



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.501 OF 2000

(From Original Conviction and Sentence in Criminal Case No.1179 of 1999 of the Chief Magistrate's Court at Mombasa –H. Njiru, Esq., S.R.M.)

JOHN OMAMBIA.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONDENT

J U D G M E N T O F C O U R T

The Appellant was charged and convicted of Attempted Murder contrary to Section 220(a) of the Penal Code and Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code. He appeals against both the conviction and the sentence.

The facts as per of the prosecution evidence is that on 7.4.99 at 5 p.m., the Appellant who was a neighbour of PW.1, Mwakimwinyi Suleiman, went to PW.1 and complained that her child had stolen his Kshs.2000/- from his house. PW.1 denied the theft story and Appellant left to his house. Soon after PW.1 heard her daughter PW.2, Miyali Mohamed, scream outside. She went out to find PW.2 bleeding from her shoulders. PW.2 complained that Appellant had cut her with a panga and that he had thrown PW.2's sister into the well outside the home. That the Appellant also had jumped into the well. She rushed PW.2 to hospital and also passed at Likoni to report to her father and the Police. When she went to report at the Police Station she found a report had already been received and recorded from someone else and that the Police had already gone to her home, the scene of crime. When she went home, her daughter and Appellant had both been retrieved from the well. Meanwhile, the daughter who had been allegedly thrown into the well was taken to Police Station and later to hospital where she was found uninjured and discharged.

Under cross-examination PW.1 admitted that the Appellant was not merely a neighbour but was their tenant for the last two years. PW.2's evidence is what has been stated above as PW.1 did not witness the incident. The panga allegedly used by the Appellant to cut PW.2 belonged to PW.1's husband i.e. PW.2's father. PW.3 Dorothy Rashid was a neighbour who heard and stated that she saw from her house Appellant come and chase PW.2. She saw Appellant cut PW.2 with a panga on the shoulder and threw another child Mwanamwaka into the well before himself jumping into it. She states that when she approached the Appellant, the latter threatened her and she ran away. She according to her, then dropped the child into the well. She reported the matter to the neighbours who checked and saw the child inside the well. Meanwhile the Appellant, according to PW.3, threw himself into the well. She ran to report to

the Police. She testified that in the morning “they” referring I believe to the inhabitants of that home, had noticed that the Appellant was drunk and that he had threatened to kill that day so that he goes to Paradise.

PW.4 is a neighbour who gave evidence that he went to the scene and tried to retrieve the Appellant and a child but was threatened to be cut with a panga by the Appellant. He abandoned the mission. He stated that Appellant was stating that he would not release the children from the well unless his Kshs.2000/- was refunded. He confirmed that Appellant was nevertheless holding the child above the water. PW.5 was No.54808 Pc Joseph Kipruto. He got a report of the incident. Accompanied by Inspector Wamboi and other Police Officers they went to the scene of crime where they retrieved the Appellant and PW.1’s child from the well. But before the Appellant demanded and got Kshs.1,500/- as a refund of his lost money at the threat of killing the child inside the well. The money was contributed by the people who were present. It was dropped into the well to the Appellant by a rope. When the child was brought out, she had no injury. He decided to send Appellant to Hospital for psychiatric examination. A report is said to have been prepared. He testified that he himself noticed that PW.2 had been injured. The Psychiatrist Report was put in as Exhibit 4 and P3 as Exhibit 1. The panga held by Appellant in the well was recovered but was apparently not produced as exhibit.

The Appellant gave a statement under oath. He stated he was a tenant of PW.1 and her husband. He used to pay rent to PW.1’s husband who apparently squandered it. This annoyed PW.1. On the material day he came home from work in the morning and found his room broken into and all his belongings thrown out. He asked PW.1 why this was so. She told him to go away as he probably failed to pay the rents to her instead of paying it to her husband who squandered it. She was angry and as he tried to enter the room, she took her husband’s panga and threw it at him. He dodged and it landed on PW.2, her child and injured her. She cried. PW.1 screamed and people appear to have come. She told them of the rent and how he had refused to pay rent. They began throwing stones and threatening violence on him. The pelting with stones made him lose two front teeth. Meanwhile he was moving backwards as the pelters approached. He reached the well where one of PW.1’s child was drawing water. He then accidentally fell in backwards, pushing in with her the child into the well. He held the child high from drowning when they landed together in the well. He sustained a fracture of the leg. He categorically denied cutting PW.1, the child, with a panga nor demanding money nor seek to trade the money for the release of the child. The Appellant was cross-examined by the prosecutor briefly but his statement remained undented.

