



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
Criminal Appeal 67 of 2005

(From original conviction and sentence of the Principal
Magistrate's Court at Kericho in Criminal Case No. 1150 of 2003
–J. N. Mwaniki (RM)

COLLONELIUS CHERUIYOT KOSKEI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant, Collonelius Cheruiyot Koskei, was charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on the 30th of May 2003 at Itibeti Village in Kericho District, the appellant unlawfully did grievous harm to Joseph Kipkemoi Mutai. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged. He was sentenced to serve ten years imprisonment. Being aggrieved by his conviction and sentence, the appellant appealed to this court.

In his petition of appeal, the appellant raised seven grounds faulting the decision of the trial magistrate in convicting and sentencing him. He was aggrieved that he had been convicted by the trial magistrate on uncorroborated and contradictory evidence. The appellant was aggrieved that the magistrate who wrote the judgment convicting him was not the magistrate who heard the witnesses when they gave their testimony. The appellant's view is that the said proceedings were therefore flawed as the magistrate who wrote the judgment did not have an opportunity of seeing the demeanour of the prosecution and the defence witnesses as they testified. The appellant further faulted the trial magistrate for taking over the conduct of the criminal proceedings without complying with the mandatory provisions of **Section 200 of the Criminal Procedure Code**. He further complained that he was prejudiced by the entire trial and his subsequent conviction. He was finally aggrieved that the convicting magistrate had not considered his mitigation before arriving at the decision to sentence him to serve a custodial sentence which in his opinion was harsh in the circumstances.

At the hearing of the appeal, Mr Siele, Learned Counsel for the appellant reiterated the grounds of appeal and urged the court to allow the appeal, quash the conviction of the appellant and set aside the sentence imposed. On his part, Mr Koech Learned State Counsel, opposed the appeal. He urged the court to find that the prosecution had established its case against the appellant to the required standard of proof beyond reasonable doubt. He urged the court to dismiss the appeal and confirm the conviction and the sentence imposed by the trial magistrate. I will revert back to the arguments made on this appeal after briefly setting out the facts of this case.

The appellant was tried by three magistrates. The first magistrate, Mr Ombaye, Senior Resident Magistrate heard all the prosecution witnesses. He put the appellant on his defence. The appellant's evidence on his defence was heard by Miss B. Ojoo, Resident Magistrate. The closing submissions were

made before Mr Mwaniki – Resident Magistrate. Mr Mwaniki – Resident Magistrate is the magistrate who delivered the judgment convicting the appellant. He also sentenced the appellant to the custodial sentence imposed. The appellant was represented by counsel during the entire proceedings. When the appellant was put to his defence and the defence hearing commenced before Miss B. Ojoo, the counsel for the appellant, who apparently was alluding to the provisions of **Section 200 of the Criminal Procedure Code**, informed the court that he did not have any objection to the proceeding continuing from where it had been concluded by the previous magistrate. After the conclusion of the defence case, Miss B. Ojoo the Resident Magistrate who heard the defence case was transferred from the station. When the file was placed before Mr Mwaniki the incoming Resident Magistrate, Mr Orina, the counsel for the appellant proceeded and made closing submissions on behalf of the appellant. The record does not however indicate that there was any objection by the appellant to the said Resident Magistrate considering the evidence adduced and delivering judgment based on the said evidence and submission made. I shall revert back to this issue at the later part of the judgment.

The facts of this case in brief are that on the 30th of May 2003 at 6.30 pm, PW1 Joseph Kipkemoi Mutai (*the complainant*) visited the appellant's home. The complainant was a son-in-law to the appellant. From the evidence adduced, the complainant had gone to the homestead of the appellant to see his child who was sick. The said child was staying with her mother and grand parents. The complainant and his wife had been separated at the time. The complainant testified that when the appellant found him in his homestead, he cut him on the head with a panga. The complainant shielded his head with his right hand. The appellant cut the complainant's right hand resulting in the amputation of the complainant's hand at the wrist level. The appellant further cut the complainant on his shoulders and his mouth. The complainant tried to run away but fell down unconscious. While the appellant was attacking the complainant, his wife – Cecilia – who was present screamed pleading with her father not to kill the complainant. The complainant was taken to Siloam Hospital where he was admitted as an inpatient for a month. The complainant testified that he had taken alcohol on the material day but was not drunk. He admitted that he had fought with one Peter Kipkoech earlier in the day but denied that the fight had resulted in the injuries that he had sustained.

PW2 John Langat Kimeli and PW5 Peter Kiprotich Mutai assisted to take the complainant to the hospital after the assault. He did not know who injured the complainant. PW3 Dr Odhiambo Achola examined the complainant and filled the P3 form. He saw that the complainant had sustained a fracture of the bone which holds the front upper teeth. There were scars on the upper lip of about 10cms, and above the right eye which was about 8cms. The bone under the scars were cut but were healing. The complainant further sustained a right frontal injury on the head with a fracture. The scar on the left shoulder measured 12cms. The complainant's left hand had been amputated above the wrist. The complainant further sustained a fracture of the right elbow. His right small finger had been amputated. The Doctor was of the opinion that the weapon which was used was sharp. He further testified that the injuries which the complainant had sustained on his mouth had resulted in the complainant to loose his front teeth. The injuries sustained by the complainant were assessed as main.

