REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 374 of 2005

JOSEPH MUNGAI MWANGI……APPELLANT

VERSUS

REPUBLIC ……... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1048 of 2004 of the Chief Magistrate's Court at Kibera- Ms Mwai SRM)

JUDGMENT

JOSEPH MUNGAI MWANGI, the appellant, was charged before the subordinate court with the offence of causing grievous harm contrary to Section 234 of the Penal code. The particulars of the charge were that –

"**On the 20th day of January 2004 at Kibera Laini Saba within Nairobi Area Province unlawfully did grievous harm to JULIUS MAINA".**

After a full trial, the learned trial magistrate found him guilty of the offence, convicted him and sentenced him to a fine of Kshs.50,000/= and in default to serve 12 months imprisonment. Being aggrieved by the decision of the learned magistrate, the appellant preferred this appeal challenging both the conviction and the sentence. The appeal, which was filed for the appellant by Kamau Kinga & Company advocates was on three grounds –

1. That the learned Senior Resident Magistrate erred in law in failing to consider the evidence of the accused together with that of DW2.

2. The learned Senior Resident Magistrate erred in holding that the accused person is the one who caused the injuries that the complainant suffered whereas the evidence on record clearly showed that the complainant fell and was trapped in one of the holes on the wooden bridge.

3. The learned Senior Resident Magistrate erred in failing to consider the weight of the evidence adduced in favour of the defence.

At the hearing of the appeal, learned counsel for the appellant, Mr. Kinga, submitted that there was no sufficient evidence to warrant the conviction. The contest was whether PW1 sustained injuries having been tripped by the appellant, or whether he fell and was trapped by a foot bridge. He contended that PW1 testified that he was beaten by the appellant on the face and hands and that, as he tried to run away,

the appellant chased him, tripped him and he fell and was stepped on by the appellant. He contended that this was contrary to the doctor's evidence which did not indicate any injury to the face or chest, but merely found an injury on the leg which was caused by a blunt object. He further stated that the evidence on record was that the complainant was chased by members of the public and fell at a foot bridge with gaping holes and that is why he fractured his leg.

He further submitted that the learned trial magistrate erred in making a finding that the appellant was a strong man with influence, which is not supported by any evidence. This was an attempt by the trial magistrate to build the prosecution case. That was an error on the part of the trial magistrate. He sought to rely on the case of **OKETHI OKALE AND OTHERS – vs – REPUBLIC [1965] EA 555.**

Learned State Counsel, Ms Gateru, opposed the appeal and supported the conviction and sentence. She submitted that the prosecution had proved that the appellant was the person solely responsible for the injuries sustained by the complainant. Though the evidence was that of a single identifying witness, it was truthful. The complainant gave evidence as to how the appellant hit him and how, after he fell down, the appellant stepped on him. The injuries were confirmed by the doctor, PW3, as grievous harm. The learned trial magistrate also considered the defence case and found it to have no merits.

The brief facts of the case are that the complainant, PW1, used to work for the appellant, in the appellant's cloth selling business at Kibera. He left the job and claimed to be owed some salary by the appellant. On the 20.1.2004 at 4.00 p.m., the two met at a hotel in Kibera liani saba. According to PW1, the appellant was not happy that PW1 had left his work and demanded to be paid Kshs.200/= by the complainant (PW1), though the appellant owed the complainant unpaid salary of Kshs.3,000/=. The appellant then hit the complainant on the face and on the hands with fists. Then the appellant walked out of the hotel and the complainant followed him. Thereafter, the appellant came back towards PW1, and PW1 started to run away. The complainant chased him and tripped him and he fell. The appellant then stepped on PW1's chest and both his legs. He tried to stand up but his legs could not carry him. He was carried by good Samaritans to Kenyatta National Hospital, only to discover that his leg was broken. Dr. Z. Kamau (PW3), a police surgeon, examined the complainant on 8.3.2004. He found that the femur of the complainant was fractured, though the complainant had already been operated upon and the fracture fixed. The doctor assessed the degree of injury as grievous harm. He produced the P3 form as an exhibit.

