainant suffered the injuries which were described as harm, in the P3 form. The conclusion to be drawn is that the complainant was responsible for the harm suffered in various parts of the body, by the complainant.

I have to conclude that all the evidence of veracity shows that the appellant had caused injury to the complainant. I dismiss the appeal, uphold the conviction, and affirm the sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 15th day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Wachira

For the Respondent: Mr. Makura