REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 05 OF 2020

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. W. Juma (C.M) in Narok CMCR No. 1049 of 2017 on 3rd February 2020)

WILLIAM KIPROTICH CHERUIYOT....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

Charge.

[1] Count I against the appellant was dismissed under section 89(5) of the criminal procedure code.

[2] In Count II, the appellant was charged with assault causing actual bodily harm contrary to section 251 of the penal code. It is alleged that on the evening of 24th august 2017 at around 7:30 p.m. at Sapetet village in Narok South sub-county, jointly with others not before the court, unlawfully assaulted **Peter Koech** thereby occasioning him actual harm.

[3] In count III, he was similarly charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code. It is alleged that on the evening of 24/8/2017 at about 7:30 p.m. at Sapetet village in Narok South sub-county within Narok County, the accused person jointly and unlawfully assaulted **Dennis Kipkurui Langat** thereby occasioning him actual bodily harm.

[4] In count IV the appellant was charged with malicious damage to property contrary to Section 339(1) of the Penal Code. It is alleged that in similar particulars and circumstances in counts 2 and 3 the accused person jointly with others not before court, willfully and unlawfully damaged one wooden door, a window, a bench and a fence all valued at Kshs 5,000/= the property of **Henry Keter.**

[5] The appellant was sentenced to serve one year imprisonment in count 2, one year imprisonment in count 3, and In count 4 he was sentenced to serve 6 months' imprisonment. The sentences were to run concurrently.

[6] Being dissatisfied with the said conviction and sentence he preferred an appeal as set out in his grounds of appeal.

[7] The appeal was canvassed by way of written submissions.

Appellant's submission

[8] The Appellant submitted that the prosecution did not prove its case beyond reasonable doubt. That the prosecution did not inform the court or do a conclusive investigation to show that there was a land dispute between the complainant and the appellant and that there are other pending cases in court regarding the same issue. That The appellant gave sworn testimony that there was a land dispute between the appellant and the complainant and there were three cases pending in court regarding the same.

[9] That the prosecution failed to prove who destroyed the complainants' property since PW2 stated that he doesn't know who had broken the kitchen door or demolished the kitchen window where they were. That the prosecution evidence therefore, was not conclusive to convict the appellant.

[10] The appellant further stated that he was on his way from the 4th appellant's home to pick his statements when he met PW2, PW3 and PW4 on his way and they questioned him why he was on the parcel of land and started assaulting him. He sustained a head injury, his collar bone and fingers were broken as a result of the assault. PW2, PW3 and PW4 stole his money. He stated that he was arrested when he went to

report the incident. During trial he adduced evidence of a P3 form filed on 28/8/2017, OB no. 11 of 29/8/2017, copy of cash bail in criminal case 599/2017, OB 6 OF 26/6/2017 and OB 6 OF 20/8/2017.The other 4 appellants and 5 defence witnesses concurred with the appellant's testimony that the complainant's were the ones who attacked the appellant and injured him leaving him on the ground bleeding and the said witnesses took him to hospital.

[11] The appellant continued; that there is no evidence of any event that occurred at the complainants' homestead. That this was false allegations that were made in order to incriminate the appellant so that they can take away his land.

[12] That the trial magistrate relied on circumstantial evidence while convicting the appellant. The appellant had been convicted prior to a two years' probation in a matter the complainants were the same as this one. The appellant alleges he was convicted on circumstantial evidence without any proof that the appellant committed any offence. The conviction was unjustified because the prosecution failed to prove its case beyond reasonable doubt and the evidence relied on was born out of mere suspicions. He has cited the case of ***Joan Chebichii Sawe V Republic [2003] eKLR***

[13] That the prosecution failed to prove the offences committed by the appellant. The prosecution failed to adduce enough evidence to show that the appellant had committed the offences he was charged with. He relied on the case of ***Emanuel mwadio munyasya vs republic.***

[14] The evidence adduced in trial court was not sufficient to justify a conviction against the appellant. The evidence was inconsistent in that the prosecution witnesses contradicted themselves in their testimonies and the evidence adduced was not concrete to convict the appellant. That apart from the photographs adduced in court no testimony was given by any members of the public to justify that the appellant had attacked the complainants. The appellant's testimony was supported by defence witnesses who were present at the scene on the material day and they saw the complainant's assaulting the appellant inflicting injuries to his head. Therefore, the appellant's evidence outweighs that of the complainants.

[15] That the learned trial magistrate shifted the burden of proof to the appellant yet it is the prosecution's duty to prove its case beyond reasonable doubt. The prosecution did not conduct investigations conclusively and the appellant in his defence adduced more evidence that would have been covered by the prosecution.