In his defence, the appellant gave sworn testimony. He also called one defence witness. He testified that the complainant used to be his employee who sold clothes for him. That on the 20.1.2004 at 3.00 p.m. he met the complainant at a hotel at Kibera Laini Saba. He entered the hotel and told the complainant that they would have to calculate what the complainant owed him after leaving employment. When he left the hotel, the complainant followed and insulted him. When people gathered, the complainant started throwing stones. However, when he exhausted the stones, the people who gathered shouted that the complainant should be caught, and the complainant started running away. He fell near a bridge and his leg was trapped in a hole. No one beat the complainant. He denied tripping the complainant. DW2, George Njoroge Kariuki, testified that he heard a quarrel, and saw stones being thrown. One of the people quarreling injured his leg, when the leg was trapped in a hole on the bridge. He did not see who was actually throwing stones, or how the complainant was injured.

The appellant was charged with an offence of causing grievous harm contrary to section 234 of the Penal Code, which states –

"234. Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life".

Clearly, the prosecution had to prove two basic elements of the offence. The first element is whether the appellant did grievous harm to the complainant. The second element is that the said grievous harm was caused unlawfully.

I have considered the evidence on record. It is not in dispute that the complainant (PW1) suffered injury. Both the evidence for the prosecution and the defence is to the effect that the complainant was

injured on the material day. That he was injured in the leg. That he was taken to the hospital (Kenyatta National Hospital). PW3, who was Dr. Z. Kamau, examined the injures suffered about one month and 12 days after the injury. He found that the left femur of the complainant had been fractured. He assessed the injury as grievous harm. From the evidence on record, I am of the view that the evidence before the learned trial magistrate established that, indeed, the complainant suffered grievous harm.

The real issues that arise in this appeal is whether the grievous harm was caused by the appellant, and whether it was caused unlawfully. I have re-evaluated the evidence on record. It is the prosecution contention that the appellant hit the complainant on the face and arms in the hotel. The prosecution also alleges that the appellant stepped on the complainant's chest and leg outside the hotel, where he broke the femur of the complainant. The learned trial magistrate in the judgment, considered both the prosecution and the defence cases. In considering the defence case, the learned trial magistrate had this to say on page J4 of the judgment –

"**I have difficulties imaging how the members of the public could be hurled at stones by one person and thereafter spare him from mob justice on one's intervention. I take judicial notice that a charging crowd in Kibera had no mercy on its victim. I also wonder why accused did not call any person to testify to these events for DW2 did not witness the same".**

In my view, these were misdirections by the learned trial magistrate. Firstly, there was no evidence that there was a crowd at Kibera which was charging on the complainant. The evidence was that there was a dispute between the complainant and the appellant. The people merely gathered because of the verbal exchange between the complainant and the appellant. I am in agreement with the submission of counsel for the appellant that the trial magistrate introduced in the judgment theories which were not canvassed in the evidence.

As was held by the Court of Appeal in the case of **OKETHI OKALE AND ANOTHER – vs – REPUBLIC [1965] EA 555** – a conviction can only be based on the actual evidence adduced and it is dangerous and inadvisable for a judge to put forward a theory not canvassed in evidence or in counsel's speech.

Clearly the learned trial magistrate introduced theories which were not based on the evidence. That was an error which prejudiced the appellant.

The second error is that the learned trial magistrate shifted the burden of proof to the appellant. It is trite that the burden of proof, in a criminal case, is always on the prosecution to prove the guilt of an accused person beyond any reasonable doubt. In requiring the appellant to have called a person to testify to the events, the learned trial magistrate erred. That was a fatal error to the case herein.

In my view, the evidence on record falls short of proof beyond any reasonable doubt that the appellant caused grievous harm on the complainant. It is clear that the complainant suffered grievous harm. However, it is quite probable that the appellant fell near the bridge and got his leg broken.

The burden was on the prosecution to prove beyond any reasonable doubt that it was the appellant who caused the grievous harm on the complainant. They failed to do so. The evidence on record creates a doubt in my mind, and I have to give the benefit of that doubt to the appellant. The issue of the injury being unlawful does not arise, as I have found that there is no sufficient evidence that it was caused by the appellant. Consequently, and with due respect to the learned trial magistrate, I find that the conviction is unsafe and cannot be sustainable.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that, if the appellant paid the fine then the same be refunded to him.

Dated and delivered at Nairobi this 23rd day of April, 2007.

George Dulu

Judge

Read and delivered in the presence of –

Appellant

Mr. Kinga for appellant

Ms Gateru for State - absent

Eric – Court Clerk

George Dulu

Judge