PW4 PC Paul Mbaabu, of Kericho Police Station received the assault report, took the complainant to hospital and later arrested and charged the appellant. When the appellant was put on his defence he denied that he had assaulted the complainant though he admitted that he had had a confrontation with the complainant but chose to run away rather than fight with the complainant. DW2 Peter K. Cheruiyot did not offer any evidence that could have assisted the court in determining the matters in dispute.

This is a first appeal. As the first appellate court, this court is mandated to reevaluate and reconsider the evidence adduced before the trial magistrate afresh before arriving at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination this court has to put in mind the fact that it neither saw nor heard the witnesses as they testified and cannot therefore be expected to make any finding as to the demeanour of the witnesses. (See **Njoroge –vs- Republic [1987] K.L.R. 19**). In the instant appeal, having heard the submission made by counsel for the appellant and the Learned State Counsel, the issue for determination are two fold; was the appellant convicted by a magistrate who had authority and jurisdiction to hear and determine the criminal case facing the appellant? Secondly, did the prosecution prove its case against the appellant to the required legal

standard? In this case, the only evidence that implicates the appellant to the crime is that of the complainant. He testified that he was viciously attacked by the appellant who was armed with a panga. The complainant testified that the appellant cut him severally with a panga to the extent that he lost consciousness. It was his further testimony that as he was being cut by the appellant, his wife – the daughter of the complainant – screamed and pleaded with his father not to kill him (*the complainant*). The complainant admitted that he had taken alcohol at the time although he denies that he was drunk. The assault took place at about 6.30 pm. It was day time. There was sufficient light to enable the complainant identify his assailant. From the evidence adduced, it is apparent that the complainant was estranged from his wife. The complainant and his wife did not live together. They were separated. At the time of the incident, the wife to the complainant was living with her parents. The children of the complainant were staying with their mother.

On re-evaluation of the evidence it is clear that the appellant was not happy that the complainant had visited his home after disagreeing with his daughter. This could be the motive why the appellant attacked the complainant. PW2 and PW5 took the complainant to the hospital. They did not see the attack. Their evidence however corroborates the complainant's evidence that he was attacked at about 6.30 pm. The two witnesses responded to the cries for help by the complainant at about 7.00 pm. They took him to hospital. Upon re-evaluating the evidence adduced by the complainant, I find the same to be cogent and consistent. There is no reason why the complainant could have wrongly implicated the appellant – his father-in-law if the appellant had indeed not assaulted him.

The explanation offered by the appellant in his defence does not in any way dent the overwhelming evidence adduced by the prosecution against him. The said defence is actually meant to exonerate the appellant for the crime which he consciously and deliberately committed. Indeed his evidence in defence places him at the scene of the attack. I reject his defence. After considering the submissions made by Learned Counsel for the appellant and Mr Koech for the State, and after re-evaluating the totality of the evidence adduced, I do find that the prosecution proved its case against the appellant to the required standard of proof beyond any reasonable doubt.

Having considered the submissions made on this appeal, the proceedings of the subordinate court in this case and the provisions of **Section 200 of the Criminal Procedure Code**, I do hold that the appellant was not prejudiced whatsoever by the fact that a magistrate who had not heard the witnesses testify, had written and delivered the judgment convicting him. The appellant was tried by three magistrates who had jurisdiction to hear and determine the criminal case that faced him. The appellant was represented by counsel. His counsel did not see the necessity to have the witnesses summoned for a second time to give testimony as provided by **Section 200(3) of the Criminal Procedure Code** before the convicting magistrate wrote and delivered the judgment. In the considered view of this court, this issue has been raised by the appellant as a red herring on this appeal to divert the court's attention from addressing the real issues in dispute and for the determination by this court.

I find no merit whatsoever in the said submission made by the appellant. For the reasons stated, the appeal against conviction is dismissed. Having re-evaluated the evidence adduced, I do not see any legal reason to interfere with the said conviction of the appellant.

On sentence, the appellant was sentenced to serve ten (10) years imprisonment. He has pleaded with this court to consider reducing the said sentence imposed in view of his age. The appellant is sixty-five years old. Having carefully considered the plea by the appellant, and taking into consideration the fact that the appellant viciously attacked the complainant – his son-in-law – causing his grievous harm, I do find that the convicting magistrate did not err in sentencing the appellant to serve a custodial sentence. Taking account of the appellant's age I will however set aside the said sentence of ten (10) years imprisonment imposed and substitute it with a sentence of this court sentencing the appellant to serve six (6) years imprisonment. The said sentence shall take effect from the 27th of July 2005 when the appellant was sentenced by the convicting magistrate.

It is so ordered.

DATED at NAKURU this 11th day of November 2005.

L. KIMARU

JUDGE