[16] The prosecution adduced photographs to prove the damaged properties. The photographs were not dated. The prosecution witnesses could not tell who damaged the property. The appellant therefore claims that nothing happened and he did not go to the complainants' homestead because if he had the complainants could have recalled who damaged the said property.

[17] DW9 in his statement stated that he is a village elder and on the particular day he heard screams and he went and found the appellant being led by the 2nd and 4th appellants and his head was bleeding. He further stated that he didn't receive any complaint from the complainant in regards to any assault or destruction of the property and he didn't receive a call from the police post to inform him of the same. Therefore, it is the appellants' allegation that the trial magistrate erred in convicting him without enough evidential proof.

[18] Ultimately, he prayed that this appeal be allowed; conviction and sentence be set aside and quashed, respectively.

Respondent's submission

[19] Mr. Ndung'u, the prosecution counsel, submitted for the state that, the appellant acting in concert with the other 4 accused persons intended to commit acts of destruction on that night. It was the testimony of pw2,3 and 4 who were in the house and overheard the words uttered by the appellant and his companions planning the destruction. The appellant and his companions proceeded to assault pw3 and 4. The Appellant assaulted PW4 using a rungu/a piece of wood. The 3rd accused cut PW3 on the leg using a panga. The injuries sustained by the complainants were corroborated by the medical evidence produced in court by PW6 – a clinical officer. The evidence of the complainant and PW1,2,5 and 8 supports the trial courts findings that the complainants were assaulted and suffered physical injuries.

[20] All prosecution witnesses positively identified the appellant since they were present at the home during the attack and destruction. The appellant was a person well known to them since he lived 2km away from the scene of the crime. There was enough light emanating from a d-light lamp and several people including the attackers had torches. Therefore, there was positive identification; by recognition and the appellant was well known to the witnesses.

[21] PW7 CPL Henry Kiboma a scene of crime officer visited the homestead the following day and took photographs of the scene and the same was produced in court as aexhibit.PW8 **Sgt. Elijah Yongo** visited the scene the very night and noted the destruction that had been occasioned by the appellant and his companions. The testimony of the eye witness was that the appellant and his companions had shared intention of causing destruction and physical harm to the occupants in the house. Counsel has relied on section of the penal code on joint offenders.

[22] The prosecution submitted that the line of defence by the appellant was merely an afterthought as the appellant or any of the co accused did not cross examine the prosecution witnesses who are supposedly have carried out the attack or robbed him. That the trial court took into consideration the appellants defence in its judgment and dismissed it. The trial court concluded that the appellant and his companions were the aggressors and not the victims as alleged. The counsel for the respondent submitted that the conviction and sentence was safe as against the Appellant and urged the court to uphold it.

ANALYSIS AND DETERMINATION

Court's duty

[23] As first appellate court; I should reevaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See **Njoroge v Republic[1] & Okeno v Republic[2].**

Grounds of appeal

[24] After carefully considering the rival arguments of parties and the record of appeal, the grounds of appeal may be collapsed into three grounds:

1. ***Whether the prosecution proved their case beyond reasonable doubt;***

2. ***Whether the appellant was a minor and whether he was accorded a fair hearing***

3. ***Whether the sentence imposed on the appellant is manifestly excessive in the circumstances.***

Whether the prosecution prove their case beyond reasonable doubt

[25] The legal burden of proof in criminal cases rests on the shoulders of the prosecution; to prove the guilt of the accused beyond reasonable doubt. Viscount Sankey L.C[3] puts it more subtly;

> ***''Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''***

Of malicious damage to property

[26] The Appellant was charged with the offence of malicious damage to property contrary to Section 339 (1) of the Penal Code which provides;

> ***"Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years."***

[27] Accordingly, to secure a conviction on the offence of malicious damage to property, the prosecution must prove beyond reasonable doubt;

a) ***Existence of some property; strict proof ownership of the property is not per se a requirement.***

b) ***that the property was destroyed or damaged.***

c) ***that the destruction or damage was occasioned by the accused.***

d) ***that the destruction was willful and unlawful***.

[28] The words *willfully and unlawfully* used in section 339 (1) of the Penal Code portend that the destruction or damaged of the identified property was wanton and without any color of right or authority. In the present case, the Appellant was convicted of damaging one wooden door, a window, a bench and a fence all valued at Kshs 5,000/= the property of Henry Keter.

What does the evidence portend?