The trial Magistrate preferred to call the Appellant’s story a planned defence. He called him an incorrigible liar and proceeded to convict him on both charges. I have carefully examined and considered the evidence on the record, the manner the same was deposed, the consequences of cross-examination and the final effect of it all. The trial Magistrate was entitled to come to the conclusion she did but this court had as much original as well the appellate jurisdiction. The main evidence came from PW.2 a child of 11 years. She can be called the eye witness. The only other eye-witness is PW.3, Dorothy Rashid, who claimed to have seen it all. She does not say how far was her house from where she witnessed the incident. She does not say where the children were playing in relation to the well. She does not indicate where the Appellant came from before he cut PW.3 with a panga. She claims to have run away as soon as Appellant allegedly threatened her. She then claims after running away, the Appellant is then said to have dropped the child into the well. She even claims that after she ran away, she informed the neighbours who checked and found the child in the well and belated claims that the Appellant had meanwhile thrown himself in the well. Even more preposterously claims that in the morning of the material day, the Appellant had claimed to be ready to kill someone so that he will be taken to paradise.

PW.1 is the mother of the complainant PW.2. She claims that when she heard a scream outside after Appellant had left her inside she rushed out and found PW.2 bleeding from the shoulders. She got informed that Appellant had injured her and thrown her other daughter into the well. What she says next is totally unbelievable! She claims to have immediately rushed PW.2 to hospital without even as much as show concern about the fate of the other child claimed to have been thrown into the well. She further claims to have gone to Likoni to inform the child’s father and Police of what happened. She never even arrived at the Police Station as quickly as one would be expected but arrived much later when she was informed by another informer that the Police had left to her home. When she arrived home, the whole

rescue, which from the evidence was delayed by the Appellant's unreasonable demands took not a very short time. She under cross-examination admitted that Appellant was not a neighbour but a tenant of a long period.

PW.5, a Police Officer, Pc. Joseph Kipruto's story confirms the facts that Appellant and the child were in the well when he arrived at PW.1's home and that he rescued them after the Appellant demanded money and received Kshs.1,500/-. The money must have been recovered from the Appellant if indeed this version of the story was true, after the Appellant was arrested. Where did it go thereafter since it now formed part of the story and should have been put in as exhibit to support the evidence that Appellant only released the child after receiving the money inside the well. it is my considered opinion that evidence given by the prosecution was not reliable. PW.1, PW.2, PW.3 and PW.5 may not have told the whole truth and various aspects of the evidence upon which the conviction was based. If PW.1 was indeed in the house when the earlier incident took place, and she came out immediately PW.2, the child screamed, how come PW.3 did not see her or vice versa, how come PW.1 did not see PW.3 who came to the rescue of the child also? PW.3 has formed evidence from what was hearsay. For example where in the morning was she when Appellant allegedly claimed he would kill that day? How could PW.1 rush to hospital taking a living child leaving and ignoring another child drowning?

I hold that the prosecution evidence left much to be desired It was not cogent but full of holes. On the other hand the Appellant gave a very likely story. The issue was that the rent he paid did not reach PW.1 who threw his goods outside and demanded that he quits. The likely story is that the falling into the well by the Appellant and the child was an accident which arose when the Appellant was backing away from several people who pelted him with stones and approached him with intention to hurt him more. His conduct in the well where he made sure the child did not drown confirms the innocence of the Appellant. The convicting story which the trial Magistrate believed and relied on was the "planned" story.

Having come to this conclusion, I hold that the prosecution failed to prove their case beyond a reasonable doubt and accordingly the trial Magistrate erred in arriving at a different conclusion.

The upshot is that this appeal must succeed. The conviction n both counts is quashed and the sentences set aside. The Appellant is ordered set free with immediate effect, unless lawfully detained.

Dated and delivered at Mombasa this 7th day of May, 2002.

D. A. ONYANCHA

J U D G E