



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 137 OF 2019

REPUBLIC.....APPELLANT

VERSUS

JAMES MUKARIA.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. O. Wanyaga SRM in Maua CR No.458 of 2016 on 09/08/2019)

JUDGMENT

1. **James Mukaria ('the respondent')** was charged with the offence of assault causing actual bodily harm contrary to **Section 251 of the penal code**. It was alleged that on 07/02/2016 at Mporoko area in Amwathi 11 sub-location in Igembe North Sub-County within Meru County, he intentionally assaulted WILLIAM KANYARU thereby occasioning him actual bodily harm.

2. He denied the charges and the prosecution paraded 5 witnesses in support of its case while the respondent gave and relied on his sworn statement for his defense. At the end of the trial and in a reserved judgment the respondent was acquitted in accordance with section 215 of the Criminal Procedure Code.

3. Dissatisfied with the respondent's acquittal, the appellant lodged this appeal setting out 6 grounds of appeal which I have collapsed into 4 as follows;

- a. The trial court erred in law and fact by failing to consider the weight of the evidence on record which was overwhelming.
- b. The trial court erred in law and fact in failing to find that the evidence on record was watertight, well corroborated, truthful and consistent.
- c. The trial court erred in law and fact by failing to find that the evidence of the defense did not in any way shake that of the prosecution to warrant an acquittal.
- d. The trial court erred in law and fact by dismissing the charges on flimsy technicalities thereby offending the sound judicial principles.

The evidence led

4. **PW1 William Kanyaru**, the complainant, testified that he was at his sister's (PW3's) home with his wife (PW2) on the material day at around 5 pm and went to the sister's shamba which had been leased to him to harvest miraa. No sooner had he climbed on the tree to harvest, leaving his panga on the ground, than the respondent, his blood brother came, cut a stick using his panga and started insulting him. He responded to him loudly so he could attract the attention of PW2 and PW3 who came and found him still on the miraa tree. While in the farm, PW3 pleaded with the respondent to leave the complainant alone because the complainant had bought the miraa and the tenure of the respondent would commence after the complainant had harvested his. The witness added that when he got down from the tree, the respondent attacked him and took the miraa and that as he walked away, the respondent followed him and hit him with the stick on the face and even broke his tooth, bit his finger and injured his left knee also. PW2 and PW3 intervened and rescued the complainant who then went into PW3's house while the respondent went away with the panga and the miraa. The three people, PW1, 2 & 3 went to Mutuati police station to report and thereafter went to Mutuati health centre where Pw1 was treated.

5. In cross examination, PW1 confirmed that the respondent was his younger brother and that they had another case of assault with him. He further asserted that the respondent had another case with his wife, PW2 and that the respondent once wrote a letter to have him removed from land committee. He stated that the respondent had tried to kill him and torched his house severally but he had forgiven him severally. He denied that they fought and maintained that the respondent had attacked him and gone to report alleging that he had been attacked by PW1. He denied that the case was about a family dispute.

6. **PW2 Julieta Karimi** testified as being the wife to PW1 and an inlaw to both PW3 and the respondent and that on the material day she was at PW3's home at around 5 pm when PW1 went to the miraa farm to harvest Miraa. They heard noise and when they went to check, they found the respondent with a panga and a big stick. PW1 was on top of a miraa tree. PW3 asked the respondent what was wrong and told him to leave PW1 alone as he had not yet harvested miraa from one tree. PW1 came down from the tree and the respondent grabbed the miraa. As PW1 left, the respondent hit him severally with the stick and also bit him on the finger which made him swell heavily before they rescued PW1, who ran to PW3's house and hid there. Subsequently, they made a report to the police and later took PW1 to the hospital.

7. During cross examination, she stated that it was not a fight but it was the respondent who had attacked PW1. She denied that the respondent had sustained injuries from the incident and admitted that she had another case with the respondent. She also admitted the existence of a land dispute between PW1 and the respondent and that there was a family meeting on 17/12/2018. During re-examination, she stated that they tried to restrain the respondent and as they struggled on the ground, he bit PW1.

8. **PW3 Pauline Ncororo**, testified that on the material day at about 5 pm, she was at her home when PW1 came and went to harvest miraa she had sold him. She and PW2 heard an argument in the farm and when they went there, they found PW1 on top of the miraa tree while the respondent was on the ground telling PW1 to stop harvesting. When PW1 came down from the tree, the respondent grabbed the miraa and as PW1 left, the respondent hit him with the stick on the face, mouth as well as several other parts of the body and also bit him. PW1 went to PW3's home and locked the gate while the respondent left with the panga and the stick. The three people went to the police and later to the hospital. During cross examination, she denied knowing of the existence of any land dispute between the complainant and the respondent but admitted that they were both her brothers. She maintained that they did not fight but it was the respondent who had attacked the complainant. She denied knowing of the existence of the meeting of 17/12/2018 or attending it.

9. **PW4 Amos Mwiti M'Eruaki**, a clinical officer at Theera Health centre, examined the complainant on 9/02/2016 who alleged to have been assaulted by a person well known to him. He classified the injury as harm and produced the treatment notes and the P3 form in respect of the complainant. On examination, the complainant had multiple bruises on the face as well as the back with swollen eyes, painful and loose incisors, chest pains and tenderness. He also had a human bite on the left index finger of the upper limb and the lower limb was swollen at the knee joint. He opined the probable types of weapon to have been sharp and blunt. During cross examination, he stated that he had treated the complainant prior to the incident and that the nature of the injuries could be consistent with a fall from a motor cycle or a tree if not for the human bites aspect.