[29] According to the evidence of PW2,3 and 4 the appellant along with others had a common mission of committing acts of destructions. The prosecution witnesses who were present at the scene positively identified the appellant as one of the attackers and perpetrators of the offence of destruction of property on the fateful night. The attackers were persons known to these witnesses as they came from same locality. The evidence adduced showed that there was light from the d-lights lamp and torches under which they identified the appellant as one of the persons who attacked and destroyed property at the scene of crime. The scenes of crime officer-PW7 produced photographs of the scene as exhibit and this was confirmed by PW8 who visited the scene the very night of the destruction. Although the witnesses could not pin point the particular property that the appellant damaged, evidence show that the attack was done by the appellants and they destroyed the property identified in the incident. The property destroyed is documented by the photographs. The destruction by the appellants of property was wanton and without any color of right or authority. I, therefore, find and hold that the prosecution proved beyond reasonable doubt the case on malicious damage to property against the appellant.

Of causing actual bodily harm

[30] According to Section 251 of the Penal Code: -

> ***Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.***

[31] The essential elements of the offence assault causing actual bodily harm are;

i. Assaulting the complainant or victim,

ii. Occasioning actual bodily harm.

See the case of ***Ndaa vs Republic[4]***

[32] I have carefully evaluated the evidence adduced by the prosecution witnesses. The appellant was known to the complainant; his identification was by recognition. It was done under the d-light lamp and torches' lights. He was positively identified as the person who assaulted the complainant.

[33] Of actual bodily hurt or injury, in ***Rex vs Donovan[5], Swift J*** stated:-

> ***"For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."***

[34] See also ***R vs Chan-Fook[6],*** paragraph D Lord Hobhouse LJ said:-

> ***"We consider that the same is true of the phrase "actual bodily harm". These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant."***

[35] Also relevant is a passage in Archbold's Criminal Pleading, Evidence and Practice 32nd Edition, Page 959 where it is stated as follows: -

> ***"Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor" (i.e. complainant)***

[36] The prosecution must, therefore, show 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).

[37] PW6-Chepkemoi Lily a clinical officer adduced medical evidence to corroborate the evidence of the complainants that they sustained actual bodily harm or injury as a result of the assault by the appellant.

[38] The defence offered by the appellant is a mere denial and a make-up story that he is the one who was injured and that these cases were fabricated due to land dispute amongst them. The evidence tendered by the prosecution that the appellant assaulted and caused actual bodily harm or injury to the complainant has not been controverted in any way. I find that the evidence tendered by the prosecution proved beyond reasonable doubt that the appellant is guilty of the offence of assault causing actual bodily injury. Accordingly, the conviction was well founded on evidence and I find no reason to fault the findings of the learned magistrate.

[39] The upshot is that I find no merits in the grounds of appeal advanced by the appellant. I dismiss the appeal on conviction.

Of Sentence

[39] Sentencing is the discretion of the trial court. Except, however, the discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. The appellate court would only interfere with the sentence imposed by the trial court if the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. See Makhandia J (as he then was in ***Simon NdunguMuragevs Republic, Criminal appeal no. 275 of 2007, Nyeri.*** In ***Shadrack Kipchoge Kogo vs Republic***, ***Criminal Appeal No. 253 of 2003*** (Eldoret), Omolo, O'kubasu & Onyango JJA) the Court of Appeal stated: -

> ***"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"***

[40] Section 251 of the Penal Code provides that a person who is guilty of the offence of assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years. The appellant was sentenced to one year for count 2 and 3.

[41] I am guided by the Supreme Court of India in **State of M.P. vs Bablu Natt {2009}2S.C.C 272** Para 13 that

> ***'the principle governing imposition of punishment would depend upon the facts and circumstances of each case.'***

[42] See also ***Alister Anthony Pareira vs State of Maharashtra, [2012] 2 S.C.C 648 Para 69*** that:-

> ***"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"***

[43] I have considered the nature of the offence, the principles of sentencing and the amount of sentence imposed. The sentence was legal and appropriate to the offence. I find no reason to interfere with the sentence imposed by the learned Magistrate. I also dismiss the appeal on sentence.

[44] Ultimately, I am satisfied that the entire appeal lacks merit and is hereby dismissed. I uphold the conviction and sentence of the trial court. Appeal in 14 days.

[45] I do note, however, that the appellant's prison term was interrupted on 20.7.2020 when the Appellant was admitted to bail. The appellant shall be taken into custody therefor.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 18TH DAY OF MAY 2021

F. M. GIKONYO

JUDGE

In the presence of:

1. **The appellant**
2. **Ms. Moenga holding brief for Mr. Mongeri for the appellant**
3. **Mr. Karanja for the Republic**
4. **Mr. Kasaso CA**

F. M. GIKONYO

JUDGE

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[1] **(1987) KLR, 19**

[2] **(1972) E.A, 32**

[3] H.L.(E)* WOOLMINGTON V DPP [1935] A.C 462 pp 481

[4] ***[1984] KLR***

[5] ***[1934] 2KB 498***

[6] ***[1994] 2 ALL ER 557***