



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

civ app 565 of 99

Omar Shariff Ali & Abdalla Ali Abdalla APPELLANT

- Versus -

Teita Estate Ltd RESPONDENT

J U D G M E N T

The Appellant in this appeal was arraigned before the Resident Magistrate at Wundanyi with two counts of assault causing actual bodily harm contrary to section 251 of the Penal Code and with one count of indecent assault contrary to section 144(1) of the Penal Code. After trial he was convicted on all the three counts and sentenced to one year imprisonment on each of the first two counts of assault and three years imprisonment on the third count of indecent assault, the sentences to run concurrently. He has appealed to this court against both conviction and sentence.

In his memorandum of appeal he has listed 6 grounds of appeal. They are:-

1. That the complainant had no witness to prove that he assaulted her except P.W.1 who also claimed he was assaulted.
2. That he had a grudge with P.W.1 for having taken a job which P.W.1 refused to take due to low pay offered.
3. That the police officer P.W.4 said the cut found on P.W.1 was not fresh.
4. That the complainant was not interested with the relationship between him (appellant) and his sister.
5. That his witness who is also the complainant's sister testified that she did not see him assault the complainant.
6. That his case was heard by two magistrates who did not consider the evidence which was tendered in the first hearing. He therefore prayed that his appeal be allowed.

I would like to deal with the last ground of appeal. As the Appellant says his case was first heard by E. Mwaita DM II. He took the evidence of two witnesses. At that time apparently the charge sheet had only

two counts of assault. The prosecution's application to add the third count of indecent assault was allowed and the case was heard de novo before A. Ngugi Resident Magistrate. I find that no prejudice was caused to the appellant as the two witnesses who had testified earlier, testified again before the Resident Magistrate and gave the same evidence they had given earlier. P.W.1 Aprina Apii testified that she did not get along well with her younger sister Ada. The latter had threatened that she was going to get some boys to beat Aprina, but Aprina thought that was a joke. On 10th June 2003 at about 1.00 p.m. while she was relaxing in her bedroom she had someone asking "where is the cow, goat and dog". She became apprehensive and locked the door. The door was broken and Appellant went in and started kicking her. He dragged her out and undressed her by lifting her dress. She screamed and P.W.2, Edward Apii, went to her help. As Edward struggled with Appellant she ran away. Before she ran away Appellant had grabbed a panga that was behind the door. P.W.2 Edward Apii corroborated his sister's evidence and added that as he struggled with appellant the latter cut him with the panga. Appellant then picked up stones and started throwing them at him. When appellant got himself free he chased P.W.1 and felled her. He lifted her clothes once again and sat on her. The matter was reported to police and P.W.1 and P.W.2 were sent to Mwatate health center for treatment. P.W.3 a clinical officer at that center treated them. He found that P.W.1 had a painful swollen thorax and abdomen as well as the upper limbs. He classified the degree of her injury as harm. Edward had a painful swollen right shoulder and cut wounds on the left hand.

When put on his defence the Appellant gave an unsworn statement. He said he went to the complainant's home to collect a water pipe. He found Ada looking annoyed and on enquiry he was told she had quarrelled with her sister Aprina. That shortly thereafter Aprina came out and started shouting at Appellant and threatening him. She attempted to throw a panga at him but her brother Edward intervened and that it is Edward who hit her with the same panga on the shoulder.

The Appellant's first witness was the complainant's sister Ada. She said that when Appellant went to their home Aprina started shouting at him saying she did not want to see him there and that when Aprina came out with a panga attempting to cut appellant with it, her brother Edward intervened and beat up Aprina. Appellant's other witness, Aggrey Mwakisha, said when Aprina came out with the panga Edward asked her to cut the appellant but she hesitated. Edward got hold of that panga and cut her instead. He added that thereafter Appellant chased Aprina and Edward.

I have considered all this evidence. I believe P.W.1 Aprina that she was not in good terms with her sister Ada and that Ada threatened to get people to beat her up. It is also clear from the record that Ada was Appellant's girlfriend. There is no reason given why Edward answering his sister's distress call could go there and gang up with appellant to beat her. Having done that if I were to believe that is what happened, why would the appellant turn round and begin chasing Edward and Aprina.

I do not believe the evidence of the Appellant and that of his witnesses. It was a fabrication. The allegation by the Appellant in his petition of appeal that P.W.1 had a grudge against him because he took a job she did not take has no basis at all. He never even mentioned it in his unsworn statement in court. I am satisfied that the appellant assaulted P.W.1 and P.W.2 causing them actual bodily harm and that he indecently assaulted P.W.1. Consequently I dismiss the appellant's appeal on conviction. The appeal on sentence has also no merit. Assault causing actual bodily harm carries a sentence of upto five years imprisonment. Appellant escaped with only one year imprisonment. Indecent assault carries twenty one years. The sentence of three years imprisonment in my view was far too lenient. Appellant is lucky that the state did not ask for enhancement. For the reasons given I find no merit in the appellant's appeal on both conviction and sentence and I accordingly dismiss it.

DATED this 18th day of March 2004.

D.K. Maraga

Ag. JUDGE