10. **PW5 Sergeant Ochieng Obuoro** from Mutuati Police Station testified that on the material day at around 5.20 pm, he was at the police station when the complainant came to report that he had been assaulted by the respondent. He issued the complainant with a P3 form and referred him for treatment. During cross examination, he stated that he did not visit the scene but relied on witness accounts because he believed them. He stated that PW1 claimed that the respondent had broken the side mirror of his motorcycle and denied PW1 and PW2 having attacked the respondent first. He stated that the respondent was just trying to fix the complainant when he made the claims against him.

11. In his defense, the respondent told the court that on the material day he found PW1 harvesting miraa he had leased from PW3, when he asked him why he was stealing his miraa, PW1 told him that the same belonged to their sister. He asked PW1 to stop harvesting his miraa but PW1 insulted him calling him a dog and punched him on the face making him scream and PW2 and PW3 came and assisted PW1 in assaulting him and even broke his teeth. His head was swollen and people came to rescue him. He reported to Mutuati police station and was given a P3 form and a warrant of arrest against PW1. PW1 had fallen from his motorcycle but he claimed he had been injured by the respondent. He stated that PW1 and PW2 had numerous cases against him and that they had tried to resolve their differences even before the chief to no avail. He stated that the complainant had been asked to withdraw the cases against the respondent which he refused. During cross examination he maintained that he had witnessed the complainant fall from his motorcycle and that PW1 was bitter because the respondent had removed him from the land committee on 16/8/2016. He stated that they have always had disputes with PW1 who was bribing the police to have him charged in court.

12. The parties were directed to file their submissions on 18/11/2019 but it appears only the appellant filed. Its submissions were to the effect that the independent witnesses were truthful, corroborative and consistent in their narration despite the fact that they were all related. According to the appellant, the time of the offence being around 5 pm, the circumstances for identification of the respondent were favourable. It maintains that injuries as contained in the medical report produced by PW4 were consistent with the testimony of the complainant and other witnesses. It was concluded that the appellant had proved its case beyond any reasonable doubt and prayed for the appeal to be allowed.

13. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570). It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424.”

14. The issues for determination are whether the offence of assault causing actual bodily harm was proved beyond reasonable doubt and if the trial court made an error in assessing the evidence when it concluded that the evidence of the respondent had raised a doubt in the prosecution's case as to entitle the respondent to the acquittal.

15. The starting point for this court, as it was for the trial court, is whether the complainant was assaulted by the respondent and if the assault occasioned to the complainant actual bodily harm. In his evidence the complainant asserted that while atop the miraa tree, the respondent

confronted him with a stick and he responded loudly to attract PW2 and 3 a fact confirmed by the two witnesses. On his part, the respondent told court that it was PW1, PW2 and PW3 who assaulted him and broke his teeth for which he made a report to the police who issued a warrant of arrest against the complainant, but abandoned the case after being compromised and that the complainant sustained injuries from a fall from a motor cycle and had instituted this charges because they had a land dispute whose existence was confirmed by PW2.

16. It must not be lost that PW1, PW2, PW3 and the respondent are siblings while PW2 is an in-law to the respondent and PW3. The evidence by the respondent is indubitable that he was grievously injured in his alleged assault by PW1, PW2 and PW3 as clearly evidenced in the treatment notes from MOH Laare Health centre.

17. On the second issue of occasioning actual bodily harm the court in the case of *Alex Kinyua Murakaru v Republic [2015] eKLR* held that :

“Thus, actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic. To make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (*mens rea*) and the assault must have taken place (*actus resus*).”

18. **PW4** who examined PW1 observed that the complainant had multiple bruises on the face as well as the back with swollen eyes, painful and loose incisors, chest pains and tenderness. He also had a human bite on the left index finger of the upper limb and the lower limb was swollen at the knee joint. The probable weapon used was both sharp and blunt. He categorized the injuries as harm.

19. The respondent was also examined at MOH Laare health centre where it was observed that he had swollen face at the cheek, cracked canine, knocked down incisor, swollen hand, pain on the face and other parts of the body. He also had bruises on the shoulder and swollen and painful hip due to trauma. The OCS of Mutuati police station who saw the respondent when he came to report the assault classified the injuries as grievous harm.

20. The evidence of injury on both sides suggest to me that there was a fight between the two brother and that it might not have been a deliberate attack upon the complainant by the respondent. I find that the admitted fact that PW3 had in fact leased the Miraa to the respondent then allowed the complainant to harvest the same mirraa was the igniter of the fight. That there was bad blood between the two brothers as demonstrated by both sides was a fertile ground to propel each to conspire against the other. In those circumstances, it would be unsafe to believe one against the other. There was a demonstrated outright doubt if the charge could not have been instigated by spite and bad blood.

21. The trial court in its judgment rendered itself to the effect that **“the court tends to believe the accused was seriously attacked in the incident. In criminal cases, the standard of proof is beyond reasonable doubt and it is the duty of the prosecution to prove its case and not for accused to prove his innocence. In this case, accused has managed to introduce the possibility that he was assaulted to the extent of the police labeling his injuries as grievous harm and issuing a warrant against the complainant. The court needed to hear more about what investigations on accused’s complainant revealed. The failure to do so adds weight to the accused’s claims that police were compromised by complainant. Consequently, the court is not convinced that the prosecution has proved its case against the accused and he is acquitted in accordance with section 251 of the CPC.”**

22. Based on my own analysis of the record and the law on burden and standard of proof, I take the view and hold that the trial court did not err in reaching the decision it did. Any reasonable judicial mind would be pricked with the plausible possibility that bad blood was the propellant in the prosecution. The upshot is that the appeal is devoid of merit and it is ordered dismissed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 17TH DAY OF MAY, 2021.

P.J. O. OTIENO

JUDGE