



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO 163 OF 2018

REPUBLIC.....APPELLANT

VERSUS

PATRICK KAIYONGI.....1ST RESPONDENT

PATRICK MUTEMBEI.....2ND RESPONDENT

PATRICK KIMATHI.....3RD RESPONDENT

EDWARD RAUA.....4TH RESPONDENT

(Being an appeal from the judgment and decision of Hon P M Wechuli, SRM, in the original Tigania PMCCRC No. 911 of 2013 dated 10.12.2018)

JUDGMENT

1. Having been charged with the offence of assault causing actual bodily harm, the four respondents were tried and acquitted of the charge the trial court having found that the evidence led showed there had been a fight between the parties hence no proof beyond reasonable doubt had been achieved. That decision aggrieved the prosecution which then brought the current appeal preferring some seven grounds of appeal. Even when so put, the seven grounds essentially blames the trial court for failure to consider the ingredients of the offence charged; failure to find that the prosecution's case was watertight, was not displaced by the defence offered and therefore dismissed the case on flimsy grounds and contrary to the weight of evidence led.

2. Being a first appeal, my duty is to reappraise the evidence afresh and in whole and come to own conclusions while giving an allowance to the fact that I lack the benefit enjoyed by the trial court in hearing and observing the witnesses testify.

3. The totality of the prosecution's case given by four witnesses was that on the material day, the complainant was attacked and injured by the four respondents on the road at night and that there was light from an electric source as well as a torch flashed by PW2. The sequence was given by the complainant to have been that while walking on the road with a friend, not called as a witness, the friend was hit by the 1st respondent and when he asked why, he was equally attacked by the 1st respondent before the others joined in attacking him. He said he was able to see them with the help of an electric light source. He narrated his injuries and said that he had known the four before very well. He made a report to the police, recorded a statement and then attended the hospital where he was treated and later a P3 form was completed. When cross examined he confirmed that his first report did not name names and that he did not tell the doctor that the injury to his hand was caused by a bottle as disclosed in the P3.

4. The evidence by Pw2 was that he was walking from the mosque when he heard people screaming and when he flashed his torch the people ran away, identified 2nd and 3rd accused and saw the complainant on the ground with a stabbed arm. He then told the complainant to go and hide at a home and that the scene was about 20 meters from the home of one Ngera. In cross examination he reiterated that the torch light made the people run away and that even though there were screams only him visited the scene and that the 3rd respondent threatened to attack him. He however did not know why and how the fight began. The evidence of Pw3 was limited to receiving the complainant in her home at night, from where he called the wife who came with the mother and used a hired vehicle to take the complainant to hospital. She was not even told by the complainant who had assaulted him.

5. The evidence of PW4, the clinician, had the P3 form on the complainant which evidenced that he was treated at the facility on the 5.7.2013 for the injuries allegedly inflicted on the 4.7.2013 and noted; a fracture of the upper incisor teeth, swollen lacerations of the upper lip, tenderness of the lateral aspects of the chest and an injury to the right thumb. He formed the opinion that a sharp object was used, assessed degree of injury as harm and then produced not only the p3 but also initial treatment notes not authored by him. Upon cross examination he

admitted being in possession of medical notes for the 4th respondent which he said was from the facility he worked for which was never authored by him but was signed without a name of the author but termed it authentic.

6. For the defence, all the four gave sworn testimonies all asserting that they were at a bar owned by a chief called Muringa when the complainant walked in with another called Domenic, bought cigarette then left before the complainant came back, bought a bottle of tusker and called the 4th accused to go with him outside the bar. Within a short while the three respondent were told that somebody had been beaten, they went out and found that it was indeed the forth respondent who was bleeding from the head. 4th respondent then told the three colleagues that he had been assaulted by the complainant using a tusker bottle which was broken and on the ground before the complainant ran away. The first three respondents then took the forth to hospital and denied ever assaulting the complainant on the road insisting that the incident was at the bar and that they did not get into contact with the complainant. In cross examination, 1st and 3rd respondents denied ever attacking the complainant not even meeting him when they went out of the bar and views the charges as a set up to forestall the 4th from pressing charges against the complainant.

7. On his part the 4th respondent gave an account as those by his colleagues and added that him and the complainant had an old dispute and that he was called out of the bar by the complainant who hit him on the head with a beer bottle. To him it's the beer bottle the complainant was holding which hurt him on the hand. Because he was hurt by the complainant, he and colleagues walked up to the police station and made a report before proceeding to the hospital for treatment at 1.50 am the same night but went back at the station to record a statement the next day they were arrested and charged. In cross examination, he said that the intention of the complainant was to hurt him but ended hurting himself in the process.

8. Pw4 was again called to produce the treatment notes for the 4th respondent and in the course reiterated his evidence that the document was authentic from the facility he worked for and although not authored by himself, was authored by a colleague whose handwriting he was familiar with. The p3 produced evidenced that the 4th respondent suffered cuts by a sharp object which was stitched and stitches removed on the 12.7.2013.

9. In his reserved judgment, the trial court found that there were critical contradiction in the evidence of PW1 and PW2 which created reasonable doubt as to what weapon was used by who to inflict the injuries alleged which made it difficult to assign any role to any particular respondent. The other discrepancy was pointed to be the presence or absence of one Domenic which PW1 insisted was with him and was equally assaulted but who was never met by PW2 at the scene.

10. As a first appellate court I have subjected the record of evidence to fresh scrutiny and reappraisal with a view to coming to own conclusion. That task has pointed to me a glaring contradiction regarding the lighting at the scene. While the complainant was insistent that there was an electric light which enabled him recognize the respondents, PW2 had to use a torch to even recognise the complainant. I get the impression that either or both PW1 and 2 did not tell the court the truth. It thus follows that their evidence could not corroborate each other but rather created a reasonable doubt as to what could have motivated the desire to give a particular version inconsistent with each other yet both were recounting a particular scenario. Secondly, the history given to the hospital by the complainant and captured in the P3 form was that he had been assaulted using a dagger and a sharp piece of a bottle. That account was totally denied by the complainant in his evidence. Those are not sets of inconsequential inconsistencies the court was expected to gloss over and just enter a conviction. I find that the contradiction raised very reasonable doubts on who between the complainant and the 4th respondent attacked the other.

11. While it was proved that the complainant was injured on the thumb, it was equally proved that the 4th respondent was injured on the head and hand. The dispute is who attacked who and with what weapon. I find it more probable that the injury on both was inflicted by a bottle and therefore the account of the 4th respondent as corroborated by the 1st -3rd respondents was more believable than that by the complainant. With such finding, I am hesitant to interfere with the factual findings and conclusions by the trial court.

12. The consequence is that I find no merit in the appeal which is therefore dismissed.

Dated and delivered this 10th day of December 2021

Patrick J.O Otieno

Judge

In presence of

Mr. Maina for the appellant

Respondents in person save for the 1st respondent

Patrick J.O Otieno

Judge